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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.

BRIEF OF APPELLANTS REUGH-KOVALSKY AND GILL

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A. INTRODUCTION

This is a case in which a large, well-connected charitable foundation, the Inland Northwest Community Foundation (“INWCF”), named as the default entity under an unfunded revocable trust instrument to preserve an estate tax charitable deduction, has used every opportunity to insinuate itself into a position to seize the assets of the Estate of K. Wendell Reugh (“Estate”) despite a pending action to determine the validity of that unfunded revocable trust.

K. Wendell Reugh (“Reugh”) engaged an attorney and accounting firm for his estate and business planning during his life. Reugh established and operated business entities and, as part of his tax and estate planning, created and funded certain trusts for his descendants. Reugh’s primary testamentary instrument through the many years of his planning (both before and after his spouse’s death) was a Will that outlined his intent regarding the disposition of his remaining assets, but in 2011, Reugh executed a nonintervention Will (“Will”) and *inter vivos* revocable trust instrument (“Trust Instrument”). Reugh never conveyed any money or other property to himself as the initial trustee named in the Trust Instrument and did not otherwise activate the Trust Instrument for any purpose. Reugh died in March 2015, and the nonintervention Will executed in 2011 was admitted to probate. The Will made a provision for the appointment of

personal representatives, who were appointed in accordance with the Will, confirmed by the court, and granted nonintervention powers. The Will named Reugh's children and the Trust Instrument as Estate beneficiaries. The Will did not identify INWCF as a beneficiary, nor did the Will make a bequest to INWCF.

INWCF has, nevertheless, claimed that it is the *de facto* residual beneficiary of the Estate and it is entitled to the bulk of Reugh's Estate. To further its effort to seize the Estate assets, INWCF moved to oust the Estate's personal representatives for alleged breaches of fiduciary duty and conflict of interest, and the trial court complied. To compound its error, the trial court appointed an institutional personal representative, Northwest Trustee and Management Services LLC ("NWTM"), contrary to the Will's process for selecting a successor trustee, that has done INWCF's bidding by abruptly changing the Estate's position in the litigation to determine the validity of the Trust Instrument to merely echo INWCF's position.

This Court should not countenance this naked power grab. It should reverse the trial court's decisions to remove Reugh-Kovalsky and Gill as the co-personal representatives of the Estate and named successor co-trustees under the Trust Instrument.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its December 22, 2017 order removing the co-personal representatives of the Reugh Estate and the named co-trustees under the Trust Instrument and appointing a successor personal representative and trustee.

2. The trial court erred in making finding of fact number 1 in the December 22, 2017 order.

3. The trial court erred in entering finding of fact number 2.

4. The trial court erred in entering finding of fact number 3.

5. The trial court erred in entering finding of fact number 4.

6. The trial court erred in making finding of fact number 7.

7. The trial court erred in making finding of fact number 11.

8. The trial court erred in making finding of fact number 12.

9. The trial court erred in making finding of fact number 13.

10. The trial court erred in making finding of fact number 14.

11. The trial court erred in making finding of fact number 15.

12. The trial court erred in making finding of fact number 16.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in acquiescing in INWCF's effort to seize the assets of the Reugh Estate by removing Reugh-Kovalsky and Gill as the co-personal representatives of the Reugh Estate under RCW 11.68.070 when they did not breach their fiduciary duties as co-personal representatives of the Estate and their actions were not conflicted? (Assignments of Error Numbers 1-12)

2. Did the trial court err in appointing NWTM as the Estate's personal representative where it failed to comply with the Will's direction on the appointment of a successor personal representative? (Assignments of Error Number 1)

3. Did the trial court err in denying an award of fees under the Trust and Estate Dispute Resolution Act, RCW 11.96A.150 ("TEDRA") from INWCF to Reugh-Kovalsky and Gill? (Assignments of Error Number 1)

4. Are Reugh-Kovalsky and Gill entitled to an award of fees on appeal from INWCF? (Assignments of Error Number 1)

C. STATEMENT OF THE CASE

The late K. Wendell Reugh simultaneously executed a Will and the K. Wendell Reugh Revocable Living Trust instrument ("Trust Instrument") on January 4, 2011. CP 335-53. That Will was straightforward. It made specific bequests to his children, CP 335-36, and then named the trustee acting under the Trust Instrument as the residuary beneficiary. CP 337. The Will did not name INWCF as an Estate beneficiary, nor did it make a bequest to INWCF. CP 335-39.

The Trust Instrument has an *inter vivos* component where Reugh is named as the sole settlor, trustee, and beneficiary during his life and the Trust Instrument reserved to Reugh the opportunity to manage and utilize the Trust assets for his benefit without restriction. CP 342-43. Following Reugh's death, the successor trustee was directed to make specific, extensive monetary bequests. CP 344-47. He made a series of specific

“pecuniary bequests” to family members and charities. CP 344. He then made provision for his descendants. CP 345-46. He established a charitable trust for Doreen Decker. CP 346-47. He indicated an intent to create a residual charitable trust. CP 347-48. INWCF was a potential default trust beneficiary named in order to preserve the estate tax charitable deduction for the Estate if Reugh was unable to form his private charitable foundation or donor-advised fund before his death; Article VI.G of the Trust Instrument directs the disposition of the residuary assets of the trust (not the Estate), if any, as follows:

G. Residuary to Charitable Foundation or Fund. 1. The successor Trustee shall distribute the remainder of the Trust Estate to a charitable foundation Settlor may have established subsequent to executing this Trust instrument, or if no such foundation has been established, to a charitable donor-advised fund established by Settlor subsequent to executing this Trust instrument (in the event more than one such fund was established by Settlor, distribution among them shall be in the manner chosen by the successor Trustee in its discretion).

CP 347.

The Trust Instrument included a savings clause in paragraph G.2 of

Article VI:

2. If Settlor established neither a charitable foundation nor a charitable donor advised fund, said remainder shall be distributed to the Inland Northwest Community Foundation, to be held as an endowed donor-advised fund known as the Wendell and MaryAnn Reugh Family Fund. Such fund shall have Settlor’s three children as its initial advisors. Upon the

death, disability or resignation of any such advisors, a replacement shall be appointed by the Board of Directors of the Inland Northwest Community Foundation from among the descendants (including descendants by adoption) of the Settlor. Settlor wishes that charitable distributions be made from the fund primarily to the kinds of charitable organizations Settlor has given to during his lifetime, serving the people of the Inland Northwest.

CP 347-48. The savings clause allows for the selection of an alternate charitable organization in the event the decedent's intended private charitable foundation or charitable fund is not in existence at the time the assets are to be distributed. CP 307-08.¹ For reasons unknown to the co-personal representatives, INWCF's name was inserted as the default charitable organization in the paragraph G.2 savings clause. CP 308.²

¹ Utilizing a private charitable foundation or donor advised fund as the recipient of any remaining assets in a trust estate is a way of minimizing estate taxes that would otherwise be payable. Typically, when drafting provisions to secure a charitable deduction for an estate in the event of an untimely death before the intended charitable beneficiary can be established (*i.e.*, a private charitable foundation or charitable fund), the drafter of such instrument would include a savings clause. Any qualifying charitable organization could have been named in the Trust Instrument to accomplish the estate tax charitable deduction objective if the intended charitable beneficiary had not been formed by the time of Reugh's death. For example, the savings clause in the Trust Instrument could have just as easily stated: "the remainder shall be distributed to such charitable organization qualifying under IRC Section 501(c)(3) as shall be selected by the personal representatives of the Settlor's estate, in their absolute discretion, provided that any such charitable organization selected by the personal representatives is able to receive such distribution," and the Estate would have been able to claim an estate tax charitable deduction. Additionally, the savings clause in paragraph G.2 could have directed the personal representatives or trustee to create a private charitable foundation, and the savings clause could have then directed the trustee to distribute the remainder to that newly created private charitable foundation.

² Reugh may not have understood the impact of paragraph G.2. if his private charitable foundation or charitable donor advised fund was not established before his death. CP 308.

Reugh's Will provided for the appointment of personal representatives. JoLynn Reugh-Kovalsky, Reugh's daughter, and Steve T. Gill, an old family friend and family business manager, ultimately became the co-personal representatives of the Estate and were named successor co-trustees after the initial person named in the Trust Instrument declined to serve.³ With regard to the Estate, the co-personal representatives had nonintervention powers,⁴ confirmed by the trial court's order admitting the

³ Upon K. Wendell Reugh's death, a petition was filed to admit the Will to probate and appoint personal representatives with nonintervention powers. CP 1-10. The will was admitted to probate on March 27, 2015 in the Spokane County Superior Court in Cause No. 15-4-00471-1. CP 18-19. The court issued letters of administration on March 27, 2015, documenting such appointment. CP 22. Reugh-Kovalsky and Gill were also nominated as the successor co-trustees of the Trust Instrument executed on January 4, 2011. CP 11-17. They accepted such appointment on March 27, 2015, CP 20-21, and notice was given as to their appointment. CP 23.

⁴ The Will stated in Article IV:

B. My estate shall be administered by my Personal Representative named in this Will without the intervention of any court and with all powers granted herein and by law to a Personal Representative acting with nonintervention powers. I direct that such nonintervention powers be unrestricted and that they may be exercised whether or not necessary for the administration of my estate. My Personal Representative shall act with full power to:

1. Mortgage, encumber, lease, sell, exchange, and convey, without notice or confirmation, any assets to my estate, real or personal, at such prices and terms as to my Personal Representative may seem just; to advance funds and borrow money, secured or unsecured, from any source.

2. Select any part of my estate in satisfaction of any partition or distribution hereunder, in kind, in money, or both (including the satisfaction of any pecuniary bequest), in shares which may be composed differently, and to do so without regard to the income tax basis of specific property allocated to any beneficiary (including any trust).

Reugh Will to probate. CP 19.

With regard to the Trust Instrument, Reugh included specific provisions for the trustee's duties. CP 348-49. He directed the trustee to pay taxes, debts, and expenses. CP 350-51, 352. He provided for the appointment of successor trustees where necessary, largely by his children. CP 349-50.

Critically, Reugh authorized his trustee *in two places* in the Trust Instrument to purchase, advance, or receive assets from the Estate:

D. The Trustee is authorized to purchase securities or other property, real or personal, from the Personal Representative of Settlor's, or Settlor's estate or from the estate of any beneficiary and also to make loans or advancements, secured or unsecured, to the Personal Representative, even though the Trustee is such Personal Representative.

CP 349.

C. The Trustee is authorized to purchase from the Personal Representative of the estate of Settlor securities or other property, real or personal, and also to make loans or advancements, secured or unsecured, to such Personal Representative, even though the trustee is the Personal Representative.

CP 351.

3. Appoint an ancillary Personal Representative or agent if such should become necessary or advisable in the judgment of my Personal Representative.

CP 337-38.

All of the assets Reugh owned at the time of his death were in his individual name. CP 442-44. Upon their appointment, the co-personal representatives began administering Estate assets, and the co-personal representatives soon discovered that no assets had been transferred into the trust. CP 306. Reugh-Kovalsky and Gill, therefore, assumed no duties under the Trust Instrument as there never have been any trust assets to administer. *Id.*

Reugh did not establish a charitable private foundation or charitable fund during his lifetime. CP 309. Therefore, under the savings clause in paragraph G.2., INWCF became the default charitable organization designated to receive the remainder of the trust assets, if any. Any such assets received were to be administered by INWCF as provided in paragraph G.2. Reugh-Kovalsky and Gill understood that if a valid trust was created by the Trust Instrument and if that trust received the remaining assets of such trust, then fiduciary duties would be owed to INWCF. *Id.*

As noted *supra*, Reugh's Will did not bequeath assets directly to INWCF; INWCF is not named in the Will at all. CP 335-39. While it is not unusual for a charitable organization to be unaware of a gift until after a decedent has passed, it bears noting that attorney Joe Delay informed INWCF President Mark Hurtubise of the residuary gift after Reugh's death, and Hurtubise sent a letter of introduction to the co-personal representatives

in anticipation of a “get acquainted” meeting with the co-personal representatives. CP 281-97.

The Estate’s administration was complex due to Reugh’s high net worth, the diversity of its investments, and the business and tax planning vehicles Reugh implemented. The co-personal representatives worked for two and one-half years to value and administer the Estate assets and file the required tax returns so that the Estate could settle its debts and identify the proper beneficiaries of the Estate assets. CP 309-10. The Estate was subject to an ongoing examination by the Internal Revenue Service (“IRS”), beginning in August 2016.⁵ The co-personal representatives ensured that INWCF was aware of that IRS examination. CP 258-59, 261.

When it became clear that INWCF intended to utilize its status as a residual beneficiary under the Trust Instrument as a basis for claiming the bulk of the Estate’s assets, Reugh’s children, the Estate’s beneficiaries, filed an action in Cause No. 15-4-00471-1 to declare the trust created under the Trust Instrument invalid. CP 25-63. They later refiled that action on March 6, 2017 in Cause No.17-4-00311-7. CP 355-89. They contended that the *inter vivos* trust under the Trust Instrument never validly came into

⁵ Estate tax examinations of this size, usually take more than three years to complete. CP 261.

existence because Reugh named himself as the sole settlor, trustee and beneficiary and, more importantly, Reugh never transferred any assets (not even the nominal \$100 cash stated in the Trust Instrument) to the named trustee (which was Reugh) to activate the trust. *Id.*⁶ The two cases were consolidated on March 15, 2017. CP 64-65.

Recognizing the risk of its effort to secure the Estate's assets in that petition, INWCF moved in the trial court on November 22, 2017 for the removal of the co-personal representatives under the pretense of a breach of fiduciary duty in an attempt by INWCF to access the undetermined remaining Estate assets. CP 82-96. The motion was heard by the Honorable Tony Hazel. INWCF argued that the co-personal representatives had breached their fiduciary duty by improperly distributing Estate assets and by attempting to resolve any residuary interest INWCF had. *Id.* This motion was filed prior to the trial court's determination of the validity of the trust created under the Trust Instrument and the resolution of the Estate's federal gift and estate tax liabilities and Washington state estate tax liabilities. CP 258-59. The co-personal representatives vigorously opposed the motion, CP 305-20, as did the Reugh beneficiaries. CP 109-29. The trial court, however, granted the motion, entering an order on December 22,

⁶ Trial is set for that action on December 3, 2018.

2017. CP 824-29.

Capitulating to INWCF's *de facto* seizure of the Estate, the trial court also agreed on December 22, 2017 to INWCF's recommended new institutional personal representative, NWTM, whose appointment was inconsistent with the Will's provision for appointment of a successor personal representative.⁷ The Estate and the Reugh beneficiaries appealed to this Court. CP 723-29. The Estate and the Reugh beneficiaries sought a stay of the trial court's December 22, 2017 order. CP 804-14. INWCF opposed it. CP 818-20.⁸ The trial court did not address that motion directly,

⁷ That provision stated:

A. I appoint as co-Personal Representatives ("Executor") of my estate:

1. DOMINIC ZAMORA and JAMES M. SIMMONS.

2. In the event either of said co-Personal Representatives is or becomes unwilling or unable to serve, then the other shall serve as co-Personal Representative and shall nominate three individuals to serve as co-Personal Representative with him. My children shall, by majority vote, designate one of said nominees to serve as the other co-Personal Representative.

CP 337. If Reugh's daughter JoLynn Reugh-Kovalsky and family friend Steven Gill were unable to serve, the three Reugh children should have been appointed any successor.

⁸ The Estate and the beneficiaries sought a stay during the appeal's pendency pursuant to RAP 8.3. This Court's Commissioner denied it by a January 4, 2018 ruling. Both the Estate and the beneficiaries moved to modify that ruling. Upon the filing of the motion, NWTM hired new counsel for the Estate, discharging its former counsel. Those counsel now represent the co-personal representatives. As expected, that new counsel abruptly changed the Estate's position on the co-personal representatives to merely echo INWCF's. That counsel has moved to change the Estate's position in trial court proceeding on the Will as well, again puppeting INWCF's position. This Court denied the motion to modify.

noting only that a 14-day stay was available as to its order. CP 828.

D. SUMMARY OF ARGUMENT

The present effort to oust Reugh-Kovalsky and Gill as the co-personal representatives of the Estate of the late K. Wendell Reugh is but one battle in the effort of INWCF to grab the Estate's assets. INWCF was not a named beneficiary in Reugh's Will, nor did Reugh make a bequest to INWCF. Because, for technical reasons, INWCF was named a residual beneficiary of an *inter vivos* trust in the Trust Instrument, INWCF seeks to parlay that technical status into the seizure of the bulk of the Estate assets. It has even secured a successor institutional personal representative to serve its purpose.

The trial court failed to comprehend its statutorily-limited role in the administration of a nonintervention will. It erred in falling prey to INWCF's motion under RCW 11.68.070 to remove Reugh-Kovalsky and Gill as personal representatives when they neither breached their fiduciary duties, nor had a conflict of interest.

The trial court erred in appointing NWTM as the Estate's successor personal representative in violation of the Will's specific direction for appointing a successor personal representative.

The trial court erred in failing to award fees at trial under TEDRA to Reugh-Kovalsky and Gill. They are also entitled to their fees on appeal.

E. ARGUMENT

(1) Washington Law on Nonintervention Wills

Washington allows personal representatives to settle estates without court intervention. RCW 11.68.011. The courts lose jurisdiction over the administration of estates where the courts have granted the personal representative nonintervention authority, unless the personal representative chooses thereafter to invoke the courts' jurisdiction or a qualified person petitions the court under specific statutory authority to address conduct of the personal representative or the estate's administration. *Matter of Estate of Hookom*, 52 Wn. App. 800, 803, 764 P.2d 1001 (1988); *In re Estate of Ardell*, 96 Wn. App. 708, 715, 980 P.2d 771, *review denied*, 139 Wn.2d 1011 (1999).

Here, Reugh specifically directed that his personal representatives were to have broad nonintervention powers. CP 337-38. He stated: "I direct that such nonintervention powers be unrestricted and that they may be exercised whether or not necessary for the administration of my estate." CP 337. *See* RCW 11.68.090(2) (testator may relieve personal representative of duties, or add or alter same).

Nonintervention wills have a special status in Washington law as our Supreme Court only recently reaffirmed in *Matter of Estate of Rathbone*, __ Wn.2d __, 412 P.3d 1283 (2018). Essentially, the personal

representative of a nonintervention estate is given plenary authority to settle an estate's affairs, subject only to specific potential times for court intervention specified in statute:

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. The court can regain this limited authority only if the executor or another person with statutorily conferred authority properly invokes it.

Id. at 1286. As the *Rathbone* court observed, a trial court may not utilize the specific statutory authority to re-intervene in an estate's administration as a broad charter to undercut the nonintervention intent of the testator. Thus, when a beneficiary tried to obtain a construction of the will favorable to his position by seeking the ouster of personal representatives and an interim accounting, the Court reversed trial court decisions based on RCW 11.68.070 (removal of a personal representative) and RCW 11.68.110 (estate accounting) that interfered with the personal representative's administration of the estate, stating: "A party may not use RCW 11.68.110 to challenge a personal representative's reasonable decisions in interpreting a will's directions." *Id.* at 1288. Similarly, it observed that RCW 11.68.070 had not been invoked in that case as to a personal representative's alleged self-dealings and indicated that the challenger to the personal representative's actions could not sustain an allegation of misconduct where

the will specifically authorized the personal representative to buy the decedent's house. *Id.* at 1290. As the Court summarized:

The facts of this case, the provisions of this will, and the nonintervention statutes support a narrow statutory interpretation. The testator's intent here is expressly and clearly evident. The will gave Todd, the personal representative, nonintervention powers. In addition, the will gave him authority to construe, if necessary, the provisions of the will. CP at 58 ("My Personal Representative and Trustee shall have the authority to construe this Will and trusts and to resolve all matters pertaining to disputed issues or controverted claims."). The will expressed the testator's intent that courts not be involved in the administration of her estate. CP at 58 ("I do not want to burden my Estate or any trust with the cost of a litigated proceeding to resolve questions of law or fact."). The will directed that Todd's administration of the estate not be challenged, especially by Glen. CP at 59 ("I specifically desire that my son, Glen, and his children, do not contest, challenge, or harass my Personal Representative."). The will contained a disinheritance clause revoking any bequest granted to any challenger to Todd's administrative decisions. CP at 59 ("[A]ny person ... who may have, a present, future, or contingent interest in this Will ... will by his contest ... forfeit any interest in which he, his issue has or may have."). The will granted a purchase option to Todd to buy the property from the estate, which can be credibly read to require the payment be made to the estate. The trial court's involvement, exercise of authority, and order construing will violates much of the testator's expressed intent.

Id.

The proper interpretation of Washington law on nonintervention wills is a crucial backdrop to the analysis of INWCF's conduct below and the trial court's erroneous decisions. As will be noted *infra*, the trial court

fell prey to INWCF's scheme to advance its position on the interpretation of Reugh's Will and Trust Instrument in the guise of an RCW 11.68.070 motion to oust the co-personal representatives.

(2) Washington Law on the Removal of a Personal Representative or Trustee

Motions to remove a personal representative under RCW 11.68.070 constitute grounds for the courts to reinvoke their jurisdiction over an estate's administration. *In re Estate of Jones*, 152 Wn.2d 1, 9, 93 P.3d 147 (2004).⁹ The 1974 Legislature adopted RCW 11.68.070, which states in pertinent part that a personal representative in a nonintervention estate may be removed for the reasons articulated in RCW 11.28.250 or for failure to execute his or her responsibilities faithfully. RCW 11.28.250 speaks to waste, embezzlement, mismanagement, fraud, incompetence to act, or wrongful neglect of the estate. *See* Appendix. Thus, a personal representative may be removed both for the reasons set forth in RCW 11.28.250 *and* if she/he fails to execute her/his responsibilities faithfully as noted in RCW 11.68.070. While a court may intervene to restrict the personal representative's powers or remove that person under RCW 11.68.070, this authority is not open-ended.

First, to invoke the provisions of RCW 11.68.070, the party seeking

⁹ But this reinvocation of jurisdiction is limited, as the *Rathbone* court held.

to remove the personal representative must be an estate creditor, or “any heir, devisee, [or] legatee” of the estate. Indeed, in *In re Estate of Hitchcock*, 140 Wn. App. 526, 167 P.3d 1180 (2007), this Court held that the beneficiary of a testamentary trust lacked standing to pursue the removal of a personal representative under RCW 11.68.070, *id.* at 532, noting that a devisee is one who receives property by will and a legatee is one who is named in the will to receive specific property or a bequest. An heir receives any property by intestate succession. *Id.*¹⁰

Furthermore, to establish grounds for the removal of a personal representative, the party seeking the removal must prove personal representative misconduct with specificity. *In re Beard’s Estate*, 60 Wn.2d 127, 132, 372 P.2d 530 (1962); *Matter of Aaberg’s Estates*, 25 Wn. App. 336, 607 P.2d 1227 (1980).¹¹ As this Court observed in *In re Estate of Lowe*, 191 Wn. App. 216, 229, 361 P.3d 789 (2015), *review denied*, 185

¹⁰ INWCF fails to qualify under *any* of the statutory grounds for standing under RCW 11.68.070, as will be argued *infra*.

¹¹ In *Beard’s Estate*, for example, the Supreme Court held that the failure of a personal representative with nonintervention powers to obtain an order of solvency from the court as a precursor to the exercise of nonintervention powers violated RCW 11.28.250; this was clearly neglect by the personal representative in the performance of an act required of that personal representative by law. Similarly, the Court of Appeals in *Aaberg’s Estates* upheld the removal of a personal representative with nonintervention powers who had failed to submit a complete inventory of estate assets, had not properly maintained the money or other assets of the estate, and had not distributed estate assets according to the will. *Aaberg’s Estates*, 25 Wn. App. at 339. The personal representative’s mismanagement of the estate under RCW 11.28.250/11.68.070 in each case was clear.

Wn.2d 1019 (2016), “a trial court must have valid grounds supported by the record to remove a personal representative.”

The need for specificity of proof is essential as to hold otherwise is to defeat the purpose of noninterventional wills to provide inexpensive, administratively simple estate administration *without court intervention*; to allow parties to file petitions to remove personal representatives with nonintervention powers without requiring them to make specific allegations of personal representative misconduct would defeat the purpose of nonintervention wills, subjecting the courts to a barrage of baseless petitions.¹² Removal of a personal representative with nonintervention powers is meant to be an unusual step to deter misconduct of the most egregious sort. Beneficiaries who disagree with the personal representative’s decisions have the remedy of seeking relief after the personal representative accounts to the court at the closure of the estate. RCW 11.68.100 – .110. Removal of the personal representative is not a

¹² This concern is not unrealistic. A court may be asked to remove a personal representative because of interpersonal concerns or argument of “efficiency.” *In re Blodgett’s Estate*, 67 Wn.2d 92, 93, 406 P.2d 638 (1965) (“The relationship between the two brothers was less than cordial . . .”); *State ex rel. Lauridsen v. Superior Court for King County*, 179 Wash. 198, 209, 37 P.2d 209 (1934) (“The administration has progressed over a period of nearly two years. A great deal of effort has been expended, and much of the work entailed has been completed. In the very nature of things, the present administrators are better qualified than at least two of the realtors would be.”); *In re St. Martin’s Estate*, 175 Wash. 285, 286, 27 P.2d 326 (1933) (“ . . . there has been considerable dissension among the heirs. The evidence discloses that this dissension is of long standing . . .”). RCW 11.68.070 contemplates a higher standard for removal of a personal representative.

substitute for this accounting upon closure of the estate, as the *Rathbone* court indicated.

The seminal case on the basis for the removal of a personal representative under RCW 11.68.070/11.28.250 is *Jones*. Our Supreme Court there acknowledged the courts' limited role in the administration of nonintervention wills, 152 Wn.2d at 9, and construed the relationship between the grounds for removal set forth respectively in RCW 11.28.250 and RCW 11.68.070. The Court concluded that in addition to the specific grounds in .250, a personal representative could be removed under that statute "for any other cause or reason which to the court appears necessary."

The Court stated:

the catchall phrase does not mean that the court may remove a representative on a whim. The rule of *ejusdem generis* states that when general term is restricted to items similar to the specific terms. Therefore, the court may remove a personal representative under the "for any other cause" provision only if the conduct is similar to the other grounds listed in the statute. In light of the rules of statutory construction, we reverse the appellate court and hold that RCW 11.68.070 fully incorporates RCW 11.28.250 into the nonintervention statutory scheme.

Id. at 11 (citations omitted).

In *In Re McAnally Estate*, __ Wn. App. 2d __, 2018 WL 2069521 (2018), this Court applied the Supreme Court's teaching in *Rathbone* to a case in which a disgruntled will and testamentary trust beneficiary sought

the removal of the estate's personal representative, a bank.¹³ This Court refused to address the personal representative's interpretation of the will's terms. *Id.* at *5. It rejected an argument that the personal representative improperly sold an estate asset where the personal representative had the right to sell the property and the beneficiary agreed to its sale. *Id.* at *5-7. This Court further found that the bank conveyed accurate information to the beneficiary, albeit not as rapidly as it should have. *Id.* at *8. The Court's analysis in this case only confirms the broad discretion afforded personal representatives under nonintervention wills after *Rathbone*.

Applying the foregoing principles in this case, it is clear that the trial court erred in removing Reugh-Kovalsky and Gill.

(3) [INWCF Failed to Document Grounds Sufficient to Support the Removal of the Co-Personal Representatives/Co-Trustees Here](#)

The trial court here concluded that because Reugh-Kovalsky was a personal representative of the Estate and a co-trustee, CP 826 (FF 8) and a trust beneficiary, *id.* (FF 9), she was conflicted when she joined her siblings in petitioning the court to contest the validity of the Trust Instrument. *Id.*

¹³ The Court declined to reach arguments posed by the beneficiary as to the personal representative's work as trustee and any alleged breach of fiduciary duty associated with the work as trustee because the only issue before the Court was the estate's closing and the trust was not party to that proceeding. *Id.* at *3. Similarly, in this case, any issues as to the actions of the co-personal representatives as trustees are beyond the purview of this proceeding under RCW 11.68.070, a proceeding pertinent *only* to their work as Estate personal representatives.

(FF 12-13). Though he was not a Will or Trust Instrument beneficiary, the trial court imputed any conflict on Reugh-Kovalsky's part to Gill. CP 827 (FF 14). The trial court erred.

(a) INWCF Lacked Standing to Invoke RCW 11.68.070 and the Trial Court Lacked Jurisdiction to Enter the Removal Order

As noted *supra*, under the language of the statute and this Court's decision in *Hitchcock*, INWCF lacked standing to invoke RCW 11.68.070 to seek the removal of Reugh-Kovalsky and Gill.

Undoubtedly, INWCF will assert that it was a listed beneficiary of what it prevailed upon the trial court to describe as a "pour-over trust," CP 826 (FF 7), but that is no different than the argument advanced by the residual beneficiary of a testamentary trust rejected by this Court in *Hitchcock*. See also, *In re Estate of Barnhart*, 149 Wn. App. 1050, 2009 WL 997413 (2009) (this Court held that widow of an heir who disclaimed interest in his mother's estate lacked standing under TEDRA to challenge his action).

The trial court erred in granting INWCF's motion where it lacked standing under RCW 11.68.070 to bring the motion.

As noted *supra*, the jurisdiction of a court in the administration of a nonintervention will is limited. The trial court here mistakenly believed that it reacquired jurisdiction over the Estate by virtue of the Estate

beneficiaries' filing of the proceeding to challenge the validity of the trust established under the Trust Instrument. CP 825 (FF 4). That was error.

As noted in *Rathbone*, the trial court had jurisdiction over a nonintervention will's administration only to a narrow extent. INWCF never cited any authority to support the view that a challenge to the validity of the trust established under the Trust Instrument allowed the trial court to reacquire jurisdiction over the Estate. CP 325. It merely claimed the filing of the challenge to the validity of the trust under the Trust Instrument was enough. *Id.* Nor did the trial court here properly acquire jurisdiction by a motion to remove the co-personal representatives/ named co-trustees under RCW 11.68.070 that was more in the nature of an effort to secure interim approval of the co-personal representatives/named co-trustees' conduct. *See Aaberg's Estates*, 25 Wn. App. at 343-44 (having exercised authority under RCW 11.68.070 to remove executor, court lost jurisdiction to address previous executor's or attorney's fees); *Ardell*, 96 Wn. App. at 716 (nonintervention personal representative does not waive nonintervention powers by petitioning the court for an order or decree during an estate's administration).

The filing by the Reugh children of an action to determine the validity of the trust established under the Trust Instrument did not constitute a waiver by Reugh-Kovalsky of her nonintervention powers as a co-

personal representative of the Estate.

(b) The Personal Representatives Did Not Mismanage the Estate

Although INWCF repeatedly implied in its memorandum below that the co-personal representatives mismanaged the Estate, CP 85-95, the trial court did not find that the co-personal representatives engaged in the type of mismanagement envisioned by RCW 11.28.250 and the case law construing it.¹⁴ Nor could it.

In *Beard's Estate*, 60 Wn.2d at 127, for example, the personal representatives knew the estate was insolvent, but proceeded without legal authority, not having secured nonintervention powers from the court, to administer the decedent's business, incurring further debts. *See also, Aaberg's Estates*, 25 Wn. App. at 336 (executor removed where he failed to submit a complete estate assets inventory or to provide a legatee her share of the household property); *Ardell*, 96 Wn. App. at 708 (personal representative not removed despite allegations of failure to provide annual

¹⁴ In *Ardell*, for example, a beneficiary waited 7 ½ years after the will was admitted to probate to petition the court for orders revoking the personal representative's letters testamentary and nonintervention powers, removing the personal representative, and compelling an accounting. Based on the large fees charged by the personal representative and legal counsel, and the personal representative's failure to reply to court inquiries or file appropriate court and tax documents, the trial court granted the petition. Even then, this Court reversed, as the petition failed to meet the test of RCW 11.68.070, holding that a personal representative with nonintervention powers committed no offense for purposes of RCW 11.68.070 in failing to file annual accountings, or distribute the assets within a prescribed time period. The court also noted that there was insufficient evidence that the fees requested demonstrated a breach of trust.

accounting, respond to court inquiries, and charging excess fees).

The co-personal representatives here were diligent in their efforts to secure IRS/DOR approval of the tax returns and to distribute assets in accordance with the Will, as will be noted in greater detail *infra* in connection with their alleged breach of fiduciary duty.

(c) The Co-Personal Representatives Were Not Conflicted

The central reason for the trial court's decision to oust Reugh-Kovalsky as a co-personal representative/named co-trustee is set forth in its order in paragraphs 12-14. CP 826-27. The trial court believed that because Reugh-Kovalsky filed a petition to challenge the validity of the trust in the Trust Instrument as a beneficiary of the Estate and a beneficiary named in the Trust Instrument, she was conflicted in serving as a co-personal representative/named co-trustee. *Id.* The court imputed the alleged conflict to Gill, even though he was neither a beneficiary under Reugh's Will or the Trust Instrument. *Id.* The trial court erred.

Conflict of interest rules are distinct for personal representatives of estates and trustees. A personal representative may be the beneficiary of the estate as well. *In re Estate of Ehlers*, 80 Wn. App. 751, 911 P.2d 1017 (1996) (making no distinction as to whether the personal representative had nonintervention powers or not). *Ehlers* rejects the proposition that a

personal representative breaches a fiduciary duty to the estate by distributing estate assets to himself or herself when he or she is also an estate beneficiary. 80 Wn. App. at 761-62.

While a trustee may not generally be the beneficiary of a trust. *Wilkins v. Lasater*, 46 Wn. App. 766, 779, 733 P.2d 221 (1987), a testamentary trustee may be authorized by the decedent to be beneficiary of the decedent's testamentary distribution. For example, in *Ehlers*, this Court found no conflict on the part of a testamentary trustee in making a distribution of property to herself over the objections of other trust beneficiaries, noting that a trustee's duties and powers are determined by the terms of the trust instrument itself, by common law, and by statute. *Id.* at 757. This only makes practical sense. No estate beneficiary could serve as a personal representative of an estate or trustee of a testamentary trust. Few would choose to forego a distribution from the estate to serve as personal representative.¹⁵

It is also important to note that Reugh specifically relieved his

¹⁵ To hold otherwise, would mean a beneficiary could not receive estate property from himself or herself as personal representative or trustee. A beneficiary would likely decline appointment in order to receive his or her inheritance in kind. This would greatly reduce the number of persons willing to serve. It would also mean that the personal representative or trustee would have to forego an inheritance to preserve his or her status as personal representative. Few would choose to forego a distribution from an estate to serve as personal representative and either alternative would also deny the intent of the testator.

personal representatives and successor trustees of conflict concerns if they received benefits under the Trust Instrument, as noted *supra*. The trustee was empowered to make “advancements” to the personal representative, even where the personal representative was a trustee. CP 349, 351.

Moreover, in any event, cases addressing conflicts of interest require far more in the way of conflicts than any putative conflict here. For example, in *In re Livingston’s Estate*, 7 Wn. App. 841, 502 P.2d 1247 (1972), the personal representative had a clear conflict of interest that prevented her from serving where the estate was barely solvent and the personal representative had a substantial creditor interest, putting her at odds with other creditors. *Id.* at 844-45. In *Lowe*, 191 Wn. App. at 216, this Court affirmed a trial court decision rejecting a motion to remove a personal representative. There, the personal representative was the decedent’s son. He removed certain silver bars and bags of silver coins from his mother’s house with her permission. She gave him authority to allocate them as he saw fit, and he allocated some of the silver to himself. This Court found no conflict justifying his removal where the will authorized his actions and he appropriately accounted for the assets to the court. *See also, Matter of Estate of Kile*, 198 Wn. App. 1008, 2017 WL 959545, *review denied*, 189 Wn.2d 1012 (2017) (trustee properly removed for conflict where trustee’s actions frustrated her father’s intentions that

trustor's grandson farm the land).

Reugh-Kovalsky is Reugh's daughter, a co-personal representative and a named co-trustee. Gill is the long-time business manager for Reugh's entities and is also a co-personal representative and a named co-trustee. The co-personal representatives must administer the Estate in the best interest of the beneficiaries. *Jones*, 152 Wn.2d at 19 fn.14. Reugh's children have raised a legitimate question as to the validity of the trust in the Trust Instrument. In answering the petition, the co-personal representatives admitted those allegations which, to the best of their knowledge, were based on undisputed facts, in an effort to expedite a determination of the trust's validity. INWCF alleged below that "Mr. Gill supports Ms. Reugh-Kovalsky's [sic] efforts to invalidate the Trust and divert the residuary of the estate," by stating that he "admits each of the Petitioner's allegations about the purported invalidity of the Trust." CP 94. This is a disingenuous representation of the Estate's response to the petition. Although Reugh-Kovalsky joined in the petition in her capacity as Reugh's daughter and Estate beneficiary, that did not prevent her from diligently performing her duties with respect to managing the Estate assets and efficiently working toward a favorable resolution of the estate and gift tax examinations. It plainly did not affect Gill's ability to act as a personal representative; he had no financial stake in the decision and he did not file the petition challenging

the Trust Instrument.

In correspondence dated January 8, 2016, attorney Thomas Culbertson advised Reugh-Kovalsky as follows:

JoLynn, you have an obvious conflict of interest since on the one hand you are one of the specific beneficiaries and on the other hand you are a fiduciary as co-personal representative of Wendell's estate and co-successor trustee of his living trust. Conflicts of interest are common and permissible in the context of trusts and estates; it is not the conflict itself which gets people into trouble, but what they do in light of the conflict.

CP 572-73. Reugh-Kovalsky and Gill were mindful of this "warning." They acted in the best interests of the Estate. Without the knowledge and history these co-personal representatives have with respect to Reugh's business operations and estate planning, more time, effort and expense to the Estate would be incurred by fiduciaries lacking such knowledge and history in addressing the issues raised by the IRS and DOR. In accordance with their fiduciary duty, after being appointed, both co-personal representatives worked diligently and in good faith to minimize the expenses incurred and potential additional gift and estate tax liability without regard to who would receive the residuary assets of the Estate because it is appropriate for the co-personal representatives to do so.

In their capacity as co-personal representatives, Reugh-Kovalsky and Gill did not interfere with the rights of any proper beneficiaries to

receive assets. They paid trust beneficiaries, but made necessary warnings. If the trust under the Trust Instrument is invalid, INWCF is not a proper beneficiary of the residuary assets of Reugh's Estate. The petition filed by Reugh's children was simply a request by interested parties for a determination of the trust's validity. A judicial determination was necessary to provide guidance to the co-personal representatives to enable them to distribute the Estate assets to the proper beneficiaries.

Although Reugh-Kovalsky filed the action as a beneficiary, she and Gill were entitled to file that action to secure proper guidance from a court on the correct distribution of Estate assets, a core duty of the co-personal representatives. RCW 11.48.010 ("It shall be the duty of every personal representative to settle the estate...in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate and nonprobate estate.").¹⁶

In sum, Reugh-Kovalsky's capacity as a petitioner and Gill's longstanding working relationship with Reugh do not approach the level of

¹⁶ As long ago as *Gwinn v. Church of Nazarene, Kansas City, Mo.*, 66 Wn.2d 838, 405 P.2d 602 (1965), our Supreme Court saw no problem in a personal representative with nonintervention powers filing an action to address the effect of a will residuary clause that the Court ultimately concluded was a charitable trust. *See also, In re Estate of Tolson*, 89 Wn. App. 21, 28, 947 P.2d 1242 (1997) (personal representatives had standing to request court assistance in determining proper disposition of estate assets under a will). TEDRA authorized the co-personal representatives to petition the trial 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.

conflict that warranted their removal as co-personal representatives of the Estate.

(d) No Breach of Fiduciary Duties

In general terms, a personal representative's duties include: (1) gathering the estate's assets; (2) notifying creditors; (3) settling claims; (4) paying taxes; and (5) distributing assets to the proper parties. RCW 11.48.010; *In re Estate of Wilson*, 8 Wn. App. 519, 507 P.2d 902, review denied, 82 Wn.2d 1010 (1973). The co-personal representatives here carried out those duties. However, the trial court labored under the misconception that the co-personal representatives owed INWCF fiduciary duties as co-trustees. CP 826 (FF 11). That was error.

The key Washington case on breach of fiduciary duty in Washington is *Jones*. There, our Supreme Court upheld the removal of a personal representative who engaged in a series of activities that breached his duty to the Estate and its beneficiaries. He was living in a house that belonged to the estate before the estate was closed; he failed to use the fair market value of the house in distribution; he failed to pay rent, utilities, or property taxes while living in the house; he commingled estate funds; and he refused to disclose financial information, including estate records, valuation of the estate, and information relating to estate property. 152 Wn.2d at 7, 21-22. Additionally, there was evidence that the executor commingled his personal

funds with estate funds. *Id.* at 16. The Court stated that while “[a]n executor should keep the trust funds in a bank account and not commingle them with his own money,” doing so is not grounds for removal if all funds are thereafter accounted for. *Id.*¹⁷

Nothing comparable to such conduct was present here.

(i) No Breach of Trustee Fiduciary Duties Was Possible as No Trust Assets Existed

No assets were transferred to the trust under the Trust Instrument during Reugh’s lifetime or after his death. INWCF asserted below that the named co-trustees breached their fiduciary duty because distributions (from the Estate) were made to “all of the beneficiaries *except* INWCF.” CP 92. It claimed the named co-trustees failed to act impartially in administering the trust and distributing trust property, in violation of RCW 11.98.078(8). INWCF further alleged that the duty of the named co-Trustees was breached through their responsibility as co-personal representatives in dealing with those interested in the Estate. CP 92-93, *citing Matter of Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). *Larson* states that personal representatives are obligated to “exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs.” *Id.*

¹⁷ *See also, In Estate of Johnson*, 196 Wn. App. 1052, 2016 WL 6599648 (2016) (personal representative breached fiduciary duty by using estate assets to repay his debt payment for LLC in which he was the principal owner and decedent owned minority interest).

But, as noted *supra*, the co-personal representatives exercised good faith and diligence in administering the Estate by ensuring that the proper tax amounts were paid and the proper beneficiaries of the Estate assets were identified. INWCF is not a remainder beneficiary of the Estate, as asserted, but is the charitable organization named as the default beneficiary in a savings clause to a residual charitable bequest in a trust instrument, the validity of which is being challenged. Until a determination concerning the validity of the trust under the Trust Instrument was made, the co-personal representatives and named co-trustees could not breach fiduciary duties by not distributing the residuary assets of the Estate.

(ii) The Co-Personal Representatives Met Their Fiduciary Duties by Not Distributing Assets Before Any Tax Issues Were Resolved

As part of their duties, the co-Personal Representatives timely filed the required federal and state tax returns; both of which are under examination by the IRS and DOR. CP 249. The IRS also examined Reugh's 2014 federal gift tax return. CP 251-52.¹⁸ Paramount to the co-personal representatives' decision not to distribute the residuary assets of the Estate was their knowledge that any increase in the value of a gift

¹⁸ The examinations were closed in January 2018 although IRS was aware of the litigation challenging the Trust Instrument's validity and the DOR was aware of the review being conducted by the IRS.

reported on the gift tax return (or any unreported prior taxable gift) and any increase in the value of any asset included in the Estate and reported on the federal and state estate tax returns could result in additional taxes, interest and penalties owed by the Estate.

In June 2016, INWCF demanded that a “substantial portion” of the Estate assets be distributed to it. CP 256.¹⁹ At that time, the co-personal representatives had just filed the federal and state estate tax returns. In correspondence to INWCF’s counsel between July and September 2016, the co-personal representatives explained that the Estate could be subject to additional tax liability due to the anticipated examinations of the federal and state estate tax returns and gift tax return and, therefore, the residuary assets of the Estate should not be distributed until those examinations (which had not yet begun) were complete. CP 246. The co-personal representatives updated INWCF of the status of the examinations subsequent to the initial notification to INWCF. CP 261. INWCF never objected or requested a

¹⁹ It is noteworthy that INWCF never objected to the co-personal representatives’ handling of the tax returns or the Estate’s assets until that demand was made. Raising an objection through its motion to remove asserting that the co-personal representatives breached their fiduciary duty in “refusing to honor the bequest” to INWCF while INWCF was aware that the petition for invalidity was pending and the Estate tax return examinations were ongoing was entirely disingenuous, and a transparent grab for Estate assets. No personal representative of the Estate could distribute the residuary assets of the Estate until the tax return examinations were complete and a final determination was made on the pending petition to determine the proper beneficiaries of the Estate’s residuary assets. Under INWCF’s reasoning, any personal representative serving would be in breach of its fiduciary duty if it did not immediately distribute the Estate’s residuary assets to it, an entity that is not named in Reugh’s Will as a direct Estate beneficiary.

distribution from June 2016 until it filed its motion to remove in which it claimed that the co-personal representatives “refused to honor the bequest to INWCF.” CP 86, 87, 88.

Despite INWCF’s repeated claim to the contrary, a distribution of the residuary Estate assets absent a closing letter/settlement agreement from the IRS and the DOR would be a breach of the co-personal representatives’ duties, and the Estate informed INWCF of such on July 8, 2016, in correspondence that states, *inter alia*, “I do not recommend large distributions of the estate or trust assets until an estate tax closing letter has been issued.” CP 246. Additionally, even as early as November 2015, INWCF was aware from attorney Delay that it would take some time to prepare and file the estate tax returns due to the size of and assets in the Estate. CP 278-79.²⁰

In sum, while the examinations of the state and federal tax returns were ongoing, the co-personal representatives breached no fiduciary duty by not distributing the residuary Estate assets until the examinations were complete, and any additional taxes, plus interest and penalties, if any, were paid and closing letters or settlement agreements were received.

²⁰ INWCF has likely dealt with taxable estates in the past and should be aware of the length of time it takes to complete the estate tax examination process for a large and complex taxable estate, particularly where the decedent also made taxable gifts that remain subject to audit.

(iii) The Co-Personal Representatives Met Their Fiduciary Duties by Not Distributing Assets to INWCF

In support of its motion to remove, INWCF also claimed that Reugh-Kovalsky and Gill were “repeatedly warned that refusing to honor the bequest to INWCF would constitute a breach of their fiduciary duties,” CP 88, and that they paid all beneficiaries, save INWCF, and attempted to resolve INWCF’s interest by a \$2.2 million payment. CP 92, 94. The record here, however, not only discloses that Reugh-Kovalsky and Gill gave INWCF proper notice of the bequest in the Trust Instrument and diligently undertook their duties to “take control of and protect estate assets, pay creditors who properly file their claims, prepare an inventory of estate assets, file the appropriate income tax returns and pay income tax, file estate tax returns and pay estate tax. . .”, just as the Estate’s attorney directed, CP 89, they followed the advice of Estate counsel by not distributing the residuary Estate assets to anyone. CP 246, 278.

INWCF asserted that the co-personal representatives distributed assets to individuals and charities named in the Trust Instrument (including Reugh-Kovalsky), but not to INWCF. CP 86. On April 15, 2015, Thomas Culbertson, Reugh’s long-time Estate planning attorney, sent a “list of priority items to be addressed sooner rather than later” which stated, *inter alia*, that the co-personal representatives should:

Determine whether to use a donor advised fund for the charitable share as the Living Trust or negotiate the ability to set up a private foundation, and notify the Community Foundation of its bequest; Distribute the pecuniary bequests to extended family and determine how to handle David Dahlin's share; Fund Doreen's charitable remainder trust after determining its trustee and determine whether to attempt to change the charitable beneficiary . . .

CP 569. In accordance with this direction from counsel,²¹ the co-personal representatives made distributions to the individuals, largely Reugh's family and charitable organizations named in paragraph C. of Article VI. of the Trust. CP 446-81. At that time, although the co-personal representatives had concerns about the Trust Instrument, no action had been taken regarding the validity of the trust established under the Trust Instrument. The co-personal representatives acted in accordance with attorney Culbertson's direction, who, based on the above statements from his letter, seemed to have concerns about the "bequest" to INWCF.²²

Moreover, the co-personal representatives acted with appropriate caution. Promptly after being served with the petition, the Estate's attorney

²¹ The co-personal representatives should not be held to have breached fiduciary duties where they followed the advice of counsel. *See In re Shea's Estate*, 69 Wn.2d 899, 421 P.2d 356 (1966) (court refused to impose constructive trust where widow on advice of counsel used checking for personal purposes although account was estate asset). Washington law provides, for example, that advice of counsel can negate an inference that a party has acted in bad faith. *Kitsap County Juvenile Detention Officers' Guild v. Kitsap County*, 1 Wn. App. 2d 143, 161, 404 P.3d 547 (2017).

²² Culbertson and his firm have been sued for professional negligence by the beneficiaries (Spokane County Cause No. 18-2-01232-0).

sent a letter to the individuals and charities (still in existence) that received distributions from the Estate (other than the Reugh children) enclosing a copy of the petition. CP 263-64. The individuals and charities were advised that if Reugh's trust was determined to be invalid, the recipients of the distributions, and federal and state tax returns would need to be amended and additional estate tax, interest and penalties paid due to the removal of the large estate tax charitable deduction claimed by the Estate in the originally filed returns.²³

In sum, the co-personal representatives properly handled the distributions and did not breach their fiduciary duties.

(iv) The Co-Personal Representatives Did Not Breach Their Fiduciary Duties in Making Distributions

The trial court concluded that Reugh-Kovalsky and Gill improperly paid \$4.875 million to nine beneficiaries, CP 827 (FF 15), and made a \$2.2

²³ Until a final determination was made regarding the validity of the trust established in the Trust Instrument, the co-personal representatives could not distribute the Estate's residuary assets because the proper beneficiaries would not yet have been determined. Additionally, if the trust under the Trust Instrument was determined to be invalid, the co-personal representatives would be required to seek the return of the distributions made to the individuals and charities listed in Article VI, paragraph C of the Trust Instrument. RCW 11.103.050. The co-personal representatives would be required to calculate a revised federal and Washington estate tax due (including interest and penalties) and submit amended returns to the IRS and DOR, which would then be subject to further examination by those agencies. If the trust established under the Trust Instrument was invalid and additional tax was owed because individuals rather than a charitable organization received the residuary estate, the amount received by those individuals would be significantly less than the amount INWCF asserted that those individuals would receive due to the additional estate tax, interest and penalties imposed.

million offer to INWCF to satisfy its interest. *Id.* (FF 16). Neither action was a breach of fiduciary duty.

First, as noted *supra*, the nine referenced beneficiaries were largely family members or charities. Each was notified that if the Trust Instrument were invalidated, the payment might have to be returned as required by RCW 11.103.050(3), the statute under which the petition was filed. This statute therefore anticipates that distributions may have been made by a trustee to beneficiaries named under a trust instrument even though that trust is later found to be invalid. Additionally, the statute also prohibits a trustee from making distributions in accordance with the terms of such contested trust instrument if the trustee “knows of a pending judicial proceeding contesting the validity of the trust.” RCW 11.103.050(2)(a).

Acting on the direction of attorney Culbertson, Reugh-Kovalsky and Gill issued checks from an Estate account to persons named under the Trust Instrument *prior* to any petition being filed to contest the validity of the trust under the Trust Instrument. Because distributions were anticipated by the Legislature as noted above and liability placed on beneficiaries to return distributions made from an invalid trust is clearly set forth in the statute, it would be inequitable to hold a trustee (or in this case, the co-personal representatives acting on the direction of counsel) in breach of their fiduciary duty in making a distribution that is later determined invalid when

the fiduciaries were not on notice a challenge to the validity was being made. In fact, Reugh-Kovalsky and Gill acted promptly in their capacities as co-personal representatives to put the recipients on notice that the action was filed and that the recipients may need to return the distribution received in order to give the recipients time to consult with their own counsel and prepare to potentially return the funds.

With regard to the \$2.2 million payment to INWCF, the Estate's CPA, Dominic Zamora, initially made that proposal:

Mr. Reugh's will contains a charitable disposition. As such, we are prepared to transfer approximately \$2.2 million to the Inland Northwest Foundation. The charitable contribution would consist of an IRA in the name of Mr. Reugh with an approximate fair market value of \$1.5 million and approximately \$720,000, which is the current actuarial value of the remainder interest in a charitable remainder unitrust created in Mr. Reugh's will. The transfers would be completed with a combination of cash and publicly traded securities by the end of the first quarter of 2016.

CP 585. The Reugh children did not believe that the Trust Instrument reflected their father's intent regarding the disposition of his estate. The purpose of the offer was to open discussion regarding the trust gifts and to give the INWCF the present value of what it would receive under the Doreen Decker charitable trust immediately (rather than waiting until she passed) in order to obtain consent to establish a private foundation to hold

the residuary estate.²⁴ There was no understanding by the personal representatives at that time that the trust was not never initially funded and could be invalid. The Zamora letter refers to the “will” rather than the Trust Instrument and does not clearly explain what the “offer” is intended to accomplish. That this was the purpose of the offer is reflected in the April 1, 2016 response letter of INWCF’s counsel. CP 187, 428.

The personal representatives did not breach any fiduciary duties in making such a proposal.

(4) The Trial Court Erred in Appointing an Institutional Personal Representative in Violation of the Will’s Provision Governing Successor Personal Representatives

K. Wendell Reugh made specific provision for the appointment of a successor personal representative where existing a personal representative could not serve. Rather than honoring that provision, the trial court violated it in appointing NWTM as the successor personal representative in its December 22, 2017 order. CP 827.

It has long been the rule in Washington that a testator’s choice of personal representatives controls, in the absence of statutory disqualification or fraud. *Lauridsen*, 179 Wash. at 202-03. *See also*, RCW 11.28.010 (“If a part of the persons thus appointed refuse to act, or be

²⁴ Reugh’s Trust Instrument established a charitable remainder trust for his longtime companion, Doreen Decker. CP 335, 346-47.

disqualified, the letters shall be granted to the other persons appointed therein.”). No such disqualification as to a successor personal representative was present here.

Reugh could not have been clearer in directing how a successor personal representative was to be chosen – his children were to do so. Rather than honoring that direction, at the behest of INWCF, the trial court usurped the testator’s intent to keep such a vital decision “in the family.” NWTM then betrayed its true colors by discharging the Estate’s existing counsel and fundamentally altering the Estate’s position in this litigation, falling into lockstep with INWCF’s position when it did not need to do so. It could have finished the Estate’s administration. Instead, it became a stalking horse for INWCF’s arguments.

The trial court erred in discharging Reugh-Kovalsky and Gill for the reasons previously voiced, but even if the Court agrees that they should be ousted, it should reverse the trial court’s selection of NWTM as the successor personal representative and remand the case to the trial court to allow the Reugh children to select any successor personal representative in accordance with the decedent’s stated direction.

(5) The Co-Personal Representatives Are Entitled to Fees Under TEDRA at Trial and on Appeal

The trial court denied a fee award under TEDRA to any party to this

motion, CP 828, but Reugh-Kovalsky and Gill were entitled to a fee award. The trial court erred in failing to award them fees from INWCF, particularly if the Court agrees that the trial court erred in ousting them as co-personal representatives.

RCW 11.96A.150(1) provides that courts in TEDRA proceedings, may order attorney fees to be awarded to any party from another party, from the trust, or from a nonprobate asset at issue. Courts

[m]ay in [their] discretion, order costs, including reasonable attorney's fees, to be awarded to any party: (a) *from any party to the proceedings*; (b) from the assets of the estate...involved in the proceedings; or (c) from any nonprobate asset that is subject of the proceedings. *The court may order the costs, including reasonable attorney's fees to be paid in such amount and in such manner as the court determines to be equitable.* In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate...involved.

(emphasis added). Washington law has long recognized that where an action confers a benefit upon an estate, an award of fees is appropriate, *Matter of Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324 (1991), but not compulsory. *In re Estate of Mower*, 193 Wn. App. 706, 728, 374 P.3d 180, *review denied*, 186 Wn.2d 1031 (2016). Indeed, in cases where parties have sought to oust personal representatives or trustees, Washington courts have awarded fees under TEDRA. *Bartlett v. Betlach*, 136 Wn. App.

8, 146 P.3d 1235 (2006), *review denied*, 162 Wn.2d 1004 (2007); *Cook v. Brateng*, 158 Wn. App. 777, 262 P.3d 1228 (2010).

The co-personal representatives were responsive to INWCF's inquiries concerning the Estate. The co-personal representatives' counsel communicated with INWCF's counsel regarding the status of the estate and gift tax examinations. INWCF was aware, without objection, of the co-personal representatives' determination not to distribute the residuary assets of the Estate until these examinations were completed and closing letters/settlement agreements received. In an effort to access Estate assets to which it is not entitled, INWCF claimed it was treated unfairly and refused a distribution before the co-personal representatives completed the administration of the Estate and before the resolution of the petition on the validity of the Trust. INWCF's motion to remove the co-personal representatives was a thinly-disguised effort to gain a tactical advantage in its campaign to seize the Estate assets from its legitimate beneficiaries. As noted *supra*, the co-personal representatives neither breached fiduciary duties nor were conflicted in their activities.

This Court should reverse the trial court's order on fees and order INWCF to pay the co-personal representatives' attorney fees and costs both at trial and on appeal.

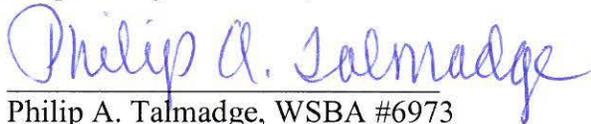
F. CONCLUSION

Although INWCF was not a beneficiary of K. Wendell Reugh's Will, nor did it receive a bequest under that Will, it hopes to morph a technical reference to it in an *inter vivos* trust that never became effective into the wholesale seizure of the Reugh Estate's assets. This effort to oust the Estate's co-personal representatives and to install a pliant institutional personal representative is but one facet of that effort.

The trial court erred in removing Reugh-Kovalsky and Gill as the co-personal representatives of the Estate and named co-trustees in the Trust Instrument, and in appointing NWTM as their successor. The Court should reverse its December 22, 2017 order. The Court should award the Estate its fees and costs at trial and on appeal.

DATED this 4th day of May, 2018.

Respectfully submitted,



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Attorneys for Appellants
Reugh-Kovalsky and Gill

APPENDIX

RCW 11.28.250:

Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once cease, and it shall be the duty of the court to immediately appoint some other personal representative, as in this title provided.

RCW 11.68.070:

If any personal representative who has been granted nonintervention powers fails to execute his trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of any unpaid creditor of the estate who has filed a claim or any heir, devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, then, in the discretion of the court the powers of the personal representative may be restricted or the personal representative may be removed and a successor appointed. In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words "Powers restricted" upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines.

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SPOKANE COUNTY CLERK

LAST WILL AND TESTAMENT

OF

K. WENDELL REUGH

I, **K. WENDELL REUGH**, of Spokane, Washington, a citizen of the United States of America, declare this to be my Last Will and revoke all prior Wills and Codicils.

ARTICLE I

Identification of Family

A. I hereby declare that I am a widower and that my immediate family now consists of my children, **JAMES R. REUGH**, **MARK W. REUGH**, and **JOLYNN REUGH KOVALSKY**. I have no other children, living or deceased. Except as provided below, I make no provisions in this Will for any of my children who survive me, whether named herein or hereafter born or adopted, nor for the descendants of any child who does not survive me.

B. For many years **DOREEN DECKER** has been my close companion. We have entered into a Property Status Agreement, dated July 29, 2008, the terms of which I hereby reaffirm. At the time this Will is signed, we do not have an intention to get married, but if we do marry, it is my intention that the terms of this Will shall prevail, regardless of the fact that our legal relationship has changed.

ARTICLE II

Specific Bequests

A. I give my clothing, jewelry, and personal effects, household furniture and furnishings, silverware and silver service, books, paintings, pictures, sporting equipment, and

boats and automobiles held for personal use, and any policy of property or liability insurance covering such items, as follows:

1. If I have prepared and signed a letter of instruction addressed to my Personal Representative directing distribution of all or any part of such items, my Personal Representative should distribute those items in accordance with the letter.

2. All such items not disposed of by the letter of instruction shall be distributed to my children who survive me, in equal shares; provided, however, that any boats or automobiles shall pass with the residuary of my estate.

3. If any tangible personal property disposed of under this Article passes to more than one individual, said individuals shall have sixty (60) days from the date of my death to divide the property among themselves. If they do not agree to a division within that period or if any of them are unable to make such a choice due to legal disability, my Personal Representative may make an equitable division of such articles among the beneficiaries or may sell any or all of such property to one or more of the beneficiaries or to others and divide the proceeds of sale among the beneficiaries.

4. If any descendant of mine is under a legal disability, my Personal Representative is given the authority and sole discretion to: (a) deliver all or any part of the items to the beneficiary; (b) place assets such as jewelry in safekeeping for the beneficiary and pay fees incurred; (c) sell all or any part and distribute the proceeds to the beneficiary or add them to any trust fund established under this Will for the beneficiary; or (d) deliver all or any part to the guardian of the beneficiary's person or the person with whom the beneficiary resides. The receipt of such guardian or other person shall be a complete discharge of my Personal Representative for the property delivered.

B. The cost of storing, insuring, packing, and shipping any item of personalty passing under this Article may, in the sole discretion of my Personal Representative, be charged as a cost of administration and not to the recipient of the property. My Personal Representative may exercise this power as to some items and not as to others, as my Personal Representative deems proper in the circumstances.

ARTICLE III
Residuary Estate

I give my residuary estate to the Trustee of the K. WENDELL REUGH REVOCABLE LIVING TRUST dated January 4, 2011, wherein I am the Settlor and the Trustee, to be held, administered, and distributed in accordance with the provisions of said Trust Agreement as if it had constituted a part thereof on the date of my death.

ARTICLE IV.
Appointment of Personal Representative

A. I appoint as co-Personal Representatives ("Executors") of my estate:

1. DOMINIC ZAMORA and JAMES M. SIMMONS.

2. In the event either of said co-Personal Representatives is or becomes unwilling or unable to serve, then the other shall serve as co-Personal Representative and shall nominate three individuals to serve as co-Personal Representative with him. My children shall, by majority vote, designate one of said nominees to serve as the other co-Personal Representative.

B. My estate shall be administered by my Personal Representative named in this Will without the intervention of any court and with all powers granted herein and by law to a Personal Representative acting with nonintervention powers. I direct that such nonintervention powers be unrestricted and that they may be exercised whether or not necessary for the administration of my estate. My Personal Representative shall act with full power to:

1. Mortgage, encumber, lease, sell, exchange, and convey, without notice or confirmation, any assets of my estate, real or personal, at such prices and terms as to my Personal Representative may seem just; to advance funds and borrow money, secured or unsecured, from any source.

2. Select any part of my estate in satisfaction of any partition or distribution hereunder, in kind, in money, or both (including the satisfaction of any pecuniary bequest), in shares which may be composed differently, and to do so without regard to the income tax basis of specific property allocated to any beneficiary (including any trust).

3. Appoint an ancillary Personal Representative or agent if such should become necessary or advisable in the judgment of my Personal Representative.

C. My Personal Representative named in this Will need not give bond, in any jurisdiction.

D. Except to the extent fundamentally inconsistent with the provisions of this Will and of my estate plan, I hereby authorize my Personal Representative to disclaim, in whole or in part, any devise or legacy or any interest in any trust provided for my benefit under the Will of any person or under any trust instrument at any time within nine (9) months after the date of the transfer which created an interest in me.

**ARTICLE V.
Expenses and Taxes**

I direct all expenses of my last illness and funeral, estate settlement costs, debts, and death taxes payable by reason of my death shall be paid in accordance with the provisions of the above-described Trust Agreement. I direct that my Personal Representative cooperate with the Trustee of such Trust for the purposes of determination and payment of such amounts.

**ARTICLE VI.
Definitions**

A. All references to children and descendants shall include adopted persons and persons born after the date of this instrument.

B. Unless some other meaning and intent is apparent from the context, the plural shall include the singular and vice versa, and masculine, feminine, and neuter words shall be used interchangeably.

DATED this 4th day of January, 2011.



K. WENDELL REUGH
Testator

The foregoing instrument was on the above date signed by the Testator, who then was of sound and disposing mind and memory, and was published and declared by him to be his Last Will in the presence of us, who at his request and in his presence and in the presence of each other, have attested the same and affixed our signatures as witnesses.

Thomas M. Smith, residing at Spokane, Washington.

Donna DeVore, residing at Spokane, Washington.

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AFFIDAVIT OF SUBSCRIBING WITNESSES

STATE OF WASHINGTON)
 : ss.
County of Spokane)

Each of the undersigned, being duly sworn upon oath and being competent to testify, deposes and says as follows:

The foregoing Last Will and Testament of the Testator, K. WENDELL REUGH, dated the 4th day of January, 2011, was signed and executed by the said Testator at Spokane, Washington, in the presence of myself and the other witness.

The said Testator thereupon published and declared the foregoing Last Will and Testament to be his Last Will and Testament and requested us to sign the same as witnesses. At the request of and in the presence of the said Testator and in the presence of each other, the other witness and I subscribed our names as witnesses thereto.

At the time of the execution of said instrument, the Testator, the other witness and I were of legal age, and the Testator appeared to be of sound and disposing mind and not acting under duress, menace, fraud, undue influence or misrepresentation.

[Handwritten Signature]

[Handwritten Signature]

SUBSCRIBED AND SWORN to before me this 4th day of January, 2011.



[Handwritten Signature]

Notary Public (Signature)
DEBORAH SCHULTZ

(Print Name)

My appointment expires: 05/25/2013

1/4/11
COPY
Original Held at
Lukins & Annis

**K. WENDELL REUGH
REVOCABLE LIVING TRUST**

THIS AGREEMENT is made and entered into at Spokane, Washington, on the 4th day of January, 2011, by and between K. WENDELL REUGH, as Settlor, and K. WENDELL REUGH, as Trustee, for the uses and purposes hereinafter described.

**ARTICLE I
Trust Name**

This Trust shall be referred to as the K. WENDELL REUGH REVOCABLE LIVING TRUST while Settlor is living.

**ARTICLE II
Trust Property**

The Settlor hereby transfers to the Trustee the sum of One Hundred Dollars (\$100.00). In addition, the Settlor has caused or may cause the Trustee to be named as beneficiary of certain policies of life insurance, and the Trustee accepts such designations in trust in accordance with the terms of this instrument. The Settlor or others may transfer other property to this trust, by direct transfers, under insurance policies or by Will (all of which property is referred to as the "Trust Estate"), to be held and disposed of in accordance with the terms of this instrument.

**ARTICLE III
Identification of Family**

The Settlor's immediate family now consists of his three children, JAMES R. REUGH, MARK W. REUGH, and JOLYNN REUGH KOVALSKY.

**ARTICLE IV.
Rights Reserved by Settlor**

A. While Settlor Lives:

1. Settlor reserves the right to direct the distribution of all income from, and principal of, the property held in this trust. Directions given hereunder shall be given orally or in writing, but if given orally shall be confirmed in writing by the Settlor, if the Trustee so requests.

2. Settlor reserve the right to amend or revoke this agreement, in whole or in part, by instrument in writing delivered to the Trustee, provided:

- a. Such rights shall be personal to the Settlor and shall not be exercised by any other person, including a guardian.
- b. The powers and duties of the Trustee shall not be changed without its written consent.

3. Settlor reserves to himself the right, without the consent or approval of the Trustee or any beneficiaries, to receive or exercise all benefits, payments, dividends, surrender values, options, rights, powers and privileges with respect to any policies of insurance which are payable to the Trustee, including but not limited to the following:

- a. The power to change the beneficiaries of such policies or any of them;
- b. The right to receive all disability benefits, dividends, payments, loan values, or surrender values provided in such policies;
- c. The power to borrow upon, surrender, or pledge any of such policies;
- d. The power to exercise any option provided in any of such policies, such as the power to convert to a different kind or amount of insurance, and the power to select the method of settlement of the proceeds of any such policies.

Upon the Death of Settlor. Except as provided in the following paragraph C., the Trust shall become irrevocable upon the death of the Settlor.

C. Amendment or Revocation by Will. In addition to any other method of amendment or revocation, Settlor may, by specific reference to this agreement in Settlor's Last Will, amend or revoke this agreement in whole or in part.

ARTICLE V.

Dispositive Provisions While Settlor Is Living

While Settlor lives, the Trustee shall make payments or transfers of assets from the Trust Estate as the Settlor directs. Any amount not so distributed shall be accumulated as part of the Trust Estate.

ARTICLE VI
Dispositive Provisions Upon Death of Settlor

A. General. Upon the death of the Settlor, the Trust Estate shall thereafter be managed and distributed as follows: After the amounts directed to be paid from the Trust Estate pursuant to the provisions of Article X ("Taxes, Debts and Expenses") have been paid or provided for, the remaining principal and any undistributed income of the Trust Estate shall be disposed of as provided in this Article VI; provided, however, the Trustee, in its discretion, may delay any or all distributions of principal of the Trust Estate for such time as may be reasonably required by the Trustee to ascertain the amounts required to be paid pursuant to said Article X and to make provisions for payment.

B. Costs and Taxes. All of the following pre-residuary gifts (that is, all the following gifts except the residuary gift passing pursuant to paragraph G. below), shall be made free of any estate tax and free of any costs of administration.

C. General Pecuniary Bequests. The successor Trustee shall make the following pecuniary gifts, if (in the case of individuals) the recipient survives Settlor. The gift to any individual who predeceases Settlor shall lapse.

✓1. Two Hundred Fifty Thousand Dollars (\$250,000.00) cash to Settlor's sister, SHIRLEY DAHLIN.

✓2. Twenty Thousand Dollars (\$20,000.00) cash to Settlor's niece, CAROLYN JONES.

✓3. Twenty Thousand Dollars (\$20,000.00) cash to Settlor's nephew, DAVID DAHLIN.

✓4. Twenty Thousand Dollars (\$20,000.00) cash to Settlor's nephew, SCOTT DAHLIN.

✓5. Ten Thousand Dollars (\$10,000.00) cash to THE SHRINER'S HOSPITAL FOR CRIPPLED CHILDREN, Spokane Unit, Spokane, Washington.

✓6. Twenty-five Thousand Dollars (\$25,000.00) cash to UNITED CENTRAL METHODIST CHURCH, Spokane, Washington.

✓7. Fifty Thousand Dollars (\$50,000.00) cash to Settlor's former daughter-in-law, KATHY REUGH, unless she has remarried.

D. Pecuniary Bequests to Settlor's Descendants. The successor Trustee shall make the following pecuniary gifts to Settlor's descendants. Any gift to a child who predeceases the Settlor shall be made to the child's descendants, by right of representation; any gift to any other descendant who predeceases Settlor shall lapse.

1. To Settlor's children, the sum of One Million Five Hundred Thousand Dollars (\$1,500,000) each, reduced, however, by the amount of money or publicly traded securities each child receives outright from the testamentary trusts left by Settlor's late wife MaryAnn Reugh. At the option of Settlor's son JAMES R. REUGH, his share may be satisfied in whole or in part by an in-kind distribution of Settlor's Spokane home on St. Andrews Lane.

2. To Settlor's grandchildren, amounts which, when added to the money and/or publicly traded securities each grandchild receives outright from the testamentary trusts left by Settlor's late wife MaryAnn Reugh, will result in each grandchild receiving an equal amount.

E. Specific Bequests Regarding Certain Business Entities. The following provisions concern JIM Partners, a Washington limited partnership, and Reugh Construction, Inc., a Washington corporation.

1. Settlor and his late wife made gifts of interests in said entities to their children, their grandchildren (including HOLLY A. POQUETTE), and their great grandchildren. Some of their grandchildren and great grandchildren received more gifts than others. In addition, Settlor's late wife left interests in said entities in one or more testamentary trusts, the distribution of which may result in some of their grandchildren receiving larger interests than other grandchildren. It is Settlor's express intention that their grandchildren and great grandchildren receive gifts from Settlor's estate to equalize their holdings in said entities so that after taking all their holdings (from whatever source) into account, Settlor's grandchildren each have equal interests, of each class of interest, in each entity, and HOLLY A. POQUETTE has interests, of each class, that are no less than half of the interests held by each of Settlor's grandchildren. Settlor therefore directs the successor Trustee of this Trust, and asks the trustee(s) of his late wife's testamentary trusts (consistent with the trusts' governing instruments), to make distributions of

-4-

interests in said entities to his grandchildren and to HOLLY A. POQUETTE in sufficient amounts to accomplish said equalization, if possible.

2. In addition, at the time of making this Trust, Settlor has several great-grandchildren to whom Settlor has gifted stock in Reugh Construction, Inc. Settlor directs that shares of stock in Reugh Construction, Inc., be given to Settlor's great-grandchildren in sufficient number so that the holdings of each of Settlor's great-grandchildren born at the time of Settlor's death equals the holdings of the great-grandchild who holds the most.

3. If the Trust Estate holds insufficient interests in either or both entities to accomplish said equalizations, then the successor Trustee is directed to make equalizing gifts of other assets, based on value. For such purpose, the value of interests in the entity shall be determined as if, on the date of Settlor's death, the entity's assets were sold at fair market value and the proceeds (ignoring any tax triggered by the sale) were distributed to the partners or shareholders.

4. In the event either entity has been liquidated, sold or otherwise disposed of, then the successor Trustee shall make equalizing gifts following the principals set forth above and valuing the interests in such entity as of the date of such liquidation, sale or other disposition.

5. It is Settlor's intention that the foregoing provisions be construed to require gifts to HOLLY A. POQUETTE as necessary to increase her holdings to at least half that of each of Settlor's grandchildren, but it is not Settlor's intention that gifts be made to his grandchildren to assure that they each hold twice that held by HOLLY A. POQUETTE.

F. Charitable Remainder Trust for Doreen Decker. The successor Trustee shall contribute the sum of One Million Dollars (\$1,000,000) to a charitable remainder unitrust, to be known as the K. Wendell Reugh Charitable Remainder Trust, for the initial benefit of DORREN DECKER, if she survives the Settlor. If not, said gift shall lapse. The trust shall have the following terms and conditions:

1. The income beneficiary shall be DORREN DECKER.
2. The income beneficiary shall be entitled to an annual unitrust distribution of five percent (5%) of the net fair market value of the corpus of the trust (as of the first

day of each calendar year) payable in quarterly installments on the last day of each calendar quarter.

2. The remainder beneficiary shall be the charitable fund or trust described in paragraph G, below.

4. The trust shall terminate upon the death of DORREEN DICKER.

5. The trust shall be governed by the laws of the state of Washington.

6. Should DORREEN DICKER disclaim her interest (or a portion of her interest) in the trust, the successor Trustee shall distribute the bequest (or such portion thereof) to the charitable fund or trust described in paragraph G, below, free of trust.

7. It is Settlor's express intention that this trust for the benefit of Dorreen Dickers be construed in such a manner as to qualify as a charitable remainder trust under §664 of the Internal Revenue Code. Except as otherwise provided herein, the terms and conditions of this trust shall be those set forth in Rev. Proc. 2005-56, as the same may be amended from time to time.

G. Residence to Charitable Foundation or Fund.

1. The successor Trustee shall distribute the remainder of the Trust Estate to a charitable foundation Settlor may have established subsequent to executing this Trust instrument, or if no such foundation has been established, to a charitable donor-advised fund established by Settlor subsequent to executing this Trust instrument (in the event more than one such fund was established by Settlor, distribution among them shall be in the manner chosen by the successor Trustee in its discretion).

2. If Settlor established neither a charitable foundation nor a charitable donor advised fund, said remainder shall be distributed to the Inland Northwest Community Foundation, to be held as an endowed donor-advised fund known as the Wessell and MaryAnn Rough Family Fund. Such fund shall have Settlor's three children as its initial advisors. Upon the death, disability or resignation of any such advisors, a replacement shall be appointed by the Board of Directors of the Inland Northwest Community Foundation from among the descendants (including descendants by adoption) of the Settlor. Settlor wishes that charitable distributions be made from the fund primarily to

the kinds of charitable organizations Settlor has given to during his lifetime, serving the people of the Inland Northwest.

ARTICLE VII
Restriction upon Alienation

The trust benefits of a beneficiary shall not be liable for his debts, shall not be subject to process or seizure by any court, and shall not constitute assets in the bankruptcy or insolvency of the beneficiary. A beneficiary shall have no power to anticipate, alienate, or encumber his trust benefits.

ARTICLE VIII
Powers and Duties of the Trustee

A. The Trustee shall have all of the rights, powers, and duties given by the laws of the State of Washington, as now in effect or as such laws shall hereafter be amended, notwithstanding the fact that the situs, principal place of business, or any of the assets of the Trust Estate may be situated in any other state.

B. Notwithstanding the powers conferred upon any Trustee, if an individual is serving as a Trustee of a trust herein established and the trust holds a life insurance policy, insuring the individual's life, such Trustee shall in no circumstances have any right, title, power or interest whatsoever with respect to the policy, and all such right, title, power, and interest in such policy shall be held and exercised only by a Co-Trustee. If no Co-Trustee is serving with such individual, then the successor Trustee named in this Trust shall exercise such powers, or, if no successor Trustee is able and willing to do so, then the Trustee may select a Co-Trustee for the purpose of holding and exercising the incidents of ownership in any such policy.

C. **Trustee Duties With Respect to Insurance.**

1. While Settlor lives, the Trustee shall be under no obligation to pay any premiums, assessments, or other charges necessary to keep insurance policies on the life of Settlor in force, nor shall the Trustee be under any obligation to ascertain whether the same have been paid, or to notify the beneficiaries hereunder of the non-payment of premiums. The Trustee shall keep safely all policies deposited with it, and shall, at the request of the Settlor execute such releases and other instruments as may be required to

permit the Settlor to exercise any options, privileges, or powers reserved to him hereunder.

2. Upon the death of the Settlor, the Trustee shall receive all such sums of money as shall become due under the terms of any policies of life insurance payable to the Trustee, including double indemnity benefits, and hold the same in trust for the uses and purposes hereinafter set forth. To facilitate the receipt of such sums of money, the Trustee shall have the power to execute and deliver receipts and other instruments, to compromise or adjust disputed claims, in such manner as are necessary and proper for the collection thereof, in the Trustee's sole discretion; provided, that if payment on any policy is contested, the Trustee shall not be obligated to take any action for the collection unless and until it shall have been indemnified to its satisfaction against any loss, liability, or expense, including attorneys' fees; and provided, further, that the Trustee is authorized, in its sole discretion, to use any funds in its hands, whether principal or income, to pay the costs and expenses, including attorneys' fees, of bringing an action for the collection of the proceeds of any policy hereunder, and may reimburse itself for any advances made for such purposes. Upon payment to the Trustee of the amounts due under policies of insurance payable hereunder, the insurance companies issuing such policies shall be relieved of all further liability hereunder, and no such company shall be under any responsibility to see to the performance of the trust created hereby.

D. The Trustee is authorized to purchase securities or other property, real or personal, from the Personal Representative of Settlor's, or Settlor's, estate or from the estate of any beneficiary and also to make loans or advancements, secured or unsecured, to the Personal Representative, even though the Trustee is such Personal Representative.

ARTICLE IX Successor Trustee

A. Upon the death, resignation, or inability of K. WENDELL REUGH to serve as Trustee, DOMINIC ZAMORA and JAMES M. SIMMONS shall serve as successor Co-Trustees of this Trust and of any testamentary trusts established by the terms of this Trust.

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B. In the event of the death, resignation, or inability of DOMINIC ZAMORA or JAMES M. SIMMONS to serve as successor Co-Trustees, the remaining Co-Trustees shall continue to serve with such additional person as shall be designated as follows:

1. In the case of this Trust, the remaining Co-Trustees shall nominate three persons and Settlor's children shall select, by majority vote, from among the nominees the person to serve as the other Co-Trustee.
2. In the case of the charitable remainder trust established initially for the benefit of DORENE DECKER, the remaining Co-Trustees shall nominate three persons and DORENE DECKER (or if she is incapacitated such person as holds her power of attorney or serves as her guardian), HOLLY A. POQUETTE, and the person then serving as the executive director of the Island Northern Community Foundation shall select, by majority vote, from among the nominees the person to serve as the other Co-Trustee.

ARTICLE X

Taxes, Debts, and Expenses

A. Upon the death of the Settlor, the Trustee shall pay out of the Trust Estate all expenses of the administration of the Settlor's probate estate and all expenses of the administration of the Trust Estate (including but not limited to the compensation of the Settlor's personal representative or executor, the successor Trustee, and their attorney's fees) payable after the Settlor's death and until the division of the trust fund into separate trusts is completed. Any such debts and expenses paid from the Trust Estate shall be paid from the residuary estate otherwise passing for the benefit of charity pursuant to paragraph G. of Article VI.

B. All estate taxes and other taxes triggered by Settlor's death and attributable to assets passing pursuant to the terms of this Trust or otherwise shall be paid from the residuary estate otherwise passing for the benefit of charity pursuant to paragraph G. of Article VI; provided, however, that if the Settlor's gross estate for state or federal estate tax purposes includes the value of any property i) by reason of Section 2044 of the Internal Revenue Code, as amended, or analogous provision of state law (relating to certain property for which the marital deduction from federal estate or gift taxes was previously allowed), or ii) passing by beneficiary designation or otherwise other than pursuant to the terms of this Trust, the Trustee shall be entitled to recover from the person or persons succeeding to such property upon the Settlor's

death the entire increment of the state and federal estate and inheritance taxes imposed on the Settlor's estate to the extent the total of such taxes is greater than would have been imposed and made payable if such property was not subject to tax in the Settlor's estate. The increment of such taxes shall not be charged against the property passing under the provisions of this Agreement.

C. The Trustee is authorized to purchase from the Personal Representative of the estate of Settlor securities or other property, real or personal, and also to make loans or advancements, secured or unsecured, to such Personal Representative, even though the trustee is the Personal Representative.

E. The Trustee need not determine the accuracy of the amounts certified by the Personal Representative. No compensatory adjustment shall be made for administration expense allowed as a federal income rather than estate tax deduction. The Trustee may make payment directly, or through the Personal Representative of the deceased Settlor's estate or otherwise, as the Trustee deems advisable, without seeking reimbursement for any payment so made. If Settlor has no probate estate, the Trustee is authorized to apply for or demand and to receive, hold, administer and distribute, as provided herein, any debt, claim, refund or rebate, premium, dividend or other thing of value belonging to or accruing to Settlor or Settlor's estate.

ARTICLE XI Incapacity

A. "Incapacity" with respect to the Settlor shall mean that the Settlor is, in the judgment of the Trustee and with the written opinion of two medical doctors, unable to manage his personal and financial affairs, whether because of illness or for any other reason.

B. During any period in which the Settlor is incapacitated, the Trustee shall be responsible for the management of the Trust assets and is authorized to distribute to the Settlor, or for the Settlor's benefit, so much of the net income or principal, or both, as the Trustee deems best for the health and support of the Settlor in reasonable comfort and of any person dependent upon the Settlor for support. While such period lasts, the Trustee may discontinue payments directed by the Settlor and may disregard an attempted exercise of any right reserved in Article IV.

ARTICLE XII
Invalidity

If a court of competent jurisdiction shall rule invalid or unenforceable any of the provisions of this instrument, the remainder of this instrument shall be given full force and effect.

All questions pertaining to the validity, interpretation, construction, and administration of this instrument shall be determined in accordance with the laws of the State of Washington.

ARTICLE XIII
Miscellaneous Provisions

A. The Trustee is authorized to pay from the income or the principal of the trust the debts and the reasonable expenses of the last illness and funeral and burial expenses of the Settlor.

B. Except where the context indicates otherwise, words in the singular number shall include the plural and words in the masculine gender shall include the feminine, and vice versa.

C. Except as expressly otherwise provided herein, all references herein to "children" and "descendants" shall include those hereafter born or adopted.

D. The captions and titles are for convenience and reference only; and they shall not define, limit, or construe the contents of any provision.

IN WITNESS WHEREOF, K. WENDELL REUGH has signed this Agreement as the Settlor and K. WENDELL REUGH has signed as the Trustee this 4th day of January, 2011.

SETTLOR:

K. Wendell Reugh
K. WENDELL REUGH

TRUSTEE:

K. Wendell Reugh
K. WENDELL REUGH

STATE OF WASHINGTON)
) ss.
County of Spokane)

On this 4th day of January, 2011, personally appeared before me K. WENDELL REUGH, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN UNDER Settlor's hand and official seal the day and year in this certificate first above written.



Thomas M. Culbertson
Notary Public (Signature)
THOMAS M. CULBERTSON
(Notary - Print Name Here)

Settlor's Commission Expires 10/30/11

COPY
Original Filed

DEC 22 2017

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

IN RE: THE ESTATE OF K. WENDELL
REUGH,

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

Petitioners.

Case No. 15-4-00471-1

[PROPOSED] ORDER GRANTING
INLAND NORTHWEST COMMUNITY
FOUNDATION'S MOTION TO REMOVE
CO-PERSONAL REPRESENTATIVES OF
THE ESTATE OF K. WENDELL REUGH
AND CO-TRUSTEES OF K. WENDELL
REUGH REVOCABLE LIVING TRUST

THIS MATTER came on for hearing on December 8, 2017, on Inland Northwest Community Foundation's Motion to Remove Co-Personal Representatives of the Estate of K. Wendell Reugh and Co-Trustees of the K. Wendell Reugh Revocable Living Trust. James A. McPhee appeared on behalf of Inland Northwest Community Foundation ("INWCF"). Amber R. Myrick appeared on behalf of the co-personal representatives of the Estate of K. Wendell Reugh and the co-trustees of the K. Wendell Reugh Revocable Living Trust. Mary Schultz appeared on behalf of Petitioners JoLynn Reugh Kovalsky, Mark Reugh and James Reugh ("Petitioners").

The Court heard argument from counsel and reviewed the following filings:

1. Motion to Remove Co-Personal Representatives of the Estate of K. Wendell Reugh and Co-Trustees of the K. Wendell Reugh Revocable Living Trust ("Motion");
2. Memorandum in Support of Motion;
3. Declaration of James A. McPhee in Support of Motion;

[PROPOSED] ORDER GRANTING INWCF'S MOTION TO REMOVE CO-PERSONAL REPRESENTATIVES OF THE ESTATE OF K. WENDELL REUGH AND CO-TRUSTEES OF K. WENDELL REUGH REVOCABLE LIVING TRUST -

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- 1 4. Estate's Objection to Motion;
- 2 5. Declaration of Amber R. Myrick in Support of Estate's Opposition to Motion;
- 3 6. Petitioners' Response to Motion;
- 4 7. Declaration of Mary Schultz re: Petitioners' Response to Motion; and
- 5 8. Reply in Support of Motion.

6 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

7 1. Petitioners argued that INWCF failed to comply with RCW 11.68.070 in
8 seeking the removal of the co-personal representatives and co-trustees. The co-personal
9 representatives and co-trustees did not raise any such argument on their own behalf.

10 2. The Court finds that INWCF substantially complied with RCW 11.68.070 in
11 filing the Motion.

12 3. To the extent INWCF deviated from any procedure referenced in the statute,
13 the co-personal representatives, co-trustees, and Petitioners were not prejudiced. The purpose
14 of the requirement that a party seeking the removal of a personal representative file a "petition
15 . . . supported by affidavit" making a "prima facie showing of cause for removal" is to prompt
16 the court to rule on whether there are grounds to reassume jurisdiction over a nonintervention
17 probate. See *In re Estate of Jones*, 116 Wn. App. 353, 362-63 (2003), reversed on other
18 grounds by *In re Estate of Jones*, 152 Wn.2d 1 (2004) ("RCW 11.68.070 provides that the
19 court may reassume jurisdiction over a nonintervention estate upon a showing that the
20 executor has failed to faithfully execute his trust, or for any of the reasons specified in the
21 court-supervised administration provisions of RCW 11.28.250.") (quotation marks omitted).

22 4. The Court reassumed jurisdiction over this probate when Petitioners filed their
23 First Amended Petition to Contest the Validity of a Trust, which was filed months before the
24 instant Motion. As jurisdiction had previously been reestablished, the Court was not required
25 to make a separate jurisdictional determination under RCW 11.68.070.

26 5. The Court also afforded counsel the option of scheduling a separate hearing at
27 which the co-personal representatives and co-trustees would be ordered to appear to address
28 the merits of whether cause for their removal existed. Counsel for the co-personal
29 representatives, co-trustees, and the Petitioners declined this option and agreed to proceed
30 with oral argument at the motion hearing.
31

32 [PROPOSED] ORDER GRANTING INWCF'S MOTION TO
REMOVE CO-PERSONAL REPRESENTATIVES OF THE
ESTATE OF K. WENDELL REUGH AND CO-TRUSTEES
OF K. WENDELL REUGH REVOCABLE LIVING TRUST -

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1 6. The co-personal representatives, co-trustees, and Petitioners had notice of the
2 Motion, filed extensive opposition briefing and exhibits, and received a full opportunity to be
3 heard at the hearing. The Court finds that due process was served.

4 7. The decedent's Last Will and Testament ("Will") contains a pour-over clause
5 that ^{on its face,} directs the decedent's assets, except certain personal property, to be transferred to the K.
6 Wendell Reugh Revocable Living Trust ("Trust"). The Will also provides ^{on its face,} that the decedent
7 "make[s] no provisions . . . for any of my children who survive me."

8 8. JoLynn Kovalsky Reugh and Steve Gill are presently serving as the personal
9 representatives of the Estate of K. Wendell Reugh ("Co-PRs") and trustees of the K. Wendell
10 Reugh Revocable Living Trust ("Co-Trustees"). Ms. Kovalsky is the decedent's daughter.
11 Mr. Gill is the decedent's longtime business manager.

12 9. JoLynn Kovalsky Reugh is a beneficiary of the Trust. ^{listed} The Trust Agreement
13 states ^{on its face,} that Ms. Kovalsky and her two siblings, Mark Reugh and James Reugh, are entitled to
14 pecuniary bequests of \$1.5 million each, subject to reductions for amounts received through
15 other family trusts.

16 10. INWCF is ^{listed as} the remainder beneficiary of the Trust. ^{on the face of the Trust Agreement.}

17 11. The Co-PRs and Co-Trustees owe fiduciary duties to INWCF. These duties
18 require the Co-PRs and Co-Trustees to treat INWCF with the highest degree of good faith,
19 diligence and undivided loyalty.

20 12. Petitioners JoLynn Reugh Kovalsky, Mark Reugh and James Reugh have filed
21 a petition contesting the validity of the Trust. In contesting the validity of the Trust, the
22 Petitioners are asserting a competing claim to funds that would otherwise be distributed to
23 INWCF as the remainder beneficiary of the Trust. ^{if the language of the Trust Agreement is given} Petitioners expressly stated their intent to
24 claim these funds in a letter to INWCF's counsel dated January 27, 2017. ^{is given effect.}

25 13. In making a competing claim to funds that would otherwise be distributed to
26 INWCF, ^{if the language in the Trust Agreement is given effect} JoLynn Reugh Kovalsky has created an irreconcilable conflict of interest. Ms.
27 Kovalsky cannot fulfill the fiduciary duties of good faith, diligence and undivided loyalty that
28 she owes to INWCF as a Co-PR and Co-Trustee while pursuing a competing claim to these
29 funds as a beneficiary.
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1 14. Ms. Kovalsky's conflict of interest is imputed to Steve Gill. Along with Ms.
2 Kovalsky, Mr. Gill admitted the Petitioners' allegations about the purported invalidity of the
3 Trust in a pleading filed by the Co-PRs in response to the Petitioners' First Amended Petition
4 to Contest the Validity of a Trust. Like Ms. Kovalsky, Mr. Gill is no longer in a position to
5 treat INWCF with the highest degree of good faith, diligence and undivided loyalty.

6 15. The Co-PRs and Co-Trustees have paid \$4.875 million to nine beneficiaries
7 listed in the Trust, including \$1.5 million each to Ms. Kovalsky and her siblings; however,
8 they now contend that the Trust is invalid. The Co-PRs and Co-Trustees now contend that the
9 \$1.5 million payments were made pursuant to the "Estate" and not the Trust. However, if the
10 Co-PRs and Co-Trustees are correct that the Trust is invalid, the payments of \$1.5 million to
11 Ms. Kovalsky and her siblings from the "Estate" would be expressly prohibited by the Will,^{language of the}
12 which specifies that the decedent "make[s] no provisions . . . for any of [his] children who
13 survive [him]."

14 16. In January 2016, the Co-PRs and Co-Trustees offered INWCF \$2.2 million in
15 full satisfaction of INWCF's right to receive a distribution under the Trust. The Co-PRs and
16 Co-Trustees extended this offer without disclosing to INWCF that the anticipated distribution
17 to INWCF under the Trust exceeded \$16 million. The Court finds that the Co-PRs and Co-
18 Trustees committed a serious breach of their fiduciary duties to INWCF in making a heavily
19 discounted offer without disclosing the anticipated amount of the distribution INWCF would
20 receive if the offer was rejected.

21 *16.5 Nothing contained in the foregoing findings of fact and
22 ORDER conclusions of law shall have any bearing or
preclusive effect on any disputed issue of*

23 17. INWCF's motion to remove the co-Personal Representatives is granted. JoLynn Kovalsky
24 JoLynn Kovalsky Reugh and Steve Gill are hereby REMOVED as personal representatives of
25 the Estate of K. Wendell Reugh pursuant to RCW 11.68.070 and RCW 11.28.250.

*fact or law relating
to the validity
of the Trust as
raised by the
Amended
Petition.*

26 18. INWCF's motion to remove the co-Trustees is granted. JoLynn Kovalsky
27 Reugh and Steve Gill are hereby REMOVED as trustees of the K. Wendell Reugh Revocable
28 Living Trust pursuant to RCW 11.98.039.

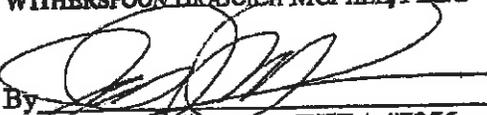
29 19. The Court appoints Northwest Trustee & Management Services ^{L.L.C.} as Personal
30 Representative of the Estate of K. Wendell Reugh and Trustee of the K. Wendell Reugh
31 Revocable Living Trust.

32 [PROPOSED] ORDER GRANTING INWCF'S MOTION TO
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OF K. WENDELL REUGH REVOCABLE LIVING TRUST -

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1 Presented by:

2 WITHERSPOON BRAJICICH MCPHEE, PLLC

3
4 

5 By Peter A. Witherspoon, WSBA #7956
6 James A. McPhee, WSBA #26323
7 Attorneys for Inland Northwest
8 Community Foundation

9 Approved as to form;

10 ~~Notice of presentment waived~~ *MS*

11 AMBER R. MYRICK, P.A.

12
13 By _____
14 Amber R. Myrick, WSBA #24576
15 Attorneys for Estate of K. Wendell Reugh

16 MARY SCHULTZ LAW, P.S.

17
18 *Objection as noted on the*
19 *record, and as to*
20 *form.*
21 By Mary Schultz
22 Mary Schultz, WSBA #14198
23 Attorneys for Petitioners

24
25
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32 [PROPOSED] ORDER GRANTING INWCF'S MOTION TO
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DECLARATION OF SERVICE

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

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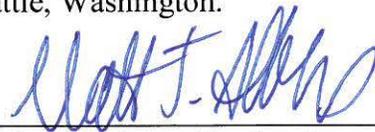
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Original E-Filed with:
Court of Appeals, Division III
Clerk's Office

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: May 9, 2018, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

May 09, 2018 - 10:31 AM

Transmittal Information

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

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Comments:

Brief of Appellants Reugh-Kovalsky and Gill

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