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No. 35737-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

IN RE THE ESTATE OF K. WENDELL REUGH, Deceased

JoLynn Reugh-Kovalsky, Mark Reugh and Jim Reugh,

Petitioners.

INLAND NORTHWEST COMMUNITY FOUNDATION'S RESPONSE
TO OPENING BRIEFS OF REMOVED PERSONAL
REPRESENTATIVES AND TRUSTEES
AND REUGH BENEFICIARIES

Attorneys for Inland Northwest Community Foundation
Peter A. Witherspoon, WSBA #7956
James A. McPhee, WSBA #26323
Witherspoon Brajcich McPhee, PLLC
601 West Main Avenue, Suite 714
Spokane, Washington 99201
Telephone: (509) 455-9077

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I. INTRODUCTION

A personal representative must administer the estate in the best interest of the beneficiaries. If a representative has a conflict of interest, whether he be appointed or named in a nonintervention will, he will not be able to fulfill his fiduciary duties. Therefore, a conflict of interest may disqualify a person from acting as the personal representative.

In re Estate of Jones, 152 Wn.2d 1, 19 n.14 (2004).

The decedent, K. Wendell Reugh, named Inland Northwest Community Foundation (“INWCF”) as the remainder beneficiary of his estate. He did so through a standard pour-over will that calls for his entire estate, except minor items of personal property, to pour over into a trust to be distributed to beneficiaries identified in the trust agreement. The trust agreement specifies that the residuary—the amount of money left over after all other beneficiaries have received their distributions—is to be distributed to INWCF, to be held as an endowed donor-advised fund known as the Wendell and Mary Ann Reugh Family Fund.

Mr. Reugh’s daughter, JoLynn Reugh Kovalsky, and his longtime business manager, Steve Gill, were appointed personal representatives of the Estate and trustees of the trust. Mr. Reugh did not nominate either of these individuals to serve as personal representatives or trustees. Ms. Kovalsky and Mr. Gill received their appointments through a series of

declinations and consents after the individuals who had been nominated declined to serve.

Upon receiving their appointments, Ms. Kovalsky and Mr. Gill promptly made distributions to the other beneficiaries, including Ms. Kovalsky and her two siblings, who received \$1.5 million each. Ms. Kovalsky and Mr. Gill then filed tax returns on behalf of the Estate that listed INWCF receiving “100% of Estate Residue” in the amount of \$16,675,286.

But Ms. Kovalsky and Mr. Gill did not distribute those funds to INWCF. Instead, they offered INWCF \$2.2 million in satisfaction of its right to a distribution—without disclosing that INWCF, as the remainder beneficiary, was in line to receive more than \$16 million. After INWCF declined that offer, *Ms. Kovalsky and her siblings claimed the entire residuary for themselves.*

The trial court removed Ms. Kovalsky and Mr. Gill from their appointments, finding that they breached their fiduciary duties to INWCF and harbored an “irreconcilable” conflict of interest. That decision was well within the court’s broad discretion. There was no error at all, let alone an error amounting to a manifest abuse of discretion. This Court should affirm.

II. STATEMENT OF THE ISSUE

Whether the removal of Ms. Kovalsky and Mr. Gill from their appointments as co-personal representatives of the Estate and co-trustees of the Trust due to breaches of their fiduciary duties and an “irreconcilable” conflict of interest was a manifest abuse of the trial court’s broad discretion.

III. STATEMENT OF THE CASE

A. Last Will and Testament & Revocable Living Trust

Mr. Reugh executed two estate planning documents on January 4, 2011. The first was a last will and testament (“Will”). C.P. 335-40. The second was a revocable living trust agreement (“Trust”). C.P. 342-53.

The Will is a standard pour-over will which calls for Mr. Reugh’s entire estate, except for certain minor items of personal property like jewelry and silverware, to be transferred into the Trust at Mr. Reugh’s death.¹ C.P. 335-40. The pour-over provision, which is central to the issues in dispute, reads as follows:

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.

¹ Washington has adopted the Uniform Testamentary Additions to Trust Act, RCW 11.12.250, which expressly endorses the use of pour-over wills to fund a trust. The statute specifically allows a trust to be funded for the first time by a pour-over will. *See* RCW 11.12.250 (“The *existence*, size or character of the corpus of the trust is immaterial to the validity of the gift.”) (emphasis added).

C.P. 337.

The Trust is the vehicle through which Mr. Reugh chose to distribute his vast wealth. It grants a number of pecuniary bequests to Mr. Reugh's friends and family members, including gifts of \$1.5 million to each of his three children, Petitioners, JoLynn Kovalsky, Mark Reugh and James Reugh. C.P. 344-46.

INWCF is designated as the remainder beneficiary of the Trust. C.P. 347. By virtue of that designation, INWCF is entitled to whatever assets remain in the Trust after all other beneficiaries have received their distribution and the Estate's liabilities have been settled (the residuary).

C.P. 347. The Trust directs that the residuary be distributed to INWCF, to be held as an endowed donor-advised fund known as the Wendell and MaryAnn Reugh Family Fund. C.P. 347-48.

B. Distributions to Other Beneficiaries

Mr. Reugh passed away on March 22, 2015. His daughter, JoLynn Kovalsky, and longtime business manager, Steve Gill, were appointed to serve as co-personal representatives of the Estate and co-trustees of the Trust after the personal representatives and trustees nominated in the Will and Trust declined their appointments.

Ms. Kovalsky and Mr. Gill promptly made distributions to each of the other beneficiaries in the precise amounts specified in the Trust:

- \$1.5 million to each of Mr. Reugh's children;
- \$250,000 to Mr. Reugh's sister, Shirley Dahlin;
- \$20,000 to Mr. Reugh's niece, Carolyn Jones;
- \$20,000 to Mr. Reugh's nephew, David Dahlin;
- \$20,000 to Mr. Reugh's nephew, Scott Dahlin;
- \$10,000 to Shriner's Hospital For Crippled Children;
- \$25,000 to United Central Methodist Church; and
- \$50,000 to Mr. Reugh's former daughter-in-law, Kathy Reugh.

C.P. 446-81.

Ms. Kovalsky and Mr. Gill subsequently filed tax returns on behalf of the Estate confirming that INWCF would receive "100% of [the] Estate Residue." C.P. 511, 550. The tax returns listed a distribution to INWCF in the anticipated amount of **\$16,675,286**. C.P. 511, 550.

C. Fiduciary Duty Warning

Apparently sensing that Ms. Kovalsky and Mr. Gill were reluctant to distribute such a large sum to charity, the attorney for the Estate at the time, Thomas Culbertson, counseled them on their fiduciary duties owed to INWCF. In a letter dated January 8, 2016, Mr. Culbertson advised Ms. Kovalsky and Mr. Gill that they were required to make full disclosure to INWCF and were not permitted to treat it as an adversary:

As fiduciaries, there are a number of duties and responsibilities which you owe to all the beneficiaries, but there are two duties which are paramount. *First, you have a duty of impartiality to the beneficiaries; that is, you cannot favor the interests of any beneficiary or group of beneficiaries over the interests of another beneficiary. Second, you have a duty of full disclosure; that is, a duty to keep all the beneficiaries sufficiently informed that they are in a position to protect their best interests.* In short, you cannot (consistent with your fiduciary duties) treat the Community Foundation as an adversary, as you might if you had a dispute with another party as to which you owe no fiduciary duties.

C.P. 185 (underlined emphasis added).

D. Discounted \$2.2 Million Offer to INWCF

On January 26, 2016, just three weeks after being counseled on their fiduciary duties, Ms. Kovalsky and Mr. Gill sent INWCF a letter offering \$2.2 million in satisfaction of a “charitable disposition” in Mr. Reugh’s will. C.P. 585. Ms. Kovalsky and Mr. Gill did not disclose that INWCF was named as the *remainder* beneficiary and was in line to receive the *entire* residuary. Nor did they disclose that the residuary would likely exceed \$16 million.

E. Petitioners’ Competing Claim to Residuary

In January 2017, after INWCF rejected the \$2.2 million offer, Ms. Kovalsky and her siblings *claimed the residuary for themselves*. In a letter from their attorney, Ms. Kovalsky and her siblings claimed that the Trust was “invalid” and that their father’s true intent was for his assets to pass to

his children rather than to INWCF. C.P. 578-83. They also threatened INWCF with litigation unless it agreed to walk away:

[I]n the event INWCF still has designs on the Reugh family's assets, this letter is intended to encourage INWCF to spend its resources elsewhere. As explained herein, Mr. Reugh's intent was to ensure that his children received his assets directly.

* * *

[I]f the [Petitioners] are forced by INWCF to litigate to carry out their father's intent, then if they prevail, and benefit his estate thereby, they will seek recovery of all fees and costs. RCW 11.96A.150.

In sum, this is notice of the [Petitioners'] intent to claim their father's estate absent an invalid trust diverting his assets, and we will proceed in that vein.

C.P. 578, 582.

F. Petition to "Invalidate" Trust

Petitioners followed through on their threat to litigate by filing a TEDRA petition to "invalidate" the Trust on March 6, 2017. C.P. 355-89. In their capacities as Personal Representatives, Ms. Kovalsky and Mr. Gill filed an answer to the Petition in which they admitted the allegations about the purported "invalidity" of the Trust on behalf of the Estate. C.P. 391-401.

G. INWCF's Motion to Remove Personal Representatives and Trustees

INWCF filed a motion to remove Ms. Kovalsky and Mr. Gill as Personal Representatives and Trustees on November 22, 2017. C.P. 82-96, 321-722. The motion was argued December 8, 2017. Before proceeding with the hearing, the trial court addressed an objection by Petitioners that INWCF had not followed the proper procedure in seeking Ms. Kovalsky's and Mr. Gill's removal. In an abundance of caution, the Court gave Petitioners the option of scheduling a separate hearing at a later date in order to eliminate any purported prejudice that might have been caused to Ms. Kovalsky and Mr. Gill by the alleged procedural defect. Petitioners, along with Ms. Kovalsky and Mr. Gill on behalf of the Estate, declined the offer.

The hearing proceeded as planned, with all parties addressing the merits of whether grounds for removal existed. At the conclusion of the hearing, the court announced that it would remove Ms. Kovalsky and Mr. Gill and appoint a successor Personal Representative and Trustee. After a presentment hearing on December 22, 2017, the court signed an order

removing Ms. Kovalsky and Mr. Gill and appointing Northwest Trustee & Management Services, L.L.C. as the successor.²

The removal order is supported by detailed findings of fact and conclusions of law. Among other findings, the court found that Ms. Kovalsky and Mr. Gill committed a “serious breach of their fiduciary duties to INWCF [by] making a heavily discounted offer without disclosing the anticipated amount of the distribution.” C.P. 834. The court also found that Ms. Kovalsky harbored an “irreconcilable” conflict of interest that prevented her from fulfilling her fiduciary duties to INWCF:

In making a competing claim to funds that would otherwise be distributed to INWCF if the language of the Trust Agreement is given effect, JoLynn Reugh Kovalsky has created an irreconcilable conflict of interest. Ms. Kovalsky cannot fulfill the fiduciary duties of good faith, diligence and undivided loyalty that she owes to INWCF as a Co-PR and Co-Trustee while pursuing a competing claim to these funds as a beneficiary.

C.P. 833. Finally, the court found that Mr. Gill was likewise unable to fulfill his fiduciary duties to INWCF due to the fact that he, like Ms.

²After announcing its ruling at the December 8 motion hearing, the court directed the parties to agree upon a successor personal representative and trustee—or, if no agreement could be reached, to submit their respective choices to the court for a final determination. No agreement was reached. INWCF proposed Northwest Trustee & Management Services, L.L.C. as its chosen successor. Petitioners refused to submit a proposed successor, as did Ms. Kovalsky and Mr. Gill on behalf of the Estate.

Kovalsky, had taken an official position on behalf of the Estate that the Trust was “invalid” and that Petitioners, rather than INWCF, were entitled to the residuary. C.P. 834.

IV. ARGUMENT

A. Standard of Review

A trial court has “broad discretion” to remove the personal representative of an estate or the trustee of a trust. *Matter of Aaberg’s Estates*, 25 Wn. App. 336, 339 (1980); *In re Estate of Ehlers*, 80 Wn. App. 751, 761 (1996); *In re Beard’s Estate*, 60 Wn.2d 127, 132 (1962). The removal of a personal representative or trustee should not be reversed unless the court’s decision was “so arbitrary as to amount to an abuse of discretion.” *Aaberg’s Estates*, 25 Wn. App. at 340; *In re Estate of Ardell*, 96 Wn. App. 708, 720 (1999). This is a “manifest abuse of discretion” standard. *Ehlers*, 80 Wn. App. at 761; *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 716 (1987).

If any one of the grounds for removal cited by the trial court is valid, the decision must be upheld. *In re Estate of Jones*, 152 Wn.2d 1, 10 & n.2 (2004); *Beard’s Estate*, 60 Wn.2d at 134. The appellate court may also affirm on any basis supported by the trial court’s findings. *Jones*, 152 Wn.2d at 10 n.2.

A trial court's factual findings are treated as verities on appeal if supported by substantial evidence. *Jones*, 152 Wn.2d at 8. Substantial evidence is "evidence that is sufficient to persuade a rational, fair-minded person" that the finding is true. *Id.*

Appellants³ cite *In re Estate of Hayes*, 185 Wn. App. 567 (2015), for the proposition that the substantial evidence standard does not apply because no "live testimony" was presented in the trial court. Petitioners' Br. at 12. This citation is unavailing. *Hayes* does not reject the substantial evidence standard in that circumstance; it merely notes a perceived inconsistency in the case law on whether substantial evidence or a different standard applies. *Id.* at 608-09. Because the perceived inconsistency was not material to its decision, the Court chose not to resolve it. *Id.* at 609.

Substantial evidence is the proper standard. As our Supreme Court explained in *Dolan v. King County*, the fact that a record consists "entirely of written documents" does not mandate de novo review. 172 Wn.2d 299, 310 (2011). Where, as here, "competing documentary evidence must be weighed and issues of credibility resolved," a reviewing court should

³ For ease of readability, the former personal representatives and trustees and the Reugh beneficiaries are referred to collectively as "Appellants." The brief refers to the former personal representatives and trustees as "Ms. Kovalsky and Mr. Gill," and to the Reugh beneficiaries as "Petitioners," when necessary to distinguish between the two groups.

review for substantial evidence. *Id.* at 310-11; *see also Foster v. Gilliam*, 165 Wn. App. 33, 54 (2011) (applying substantial evidence standard to “purely written record” on appeal of order removing trustee due to breaches of fiduciary duties).

B. The trial court had full authority to remove Ms. Kovalsky and Mr. Gill from their appointments.

1. RCW 11.68.070 is not “jurisdictional.”

Appellants make several “jurisdictional” arguments addressed to the validity of the removal order. Petitioners’ Br. at 12-32; Kovalsky & Gill Br. at 14-18, 22-24. The thrust of these arguments is that the removal order is “void for lack of subject matter jurisdiction.” Petitioners’ Br. at 29.

Appellants’ focus on subject matter jurisdiction is misplaced. As our Supreme Court recently clarified, “jurisdiction” in this context refers to a court’s *authority* to remove a personal representative under RCW 11.68.070 if the statutory criteria are satisfied. *See Matter of Estate of Rathbone* 190 Wn.2d 332, 339 n.4 (2018) (“Although our cases refer to a court’s power to act in nonintervention probates as ‘jurisdiction,’ they are referring to the statutory grant of ‘authority’ to decide the issue addressed in that particular statute [RCW 11.68.070].”).

Where, as here, the party seeking removal expressly invokes RCW 11.68.070, the court is authorized to reassume control over the probate and decide whether the personal representative should be removed:

Although a superior court’s power to intervene in the administration of a nonintervention estate is limited, personal representatives with nonintervention powers are subject to the remedies available under RCW 11.68.070. *Filing a petition under RCW 11.68.070 allows heirs to invoke a superior court’s authority to remove or restrict the powers of a personal representative for failing to comply with his or her fiduciary duties.*

Id. at 342 (emphasis added); *accord Jones*, 152 Wn.2d at 9 (“[U]nder RCW 11.68.070, [the beneficiaries] had the statutory authority to invoke jurisdiction and properly did so. Therefore, the superior court had the jurisdiction to decide if [the personal representative] faithfully discharged his duties pursuant to RCW 11.68.070 and 11.28.250.”).

As *Rathbone* makes clear, RCW 11.68.070 is not jurisdictional. When a party invokes the statute, the court simply proceeds to determine whether the criteria for removal have been satisfied. The question is not whether the court is empowered to remove the personal representative in the “jurisdictional” sense—RCW 11.68.070 confers that authority on its face—but whether it would be appropriate for the court to *exercise* that power on the facts presented. In making that decision, the court must be mindful of the testator’s intent that the personal representative administer

the estate without judicial supervision. *Rathbone*, 190 Wn.2d at 342. But that is a *policy* consideration rather than a jurisdictional one. *Id.* There is no “threshold” jurisdictional requirement as Appellants contend.

The trial court did not have the benefit of the *Rathbone* decision when it issued the removal order. While the court’s “jurisdictional” ruling is perfectly sound under the precedent that existed at the time, *Rathbone* simplifies the issue considerably. The bottom line is that INWCF invoked RCW 11.68.070 and demonstrated that the criteria for removal were met. That is all that the statute requires. Accordingly, as the case comes to this Court, the question is whether the trial court properly exercised its “broad discretion” to remove Ms. Kovalsky and Mr. Gill from their appointments. *Aaberg’s Estates*, 25 Wn. App. at 339; *Ehlers*, 80 Wn. App. at 761; *Beard’s Estate*, 60 Wn.2d at 132.

2. Appellants’ claims that INWCF lacked “standing” are unavailing.

Appellants also challenge INWCF’s “standing” to seek removal under RCW 11.68.070, arguing that INWCF is not an “heir,” “devisee” or “legatee” under the Will. Petitioners’ Br. at 13-17, 27-29; Kovalsky & Gill Br. at 17-18, 22-24.

The Court should reject that argument for two reasons. First, Appellants did not raise the argument below. Accordingly, the argument

has been waived and should not be considered on appeal. *State v. Riley*, 121 Wn.2d 22, 31 (1993); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853 (2002); *see also* RAP 2.5(a) (appellate court may refuse to review any claim of error not raised in the trial court).⁴

Second, INWCF does in fact have “standing.” Mr. Reugh’s will is a standard pour-over will. The will directs that Mr. Reugh’s entire estate, save for minor articles of personal property like jewelry and silverware, be distributed in the manner specified in the Trust Agreement. C.P. 192. The Trust Agreement, in turn, calls for INWCF to receive whatever remains of the estate after the pecuniary bequests to Mr. Reugh’s family members and friends have been made. C.P. 202.

INWCF is clearly a “devisee” or “legatee” in this circumstance. A devisee is “a recipient of property by will.” *In re Estate of Hitchcock*, 140 Wn. App. 526, 532 (2007). A legatee is “one who is named in a will to take personal property; one who has received a legacy or bequest.”⁵ *Id.*

⁴ Petitioners assert that “standing” to seek relief under RCW 11.68.070 is a threshold jurisdictional requirement that cannot be waived. Petitioners’ Br. at 28-29. As noted above, however, RCW 11.68.070 is not jurisdictional. *Rathbone*, 190 Wn.2d at 339 n.4, 342. Accordingly, the ordinary waiver rules apply.

⁵ A “legacy” is defined as “[a] gift by will, [especially] of personal property and often money.” LEGACY, *Blacks Law Dictionary* (10th ed. 2014). A “bequest” is defined as “money or other property that a person arranges to give to someone or an organization upon death; [especially] property ([usually] personal property or money) disposed of in a will.” BEQUEST, *Blacks Law Dictionary* (10th ed. 2014).

The argument that INWCF does not meet either definition because its right to a distribution is not mentioned in the Will itself puts form over substance. Again, the Will directs that the entire estate, save for minor articles of personal property, be distributed in the manner specified in the Trust Agreement. The Will and Trust Agreement were thus “integrally related components of a single testamentary scheme.” *Clymer v. Mayo*, 473 N.E.2d 1084, 1092 (Mass. 1985).

If the Court were to accept Appellants’ argument, the only people who would have “standing” to petition for the personal representatives’ removal would be the recipients of minor articles of personal property—jewelry, silverware, and the like. The main beneficiaries would be left without recourse if the personal representatives decided to distribute the funds to someone else (or to themselves). Indeed, that is precisely the result the Appellants are seeking.

The Court should not abide that absurd result. *See State v. Ervin*, 169 Wn.2d 815, 823-24 (2010) (courts must avoid absurd results when interpreting statutes). The Legislature has expressly endorsed the use of pour-over wills as a means of gifting probate assets. RCW 11.12.250. It therefore stands to reason that the Legislature would not draw a distinction

between “devisees” and “legatees” whose names appear on the face of a will and those who receive gifts of probate assets via a pour-over clause.

Contrary to Appellants’ assertions, *Hitchcock* does not dictate a different result. The will at issue in *Hitchcock* was not a pour-over will. Accordingly, the court had no occasion to consider whether a beneficiary who receives a gift of probate assets by operation of a pour-over clause would be prohibited from petitioning for removal under RCW 11.68.070. The holding in *Hitchcock* is limited to beneficiaries of testamentary trusts. 140 Wn. App. at 532. The Court should decline Appellants’ invitation to extend that holding to the novel circumstance presented here.

C. **Substantial evidence supports the trial court’s finding that Ms. Kovalsky and Mr. Gill breached their fiduciary duties and harbored irreconcilable conflicts of interest.**

Appellants colorfully describe INWCF as a “financial predator” attempting to steal the Reugh children’s inheritance. Petitioners’ Br. at 2, 11, 25, 34, 49; *see also* Kovalsky & Gill Br. at 2 (accusing INWCF of making a “naked power grab”). But on the face of the Will and Trust, INWCF is the main beneficiary. The fact that Appellants would call someone in that position a “predator” speaks volumes about how Ms. Kovalsky and Mr. Gill managed the Estate prior to being removed.

As the trial court properly concluded, Appellants chose to treat INWCF as an *adversary*. First, they offered INWCF \$2.2 million in full satisfaction of INWCF's right to a distribution, without disclosing that INWCF was in line to receive more than \$16 million as the remainder beneficiary. Then, when INWCF rejected that offer, Appellants took a more aggressive approach, claiming the entire \$16 million residuary for themselves. By treating INWCF as an adversary, Appellants Kovalsky and Gill breached the duties of good faith, diligence and undivided loyalty that they owed to INWCF as a beneficiary. The trial court's decision to remove them from their appointments was a sensible exercise of its broad discretion.

1. Ms. Kovalsky and Mr. Gill breached their fiduciary duties to INWCF by making a heavily discounted offer of \$2.2 million without disclosing that INWCF was to receive more than \$16 million as the remainder beneficiary.

As personal representatives of the Estate and trustees of the Trust, Ms. Kovalsky and Mr. Gill stood in a fiduciary relationship to INWCF and the other beneficiaries. *Matter of Estate of Larson*, 103 Wn.2d 517, 521 (1985); *In re Estate of Ehlers*, 80 Wn. App. 751, 757 (1996). The fiduciary relationship required them to treat INWCF with "the highest degree of good faith, diligence and undivided loyalty." *Ehlers*, 80 Wn. App. at 757. Their status as fiduciaries also prohibited them from

advancing their own interests at INWCF's expense. *Tucker v. Brown*, 20 Wn.2d 740, 768 (1944) (trustee must "exclude from consideration . . . his own advantage or profit" and must not "gain any advantage, either directly or indirectly, for himself"); *Matter of Drinkwater's Estate*, 22 Wn. App. 26, 30 (1978) (personal representative must conform to rules governing trustee, including prohibition on profiting at a beneficiary's expense).

As the trial court properly concluded, extending INWCF an offer of \$2.2 million in full satisfaction of its right to a distribution was a clear breach of Ms. Kovalsky's and Mr. Gill's fiduciary duties. Ms. Kovalsky and Mr. Gill knew that the distribution owing to INWCF would far exceed that amount—a fact confirmed by, most notably, estate tax returns signed by Ms. Kovalsky and Mr. Gill that list a distribution of the entire residuary to INWCF in the anticipated amount of **\$16,675,286**:

If "Yes," attach a copy of the written disclaimer required by section 2518(b).

Item number	Name and address of beneficiary	Character of distribution	Amount
1	Inland Northwest Community Foundation, Receiving 100% of Estate Residus.		18,675,286.
2	Doreen Decker CRUT. \$719,660 charitable value of gross \$1,000,000 funding of CRUT.		719,660.
3	United Central Methodist Church, Spokane, WA.		25,000.
4	The Shriner's Hospital for Cripples Children, Spokane Unit, Spokane, WA.		10,000.

C.P. 511-12, 550; *see also* C.P. 560-70 (April 25, 2015 letter from Estate attorney Thomas Culbertson to Ms. Kovalsky and Mr. Gill summarizing Mr. Reugh's assets and enclosing spreadsheet listing value of each).

But, inexplicably, Ms. Kovalsky and Mr. Gill did not disclose the anticipated value of the distribution. Nor did they inform INWCF that it was the *remainder* beneficiary and was therefore entitled to a distribution of whatever remained of Mr. Reugh's substantial assets after bequests to other beneficiaries had been satisfied. Instead, Ms. Kovalsky and Mr. Gill made a vague reference to a "charitable disposition" and implied that the value was \$2.2 million:

Mr. Reugh's will contains a charitable disposition. As such, we are prepared to transfer approximately \$2.2 million to the Inland Northwest Foundation [sic]. . . . If the Foundation finds this proposal suitable, we will have the necessary documents drawn up and complete the process of the transfer.

C.P. 585.

Failing to disclose INWCF's status as the remainder beneficiary and the anticipated value of the distribution was inexcusable. As fiduciaries, Ms. Kovalsky and Mr. Gill owed INWCF the highest degree of good faith, diligence, and undivided loyalty. *Larson*, 103 Wn.2d at 521; *Ehlers*, 80 Wn. App. at 757. The fact that they offered \$14 million less than INWCF would otherwise have received was bad enough. That

alone amounted to a breach of their fiduciary duties. But *failing to tell INWCF that the offer was heavily discounted* was completely beyond the bounds of proper fiduciary conduct.

Ms. Kovalsky and Mr. Gill clearly hoped that INWCF would see the sizeable sum of \$2.2 million and accept their offer without asking questions. Had that occurred, Ms. Kovalsky and Mr. Gill would have been left with more than \$14 million to distribute to whomever they wanted, in direct contravention of Mr. Reugh's intent that those funds be distributed to INWCF to be held in the Wendell and Mary Ann Reugh Family Fund. There could not be a more clear-cut example of a breach of fiduciary duty.

It also bears noting that Appellants were expressly warned by Estate attorney Thomas Culbertson not to treat INWCF as an adversary. In a letter dated January 8, 2016, bearing the subject line "Fiduciary Duties," Mr. Culbertson advised Ms. Kovalsky and Mr. Gill that the fiduciary duties attendant to their appointments prohibited them from advancing their own interests to the detriment of INWCF:

As fiduciaries, there are a number of duties and responsibilities which you owe to all the beneficiaries, but there are two duties which are paramount. *First, you have a duty of impartiality to the beneficiaries; that is, you cannot favor the interests of any beneficiary or group of beneficiaries over the interests of another beneficiary. Second, you have a*

duty of full disclosure; that is, a duty to keep all the beneficiaries sufficiently informed that they are in a position to protect their best interests. In short, you cannot (consistent with your fiduciary duties) treat the Community Foundation as an adversary, as you might if you had a dispute with another party as to which you owe no fiduciary duties.

C.P. 185 (underlined emphasis added).

Ms. Kovalsky and Mr. Gill made their underhanded \$2.2 million offer to INWCF a mere three weeks later. C.P. 585. The fact that they ignored an express warning not to treat INWCF as an adversary made the case for their removal all the more compelling. The Court can and should affirm on the basis of the \$2.2 million offer alone.

2. Ms. Kovalsky breached her fiduciary duties to INWCF by making a competing claim to the residuary estate.

Ms. Kovalsky, while acting as Personal Representative and Trustee, asserted a competing claim to millions of dollars that Mr. Reugh's estate planning documents unmistakably leave to INWCF. As the trial court correctly concluded, Ms. Kovalsky's decision to claim those funds for herself created an "irreconcilable conflict of interest" that precluded her from fulfilling her fiduciary duties to INWCF. C.P. 833.

Appellants insist that Ms. Kovalsky could not have been conflicted because Washington law allows personal representatives to claim estate

assets as beneficiaries. *Kovalsky & Gill Br.* at 25-26 (citing *Ehlers*, 80 Wn. App. 761-62). But Appellants miss the point.

INWCF does not dispute that personal representatives are entitled to receive gifts of estate assets as beneficiaries. The fact that a personal representative is also a beneficiary, standing alone, does not create a conflict of interest.

The conflict arises when the personal representative stakes a competing claim to *other* assets that were left to *another* beneficiary. In that situation, the personal representative cannot fulfill the duties of good faith, diligence and undivided loyalty that he or she owes to the other beneficiary. Having asserted a competing claim to the other beneficiary's gift, the personal representative has necessarily elevated his or her own interests above the interests of the other beneficiary. That is a textbook conflict. *Tucker*, 20 Wn.2d at 768; *Drinkwater's Estate*, 22 Wn. App. at 30.

Appellants maintain that Ms. Kovalsky did not actually make a competing claim to INWCF's distribution. The thrust of these arguments is that Ms. Kovalsky, in challenging the validity of the Trust, was merely asking the Court for "guidance" on how she and Mr. Gill should distribute

the residuary rather than claiming it for herself and her siblings. Kovalsky & Gill Br. at 30; Petitioners' Br. at 40-41.

The Court should not be fooled. In contesting the validity of the Trust, Ms. Kovalsky and her siblings were not making a dispassionate request for "guidance" on how the residuary should be distributed. They were claiming the residuary for themselves.

Any doubt on that score is resolved by Petitioners' January 27, 2017 letter to INWCF. In that letter, Petitioners asserted that, despite having named INWCF as his remainder beneficiary, Mr. Reugh's true intent was "to ensure that his children received his assets directly." C.P. 578. Petitioners also threatened INWCF with litigation if it refused to honor that purported intent:

This Trust is invalid. Mr. Reugh was responsible for the Trust's never being activated; by all accounts, it was because he intended that this be so. Mr. Reugh's assets pass directly to his children, and not to a trust.

* * *

[I]f the [Petitioners] are forced by INWCF to litigate to carry out their father's intent, then if they prevail, and benefit his estate thereby, they will seek recovery of all fees and costs. RCW 11.96A.150.

In sum, this is notice of the [Petitioners'] intent to claim their father's estate absent an invalid trust diverting his assets, and *we will proceed in that vein.*

C.P. 582 (emphasis added).

Petitioners subsequently followed through on that threat by filing the First Amended Petition to Contest the Validity of a Trust. C.P. 355-89. Describing that filing as a dispassionate request for “guidance” is disingenuous.

In the end, the conflict issue is straightforward. Ms. Kovalsky had a duty to treat INWCF with the utmost good faith, diligence and undivided loyalty. *Larson*, 103 Wn.2d 517, 521; *Ehlers*, 80 Wn. App. at 761. She breached that duty by making a competing claim to INWCF’s distribution. Having asserted that claim, Ms. Kovalsky was hopelessly conflicted. She put her own interests above INWCF’s interests and could no longer treat INWCF with the utmost good faith, diligence, and undivided loyalty that her appointments required. The trial court made a sensible decision to remove her from those appointments. This Court should affirm.

3. Ms. Kovalsky and Mr. Gill breached their fiduciary duties to INWCF by taking the position that the Trust is “invalid.”

The trial court found that Ms. Kovalsky and Mr. Gill breached their fiduciary duties by filing an answer to the First Amended Petition to Contest the Validity of a Trust (“Petition”) admitting that the Trust was “invalid.” C.P. 834. That finding is supported by substantial evidence.

As discussed above, the Petition was a bid by the Reugh children to claim the residuary estate for themselves. In filing their answer, Ms.

Kovalsky and Mr. Gill committed the Estate to the position that the Trust was invalid—and, by extension, that the residuary should be distributed to the Reugh children rather than to INWCF. C.P. 391-401.

Ms. Kovalsky and Mr. Gill attempt to pass this off as a noble effort to “expedite a determination of the trust’s validity.” Kovalsky & Gill Br. at 28. The reality, of course, is that Ms. Kovalsky was admitting her own allegations about the Trust’s “invalidity,” with a view toward improving the Reugh children’s chances of success. Mr. Gill, having presumably reviewed the Petition and discussed its contents and objectives with Ms. Kovalsky, was complicit in that effort. The trial court was well justified in concluding that the filing of the answer put Ms. Kovalsky and Mr. Gill in a conflicted position that interfered with their fiduciary duties to INWCF.

4. The trial court did not err in imputing Ms. Kovalsky’s conflict of interest to Mr. Gill.

The trial court did not err by imputing Ms. Kovalsky’s conflict of interest to Mr. Gill. Contrary to Appellants’ assertions, the fact that Mr. Gill was not a beneficiary under the Will or the Trust does not preclude a conflict finding. The record clearly reflects that Mr. Gill was aligned with Ms. Kovalsky and actively supported the Reugh children in their efforts to divert the residuary away from INWCF. C.P. 585 (January 26, 2016 letter to INWCF offering \$2.2 million in full satisfaction of INWCF’s right to a

distribution); C.P. 391-401 (answer admitting that Trust is “invalid”). Mr. Gill chose to join in these efforts by way of an answer that the Personal Representatives and Trustees were not required to file. Pursuant to RCW 11.96A.100(5), an answer to a TEDRA Petition is not required to be filed until five days before the scheduled hearing. No hearing on the underlying Petition has been scheduled to date. Under these circumstances, imputing the conflict to Mr. Gill was appropriate.

The *Jones* decision is instructive. The personal representative in that case, Russell Jones, was appointed as personal representative of his mother’s estate. *Jones*, 152 Wn.2d at 7. Russell and his three brothers, David, Jeffery, and Peter, were the beneficiaries. *Id.* Jeffery and Peter became unhappy with Russell’s administration of the estate and filed a petition to remove him as personal representative. *Id.* David opposed that request, testifying that Russell had been doing an “honest, competent, and thorough job,” and had been “fair and equitable” in distributing estate assets. *Id.* at 20. The trial court granted the petition upon finding that Russell had breached his fiduciary duties to Jeffery and Peter. *Id.* at 7. The court appointed a neutral third party to take Russell’s place. *Id.*

On appeal, Russell argued that the trial court erred by appointing a third party as the new personal representative rather than David, who had

been named in the will as the alternate personal representative. *Id.* at 18-19. The Court rejected that argument, concluding that David was “in league” with Russell and was therefore disqualified due to a conflict of interest. *Id.* at 19-20 & n.14. Given that David had “exhibited trust and comfort” in Russell’s improper administration of the estate, the Court reasoned, he would not be able to fulfill the fiduciary duties that an appointment as the new personal representative would require. *Id.*

Like David in the *Jones* case, Mr. Gill was “in league” with the principal wrongdoer, Ms. Kovalsky. Mr. Gill knew that Ms. Kovalsky and her siblings were fighting to wrest the residuary away from INWCF, and he supported her in that conflicted position at every turn. The trial court was well justified in deeming Mr. Gill equally conflicted.

D. The trial court did not err in appointing a neutral third party to replace Ms. Kovalsky and Mr. Gill.

In an argument being raised for the first time on appeal, Appellants maintain that the Reugh children should have been allowed to select the new personal representative pursuant to Article IV of the Will and Article IX of the Trust. Petitioners’ Br. at 46-47; Kovalsky & Gill Br. at 41-42. That argument fails for a host of reasons.

First, Appellants waived the argument by not raising it below. *Riley*, 121 Wn.2d at 31; *Wingert*, 146 Wn.2d at 853; RAP 2.5(a).

Second, neither the Will nor the Trust purports to give the Reugh children the right to select a successor when a personal representative or trustee is *removed*. Article IV of the Will only allows the Reugh children to select a successor when an individual who was nominated as a personal representative is “unwilling or unable to serve,” or when an appointed personal representative deems it “necessary or advisable” to appoint an ancillary personal representative. C.P. 337, 338. The Trust only allows the Reugh children to select a successor in the event of the “death, resignation, or inability” of a nominated successor trustee to serve. C.P. 350. None of those circumstances apply.

Third, assuming *arguendo* that the Reugh children *did* have an absolute right to choose the replacement, they forfeited that right by refusing to submit a proposed replacement as directed by the trial court. At the end of the December 8, 2017 hearing, after announcing its decision that Ms. Kovalsky and Mr. Gill would be removed, the trial court ordered the parties to confer and agree up on a replacement personal representative and trustee, or, if no agreement could be reached, to submit their proposed candidates for the court’s consideration. C.P. 738. INWCF promptly contacted Appellants and proposed that Northwest Trustee & Management Services, L.L.C. (“NWT&MS”), be appointed as the replacement. C.P.

743. Appellants refused that proposal. C.P. 783. INWCF then submitted NWT&MS to the trial court as its nominee. C.P. 738-85. Appellants never submitted a nominee of their own. Having refused to submit a proposed replacement, Appellants cannot be heard to complain that the trial court erred in declining to afford them a choice.

E. Arguments about the validity of the Trust and INWCF's status as a beneficiary are not properly before the Court.

Appellants expend considerable effort attacking the validity of the Trust and challenging INWCF's status as a beneficiary. The Court should disregard those arguments and focus on the narrow question presented: whether the trial court abused its discretion in removing Ms. Kovalsky and Mr. Gill due to breaches of their fiduciary duties and conflicts of interest.

The validity of the Trust and the bequest to INWCF are issues that will be decided by the trial court in the first instance as the case proceeds. This Court need not, and should not, address those questions.

Appellants argue that the outcome of the appeal hinges on the validity of the Trust, suggesting that Ms. Kovalsky and Mr. Gill would not owe INWCF any fiduciary duties (and therefore could not have breached any fiduciary duties), if the Trust is not valid or if INWCF is not a proper beneficiary. *See, e.g.*, Petitioners' Br. at 34-35. But that argument is circular.

If Ms. Kovalsky and Mr. Gill were concerned about the validity of the Trust or INWCF's beneficiary status, as fiduciaries, they should have brought that concern to INWCF's attention in an open, honest, and non-adversarial manner. But instead they tried to dupe INWCF into accepting millions of dollars less than it would have otherwise received. When that didn't work, Ms. Kovalsky and her siblings went on offense, threatening to sue INWCF unless it agreed to surrender the residuary to them. And then, when the threatened lawsuit materialized, Ms. Kovalsky and Mr. Gill ignored the plain language of the Will and Trust and sided with the Reugh children.

Whatever the merits of Appellants' arguments about the validity of the Trust, there can be no dispute that Ms. Kovalsky and Mr. Gill failed to uphold their fiduciary duties of good faith, diligence and undivided loyalty to INWCF. The Court should affirm.

F. The Court should award INWCF attorney's fees and costs incurred in responding to Appellant's meritless appeal.

The positions Appellants have taken in this appeal are wholly without merit. Appellants' insistence that Ms. Kovalsky and Mr. Gill did not have a conflict of interest is especially meritless. INWCF respectfully requests that it be awarded its attorney's fees and costs pursuant to RCW 11.96A.150 and RAP 18.1. The Court has broad discretion to order that

such fees and costs be paid from the estate under RCW 11.96A150, and INWCF submits that payment from the estate is appropriate.

V. CONCLUSION

The trial court properly exercised its discretion to remove Ms. Kovalsky and Mr. Gill from their appointments. While ostensibly acting as fiduciaries, charged with the highest degree of good faith, diligence and undivided loyalty, Ms. Kovalsky and Mr. Gill attempted to dupe INWCF into accepting a heavily discounted distribution of \$2.2 million—more than \$14 million less than the amount it would otherwise have received as the remainder beneficiary. Ms. Kovalsky then claimed the entire residuary for herself and her siblings, taking a position directly adverse to INWCF. Mr. Gill joined Ms. Kovalsky in that conflicted position, committing the Estate to the position that INWCF was not entitled to anything. There was no error committed by the trial court, let alone an error that amounts to a manifest abuse of discretion.

RESPECTFULLY SUBMITTED this 8th day of June, 2018.

WITHERSPOON BRAJCICH MCPHEE, PLLC

By: 

Peter A. Witherspoon, WSBA #7596

James A. McPhee, WSBA #26323

*Attorneys for Inland Northwest
Community Foundation*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the following recipients in the manner indicated below on June 8, 2018.

<input checked="" type="checkbox"/> U.S. MAIL	Mary Schultz
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<input type="checkbox"/> TELECOPY (FAX) to:	Spangle, WA 99031
<input checked="" type="checkbox"/> EMAIL TO:	
mary@MSchultz.com	

<input checked="" type="checkbox"/> U.S. MAIL	Amber R. Myrick
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<input type="checkbox"/> OVERNIGHT MAIL	POB 7363
<input type="checkbox"/> TELECOPY (FAX) to:	Boise, ID 83707
<input checked="" type="checkbox"/> EMAIL TO:	
amyrick@myricklawoffice.com	

<input checked="" type="checkbox"/> U.S. MAIL	Philip A. Talmadge
<input type="checkbox"/> HAND DELIVERED	Talmadge Fitzpatrick Tribe
<input type="checkbox"/> OVERNIGHT MAIL	2775 Harbor Avenue SW
<input type="checkbox"/> TELECOPY (FAX) to:	Third Floor, Suite C
<input checked="" type="checkbox"/> EMAIL TO:	Seattle, WA 98126
phil@tal-fitzlaw.com	

<input checked="" type="checkbox"/> U.S. MAIL	Nicholas S. Marshall
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<input type="checkbox"/> TELECOPY (FAX) to:	Group
<input checked="" type="checkbox"/> EMAIL TO:	P.O. Box 9500
nmarshall@adlawgroup.com	Boise, ID 83707
mheld@adlawgroup.com	

/s/ Veronica J. Clayton
Veronica J. Clayton

WITHERSPOON BRAJCICH MCPHEE, PLLC

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