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Spokane County Superior Court No. 154015209

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By SR

WASHINGTON STATE COURT OF APPEALS
DIVISION III



In the Matter of the Estate of Clara V. Larson,

Norman D. Larson, Personal Representative of the
Estate of Clara V. Larson and
Successor Trustee of Gordon E. Larson
Testamentary Trust,

RECEIVED

FEB 27 2019

Law Offices of
J. Scott Miller PS

Respondent/Appellant

v.

Connie M. Mitchell,

Petitioner/Respondent.

RESPONDENT'S RESPONSE BRIEF

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A. Introduction

After his mother's death, Norman Larson succeeded her as trustee of his late father's testamentary trust. The remainder beneficiaries were Norman and his sister Connie Mitchell. Based on the terms of the trust, it terminated after his mother died, and Norman needed to distribute the real property held in trust. At first, he seemed to acknowledge that he and his sister would hold the property as tenants in common. However, he later retained an attorney who worked for months, arguing that Norman Larson should receive *all* the property, and Connie should receive none. This attorney sent numerous letters on Norman's behalf and ultimately filed a motion with the court seeking instructions and approval, arguing for all the property to go to Norman. While this dispute was ongoing, Connie Mitchell initiated a TEDRA action to interpret her late father's trust. Subsequently, she moved for Norman's removal as trustee for breach of his fiduciary duty.

Norman Larson acquiesced to the court resolving the dispute. He filed his own motion for instructions and approval in Clara Larson's probate matter, and later agreed to consolidate the TEDRA action with the probate matter. Only after the court denied his motion for summary judgment, and ruled against him at trial, did he argue in reconsideration that the trial court never had authority in the first place. He reasoned that

the recent Estate of Rathbone case prohibited the trial court from getting involved. However, this matter involves a *trust*; it does not involve a non-intervention will at issue in Rathbone. Further, he availed himself of the jurisdiction of the court by bringing his motion for instructions and approval. Ultimately, the Court had authority to interpret and resolve the issues surrounding the trust.

On appeal, Mr. Larson also makes unclear challenges to the trial court's findings, conclusions, and ultimate remedy in this matter. If those challenges are even sufficiently preserved and argued, they fail. Here, the trial court was very clear and specific. It made findings on what happened, and concluded that Mr. Larson had breached his fiduciary duty by attempting to obtain all of the property. Rather, than remove Mr. Larson and appoint an independent trustee, however, the Court attempted to resolve all of the issues by simply ordering an equitable distribution of the trust property. The trial court was well within its substantial discretion in resolving the dispute in this manner.

This Court should affirm the trial court, and exercise its discretion to award Ms. Mitchell attorney fees on appeal.

B. Issues

1. Assignments of error are waived if not argued in the body of the brief. Mr. Larson assigns error to the trial court's denial of his summary judgment motion, but makes no

substantive argument on the issue. Ultimately, there was a trial on the merits. Should the court consider the summary judgment issue?

2. A trial court has substantial discretion sitting in equity to grant appropriate relief. Here, the trial court itself divided the trust property between the beneficiaries after concluding that trustee breached his fiduciary duty by trying to seek all of the trust property for himself. Did the trial court abuse its discretion?
3. A court cannot interfere with the personal representative of a nonintervention will after granting nonintervention powers. Here, Gordon Larson's Will created a testamentary trust, and decades later, Norman Larson, as successor trustee, affirmatively asked the court to interpret the trust. Does the court have the power to construe the trust?
4. A court and all parties to an action have the right to assume that an attorney representing a client has authority to do so until told otherwise. Here, Norman Larson retained an attorney for two months, who sent letters and filed a motion on his behalf seeking all of the trust property go to Norman. Did the trial court err in considering the conduct of the attorney in determining if Norman Larson breached his fiduciary duty?
5. Are the trial court's findings supported by substantial evidence?
6. Should the court award Ms. Mitchell reasonable attorney fees on appeal?

C. Statement of the Case¹

This case involves the trust created by Gordon Larson and the estate of Clara Larson. Gordon and Clara Larson were married. CP at 457. Gordon died in 1984. Id. Clara and their two children, Connie Mitchell and Normal Larson, survived him. Id. When Gordon died, his Will² created a Trust and placed his undivided, one-half ownership interest in 480 acres of land in the Trust. Id. Clara owned the other one-half interest. See id. Clara served as trustee of the Trust. Id. She thus held title to both undivided one-half interests in the land for decades, one personally and the other as trustee. Id.

In 2002, Clara executed a partition agreement, which partitioned the undivided one-half interests, determining an approximate equal division of the property. Id. Specifically, she split 480 acres of land in half: with 240 acres going to her individually and 240 acres going to her as trustee for her late husband's trust. Id. Thereafter, she held the now divided land as owner and trustee. See CP at 457-58.

¹ The facts are largely taken from the trial court's Findings of Fact. CP at 457-61.

² Gordon Larson's Will is in the Clerk's Papers beginning on page 78, and is attached to the Brief as Appendix A.

Clara died on October 9, 2015. CP at 458. Her son Norman Larson probated her Will and was appointed as the estate's personal representative with nonintervention powers. Id. It was undisputed that Clara's Will distributed all real property to Norman Larson, but gave cash and cattle to Connie Mitchell. Id. The Will also forgave any debt Connie Mitchell owed to Clara. Id.

Gordon Larson also became the successor trustee of Norman Larson's testamentary trust. See CP at 49, 85; Appendix A at 8. However, that Trust was set to terminate after Clara Larson's death. CP at 82-83; Appendix A at 5-6. After Clara died the remaining assets in trust were directed to go "in equal shares to [Gordon]'s children." Id. Thus, the only activity for Mr. Larson to complete as successor trustee was to terminate the trust, deeding the real property to himself and Connie Mitchell.

In December of 2015, Rich Algeo, as the attorney for Clara Larson's estate, sent a letter to Connie Mitchell. CP at 243-44, Appendix B. In the letter, he indicated that the trust property would properly pass to Connie and Norman as "tenants in common." CP at 244; Appendix B at 2. However, Mr. Algeo suggested a division of the property "To avoid joint ownership." Id.

Sometime later that Spring, Mr. Algeo told Mr. Larson that he should retain independent counsel as there may be a conflict of interest in Algeo representing him given the animosity between him and his sister. See RP at 128-29. Mr. Larson retained attorney Brant Stevens to represent him. Id.; CP at 458.

Instead of distributing the land as tenants in common, in May of 2016, Mr. Stevens sent a letter to Connie Mitchell on behalf of Norman Larson, stating that Norman Larson was to receive all of the real property from the Trust. CP at 459; Appendix C. He argued that the Trust required that all real property pass to Clara's estate rather than as previously understood to Connie and Norman as tenants in common. CP at 459; Appendix B. Because Clara's Will gave him all of her real property, the result would be that Norman would receive all of the real property from Ms. Larson's estate and from Mr. Larson's trust. Id. In other words, all 480 acres would go to Norman Larson with none going to Connie Mitchell. Appendix C.

Later in June, Brant Stevens also argued that the Certificates of Deposit (CDs) that were in Clara Larson's estate were not "cash" under her Will and would pass to Norman Larson and not Connie Mitchell. CP at 260, Appendix D.

Because Norman Larson was now seeking all of the land, Connie Mitchell commenced a new action under Washington's Trust and Estate Dispute Resolution Act (TEDRA), seeking interpretation of the Gordon Larson Trust. CP at 18-19, 459. She sought the following relief:

1. To declare the intent of the *Testamentary Trust* created by the Last Will and Testament of Gordon E. Larson with respect to the agricultural property owned by Gordon E. Larson at the time of his death.
2. To require a full accounting of the *Testamentary Trust* created by the Last Will and Testament of Gordon E. Larson, deceased.
3. To award Petitioner Connie M. Mitchell Damages to which she may be entitled.
4. To award Petitioner Connie M. Mitchell her reasonable attorney fees and costs.
5. *For further and additional relief as the Court may deem appropriate.*

CP at 18-19 (emphasis added). Though the Petition nominally indicates a request "for Petitioner's property interest in Trust *and estate*," Ms. Mitchell made no substantive request that the Court interpret or otherwise analyze Clara's Will. See CP at 18-19. However, she did request whatever "additional relief the Court may deem appropriate." CP at 19.

In response to Ms. Mitchell's TEDRA petition, Mr. Larson brought a motion seeking "Instructions" and "Approval." See CP at 459; Appendix E. He brought this motion in the probate action itself. See id. He affirmatively requested the Court grant approval of his interpretation

that the real property does not pass to Connie Mitchell under the Trust, but rather to Clara's estate and thus to him. See id.

At some point, Norman Larson had misgivings about his attorney's tactics. He consulted with Rich Algeo the estate attorney, who told him he should follow the advice of his attorney. CP at 459. He did so. Id. Late in July of 2016, after Mr. Stevens filed the Motion for Instructions/Approval, Norman Larson again consulted with Mr. Algeo, and afterward decided to fire Mr. Stevens. CP at 459.

Rich Algeo took over temporarily as Mr. Larson's attorney and struck the Motion for Instructions/Approval. CP at 43.

Eventually, Mr. Larson agreed to consolidate the probate matter with the TEDRA petition, recognizing that "both actions present common questions of law and fact." CP at 45, 459-60.

In December of 2016, Mr. Larson sent Ms. Mitchell a "Proposed Plan of Final Distribution." CP at 49. The proposed plan would give Ms. Mitchell the north half of parcel no. 27122.9007 (40 acres) and parcel no. 27122.9006 (40 acres) for a total of 80 acres. CP at 50. In contrast, it would give Mr. Larson the south half of parcel no. 27122.9007 (40 acres), parcel no 27122.9008 (40 acres), and parcel no. 27024.9009 (80 acres) for a total of 160 acres. CP at 50. Ms. Mitchell objected to the proposed distribution. CP at 57.

Subsequently, Mr. Larson brought a motion for summary judgment. CP at 129. In his motion, Mr. Larson argued that Ms. Mitchell's TEDRA petition, seeking interpretation of the Gordon Larson Trust, was a will contest or a creditor's claim on Clara Larson's estate and was barred by the four-month statute of limitations. CP at 134. He also argued Ms. Mitchell was entitled to nothing under Ms. Larson's estate because she had violated the no-contest provision of Clara Larson's Will. CP at 134.

Around this time, Mr. Larson's new attorney sent a letter on his behalf to Ms. Mitchell's attorney demanding that Ms. Mitchell pay back rent for staying at a house on the property going back to April of 1978. CP at 311; RP at 101. He demanded \$187,200.00 in back rent. Id. Ms. Mitchell did not begin living in the house until 1992. RP at 90. Also, Clara Larson's Will forgave all debts Ms. Mitchell owed to her. CP at 458.

Ms. Mitchell also brought a petition specifically under RCW 11.98.039, RCW 11.28.250, and RCW 11.68.070 to remove Mr. Larson as trustee and personal representative for breach of his fiduciary duty in those roles. CP at 203.

Ultimately, the trial court denied both the summary judgment motion and the motion to remove Mr. Larson. CP at 437. The trial court

concluded that there were genuine material facts in dispute precluding summary judgment. CP at 440.

The matter went to a bench trial on October 30, 2017. See RP at 1. Both Connie Mitchell and Norman Larson testified, as did the estate attorney Mr. Algeo, and real estate broker, Steve Barrett. Id.

Through trial testimony, Norman Larson admitted that he had never created a separate trust account but rather he paid the property taxes for the Trust property out of the cash in the estate account. RP at 203, 205. All leftover cash in the estate account would go to Connie Mitchell and would not be split with Norman. CP at 461.

Steve Barrett also testified as to the broker price for the property. RP at 144. He did not price each lot individually, but instead gave opinions on different divisions. See CP at 167, 185. He was giving an opinion on the broker's price, which he acknowledged was different than an appraiser opinion on fair market value. RP at 149. He acknowledged that Ms. Mitchell raised the property value of one of the parcels by adding a well to the parcel. RP at 161. He also acknowledged that he did not take into account the cost of needed repairs on parcel 9006. RP at 162 (acknowledging it was possible that the cost to repair the house could exceed the value of the house).

After trial, the Court decided in favor of Connie Mitchell. The trial court made numerous findings of fact and conclusions of law. CP at 456-63, Appendix F. The trial court concluded that Mr. Larson breached his fiduciary obligations to Ms. Mitchell. CP at 461-62. It declined to remove him as trustee and Personal Representative but instead ordered him to distribute the remaining money in the estate save \$5,000 to wrap up the probate. CP at 462. It also ordered him to quit claim to Connie Mitchell parcel nos. 27122.9006 (40 acres) and 27122.9007 (80 acres), along with the westerly half of parcel no. 27122.9008 (20 acres) for a total of 140 acres. CP at 462-63. The remaining parcel no. 27024.9009 (80 acres) was to go to Gordon Larson along with the easterly half of 27122.9008 (20 acres) for a total of 100 acres. RP at 247-48.

After losing at trial, Mr. Larson brought a Motion to Reconsider arguing that the trial court had no power to interpret the Trust under our Supreme Court's recent Rathbone³ decision. CP at 464. He also argued that the trial court's findings of fact were wrong or incomplete, and that its distribution was unfair because it gave Connie 140 acres of land and Norman roughly 100 acres. CP at 480-81.

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

Ultimately, the trial court denied Mr. Larson's motion for reconsideration. CP at 506. In explaining its denial, the court stated that it had given Connie Mitchell more land in recognition of the time and energy she expended having to assert her rights through TEDRA and maintain the action for so long. See RP at 246. Specifically, the court stated as follows:

The distribution of the properties addressed some, what I would are factual shortcomings based on the presentation of counsel. *With regard to the distribution of assets and the requirement of having counsel and the issue being so strongly litigated* – I think the case was first assigned to this court in January of 2017, so we're now nearly 18 months out, *with all the expenses and all the time and all the consumption that has gone on there.*

So rather than – because the estate had at that point paid and was, as you indicated, cash poor, *the court did what I felt was fair and just and equitable* under the circumstances in terms of reaching the orders that I did, *including the orders relative to the parcels.*

RP at 246 (emphasis added).

Mr. Larson timely appealed the trial court's final order and order on reconsideration. CP at 508.

D. Argument

- 1. This Court should not consider Mr. Larson's argument that the trial court improperly denied summary judgment.**

Norman Larson assigns error to the trial court's denial of his motion for summary judgment. Appellant's Opening Brief at 1.

However, he does not substantively address this assignment of error in the body of his brief. See Appellant's Opening Brief at 8-21. Rather, he makes only an oblique reference to his summary judgment motion in his opening issue. Id. at 9. "It is well established that assignments of error that are not argued in the brief are waived." State v. Schaffer, 70 Wn.2d 124, 125, 422 P.2d 285 (1966). Because Norman Larson has failed to substantively argue this issue, the Court should consider it waived.

In addition, an appellate court almost never considers a summary judgment determination when there has ultimately been a trial on the merits. This Court held in Johnson v. Rothstein that reexamining summary judgment after a trial would be inappropriate: "We hold that a denial of summary judgment cannot be appealed following a trial if the denial was based upon a determination that material facts are in dispute and must be resolved by the trier of fact." Johnson v. Rothstein, 52 Wn. App. 303, 304, 759 P.2d 471 (1988). The only exception to this issue is when the parties dispute no material facts and an issue of law is decided. See Kaplan v. Nw. Mut. Life Ins. Co., 115 Wn. App. 791, 799, 65 P.3d 16 (2003).

Here, the trial court denied summary judgment because of disputes of material fact. See CP at 440 (trial court's order denying summary

judgment). Thus, this Court should not consider the summary judgment issue.

Mr. Larson waived his first assignment of error regarding the denial of his summary judgment motion.

2. The trial court properly interpreted the Trust and divided the Trust Property

The main thrust of Mr. Larson's brief is that the trial court erred in dividing the property, in how it divided the property, and thus in rejecting the trustee's proposed division. Mr. Larson does not properly assign error to these issues under RAP 10.3(a)(4) and 10.3(g), thereby waiving them. Escude ex rel. Escude v. King Cty. Pub. Hosp. Dist. No. 2, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). Regardless, the trial court did not err. The trial court has substantial discretion in granting affirmative relief under TEDRA, and its decision and division are supported by the findings of fact and conclusions of law.

Here, the trial court granted relief that Ms. Mitchell never requested. It affirmatively divided the Trust property in what it deemed was a fair and equitable manner in light of the specific facts of the case and all of the evidence it heard. See CP at 462-63. While Mr. Larson does not specifically assign error to the trial court's order dividing the

property, he either directly or implicitly argues against it throughout his brief. Thus, Ms. Mitchell addresses this as its own distinct issue.

Where the court is fashioning an equitable remedy, it is exercising its substantial discretion, making the standard of review abuse of discretion. See Estate of Ehlers, 80 Wn. App. 751, 755, 761, 911 P.2d 1017 (1996) (holding that petition to remove a trustee is reviewed for abuse of discretion); Friend v. Friend, 92 Wn. App. 799, 803, 964 P.2d 1219 (1998) (holding that partition action invokes court's equitable powers and is reviewed for abuse of discretion). The trial court abuses discretion when it exercises discretion on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the trial court did not abuse its discretion in dividing the Trust property. The trial court made findings and conclusions regarding the ongoing dispute between Ms. Mitchell and Mr. Larson. Including, that Mr. Larson sought back rent from Ms. Mitchell to be paid to the Trust.⁴ The Court concluded that Norman Larson's assertions through counsel

⁴ Had Mr. Larson simply deeded the property to himself and Ms. Mitchell as tenants in common immediately following their mother's death, no rent would be owing. Mr. Larson should not be allowed to benefit from his forced delay of his duties as trustee.

that he was entitled to all of the real property in the Trust and that Certificates of Deposit were not “cash” as contemplated by Clara Larson’s Will fell below the standards required of a trustee and Personal Representative. CP at 461-62 (Conclusion of Law E). The court also concluded that Mr. Larson failed to take reasonable steps to value the farmland until after Ms. Mitchell felt compelled to file a TEDRA petition because of Mr. Larson’s positions that she was to take no property under the Trust. See CP at 462 (Conclusion of Law G). Finally, the court concluded that there was substantial distrust between the parties that was likely to lead to continued litigation, thereby decreasing the assets of the Trust. CP at 462 (Conclusion of Law H).

All of the above rationales support the trial court exercising its discretion to simply divide the property. The trial court sought to simply put an end to further litigation by dividing the property and forcing the end of the estate and the Trust issues. See CP at 462-63; RP 246 (“[T]he court’s findings and conclusions are the best attempt that I could – I mean, that’s my attempt to solve all the issues in this case.”). Thus, the trial court acted in equity to end the dispute. See id.

The trial court’s division was reasonable. It effectively sat as if in an action for partition. Cf., Friend v. Friend, 92 Wn. App. 799. The trial court granted Ms. Mitchell parcel nos. 27122.9006 and 27122.9007 and

the westerly half of 27122.9008 “as her equal share of the undivided ½ interest in the real property.” CP at 463-64. This left the entirety of 27024.9009 to Mr. Larson along with the eastern half of 27122.9008. See id.; RP at 247-48. The trial court’s division resulted in Ms. Mitchell receiving roughly 140 acres to Mr. Larson’s roughly 100 acres. The difference was to account for Ms. Mitchell having to bring and maintain a TEDRA action to get relief. The trial court explained this ruling in response to Mr. Larson’s motion for reconsideration, clarifying that its order relative to the parcels was to resolve the equity of having to commence and maintain the ongoing litigation:

The distribution of the properties addressed some, what I would are factual shortcomings based on the presentation of counsel. *With regard to the distribution of assets and the requirement of having counsel and the issue being so strongly litigated* – I think the case was first assigned to this court in January of 2017, so we’re now nearly 18 months out, with *all the expenses* and *all the time* and all the consumption that has gone on there.

So rather than – because the estate had at that point paid and was, as you indicated, cash poor, *the court did what I felt was fair and just and equitable* under the circumstances in terms of reaching the orders that I did, *including the orders relative to the parcels.*

RP at 246 (emphasis added).

Mr. Larson’s primary argument is that the trial court’s division results in unequal valuations between Ms. Mitchell and himself. See Respondent’s Opening Br. at 18. He appears to rely on the testimony of

Steve Barrett for this conclusion. However, Mr. Larson ignores the fact Mr. Barrett's testimony was substantially undercut at trial. First, Mr. Barrett is a real estate broker not an appraiser. RP at 145. He freely admitted that he reached a "price opinion" which is distinct from the market "value" of the property. RP at 149. He also substantially increased the value of parcel no. 27122.9006 because it had access to water through a well that Ms. Mitchell paid for herself. RP at 161. He also did not take into account the price to repair the residence on 27122.9006, which had substantial damage to its foundation and was unlivable without a working furnace. RP at 162-63.

The above factors explain why the court did not defer to Mr. Barrett's "price" opinion. Notably, the price opinion had the effect of punishing Ms. Mitchell for putting a well on parcel no. 27122.9006. Had the court adopted the price opinion, Ms. Mitchell would have spent her own money to raise that parcel's value only to be punished by receiving less of the real property *because* it had a higher value. Any remaining inequality between what Mr. Larson received and what Ms. Mitchell received under the trial court's order is explained above by the trial court making an equitable adjustment to compensate Ms. Mitchell for the substantial litigation required to recover her property.

Finally, Mr. Larson incorrectly describes parcel no. 27024.9009 in an attempt to devalue the property he received in eyes of this Court. He states (without citation to record) that parcel no. 27024.9009 “has no road access” and is “in accessible [sic].” Respondent’s Opening Br. at 18. He also states that the parcel “cannot be farmed.” Id. All of the above was directly contradicted by Steve Barrett’s testimony at trial. Mr. Barrett stated that 9009 has a county road that “goes right up to the south property line of 09,” and therefore has access through a “public right-of-way.” RP at 164-5. He also stated that he estimated about “20 acres of tillable on [parcel] 9009,” making roughly a quarter of the land farmable. Id. That property is also directly adjacent to property that Mr. Larson inherited through Clara Larson’s estate, making it contiguous with his other property. See RP at 175, 190.

The trial court did not abuse its discretion in dividing the trust property and in awarding slightly more property to Connie Mitchell.

i. The trial court was free to disregard the trustee’s allocation of the trust property where it was unreasonable.

Norman Larson argues that the trial court erred by disregarding his proposed distribution of the trust property. He reasons that under Estate of Ehlers, he had “absolute authority” to make “pro-rata distribution[s]” of the Trust property without an equitable adjustment. Appellant’s Opening

Br. at 9. Mr. Larson, however, misunderstands the trustee's powers, the meaning of the phrase *pro rata*, and misreads Estate of Ehlers. Ultimately, the trial court did not need to follow his proposed distribution because it was neither equal nor equitable.

First, Mr. Larson misunderstands what a "pro-rata distribution" is. Pro-rata means "proportionately." PRO RATA, Black's Law Dictionary (10th ed. 2014). The Trustee is of course empowered to make a "pro-rata distribution of trust property." Appellant's Opening Br. at 9. If here Mr. Larson had granted Ms. Mitchell and himself each a one-half interest in all of the property as tenants in common, that would have been appropriate. In fact, that is what the estate attorney Mr. Algeo acknowledged should happen in his opening letter to Ms. Mitchell. CP at 243-44, Appendix B. The reason Mr. Larson did not do so, notwithstanding his fiduciary obligations, is likely because of the dislike between him and his sister. See CP at 50 (acknowledging the animosity between them in his proposed distribution awarding Ms. Mitchell only 80 acres).

Presumably, Mr. Larson meant that the trustee has the power to make *non pro-rata* distributions from the Trust. Indeed, RCW 11.98.070, specifically allows the trustee to make "nonpro rata distributions of property in kind." RCW 11.98.070(15). This power allows the trustee in

certain circumstances (controlled of course by the express language of the trust and intent of the settlor) to distribute real property held in trust to two of three beneficiaries while giving the third the equivalent value in cash. See In re Estate of Ehlers, 80 Wn. App. 751, 755, 761, 911 P.2d 1017 (1996).

However, neither RCW 11.98.070 nor Estate of Ehlers gives the trustee the power to give one beneficiary more property merely because he wants to without giving an equivalent value to the other beneficiary who is supposed to take equally.

In Ehlers, the successor trustee and her two siblings were beneficiaries of their father's testamentary trust. Id. at 754-55. Loraine, one of the siblings, challenged Vera's (the trustee's) distribution of the real property of the trust. Citing the "acrimonious relationship," Vera deeded the real property in the trust to her and her remaining sibling (not Loraine) as tenants in common, and distributed to Loraine the cash equivalent of her one-third interest in the real property. Id. at 755-56. Loraine sought Vera's removal as trustee. Id. at 755. Loraine argued that Vera had abused her position as trustee by distributing property to herself over the objection of one of the beneficiaries. Id. at 760-61. She reasoned this resulted in a conflict of interest. Id. at 761. The Court of Appeals found that the trial court did not abuse its discretion in denying the

removal of Vera. Id. The trial court refused to remove Vera because her actions caused Loraine no harm. Id. The Court of Appeals agreed reasoning that “non pro rata distribution was authorized by statute and did not cause Loraine to suffer any damage” because she received a cash equivalent for the property. See id. at 761.

Thus, even Ehlers does not stand for the broad proposition that Mr. Larson argues: that the trustee can simply make unequal distributions of trust property without equivalent compensation. Plainly in Ehlers, the trustee gave the third sister “cash representing one-third of the value of the trust and estate” in lieu of her 1/3 third interest in the real property. See id. at 755-56. Here, a cash equivalent payment was impossible because there was no cash in the Trust. RP at 203-04. Thus, any non pro-rata distribution of real property here would result in an unequal total distribution.

Finally, Mr. Larson’s proposed distribution was not equal or equitable. He proposed to deed Connie Mitchell the northern half of parcel no. 27122.9007 (40 acres) and parcel no. 27122.9006 for a total of 80 acres. CP at 50. In contrast, he proposed to deed himself the southern half of 27122.9007 (40 acres), all of 27122.9008 (40 acres) and all of 27024.9009 (80 acres) for a total of 160 acres. CP at 50. Mr. Barrett, Mr. Larson’s hired broker, priced the property going to Ms. Mitchell at

\$250,000. CP at 167. In contrast, he priced the property going to Mr. Larson at \$375,000. CP at 167. Thus, based on Mr. Larson's own broker's opinion, Mr. Larson's division would result in him receiving over \$100,000 more than Ms. Mitchell in property value.

Nothing in TEDRA or any other statute requires the court to adopt a trustee's flawed and biased interpretation of the trust or distribution of property at issue.

- ii. The Court should not consider the information provided in any of the appendices of the Appellant's Brief because the information was not taken from the appellate record.**

The Rules of Appellate Procedure (RAPs) allow a party to attach an appendix to his or her brief to provide the court easy access to pertinent materials. See RAP 10.3(a)(8). However, the appendix can only contain information from the appellate record: "An appendix may not include materials not contained in the record on review without permission from the appellate court." Id. When an appellant attaches documents to his or her brief that are not part of the appellate record the court will not consider them. City of Moses Lake v. Grant Cty. Boundary Review Bd., 104 Wn. App. 388, 391, 15 P.3d 716 (2001).

Here, Mr. Larson improperly attaches documents that are not part of the appellate record. He provides no cite to the portion of the records

the documents come from and a closer look at the records show that they cannot be from the trial. First, Appendix A appears to be a homemade table. It contains the Court of Appeals case number on it so could not possibly come from the appellate record, and it purports to provide information from the Spokane County Assessor's office from 2019. Respondent's Opening Br., Appendix A at 1. As the trial in this matter concluded in October of 2017, and the trial court issued its order in May of 2018, it is impossible for the lower court to have considered Assessor information for 2019. The same is true for Appendices A1-A4, which appear to be recent printouts from the Spokane County website for the particular parcel numbers.

The court should disregard the appendices to the appellate brief because they provide information outside the record in violation of RAP 10.3(a)(8).⁵

3. The trial court had jurisdiction to interpret the Gordon Larson Trust.

Norman Larson argues that Rathbone somehow controls this case

⁵ In an effort at expediency, Ms. Mitchell brings this argument in her Brief in lieu of filing a separate motion to strike. See Engstrom v. Goodman, 166 Wn. App. 905, 909, n.2 271 P.3d 959 (2012) (“So long as there is an opportunity (as there was here) to include argument in the party's brief, the brief is the appropriate vehicle for pointing out allegedly extraneous materials—not a separate motion to strike.”).

and prevents the court from interpreting the Gordon Larson Trust. This argument fails for two reasons: first, Rathbone only applies to nonintervention wills; it does not prevent a trial court from interpreting a trust. Second, here Norman Larson availed himself of the jurisdiction of the court, foregoing any argument that the court lacked the power to interpret the trust.

At the outset, the court should be aware that Mr. Larson is confusing what document is at issue. He first appears to argue that Clara Larson's Will is at issue, but this is incorrect. See Respondent's Opening Br. at 10 ("The Court Had No Jurisdiction to Construe the Nonintervention Will of *Clara V. Larson*" (emphasis added)). Ms. Mitchell never asked the court to interpret or grant relief under Clara Larson's Will, rather she asked the court to interpret the Trust of Gordon Larson.

Nothing in Rathbone prohibits the court from exercising TEDRA power to interpret a Trust. The only request that Ms. Mitchell made regarding the Clara Larson's estate was to remove Mr. Larson as personal representative. See CP at 203-4; RP at 215. However, even in nonintervention Wills, a beneficiary can still petition to have the personal representative removed.

i. **Rathbone does not apply to Ms. Mitchell's TEDRA Petition.**

Mr. Larson agrees on appeal that our Supreme Court's recent opinion in Rathbone requires reversal. Mr. Larson, however, misreads Rathbone and misunderstands the nature of Ms. Mitchell's petition.

In Rathbone, the court considered whether the Trust and Estate Dispute Resolution Act (TEDRA) granted the Superior Court jurisdiction to interpret a nonintervention will. 190 Wn.2d 332. The court concluded that the act did not grant a Superior Court jurisdiction to interpret a nonintervention will unless the executor first invokes the court's authority. Id. at 337-38, 345-46. Rathbone, however, does not deal with a Trust: nowhere in the opinion does the court mention a Superior Court's power to interpret trusts under TEDRA. See id.

Here, Ms. Mitchell brought a TEDRA petition asking the court to interpret a Trust *not* a nonintervention Will. This distinction is apparent from the relief requested in the Petition:

1. To declare the intent of the *Testamentary Trust* created by the Last Will and Testament of Gordon E. Larson with respect to the agricultural property owned by Gordon E. Larson at the time of his death.
2. To require a full accounting of the *Testamentary Trust* created by the Last Will and Testament of Gordon E. Larson, deceased.
3. To award Petitioner Connie M. Mitchell Damages to which she may be entitled.

4. To award Petitioner Connie M. Mitchel her reasonable attorney fees and costs.

5. *For further and additional relief as the Court may deem appropriate.*

CP at 18-19 (emphasis added). As indicated by the relief requested, Ms. Mitchell did not request that the court interpret a nonintervention will. Rather, all interpretation requests went to the “Testamentary Trust.” Id.

TEDRA affirmatively grants the court the power to interpret the provisions of a Trust. Specifically, RCW 11.96A.040 grants Superior Courts “original subject matter jurisdiction over trusts and all matters relating to trusts.” RCW 11.96A.040(2). The statute goes on to provide that the Superior Courts may “settle all matters relating to trusts.” RCW 11.96A.040(3). Next, section .080 provides that “any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter. . . .” RCW 11.96A.080(1). Finally, “Matter includes any issue, question, or dispute involving . . . the construction of . . . trusts. . . .” RCW 11.96A.030(2). Plainly, the court has and had jurisdiction to interpret the Trust under the TEDRA statute.⁶

⁶ Mr. Larson argues that the trial court improperly interpreted Clara Larson’s Will because it asked him to make certain payments out of the estate. However, he does not assign error to that portion of the order, waiving the issue on appeal. In any event, he later states that he has “no objection to the distribution of cash and cash equivalents, thereby abandoning any issues.” Appellant’s Opening Br. at 20.

ii. **Mr. Larson also affirmatively invoked the jurisdiction of the Court, making Rathbone inapplicable.**

While Rathbone affirmed the long-standing rule that a court cannot interfere with the personal representative of a nonintervention will, it also reaffirmed the exception that applies if the personal representative invokes the jurisdiction of the court. Here, Mr. Larson specifically invoked the jurisdiction of the court, granting the court the power to move forward.

A personal representative that invokes the court's authority is subject to that authority. As the court reiterated in Rathbone:

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.

190 Wn.2d at 339, 412 P.3d at 1286 (emphasis added). This has long been the rule in Washington. See, e.g., In re Megrath's Estate, 142 Wash. 324, 326–27, 253 P. 455 (1927), aff'd, 142 Wash. 324, 256 P. 503 (1927). In Megrath, the court recognized that the executor could himself invoke the power of the court:

This is not a limitation, but rather a grant of power to the executor. If in his judgment matters arise in the settlement of the estate requiring judicial determination, he may invoke the jurisdiction of the superior court, either in equity or in probate. But this must be of his own volition. The jurisdiction of the probate court can only be invoked by

others in those cases where the statute has conferred the right.

Id.

Here, Mr. Larson volitionally invoked the power of the trial court. In fact, Mr. Larson moved the court for “instructions” and “approval” under the probate cause number. CP at 29-40. In Mr. Larson’s Motion for Instruction/Approval, Mr. Larson specifically argued that under TEDRA “this Court has the Jurisdiction and Authority to administer and settle all matters relating to the probate of estates and the administration of trusts.” CP at 32. He further indicates that “The instructions and approval requested by the Court relating to the Gordon Larson Trust is directly related to the Clara Larson probate as the trust principal is likely to be distributed to the Clara Larson estate, and therefore, must be distributed in the probate accordingly.” Id. He then agreed to consolidate the probate proceeding with the TEDRA proceeding, recognizing that “both actions present common questions of law and fact.” CP at 45. In other words, he agreed that the court should consider the probate matter along with the TEDRA petition.

The above conduct indicates that Mr. Larson wanted the court to approve his scheme that under the Trust and Will, all the real property belonged to him. He even explains in a footnote of his motion that he wants “approval from the court.” CP at 32 n.1. By doing this, Mr. Larson

invoked the trial court's jurisdiction. When confronted with this issue below the trial court agreed:

Mr. [Larson's attorney] asked for the court's involvement, took a position on behalf of Mr. Larson, and the court then got involved. And at that point, I think the court's jurisdiction and authority has been requested by Mr. Larson and through his attorney.

It was then stipulated by parties to consolidate the TEDRA with the estate question. . . I then have authority and jurisdiction and a responsibility to address all issues.

RP at 245-46.

Now that Mr. Larson has lost, he argues the trial court never had the authority at all. Because he invoked the trial court's jurisdiction under the probate cause number, he cannot now complain that the trial court exercised that jurisdiction against him.

4. The Trial court properly considered the actions of Mr. Larson's former attorney.

Mr. Larson argues that the court should not have considered the actions of his former attorney, who he argues acted without his authority. This argument is contradicted by the trial court's findings and conclusions. In fact, Mr. Larson's own reasoning on appeal undercuts his argument. This court reviews a trial court's rulings on the admissibility of evidence for abuse of discretion. State v. Brown, 132 Wn.2d 529, 578, 940 P.2d 546 (1997).

First, Mr. Larson's former attorney did not act without his authority. The trial court found that Norman Larson "after discussing the advice of Brant L. Stevens with the estate's lawyer, Richard P. Algeo, determined to follow the advice of his lawyers." CP at 459 (Finding of Fact 21). Thus, per the court's finding, Mr. Stevens was not acting without Mr. Larson's authority but with it.

This finding is consistent with trial testimony and thus supported by substantial evidence. Mr. Larson testified consistent with that finding: "I went to Algeo and I told him I didn't agree with [Mr. Steven's interpretation]. Mr. Algeo gave me advice and said I should do what my lawyer says." RP at 29. Mr. Larson also admitted that he both hired and paid for Mr. Stevens himself. RP at 31.

Looking at Mr. Larson's appellate brief, he admits he gave his attorney authority. Specifically, his argument is consistent with the above facts. He admits that "Mr. Algeo declined to intervene against Attorney Stevens, so Mr. Larson *acquiesced* against his better judgment." Appellant's Opening Br. at 23 (emphasis added). However, the key phrase here is that he "acquiesced" to Mr. Stevens' course of action. Id. Mr. Stevens was not acting without Mr. Larson's authority where Mr. Larson acquiesced to the course of action.

Mr. Larson cites numerous cases that stand for the proposition that “an attorney has no authority to act contrary to his client’s instructions.” Appellant’s Opening Br. at 12. Here, however, Brant Stevens was not acting contrary to his client’s instructions but rather with his client’s approval until he was fired. “Once a party has designated an attorney to represent the party in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client’s decision to terminate it has been brought to their attention.” Russell v. Maas, 166 Wn. App. 885, 889, 272 P.3d 273 (2012) (holding that procedural acts of the attorney are binding on the client). Here, Mr. Larson did not decide to terminate Mr. Stevens until late July of 2016, well after he had filed the Motion for Instructions/Approval. See CP at 43; RP at 137-8. Thus, everything Mr. Stevens did before the end of July was binding on Mr. Larson: this includes Mr. Stevens’ actions for over two months trying to obtain all the real property for Mr. Larson.

The trial court properly considered the acts of Mr. Larson’s former attorney Brant Stevens. Because Mr. Larson retained and paid Mr. Stevens and “acquiesced” to his course of action, Mr. Stevens’ acts were binding on Mr. Larson.

5. This Court should not consider Mr. Larson's improper and nonspecific challenges to the trial court's findings of fact.

i. Mr. Larson failed to properly assign error to the disputed findings, making them verities.

The Rules of Appellate Procedure require a party to assign error to specific findings of fact that the Appellant takes issue with. See RAP 10.3(a)(4) (requiring a "separate concise statement of each error a party contends was made by the trial court"); RAP 10.3(g) (requiring "A separate assignment of error for each finding of fact a party contends was improperly made . . ."); State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) ("Defendant's failure to assign error to the facts entered by the trial court precludes our review of these facts and renders these facts binding on appeal."). Where the appellant fails to assign error the facts are viewed as verities. See Hill, 123 Wn.2d at 644.

Here, Mr. Larson did not properly assign error to his challenged findings. Mr. Larson's brief only purports to make four assignments of error. See Appellant's Opening Br. at 1. None of those errors involve specific findings of fact or conclusions of law. See id. The court should consider the trial court's findings of fact as verities because error was not properly assigned to them.

Both this court and our Supreme Court have occasionally exercised discretion to waive formal requirement of having assignments of error for each challenged finding where the briefing itself is sufficient to make the challenge clear. See, e.g., Daughtry v. Jet Aeration Co., 91 Wn.2d 704, 710, 592 P.2d 631 (1979); State v. Neeley, 113 Wn. App. 100, 105, 52 P.3d 539 (2002). Of course, the court can waive formal requirement with any rule in the interests of justice. RAP 1.2(c).

Here, the court should not exercise its discretion to waive the requirement because the briefing does not make the challenges clear. The appellant appears to deal with substantive issues in the first part of his brief and then at the end of his brief he spends seven pages *bullet pointing* all of the findings and conclusions that he disagrees with. See Appellant's Opening Br. at 13-19. The bullet points provide conclusory disagreement with the findings, not substantive analysis. See id. This is not the sort of "clear" briefing that the courts in Neeley and Daughtry were referring to.

ii. Regardless, Mr. Larson's challenges to the findings fail.

The appellate court does not reweigh the evidence but defers to the lower court's findings. Bale v. Allison, 173 Wn. App. 435, 458, 294 P.3d 789 (2013). An appellate court will not disturb findings of fact that are supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870

P.3d 313 (1994). Evidence is substantial if it could persuade a fair-minded individual of the truth of the assertion. Id.

Here, all of the trial court's "challenged" findings are supported by substantial evidence. First, Mr. Larson "has no dispute with the first 18 Findings of Fact," making them verities. The Appellant's Opening Br. at 13. The remaining challenges are addressed in turn, grouping similar challenges together.

First, Mr. Larson takes issue with Findings 19-26 collectively. His challenge here is confusing. He appears to assert that the trial court's findings are incomplete. See Appellant's Opening Br. at 14 ("The Trial Court recognizes that attorney Stevens was terminated *but does not mention . . .*" (Emphasis added)). However, a trial court need not make a finding about every fact at issue, only material ones. In re LaBelle, 107 Wn.2d 196, 219, 728 P.2d 138 (1986) ("[A] trial court is not required to make findings of fact on all matters about which there is evidence in the record; only those which establish the existence or nonexistence of determinative factual matters need be made."). Ultimately, the record supports the court's findings as addressed below.

Next, Mr. Larson argues that the trial court made a scrivener's error in Finding 19. Ms. Mitchell agrees: *Norman* Larson retained Brant

Stevens. See CP at 458. *Gordon* Larson is Norman's deceased father. See CP at 2.

Next, Norman challenges Findings 20, 22, and 23 on the grounds that they refer to letters that were not formally offered and admitted in evidence. However, it does not matter that the letters were not admitted because the relevant facts surrounding them were testified to. For Finding 20, the letter dated May 5, 2016 from Brant Stevens, was substantially discussed in testimony. RP 61-62 (reading into the record the dispositive paragraph of the letter); RP at 132 (further discussing letter). For Finding 23, the letter was also discussed in testimony. See RP at 132-33. As for Finding 22, the letter was not discussed directly at trial, but was included in response to Mr. Larson's motion for summary judgment. See CP at 248-250. Thus, the court was aware of the letter, which is largely irrelevant to the ultimate issues.

Next, Mr. Larson's challenges Findings of Fact 21, 25, 26, 29, 34, and 38, arguing the findings do not include all of the facts that Mr. Larson thinks they should. This is irrelevant. As indicated above, a trial court need not make a finding about every fact in evidence. In re LaBelle, 107 Wn.2d at 219. These findings are accurate in that they describe what happened. See RP at 235 ("That's what, in fact, happened.")

Finally, Mr. Larson challenges Finding 24 because it incorrectly quotes the relief Ms. Mitchell requested in her TEDRA petition. Mr. Larson is correct that Ms. Mitchell only asked the court to interpret the Trust. See CP at 18-19; Appellant's Opening Br. at 15. However, Mr. Larson fails to show any significance from the trial court's misstatement in Finding 24.

Ultimately, this court should accept the trial court's findings either as verities because they have not been properly challenged or because the pertinent findings are supported by substantial evidence.

6. The Court should award Ms. Mitchell her reasonable attorney fees and costs under TEDRA.

TEDRA authorizes the trial court or an appellate court to award reasonable attorney fees and costs to the prevailing party in a TEDRA action. The statute allows the court to assess attorney fees against any party to the proceedings:

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings.

RCW 11.96A.150 (emphasis added). Here, Ms. Mitchell requests this court award her reasonable attorney fees and costs on appeal against Norman Larson individually.

Attorney fees are appropriate here given the length of time that Ms. Mitchell has had to fight for her property. Clara Larson died on October 9, 2015. CP at 458. Since then, Norman Larson has either argued against Ms. Mitchell getting any property or fought to reduce how much she should get. He has argued that he was entitled to all the real property. CP at 29 (Motion for Instruction/Approval). He argued Ms. Mitchell should get nothing because her TEDRA petition was a creditor claim barred by the four-month statute of limitations. CP at 134 (Motion for Summary Judgment). He argued that she should get only 80 acres of the land while he should get 160 acres. CP at 49 (Notice of Proposed Distribution). He also argued that Ms. Mitchell was challenging Clara Larson's Will and so should get nothing under the will-contest provision. CP at 134. In short, Norman Larson has done everything possible to sabotage, prevent, or delay Ms. Mitchell's attempts to enforce her rights under her father's trust. In such a situation, attorney fees are appropriate.

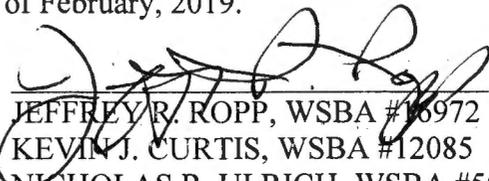
Here, the trial court *effectively* awarded Ms. Mitchell attorney fees further making attorney fees appropriate on appeal. Below, the trial court divided the property giving Ms. Mitchell 140 acres and Mr. Larson 100 acres. See CP at 462-63. The trial court explained that it did this to account for Ms. Mitchell's forced efforts in having to bring and maintain her TEDRA petition. See RP at 246. Here, because this court can direct

an award against Norman Larson individually, it should do so consistent with the determination of the trial court.

E. Conclusion

The trial court exercised its discretion to divide the property in Gordon Larson's trust in as equitable a manner as possible after considering all the evidence. The court did not abuse its discretion. It had authority, notwithstanding Rathbone, to both interpret and grant relief under Gordon Larson's testamentary trust. It properly considered the actions of Mr. Larson's attorney who sought to deny Ms. Mitchell any of the real property, and the court's findings and conclusions are adequately supported by the record. The court should affirm the judgment of the trial court and grant Ms. Mitchell attorney fees on appeal.

DATED this 27th day of February, 2019.



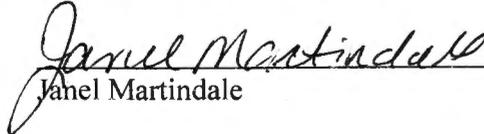
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NICHOLAS R. ULRICH, WSBA #50006
WINSTON & CASHATT, LAWYERS, a
Professional Service Corporation
Attorneys for Petitioner/Respondent
CONNIE M. MITCHELL

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 27th day of February, 2019, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

J. Scott Miller Law Offices of J. Scott Miller, P.S. 201 W. North River Drive, Suite 305 Spokane, WA 99201 Attorneys for Appellant	VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> HAND DELIVERED <input checked="" type="checkbox"/> BY FACSIMILE <input type="checkbox"/> VIA EMAIL <input type="checkbox"/>
--	---

DATED at Spokane, Washington on February 27, 2019.


Janel Martindale

APPENDIX

- A** CP 78-87 Last Will of Gordon E. Larson
- B** CP 243-244 December 10, 2015 Letter from Richard Algeo
- C** CP 246 May 5, 2016 Letter from Brant Stevens
- D** CP 260 June 24, 2016 Letter from Brant Stevens
- E** CP 29-40 Motion for Instruction/Approval
- F** CP 456-463 Court's Findings of Fact, Conclusions of Law
and Order re Trial Issues

Appendix A

FILED

84 JUL 10 P12:01

84400808-5 THOMAS P. FALLQUIST
SPOKANE COUNTY CLERK

LAST WILL AND TESTAMENT
OF
GORDON E. LARSON

2
I, GORDON E. LARSON, a resident of the State of Washington do hereby make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils heretofore made by me.

W
ARTICLE I

Identification of Family

I am presently a married man and my immediate family now consists of my wife, CLARA V. LARSON, and my two children, all of legal age, namely: NORMAN D. LARSON and CONNIE M. MITCHELL. I have no deceased children.

Except as provided below, I make no provision 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.

TURNER, STOEVL, CAGLIARDI & GOSS
LAWYERS
201 WEST INDIANA
P. O. BOX 8610
SPOKANE, WASHINGTON 99208
(509) 325-1222

ARTICLE II

Confirmation of Spouse's Community Property

I hereby declare that I do not intend to put my wife to any election regarding the disposition of her interest in our community property and I expressly confirm to her the one-half interest therein that belongs to her by reason of law.

ARTICLE III

Specific Directions

Upon my death, my Personal Representative shall see that I received a dignified burial according to traditional custom.

ARTICLE IV

Specific Bequests

4.1 I give to my wife, CLARA V. LARSON, provided she survives me by thirty (30) days, my community one-half interest in the house which my wife and I are using as our personal residence on the date of my death. In the event that my wife does not survive me by thirty (30) days, this gift shall lapse and pass to my residuary estate.

4.2 I give to my children, in equal ownership shares, any policy of life insurance which I may own on my wife's life on the date of my death.

4.2.1 In the event that either any of my children should predecease me, then that child's share shall be distributed per stirpes to any surviving children of the deceased child.

4.3 I give to my wife, CLARA V. LARSON, provided she survives me by thirty (30) days, my clothing, jewelry and personal effects, household furniture and furnishings, silver, books, paintings, pictures, sporting equipment, books and automobiles, held for personal use, and my interest in any property or liability insurance policy covering such items.

4.3.1 In the event that my wife does not survive me by thirty (30) days, then the foregoing items shall be distributed between my children, share and share alike.

ARTICLE V

Credit Shelter Trust

5.1 Credit Shelter Bequest. If my wife survives me by thirty (30) days, I leave to my Trustee to hold as the principal of this Credit Shelter Trust an amount described in Section 5.2 below. This amount shall be computed using values finally determined for Federal Estate tax purposes.

5.2 Amount of Bequest. The amount of the Credit Shelter Bequest shall be the largest amount that can pass free of federal estate tax because of the maximum federal estate tax unified credit and the state death tax credit (if use of this credit does not increase the state death taxes paid) but no other credit less:

- (1) All assets disposed of by previous Articles of this Will and all assets passing outside of this Will, provided the assets do not qualify for the federal estate tax marital deduction or charitable deductions; and
- (2) All estate taxes which my Personal Representative must pay; and
- (3) All expenses and debts my Personal Representative must pay and which are not finally allowed as deductions from my gross estate and the federal estate tax proceedings in my estate.

5.3 Funding the Trust. For the purpose of funding this bequest, there shall be allocated, to the extent possible and in the order indicated, any assets (a) included in my estate which would not qualify for the marital deduction allowable in determining the federal estate tax or (b) which are not subject to the estate tax imposed by the state of my domicile at my death, and, (c) such other assets as required to fully fund this trust.

My Personal Representative is given authority in her discretion to determine what property from my estate within the foregoing classifications, either community or separate, real or personal, shall be used to satisfy this bequest and devise.

5.4 Beneficiary. This trust is for the benefit of my wife, CLARA V. LARSON.

5.5 Terms; Management. Until my wife's death, the Trustee is instructed to hold and manage the trust estate as follows:

5.5.1 All the net income from the Trust Estate shall be paid to my wife in convenient intervals, but at least annually. I specifically give my Trustee the power to accumulate a reasonable reserve fund for the payment of any legitimate operating debts or costs of the Trust Estate.

5.5.2 Whenever the Trustee determines that the income and property of my wife from all sources known to the Trustee is not sufficient for her maintenance, health, safety and education; the Trustee may pay to her, or use for her benefit, so much of the Trust Estate as the Trustee determines to be required for those purposes. The Trustee shall consider the other resources and support available to my wife for such decision.

5.5.3 During her lifetime, my wife shall have the right in any calendar year (including the year of my death) to withdraw from the principal of the trust, cash or other assets not in excess of the greater of \$5,000 or 5% of the market value of the principal of the trust, determined as of the last day of December of the calendar year of the withdrawal. Such right of withdrawal may be exercised only during the first fifteen days of December of each year by my wife notifying the Trustee in writing to that effect, specifying the cash or assets at current market value which she desires to withdraw; and promptly thereafter the Trustee shall make such distribution. Such right of withdrawal shall be noncumulative so that if my wife does not withdraw during the first fifteen days of December of any calendar year the full amount to which she is entitled under this provision, her right to withdraw the amount not withdrawn shall lapse as of December 21 of that calendar year.

5.6 Disposition of the Trust. Upon the death of my wife, CLARA V. LARSON, or if she does not survive me by thirty (30)

days; I direct that my Trustee distribute the remaining principal and accumulated income in the Credit Shelter Trust pursuant to the dispositive directions and subject to the terms and conditions, if any, set forth in section 6.1 of this will.

ARTICLE VI

Residuary Estate

I give, bequeath and devise all my remaining separate and community property of every kind and nature to my wife, CLARA V. LARSON, provided she survives me by thirty (30) days.

6.1 In the event that my wife does not survive me by thirty (30) days, I then give and bequest the remaining property comprising my residuary estate in equal shares to my children. In the event a child of mine should predecease the date of distribution; I then give and bequest that child's share to his or her surviving children per stirpes.

ARTICLE VII

Provision Against Alienation

Neither the income nor the principal of any trust created by this Will shall be alienable by a beneficiary, either by assignment or by any other method, and the same shall not be subject to be taken by his creditors by any process whatever. This provision shall not limit the exercise of any power of appointment.

ARTICLE VIII

Powers and Duties of the Trustee

In addition to the duties, powers and rights imposed and granted by law, the Trustee of any trust created by this Will shall have the power, restrictions and the exercise of discretion as hereinafter defined:

8.1 To determine what is principal and income, which authority shall specifically include the right to make any adjustments between principal and income for premiums, discounts, depreciation or depletion, provided, that all dividends which represent capital gains realized from the sale of securities owned by regulated investment, shall be treated as principal. Any appreciation in value of investment property realized on sale, transfer or other disposition, shall be considered principal and added to the trust corpus.

8.2 To rely with acquittance on advice of counsel in questions of law.

8.3 To merge or combine any trust hereunder with the trust or trusts otherwise established for substantially the same class or classes of persons, thereafter to jointly administer and distribute such combined estate.

ARTICLE IX

Directions Regarding Debts, Expenses of Administration and Taxes

9.1 I direct my Personal Representative to pay all expenses of administration and all inheritance, estate, succession and similar taxes ("death taxes") that become payable by reason of my death

other than the estate tax attributable to property included in my gross estate by reason of I.R.C. Section 2044 from the assets of my residuary estate, whether or not the expenses of administration or death taxes are attributable to property passing under this will.

9.2 I authorize my Personal Representative to exercise all elections available under federal and state laws with respect to (a) the date or manner of valuation of assets, (b) the deductibility of items for state or federal income or death tax purposes, and (c) other matters of federal or state tax law, in accordance with what my Personal Representative believes to be in the best interests of my estate. I relieve my Personal Representative of any duty to make any adjustment to the shares or interest of any person who may be adversely affected by all such elections.

ARTICLE X

Appointment of Fiduciaries

10.1 Appointment of Trustee. I appoint my wife, CLARA V. LARSON, as Trustee of the Credit Shelter Trust created under this Will. In the event that she be unable or unwilling to serve, I then appoint NORMAN D. LARSON, as successor Trustee. My Trustee shall serve without the necessity of filing a bond and shall be entitled to commissions or fees based on a reasonable rate of compensation for services rendered.

10.2 Appointment of Personal Representative. I appoint my wife, CLARA V. LARSON, Personal Representative of my estate, or if she be unable or unwilling so to serve, I appoint my son, NORMAN D. LARSON, as Personal Representative, either to act as

such without bond and without intervention of any court, except as may be required under the laws of the State of Washington in the case of nonintervention wills. My Personal Representative shall have full power to sell, convey, and encumber, without notice or confirmation, any assets of my estate, real or personal, at such prices and terms as to her may seem just; to advance funds and borrow money, secured or unsecured, from any source, including any corporate executor's banking department, to mortgage or pledge estate property; to select any part of my estate in satisfaction of any partition or distribution hereunder, in kind, in money or both. Such powers may be exercised whether or not necessary for the administration of my estate.

ARTICLE XII

Miscellaneous

11.1 Children. All references to children and descendants shall include adopted children.

11.2 Encumbrances. Any mortgage, lien, or other encumbrance upon any property bequeathed or devised hereunder, either outright or in trust, shall be assumed by the beneficiary of such property.

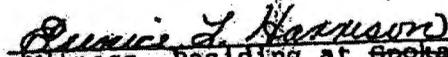
11.3 Usage. Unless some other meaning I intend is apparent from the context, the plural shall include the singular and vice versa and masculine, feminine and neuter words shall be used interchangeably.

DATED this 20 day of June, 1984.


GORDON E. LARSON

The above and foregoing instrument was at the date hereof signed by the Testator, GORDON E. LARSON, and published and declared by him to be his Last Will and Testament, in the presence of us, who at his request and in his presence and in the presence of each other, have hereunto set our hands as witnesses thereto this 20 day of June, 1984.


Witness, Residing at Spokane
CHATTANOOGY, WA


Witness, Residing at Spokane
COLBERT, WA

Appendix B

Algeo & Clarke, P.S.
Attorneys At Law

Richard P. Algeo

Harold D. (Pete) Clarke
[Retired]

201 W. North River Dr.
Suite # 305
Tel (509) 328-6123
Fax (509) 328-6434
Email:
RPAlgeo@comcast.net

December 10, 2015

Ms. Connie M. Mitchell
22021 N. Austin Rd.
Colbert, WA 99005

RE: Estate of Clara V. Larson

Dear Connie:

The purpose of this letter is to discuss the current posture of the probate and the distribution of your father's trust. Initially, the dollar figures and valuation figures are to the best of my knowledge, but could change based on the response from the two annuity companies and one mutual fund..

Dealing with the probate first, I am enclosing a working draft of the Inventory & Appraisalment. Schedule A lists five parcels of real estate owned by your mother at the time of her death. Pursuant to your mother's Last Will and Testament, the 240 acres is left to Norman. For valuation purposes, I have used the assessor's value for the land, without reduction for open spaces classification. It is Norman's opinion that the assessed value is pretty close to fair market value.

Schedule B lists stocks and bonds owned by your mother. I interpret the Will to leave this bond to you. Norman believes that the Metropolitan Investment Securities bond has a negligible value. This is the successor to the Metropolitan Mortgage failure several years back. The company was taken over by a trustee. The trustee's duty was to collect, sell and disburse funds to the investors. During her lifetime, your mother did receive several distributions. We think there might be one more distribution, but do not know when or any idea of the amount.

Schedule D lists bank accounts and monies. Pursuant to your mother's Will, all "net cash" is left to you. Net cash is the cash left over after paying any debts, final expenses, probate fees and costs. Items 1, 2, 3 and 7 are bank accounts or certificates of deposit. Item 4 is a mutual fund. Items 5 and 8 are annuities. I am not sure about item 6, but think

Ms. Connie M. Mitchell

Page 2

it is a small investment account. I have contacted the mutual fund and the two annuity companies requesting the paperwork for the Estate to file a beneficiary claim.

Other than the five cows, the rest of the probate property is left to Norman. As I mentioned on the phone, it is my opinion that there is no Washington Estate Tax due as a result of your mother's death. For income tax, the annuities may have an income component that is taxable. In addition, there is no income tax due on an inheritance, with the possible exception of taxable income within the annuities. I will know more when I submit the beneficiary claims.

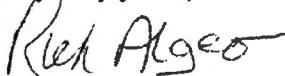
Turning to the distribution of your father's trust, I am enclosing another sketch of the farmland. I have circled and highlighted the assessor's value [with out reduction for open spaces classification] for the four parcels. Again, you and Norman hold this land as equal undivided tenants in common.

To avoid joint ownership, I recommended to Norman the possible division of the property between the two of you at this time. I encouraged Norman to submit a proposal for your consideration. I have highlighted in pink the two parcels which Norman believes you would have the most interest. Parcel No. 27122.9006 includes both the farmland and your house. The adjoining property is the north half of Parcel No. 27122.9007, which is 40 acres. Norman would received the south half of Parcel No. 27122.9007 which is 40 acres, plus Parcel No. 27122.9008 and Parcel No. 27024.9009.

Property can be divided on any reasonable basis. Here, the property assigned to you is 80 acres with an assessor's value of \$208,870. The property assigned to Norman is 160 acres with an assessor's value of \$187,780. You receive the more expensive land, but with the less acreage. Norman is just the opposite.

In summary, like I said on the phone, you should feel free to discuss any questions with an independent advisor of your choice. I will continue to complete and submit the beneficiary claim forms for the annuities and mutual fund. Please let me know if you wish to retain the mutual fund. Please give me a call with any questions. I look forward to hearing from you. Thank you.

Very truly yours,



Richard P. Algeo
Attorney at Law

Appendix C



LAW OFFICE OF BRANT L. STEVENS

222 West Mission Ave, Suite 25

Spokane, Washington 99201

*Licensed in Washington and Idaho

Office: (509) 325-3999 Cellular: (509) 710-0085

FAX: (509) 325-0127



May 5, 2016

Steve Hughes
Ewing Anderson PS
522 W. Riverside Ave., Suite 800
Spokane, WA 99201

Re: Gordon E. Larson Trust

Dear Mr. Hughes,

Upon review of the Gordon E. Larson Estate documents, it is my interpretation that all the property in the trust passed to the Estate of Clara Larson. Therefore, pursuant to her Last Will and Testament, Norman Larson is entitled to all 240 acres that were in the trust. The acreage is not to be divided between your client and Mr. Norman.

The residuary clause found in 6.1 does not apply to the disposition of the corpus of the trust as Clara survived Gordon for more than thirty (30) days. Furthermore, it is clear that Clara was the sole and exclusive beneficiary of the trust.

As the successor trustee is directed to dispose of the corpus of the trust and dissolve the trust at the time of Clara's death, it is our position that Norman Larson deed all of the property to himself, per the terms of Clara's Last Will and Testament.

If you have any questions or concerns please contact my office.

Respectfully,

Brant L. Stevens
Attorney at Law

RECEIVED
MAY 06 2016
EWING ANDERSON, P.S.

Appendix D



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FAX: (509) 325-0127



June 24, 2016

Mr. Richard P. Algeo
Algeo & Clarke, P.S.
Attorneys at Law
201 West North River Drive, #305
Spokane, WA 99201

Mr. Steven W. Hughes
Ewing Anderson, P.S.
Attorneys at Law
522 West Riverside Avenue, Suite 800
Spokane, WA 99201

RE: Estate of Clara V. Larson

Dear Mr. Algeo and Mr. Hughes:

I received your letter dated June 15, 2016, regarding distributions to Connie.

I looked at Clara's will (paragraph 2.3), it provides for cash on hand, bank accounts, cash from annuities, and cash from life insurance proceeds are to go to Connie. I would argue that CDs, American Funds Account, and Mutual Securities, Inc., do not fit into these distributions. I would object to distributing these accounts to Connie before we have more information.

Additionally, I spoke with Steve a couple weeks ago regarding the trust property distribution, and we have different interpretations of Gordon's Trust and Will. Accordingly, I hope to have a Motion to Clarify filed in a couple weeks.

Thank you both for your patience in this matter.

Respectfully,

Brant L. Stevens
Attorney at Law

BLS:sr

pc: Norman Larson

Appendix E

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FILED

JUL 14 2016

**Timothy W. Fitzgerald
SPOKANE COUNTY CLERK**

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

In the Matter of the Estate of:

CLARA V. LARSON,

Deceased.

Case No.: 15-4-01520-8

**MOTION FOR
INSTRUCTION/APPROVAL**

I. MOTION/RELIEF REQUESTED

COMES NOW, Norman Larson as Successor Trustee of the Gordon Larson Trust, by and through his attorney of record, Brant L. Stevens, and hereby moves the court for Instruction and Approval relating to the distribution of the property in the Gordon Larson Trust. Further, Norman Larson, requests one-half of attorney's fees for bringing this motion in equity.

II. STATEMENT OF THE FACTS

Gordon E. Larson and Clara V. Larson were husband and wife. Gordon Larson died on June 22, 1984. Gordon Larson was survived by his wife, Clara Larson, and two adult children, Norman Larson and Connie Mitchell. At the time of Gordon Larson's death, he and Clara owned

**Motion for Instruction and Approval
Page 1 of 12**

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1 approximately 480 acres of farmland in Spokane, County, Washington. This farmland included
2 two personal residences and a number of outbuildings.

3 The Last Will and Testament of Gordon Larson was executed on or about June 20, 1984, and
4 admitted to probate on July 10, 1984, under Spokane County Cause No. 84-4-00808-5. The
5 terms of the Will created the Gordon Larson Trust. Gordon Larson's undivided one-half interest
6 in the 480 acres of farmland was conveyed into the Gordon Larson Trust. Clara Larson was the
7 Trustee and sole beneficiary. The two surviving children were devised contingent remainder
8 interests.

9 On or about September 11, 2002, Clara Larson, a single person, and Clara Larson as Trustee
10 of the Gordon Larson Trust, entered into a "Partition Agreement" which stated:

11 In order to facilitate future estate planning, Clara has requested that the
12 480 acres now jointly owned, be partitioned into two separate parcels of
13 equal value. One parcel is to be vested in the name of Clara V. Larson, a
14 single person. The other parcel is to be vested in the name of the Gordon
E. Larson Trust, Clara V. Larson Trustee.

15 Following the execution of the Partition Agreement, executed quit claim deeds were recorded
16 with the Spokane County Auditor. Paragraph 6 of the Partition Agreement reads in pertinent part
17 as follows:

18 This agreement shall be binding upon the heirs, executors, administrators, successors and
19 assigns of the respective parties.

20 Clara Larson died on October 9, 2015. Her Last Will and Testament was admitted to probate
21 on or about October 26, 2015. The Will made certain specific bequests, including a bequest to
22 Connie Mitchell the following assets:

23 **Motion for Instruction and Approval**
24 **Page 2 of 12**

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- A. One-half of my cattle;
- B. All net cash in my Estate including cash on hand, in bank accounts, received from annuities and life insurance policies;
- C. Forgiveness for repayment of all monies loaned to my daughter CONNIE and not repaid as of the date of my death.

The Will also gave the following assets to Norman Larson:

- A. In recognition that NORMAN actively farms my real property, all real property which I own at the date of my death, including my personal residence and the (sic) my furnishings therein;
- B. All my farm equipment, vehicles, and one-half of my cattle.
- C. All remaining real and personal property within my estate.

It is the position of Mr. Algeo, attorney for the Clara Larson Estate, and Mr. Hughes, attorney for Connie Mitchell, is that the remaining four (4) parcels, or 240 acres, two 80 acre parcels and two 40 acre parcels, to be split equally between Norman Larson and Connie Mitchell. However, per the terms of the Gordon Larson Trust, the property passes to Clara Larson's Estate, and then to Norman via the residual clause. Therefore, Norman Larson brings this Motion for instruction on to how to distribute the remaining property in the Trust pursuant to his fiduciary duties and the terms of the Trust.

On June 24, 2016, Connie Mitchell, by and through her attorney of record Steven Hughes, filed a TEDRA Petition under the above captioned matter. The TEDRA Petitioner asks for a

**Motion for Instruction and Approval
Page 3 of 12**

**The Law Office of:
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1 declaration regarding the real property interests that Connie Mitchell may have, if any, in the 240
2 acres in the Gordon Larson Trust.

3 **III. LEGAL MEMORANDUM**

4 a. The Court has Authority to Determine the Rights of the Parties and Terms of the Trust as
5 It Relates to the Assets in Clara Larson's Estate.

6 Under RCW 11.98.145(2) relating to distribution of a trust upon termination, Norman Larson
7 as Successor Trustee has a statutory duty to "proceed expeditiously to distribute the trust
8 property to the person entitled to it."¹ Norman Larson brings this motion before the Court in
9 order to effectuate an expeditious distribution.

10 Pursuant to RCW 11.96A.040(3), this Court has the Jurisdiction and Authority to
11 administer and settle all matters relating to the probate of estates and the administration of trusts.
12 The instructions and approval requested by the Court relating to the Gordon Larson Trust is
13 directly related to the Clara Larson probate as the trust principal is likely to be distributed to the
14 Clara Larson Estate and, therefore, must be distributed in the probate accordingly.

15 b. The Trust Unambiguously Devises the Entirety of Gordon Larson's Trust to Clara
16 Larson.

17 The terms of the Gordon Larson Trust are clear and unambiguous. The Gordon Larson Trust
18 ("Trust") creates a trust with Clara Larson as the sole beneficiary if she survives Gordon Larson
19 for more than thirty 30 days. The Trust also expressly created a Contingent Remainder interest

20 _____
21 ¹ In complete transparency and with full candor to this Court, if the Court instructs Norman Larson as Trustee to
22 distribute the principal and corpus of the trust to the Estate of Clara Larson, Norman Larson will take the property in
23 full under the trust as Clara Larson's Will devises all property and the residue of her Estate to Norman Larson. It is
24 for this reason that Norman Larson, as the Trustee, requests Court direction. As a Trustee Norman Larson has an
25 obligation to follow the directions of the Trust, but by doing so, Norman Larson increases his inheritance under
Clara Larson's Will. For this reason, Norman Larson elected not to proceed without approval from the Court.

1 for both Norman Larson and Connie Mitchell. The condition precedent required for Norman and
2 Connie's interests to vest, specifically for Clara Larson to not survive Gordon Larson by thirty or
3 more days, did not occur which extinguished any interest Norman and Connie Mitchell had in
4 the Trust. Thereby, the sole and exclusive beneficiary was Clara Larson, and the Trust must be
5 distributed at this time to her Estate for distribution.

6 The Last Will and Testament of Gordon E. Larson created a Credit Shelter Trust. *A true and*
7 *correct copy of The Last Will and Testament of Gordon E. Larson is hereby attached as "Exhibit*
8 *A."* The Trust was created for the purpose of passing property and assets in order to minimize
9 federal estate tax and state death tax implications. *See Exhibit A 5.2-5.3.* The Trust was also
10 created to prevent attachment to the property by creditors. *Article VII.* The Trust was funded by
11 all the remaining assets, namely property, that was not divested in previous provisions of the
12 Will. *Id. 5.3.* Under Article IV Specific Bequests, Clara Larson was given: Gordon Larson's one-
13 half interest in the family home, his clothing, jewelry and personal effects, household furniture
14 and furnishings, silver, books, paintings, pictures, sporting equipment, books and automobiles,
15 and his interest in any property or liability insurance covering such items.
16

17 The beneficiary of the trust is unequivocally and exclusively Clara V. Larson. "5.4
18 Beneficiary. This trust is for the benefit of my wife, Clara V. Larson." *Id.* at 5.4.

19 Section 5.5 of the Trust describes the terms and management of the trust. The entirety of the
20 directions given for management of the trust are for the benefit of Clara Larson, either in income
21 distribution or withdrawal of principal, for the exclusive support and maintenance of Clara
22 Larson. *See 5.5; 5.5.1-5.5.3.* Section 5.6 states,

23 **Motion for Instruction and Approval**
24 **Page 5 of 12**

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1 Disposition of the Trust. Upon the death of my wife, Clara V. Larson, or if
2 she does not survive me by thirty (30) days; I direct that my Trustee
3 distribute the remaining principal and accumulated income in the Credit
4 Shelter Trust pursuant to the dispositive directions and subject to the terms
5 and conditions, if any, set forth in section 6.1 of this will.

6 Article VI states:

7 Residuary Estate. I give, bequeath and devise all my remaining separate
8 and community property of every kind and nature to my wife, CLARA V.
9 LARSON, provided she survives me by thirty (30) days.

10 6.1 In the event that my wife does not survive me by thirty (30) days, I
11 then give and bequest the remaining property comprising my residuary
12 estate in equal shares to my children. In the event a child of mine should
13 predecease the date of distribution; I then give an bequest that child's
14 share to his or her surviving children per stirpes.

15 In Article X, Gordon Larson appointed Clara Larson as Trustee of the Trust and Norman
16 Larson as Successor Trustee. Under Section 8.2, the Trustee may "rely with acquittance on
17 advice [sic] of counsel in questions of law."

18 The terms of the Will and Trust are clear. There are no ambiguities. It is clear that if Clara
19 Larson survives Gordon Larson by thirty (30) days, Clara Larson is to receive essentially the
20 entirety of the Estate. The Residuary Clause created a Contingent Remainder interest for Norman
21 Larson and Connie Mitchell in the Estate and in the Trust.

22 The trust distribution of the remaining principal is subject to the terms and conditions of the
23 residuary clause, creating the same contingent remainder for Norman and Connie under the Will
24 and the Trust. The Distribution section of the Trust explicitly states that the distribution is
25 "subject to the terms and conditions, if any, set forth in section 6.1 of this will." The terms and
conditions set forth in section 6.1 expressly states, "In the event that my wife does not survive

Motion for Instruction and Approval
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1 me by thirty (30) days, I then give and bequest the remaining property comprising my residuary
2 estate in equal shares to my children.”

3 A contingent remainder is a remainder interest that is subject to a condition precedent; under
4 the creating language, one is not permitted to take until or unless some condition has occurred.
5 17 Wn. Prac., Real Estate §1.20 Contingent Remainders (2d Ed. May, 2016). The condition is
6 precedent; both grammatically and logically, the condition must occur before the remainderman
7 is eligible to take.² *Id.*

8 A contingent remainder was created under the Will and Trust. If, and only if, Clara Larson
9 did not survive Gordon Larson by thirty (30) days, would Norman and Connie take under the
10 terms of the Will and Trust. If the condition precedent which creates the contingent remainder
11 does not take place, the interest is extinguished. In this matter, Clara Larson survived her
12 husband by over twenty years. Therefore, the condition precedent in order for Norman and
13 Connie to take under the terms of the Will and Trust did not occur. Norman and Connie’s
14 contingent remainder interest, therefore, is extinguished and neither takes under the terms of the
15 Will and Trust. Wherefore, the Trust principle is to be distributed to the Estate of Clara Larson
16 under the terms of the residuary clause.
17

18 On its face, under the four corners of Gordon Larson’s Last Will and Testament and Trust,
19 there are no ambiguities. The intent is clear, if Clara Larson survives Gordon Larson for thirty
20

21
22 ² A contingent remainder is not to be confused with a vested remainder which is a remainder that is, there is no
condition other than the end of the preceding estate that must occur before the remainder can take in possession. 17
Wn. Prac., Real Estate § 1.18 Vested Remainders, (2d ed., May 2016).

1 (30) days, she is to receive the entirety of the Estate, less any specific bequests. The Testator's
2 intent is clear.

3 c. Extrinsic Evidence to Create Ambiguity is Inadmissible

4 It is only through extrinsic evidence is an ambiguity or question raised regarding the "actual
5 intent" of the Testator. It appears, that the Larson family had a general understanding that the
6 children, Norman and Connie, would split the property, the principal in the Trust, after Clara
7 Larson died, despite the terms of the Trust.

8 However, under the parol evidence rule, parol or extrinsic evidence is not admissible to add
9 to, subtract from, vary, or contradict written instruments which are valid, complete, and
10 unambiguous. *Berg v. Hudesman*, 115 Wn.2d 657, 670 (1990) (internal citations omitted). In
11 construing a trust or will, the Court must ascertain the testators intent from the four corners of the
12 document. *Woodard v. Gramlow*, 123 Wn. App. 522 (2004) citing *In re Estate of Bergau*, 103
13 Wn2d 431, 435 (1985). The entire will or trust should be considered, and effect should be given
14 to every part. *In re Estate of Price*, 73 Wn. App. 745, 754 (1994). A court may admit extrinsic
15 evidence to explain the language of the will only if it finds the testator's intent ambiguous. *Id.*
16 The terms of a will or trust instrument are only ambiguous if they are susceptible to more than
17 one meaning. *Iwaits v. Hamlin*, 55 Wn. App. 193, 200 (1989).

18
19 The rigidity of this rule is demonstrated in *Vadam v. American Cancer Society*, wherein the
20 trial court refused to consider extrinsic evidence in construing a will although it was alleged that
21 the wrong beneficiary had been mistakenly named. 26 Wn. App 697 (1980). The only question in
22 *Vadman* on appeal was whether extrinsic evidence was admissible in the construction of a will

23 Motion for Instruction and Approval
24 Page 8 of 12

The Law Office of:
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1 wherein extrinsic evidence created an ambiguity when the language of the will was
2 unambiguous. *Id.* at 698.

3 Evidence was provided which “strongly suggested” that the testator had intended a charitable
4 bequest go to the Cancer Society, despite the language describing the beneficiary as the
5 “National Cancer Foundation.” *Id.* Upon cross-motions for summary judgment, the trial court
6 ruled the affidavits inadmissible. *Id.* at 699. The appellate court affirmed. *Id.* at 700. The
7 appellate court stated, “The rule is well established that whenever possible the actual intent of the
8 testator should be ascertained from the language of the will itself unaided by extrinsic facts. *Id.* at
9 699, citing *In re Estate of Griffen*, 86 Wn.2d 233 (1975); *In re Estate of Riemcke*, 80 Wn.2d 722
10 (1972).

11 Evidence may be admissible if there is a latent ambiguity; a latent ambiguity is one not
12 outwardly apparent from the face of the will, but which becomes apparent where, for example
13 the identity of the beneficiary becomes obscure or uncertain when applying the instrument to the
14 facts as they exist. *Vadman*, 26 Wn. App. at 699. However, unless there is uncertainty or
15 obscurity exposed, the evidence is inadmissible. *Id.* at 700. The appellate court further reasoned,
16 “if the description applies completely to a certain person or persons and to no others, evidence
17 may not be received to show that the testator intended the gift to be to others, even if it is
18 claimed that a mistake was made in drafting the will.” *Id.* citing 4 W. Bowe & D. Parker, Page
19 on Wills § 32.4-6 (1961).

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23 **Motion for Instruction and Approval**
24 **Page 9 of 12**

The Law Office of:
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1 Therefore, the *Vadman* court held “absent an ambiguity in the will’s language, extrinsic
2 evidence is not admissible to modify the testat[or’s] apparent intent... Review of the will in its
3 entirety does not reveal a contrary intent.”

4 Like *Vadman*, in this case the Will is clear and unambiguous on its face. Additionally, there
5 are no obscure or uncertain descriptions or persons that create a latent ambiguity. The Court, and
6 Norman Larson as Trustee, is required to follow the terms of the Will as written. Extrinsic
7 evidence to create an ambiguity or to claim there was a mistake in the drafting is inadmissible.

8 d. The Partition Agreement is Irrelevant to the Distribution of the Trust.

9 In the alternative, if the Court allows extrinsic evidence to be admitted, the Partition
10 Agreement from September, 2002, is irrelevant and unpersuasive. Pursuant to the TEDRA
11 Petition filed by Petitioner Mitchell, Petitioner is heavily relying upon the “Partition Agreement”
12 filed on September 11, 2002, to support her position on the distribution of the Trust principal.

13 There is language in the “Recitals” which states the “Clara Larson is the trustee and sole
14 income beneficiary. The remainder beneficiaries are Gordon E. Larson’ two children, Norman D.
15 Larson and Connie Mitchell.” This statement is unpersuasive as to the rights and interests created
16 under the language of the Trust. Namely, this Partition Agreement is not relevant. It was drafted
17 over 16 years after the Trust was created. It was drafted at the direction of Clara Larson, not
18 Gordon Larson. It provides no evidence of Gordon Larson’s intent. Nor does it create any new
19 interests in the property.

20 Additionally, the statement is found under the Recital portion of the contract. Recitals are
21
22 factual statements that tend to demonstrate the reason or purpose behind the formation of the

23 Motion for Instruction and Approval
24 Page 10 of 12

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Dated this 11th day of July, 2016.

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Attorney for Norman Larson, Successor Trustee

Motion for Instruction and Approval
Page 12 of 12

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Appendix F

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FILED
MAY 01 2018
Timothy W. Fitzgerald
SPOKANE COUNTY CLERK

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

In Re Estate of:)
CLARA V. LARSON,)
Deceased.)
_____)
CONNIE M. MITCHELL)
Petitioner,)
v.)
NORMAN D. LARSON,)
Personal Representative of the Estate of)
Clara V. Larson, and Successor Trustee)
of Gordon E. Larson Testamentary Trust)
Respondent.)
_____)

No. 15-4-01520-8
(Consolidated with No. 16-4-00919-2)
COURT'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER RE: TRIAL ISSUES

THIS MATTER HAVING BEEN HEARD on October 30, 2017 and the Court having heard trial testimony, argument of counsel and having considered the documents, pleadings, illustrative exhibits and materials on file herein now makes the following FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER in these consolidated cases.

In Re Estate of: Clara V. Larson
Court's Findings of Fact, Conclusions of Law and
Order Re: Trial Issues

FINDINGS OF FACT

The Court makes the following Findings of Fact:

1. Gordon E. Larson and Clara V. Larson were husband and wife. Gordon E. Larson passed away on June 22, 1984, survived by his wife, Clara V. Larson, and two adult children, Connie M. Mitchell and Norman D. Larson;

2. The Last Will and Testament of Gordon E. Larson (hereinafter Gordon's Will), was probated under Spokane County Cause No. 84-4-00808-5;

3. Gordon's Will directed that a Gordon E. Larson Trust (hereinafter Gordon's Trust) be established and that his undivided one-half (1/2) ownership interest in 480 acres of farmland be conveyed into Gordon's Trust;

4. Clara V. Larson was the Trustee of Gordon's Trust and the sole income beneficiary;

5. Connie M. Mitchell and Norman D. Larson were designated remainder beneficiaries under Gordon's Trust;

6. Clara V. Larson, executed a Partition Agreement on September 11, 2002, as an owner of one-half (1/2) ownership interest in 480 acres of farmland and as the Trustee of Gordon's Trust;

7. The Partition Agreement set forth Clara V. Larson's intent that the above-referenced 480 acres of farmland "be partition [sic] into parcels of equal value;

8. The 480 acres of farmland were specifically identified by legal description, were all in Spokane County, Washington and had been jointly owned up to that date by Clara V. Larson and Gordon's Trust;

9. Clara determined an approximate equal division of the 480 acres of farmland and executed Quit Claim Deeds on that same day, September 11, 2002;

10. The approximate equal division was specifically acknowledged to include outbuildings and capital improvements to each parcel;

1 11. The Partition Agreement was specifically made binding on the heirs, executors,
2 administrators, successors and assigns of Gordon's Trust and Clara V. Larson, individually;

3 12. Clara V. Larson passed away October 9, 2015 and her will was admitted to probate in
4 Spokane County under Cause No. 15-4-01520-8;

5 13. The Last Will and Testament of Clara V. Larson, (hereinafter Clara's Will) specifically
6 provided that one-half of Clara's cattle and all net cash were to be transferred to Connie M.
7 Mitchell and that any debt for all monies loaned to Connie M. Mitchell by Clara V. Larson as of
8 the date of Clara's death would be forgiven by the Estate;

9 14. Clara's Will also provided that Norman D. Larson was bequeathed all real property
10 owned by Clara on the date of her death, one-half of Clara's cattle, all of Clara's farm equipment
11 and any remaining real and personal property within Clara's Estate;

12 15. Clara's Will contained a "No-Contest or Forfeiture Provision;"

13 16. Norman D. Larson was nominated in Clara's Will to be appointed as Personal
14 Representative of the estate and Letters Testamentary were issued to him on October 26, 2015;

15 17. Norman D. Larson worked with attorney Richard P. Algeo to file the Probate Action
16 and on December 10, 2015, Richard P. Algeo as counsel for the Personal Representative sent
17 a letter to Connie M. Mitchell providing a summary of the assets of the estate known at that time
18 and reminding her that she should feel free to seek input from an independent advisor of her
19 choice;

20 18. Some time thereafter Richard P. Algeo learned that Connie M. Mitchell had retained
21 separate counsel and determined that the representation offered by Algeo would be to the Estate
22 of Clara V. Larson only;

23 19. In the spring of 2016, Gordon D. Larson retained Brant L. Stevens as his independent
24 advisor;

1 20. Brant L. Stevens, as attorney for Gordon D. Larson, wrote a letter to Steve Hughes,
2 attorney for Connie M. Mitchell, on May 5, 2016, providing that his analysis of Gordon's Trust
3 and Clara's Will determined that all property in Gordon's Trust passed to Clara's Estate and
4 therefore should be deeded to Norman D. Larson;

5 21. Norman D. Larson, after discussing the advice of Brant L. Stevens with the Estate's
6 lawyer, Richard P. Algeo, determined to follow the advice of his lawyers;

7 22. On May 10, 2016, Steven W. Hughes, as counsel for Connie M. Mitchell, responded
8 to Brant L. Stevens, expressing a different legal conclusion and advising that a TEDRA action
9 would be filed in the event an agreement could not be reached reflecting residuary beneficiary
10 status for Connie M. Mitchell under Gordon's Trust because of the death of Clara;

11 23. On June 24, 2016, Brant L. Stevens as attorney for Norman D. Larson, wrote a letter
12 to Richard P. Algeo and Steven W. Hughes, asserting different interpretations of Gordon's Trust
13 and Will existed and promising a Motion to Clarify;

14 24. On June 24, 2016, Steven W. Hughes filed a TEDRA action under Spokane County
15 Cause No. 16-4-00919-2 demanding: a declaration of her interest in the property under Gordon's
16 Trust and her interest in Clara's Estate; an accounting of Gordon's Trust; damages suffered by
17 Connie M. Mitchell; and, seeking attorney fees and costs;

18 25. On July 14, 2016, Brant L. Stevens, as "Attorney for Norman Larson, Successor
19 Trustee," filed a Motion for Instruction/Approval relating to distribution of any real property
20 holdings of Gordon's Trust, asserting that it should all be expeditiously distributed to Norman D.
21 Larson and seeking attorney fees;

22 26. Thereafter, Norman D. Larson, again consulted with Richard P. Algeo and determined
23 to terminate the employment of Brant L. Stevens in this matter;

24 27. Norman D. Larson retained the Law Offices of J. Scott Miller, P.S., through J. Scott
25 Miller and the parties Stipulated to Consolidation, with an Order signed on November 16, 2016;

1 28. On December 21, 2016, Norman D. Larson, as Successor Trustee, filed a Notice of
2 his intent to make the final distribution of farmland owned by Gordon's Trust;

3 29. On February 13, 2017, an Answer to the TEDRA Petition was filed on behalf of Norman
4 D. Larson and on February 16, 2017, an Amended Answer was provided seeking: affirmation of
5 the Successor Trustee's Proposed Plan of Distribution; dismissal of the TEDRA Petition with
6 Prejudice; an award of attorney fees and costs; an award of reasonable rental value from Connie
7 M. Mitchell for the house, outbuildings and property she utilized as her home; and, for an award
8 of general damages for Norman D. Larson;

9 30. On June 30, 2017, a Motion to Approve payments was filed seeking authority to use
10 Estate funds to pay \$622.50 to Norman D. Larson for service provided as Personal
11 Representative of the Estate of Clara V. Larson and to pay all litigation attorney fees and costs
12 incurred as Trustee of Gordon's Trust;

13 31. Development of these consolidated cases resulted in Norman D. Larson's Motion for
14 Summary Judgment and Connie M. Mitchell's Petition to Remove Trustee/Personal
15 Representative which were heard on July 7, 2017 and denied by Order signed October 27, 2017;

16 32. Trial was held October 30, 2017, and the Court heard testimony from Connie M.
17 Mitchell, Norman D. Larson, Richard P. Algeo and Stephen Barrett;

18 33. It was acknowledged by all parties that the house where Connie M. Mitchell resided,
19 belonged to Gordon's Trust, of which she was a residuary beneficiary;

20 34. No one disputed that the house which Connie M. Mitchell had been using as her home
21 was damaged when a lower wall collapsed, damaging the furnace and causing the residence to
22 be unsafe;

23 35. Norman D. Larson continued to maintain that Connie M. Mitchell should be ordered to
24 pay some amount of rent to Gordon's Trust;

1 36. Any cash paid to Gordon's Trust would be shared equally by the beneficiaries after
2 payment of necessary costs or expenses of Gordon's Trust;

3 37. Any cash paid to or remaining in Clara's Estate following payment of reasonable and
4 necessary costs would be distributed to Connie M. Mitchell; and

5 38. Steven Barrett's Real Estate Broker's Price Opinion reflected the "as is" condition of
6 the property as of April 29, 2017 and he was not retained in the matter until November or
7 December of 2016.

8 CONCLUSIONS OF LAW

9 From the foregoing Findings of Fact, the Court makes and enters the following Conclusions
10 of Law;

11 A. RCW 11.96A.040 provides the Superior Courts of the State of Washington with original
12 jurisdiction to probate wills and estates of deceased individuals, to administer and settle all
13 matters relating to trusts and to issue any orders as are proper or necessary in the exercise of
14 such jurisdiction;

15 B. Any beneficiary may petition for change of a trustee for reasonable cause (RCW
16 11.98.039(4));

17 C. In addition to other powers, a trustee has discretionary power to sell, convey, control,
18 divide, partition and manage trust property in accordance with standards provided by law (RCW
19 11.98.070);

20 D. Trustees must execute their duties with the highest degree of good faith, diligence and
21 undivided loyalty to the beneficiaries (In re Estate of Ehlers, 80 Wn. App. 751 (1996));

22 E. Norman D. Larson's assertions, through counsel, that all real property in Gordon's Trust
23 passed to him following Clara's death, that Certificates of Deposit in Clara's Estate were not
24 "cash" as defined by Clara's Will and that Successor Trustee duties required a claim for rent be
25 asserted on behalf of Gordon's Trust (either throughout Connie M. Mitchell's occupation of the

1 subject home or from the date of Clara's death to the present) all fall below the degree of good
2 faith, diligence and undivided loyalty owed by the Successor Trustee and/or the Personal
3 Representative in this situation;

4 F. This Court has discretion to award reasonable attorney fees and costs in an amount
5 and manner that it deems equitable from the Estate of Clara V. Larson, and/or the Trust of
6 Gordon E. Larson after considering any and all factors that the Court deems to be relevant and
7 appropriate;

8 G. Norman D. Larson failed to take reasonable steps to value the 240 acres of farmland
9 for partition until after Connie M. Mitchell felt compelled to file a TEDRA petition in response to
10 Norman D. Larson's announced positions as Personal Representative and Successor Trustee;
11 and,

12 H. The parties have a continuing mutual distrust of one another and there is a risk of
13 continued litigation that would unnecessarily and inequitably decrease the assets held by
14 Gordon's Trust and/or diminish the undistributed portion of Clara's Estate.

15 NOW, THEREFORE, the Court hereby ORDERS the following:

16 Norman D. Larson, as Personal Representative of the Estate of Clara V. Larson shall pay
17 himself \$662.50 for services provided as Personal Representative of the Estate.

18 Norman D. Larson, as Personal Representative of the Estate of Clara V. Larson, shall
19 reimburse himself for the costs associated with the filing of the Probate action and Letters
20 Testamentary paid out of his own fund, if any, up to a maximum of \$250.00.

21 Norman D. Larson, as Personal Representative of the Estate of Clara V. Larson, shall
22 transfer the balance of cash or cash equivalents to Connie M. Mitchell, save only a \$5000.00
23 reserve in the Estate Account to be used to finalize and close the Probate file.

24 Norman D. Larson, as Successor Trustee of Gordon's Trust, shall provide Quit Claim
25 Deeds to Connie M. Mitchell as her equal share of the undivided 1/2 interest in real property held

1 in Gordon's Trust of the Parcels No. 27122.9006 and 27122.9007, along with the westerly half
2 of Parcel 27122.9008.

3 Norman D. Larson, as Successor Trustee of Gordon's Trust, shall provide an unequivocal
4 waiver of any claim for past due rent to Connie M. Mitchell through the date of effective transfer
5 of the real property parcel on which her house presently sites (Parcel No. 27122.9006).

6 The Parties shall each pay their own attorney fees and costs of litigation.

7 DATED this 30th day of April, 2017.

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10
11 THE HONORABLE TIMOTHY B. FENNESSY

12 Superior Court Judge, Department 11
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