

NO. 87544-8

SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Estate of:
VIRGIL VICTOR BECKER, JR.
Deceased.

CATHERINE JANE BECKER, CAROL-LYNNE JANICE BECKER, and
ELIZABETH DIANE MARGARET BECKER,

Respondents,

v.

JENNIFER WHITE, in her capacity as Personal Representative of the
Estate of Virgil Victor Becker, Jr.,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENTS - CATHERINE JANE
BECKER, CAROL-LYNNE JANICE BECKER, AND ELIZABETH
DIANE MARGARET BECKER

Bruce A. McDermott, Bar# 18988
Teresa Byers, Bar# 34388
GARVEY SCHUBERT BARER
Attorneys for Respondents

Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
206 464 3939

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I. IDENTITY OF RESPONDENTS

Catherine Jane Becker, Carol-Lynne Janice Becker and Elizabeth Diane Margaret Becker (“Adult Children”) are the children of Decedent’s first marriage, petitioners in the Will Contest and creditors of the Estate.

II. SUPPLEMENTAL ISSUE PRESENTED FOR REVIEW

The Adult Children rely on their Opposition to Petition of Nancy Becker for Discretionary Review to this Court and their briefing below to address the issues Appellant Nancy Becker (“Nancy”) raised in her initial Petition to this Court. This Supplemental Brief addresses a new issue raised for the first time in Nancy’s Statement of Additional Authority in Support of Petition for Discretionary Review, wherein she referred the Court to *Toland v. Toland*, 2012 WL 4373331, 286 P.3d 60 (2012).

The Court of Appeals in *Toland* held that the surviving parent of a minor who inherited outright had standing to participate in a TEDRA proceeding to determine the custodian of the child’s funds and confirm that the child received her proper inheritance. Nancy referred to Section III.1 of her Petition for Review when citing *Toland* as pertinent authority; however, that section relates directly to Nancy’s alleged *personal* interests (as opposed to her interests as a parent) in the Estate as

a putative intestate heir.¹ *Toland* does not address the role of a surviving spouse in an Estate; therefore, the Adult Children presume that Nancy will raise, for the first time in this matter, a variation of the following question:

Does Nancy, as the surviving parent of a minor who is the sole beneficiary of a testamentary trust, have standing under the Trust and Estate Dispute Resolution Act (“TEDRA”) to veto execution of a settlement between the Estate and the Will Contestants and creditors?

III. STATEMENT OF PERTINENT FACTS

The parties briefed the underlying facts in their earlier submissions. However, some salient facts should be emphasized in light of the additional authority Nancy proffers.

A. Probate of the Will.

Under Nancy’s interpretation of Decedent’s Will in probate, the entirety of his estate passes to a testamentary trust for the benefit of his youngest daughter, Barbara.² The Will does not name a trustee for Barbara’s trust or set out detailed terms for the administration of the trust.

The same day that Decedent’s 1999 Will was admitted to probate, the court appointed a Guardian ad Litem (“GAL”) for Barbara as the “sole beneficiary and heir” of the estate.³ The court specifically charged the

¹ In *Toland*, the father’s reply brief in the Court of Appeals expressly stated “Commander Toland is not arguing that his right to participate in the probate arises from the relationship with his deceased wife.” Reply Brief, p. 4.

² CP:1-11.

³ CP:12-14.

GAL to make recommendations as to i) whether Nancy was the appropriate trustee for the testamentary trust; ii) the allocation and distribution of funds from the trust to Barbara during the administration of the Estate; and iii) the allocation of assets between the trust and the surviving spouse (Nancy).⁴ From the onset of the probate, conflicts of interest between Nancy and her daughter were apparent and necessitated appointment of independent third parties to act in Barbara's best interests.

B. Litigation and the Resulting Discovery.

The Adult Children filed a timely Will Contest and fourteen creditors' claims against the Estate.⁵ Through documents produced in discovery, they learned that Nancy had undervalued the Estate by several million dollars, claiming for herself both separate and community interests in property wholly without legal basis. Discovery revealed that the characterization of those interests sprung merely, and literally, from what Nancy and her accountant made up.⁶ Nancy's attempt to claim Estate assets as her own became apparent to the GAL in the course of discovery and preparation for a previously agreed-to mediation.

⁴ CP:12-14.

⁵ CP:15-29. At that time, the initial GAL resigned and the present GAL, Jennifer C. Rydberg was appointed. CP:30-36.

⁶ The effect of Nancy's mischaracterization was to claim as her own millions of dollars of assets that otherwise passed to *her daughter* under the Will in probate that she purported to vigorously defend. Her repeated protestations her defense of the Will, her continuing appeals and now her allegations that she has a fundamental right to participate to protect her *daughter's* interests therefore ring hollow to this day. CP:121 (p. 50-51); CP:123 (p. 141:21-23); CP:124-125; CP:156; and CP:79.

Although Nancy, as the then acting PR, ultimately refused to participate actively in the mediation, the GAL and Petitioners negotiated a settlement that encompassed the Will Contest and the creditors' claims.⁷ A CR2A Agreement memorialized the settlement and divided the Estate into two equal shares, with one share for Barbara's Trust and the other share subdivided among the three Adult Children. The Settlement Agreement did not purport to divide any particular assets of the Decedent between his children or decide the character of any particular asset. In deference to the court's plenary powers under TEDRA, the Agreement contemplated court approval, either directly or *via* a representative.

C. Nancy Sabotaged the Settlement.

Nancy refused to execute the Agreement in her role as personal representative ("PR"). Stymied by Nancy's refusal, the GAL and Petitioners asked the court to appoint a limited co-PR to review and approve the CR2A Agreement. Meanwhile, Nancy moved to remove the GAL and filed for summary judgment on the Adult Children's claims. At the first scheduled hearing, the court continued approval of the Agreement, mooted various motions, stayed motions for summary judgment and set additional hearings.⁸

⁷ CP:258-264.

⁸ CP:742-743.

Briefing surrounding approval of the CR2A Agreement and Nancy's attempt to remove the GAL crystallized Nancy's conflicts of interest and mismanagement of the estate. Thus, the GAL petitioned to remove Nancy as the PR based upon four direct and irreconcilable conflicts of interest between Nancy and the Estate. The conflicts arose from disputes as to what property belonged to Nancy and what belonged to the Estate, and Nancy's admission that she commingled Estate assets with her personal assets and owed funds to the Estate. The GAL's petition to remove Nancy was granted, and a third party became the new PR.⁹

Despite Nancy's removal, and the fact that Decedent did not name her as a beneficiary of the Will, Nancy insisted that she was a necessary party to any settlement agreement involving the Estate and, thus, could unilaterally veto any attempt to settle with the Adult Children.

D. The Trial Court Held Nancy Lacks Standing.

Nancy's repeated attempts to thwart settlement forced the GAL to petition the trial court for a determination of Nancy's standing with regard to the approval of a CR2A Agreement.¹⁰ The trial court received briefing on the roles of each of the parties and parsed thoroughly the bases for standing under TEDRA.¹¹ Nancy was represented by counsel and had every opportunity to argue for her standing. The trial court found her

⁹ CP:920-924 & CP: 746-749.

¹⁰ CP:173-183.

¹¹ CP:189-190, CP:204-208, 209-214, & CP:215-229.

arguments unpersuasive, and held that Nancy lacked standing to participate in the negotiations of a CR2A Agreement that resolved the Will Contest brought by the Adult Children, resolved the creditors' claims of the Adult Children and distributed Decedent's Estate.¹²

Nancy filed a Motion for Discretionary Review to the Court of Appeals as to the Order on Standing. The Commissioner granted review. On appeal, Nancy alleged multiple bases for standing arising from her status as Decedent's surviving spouse. None of the bases depended on her relationship with Barbara. The Court of Appeals, in a carefully worded and detailed decision, also parsed through each of the alleged bases for standing and upheld the trial court's order.¹³

Nancy then filed a motion for Discretionary Review to this Court relying upon the same arguments presented to the Court of Appeals. More recently, she filed a Statement of Additional Authority in Support of Petition for Discretionary Review citing *Toland, supra*, and alleging for the first time that her standing arises not from her putative personal interests in the Estate but as Barbara's mother. The irony is palpable, given that Nancy was removed as PR for direct and irreconcilable conflicts of interests with the Estate arising from property disputes and commingling of assets that deprived Barbara's Trust of millions of dollars.

¹² CP:230-232.

¹³ *In re Estate of Becker*, 2012 WL 12255160 (Div. 1, April 16, 2012)(App. 51 to Petitioner's Motion for Discretionary Review).

Irony aside, the fact that Nancy is Barbara's mother does not grant her standing to thwart a settlement between the Estate and the Adult Children. Multiple fiduciaries guard Barbara's interests as the beneficiary of a testamentary trust and the facts here distinguish this situation from that of *Toland*. Moreover, *Toland*, if it stands, should be narrowly construed to avoid conflicting with longstanding Washington law.

IV. LEGAL ARGUMENT

A. *Toland* is Factually Distinguishable.

The Adult Children empathize with the father in *Toland*, but that situation is readily distinguishable from this one. *Toland* is a sympathetic court's remedy of an untenable situation, caused by the application of foreign law literally separating father from child. While understandable, it should be narrowly construed and limited to its unique facts.

1. *Custody of the Child is Not Implicated.*

The court's decision in *Toland* focused upon a well-recognized conflict between U.S. and Japanese laws for which there was no apparent solution, and through which Commander Toland lost the *actual* custody of his daughter. Under Japanese law, his parental rights were effectively terminated in a foreign proceeding, without notice. Such a proceeding would violate the due process provisions of the U.S. Constitution were it to occur domestically. Moreover, the court specifically noted that "Paul's chances of prevailing in Japan in a custody action are "slim to none"

because of the “fait accompli” set up by the guardianship proceedings of which the father had been unaware. *Toland*, 286 P.3d at 63. Thus, in *Toland*, standing in the probate was literally the last means by which the father could be involved in his daughter’s life in any way at all.

Conversely, Nancy has maintained continuous custody of Barbara since Decedent’s death. No one has brought an action to deprive her of custody of her daughter. Nancy continues to have every opportunity to exercise unfettered and complete parental rights over Barbara, including decisions regarding companionship, education, and religious, social and community upbringing. To the extent that the *Toland* decision was in effect a means to ensure that Commander Toland retained some involvement in his child’s life, that concern is not present here.

2. *An Inheritance Outright is Distinguishable from One In Trust.*

Commander Toland’s daughter, Erika, inherited her mother’s estate outright, via the intestacy statute. Because her mother died without a Will, an administrator probated her property and that property passed directly to Erika. Commander Toland petitioned to become the custodian of the funds distributed to Erika *personally* under the Uniform Transfers to Minor’s Act (RCW 11.114, *et. seq.*)(“UGMA”) and argued he had a statutory right to administer *Erika’s* estate pursuant to RCW 26.16.125. UGMA provides that when an administrator wants to make a transfer for the benefit of a minor, in the absence of a will, “[t]he *personal*

representative, the trustee, or a member of the minor's family may select the custodian, subject to court approval." RCW 11.114.060. Thus, although Commander Toland invoked TEDRA to become the custodian of his daughter's assets, his standing arose from UGMA rather than via a fundamental liberty interest. Under UGMA he had, and asserted, standing to petition to be the ultimate custodian of assets distributed without a Will.

Here, the Will in probate directs the Estate to a testamentary trust – not Barbara directly. The trial court's order on appeal does not purport to influence the terms of the distributions from the testamentary trust. Nor does the order on appeal determine how funds distributed from the testamentary trust will be managed following any direct distribution to Barbara. To date, no one has requested a custodian for the distributions or requested that such distributions be placed in an UGMA account. Thus, unlike Commander Toland, Nancy is not seeking to assert her statutory rights to nominate a custodian for her daughter's inheritance. UGMA applies to the transfer of assets to a minor, which is not occurring with a transfer to a trust. Thus, the UGMA does not apply to this case.

Similarly, RCW 26.16.125 cannot be used to grant Nancy standing in this matter. RCW 26.16.125 provides that "in case of one parent's death, the other parent shall come into full and complete control of the children and their estate." Again, unlike Erika, Barbara inherits via a testamentary trust. Thus, RCW 26.16.125, which applies a presumption

that a parent may administer a *child's estate*, is not implicated because the testamentary trust for Barbara's benefit is not part of *her* estate. It is a separate legal entity administered by a trustee, which files its own tax return and can sue and be sued in its own capacity. *See* Restatement (third) of Trusts, §2, at 17, cmt. A (2003) ("modern common-law and statutory concepts and terminology tacitly recognize the trust as a legal 'entity'), CR 17(a)(a trust may sue as a real party in interest), RCW 11.12.250, *and* RCW 11.98.070. RCW 26.16.125 may grant Nancy the ability to manage Barbara's personal assets, but it cannot grant her standing to determine what assets shall be held in trust for Barbara.

3. *Capable Fiduciaries Already Protect Barbara's Trust.*

In *Toland*, the court noted another unfortunate fact – although a GAL had been appointed for Erika, that individual was not notified of his appointment. Consequently, he literally could not act in Erika's best interests. That is clearly not the case here, where the GAL has actively participated in the probate. The GAL successfully petitioned for removal of Nancy as PR to ensure that Nancy's self-dealing and conflicts of interest ceased and an independent third party was appointed to marshal and protect the Estate. In doing so, the GAL protected the testamentary trust ultimately benefiting Barbara. The *Toland* court was motivated by a failure within the GAL system; such failure is not present here.

B. To the Extent that *Toland* Extends a Parent's Fundamental Liberty Interests to Make the Parent a Necessary Party in All TEDRA Matters, it Improperly Expands Washington Law.

Petitioners anticipate that in light of *Toland*, Nancy raise an entirely new argument, namely that she has a fundamental liberty interest in managing her daughter's estate and that interest extends back through Barbara, through the testamentary trust for Barbara's benefit, and through the PR of the Estate to grant Nancy standing to oppose a settlement between the Estate and the Adult Children as contestants of the Will and creditors of the Estate. This argument fails. Assuming that a parent has the right, either via the Constitution or a statute (RCW 26.16.125) to manage a *child's* estate, that right is limited to participation in the management of the *child's* estate, not to dictate the result of a dispute between a third party and another parent's estate which benefits a trust ultimately benefiting the child. Expanding the parent's fundamental rights without regard for the distinctions between a decedent's estate, a testamentary trust, and the interests of third parties in an individual's personal estate breaks the very bones of TEDRA.

1. *Troxel Does not Hold that a Parent has a Fundamental Liberty Interest in a Child's Estate; Rather in Washington the Right to Manage a Child's Estate Flows from Statutory Law.*

The connection between management of a child's finances and a parent's Constitutional rights is an attenuated one. The *Toland* decision cites *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054 (2000) for the

premise that a parent has a fundamental interest in the “care, custody and control” of his or her child, and summarily declares that the management of the child’s estate is inextricably linked to those rights. However, *Troxel* addressed only the *physical custody* of children. The Supreme Court in *Troxel* investigated the rights of third parties, in that case grandparents, to assert *visitation rights* as to their minor grandchildren. The grandchildren’s financial situations and own estates were not at issue. In fact, none of the cases cited in the *Toland* briefs or the Court of Appeals decision link management of a child’s estate with a parents’ fundamental rights. Instead, fundamental rights are addressed in cases that would interfere with parents’ rights to custody of or visitation with their child.

The basis for the right to manage a child’s estate in Washington is *statutory*. RCW 26.16.125. But that statute by its terms expressly applies only to the management of the child’s estate. It does not apply to the management of assets by a third party, in trust, for the benefit of the child or to an action to determine what comprises the underlying estate. The importance of this distinction cannot be overstated.

2. *Decedent Intended for the Trust to be Managed by a Trustee and that Intent Controls under Washington Law.*

As set forth above, a trust is a separate legal entity. The duties of the trustee run to the trustor and to the beneficiaries, and require the trustee to manage the trust in accordance with the trustor’s instructions.

See Restatement (third) of Trusts, §2, at 17, cmt. A (2003). This rather unique creature serves a valuable purpose--it ensures that the wishes of the trustor can be fulfilled even after his or her death and the trustor's intent alone determines appropriate distributions for the benefit of the beneficiaries. Provided that the distribution terms are not illegal or a gross violation of public policy, those terms are controlling. *In re Elliott's Estate*, 22 Wash.2d 334, 156 P.2d 427 (1945).

Moreover, the role of the trust in modern society is expansive. Assume, for instance, that a couple divorces with a minor child. A parent commonly then creates a testamentary trust for the benefit of the child and names a third party trustee to manage the trust precisely to ensure that upon the death of the first parent to die, the ex-spouse does not control the deceased parent's assets held for the child. Moreover, the deceased parent clearly would not want the ex-spouse to interfere in the underlying administration of the deceased spouse's estate. If the first to die parent wanted the ex-spouse involved in the management of the trust, presumably he or she would have been named as the trustee, or alternatively, the deceased parent would simply have transferred the interests to the surviving parent as custodian for the child. When the deceased parent instead names a third party fiduciary, to hold that the ex-spouse has a fundamental right to control the administration and distribution of the *decedent's* assets would contravene the decedent's intent.

“It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and punctually observed so far as it is consistent with the established rules of law.” *In re Elliott’s Estate*, 22 Wash.2d 334, 350-351, 156 P.2d 427, 435 (1945). Thus, testamentary instruments express a decedent’s fundamental rights, and those rights may not be overridden by interpretation of secondary and supplemental concerns of third parties. “The right to dispose of one’s property by will is not only a valuable right but is one assured by law, and will be sustained whenever possible.” *See, e.g., In re Elliott’s Estate*, 22 Wash.2d at 350-351, 156 P.2d at 435 (1945) *citing In re Peters’ Estate*, 101 Wash. 572, 172 P. 870 (1918). To ensure this valuable right, the courts rely not only upon the common law, but also a statute which instructs the judiciary as follows: “All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.” RCW 11.12.230.

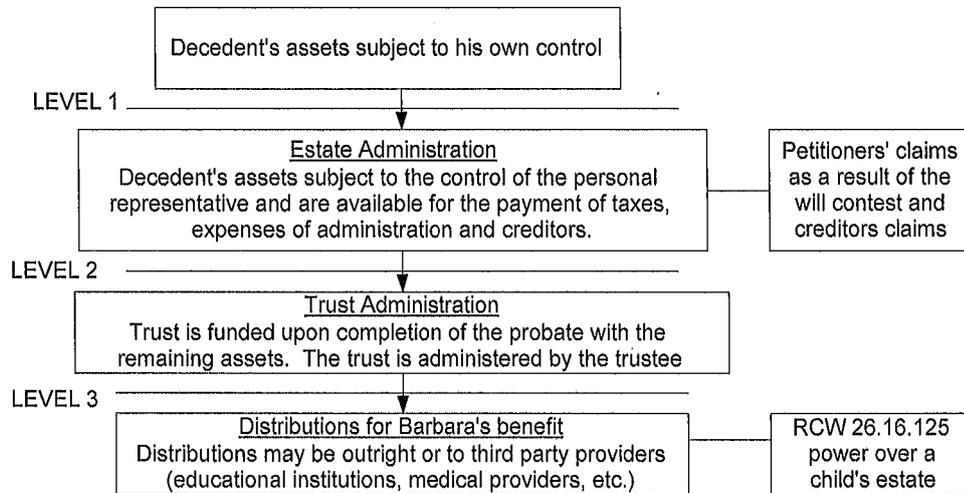
The 1999 Will in probate, which Nancy aggressively and unflinchingly has defended as the last expression of Decedent’s intent, transfers his estate to a testamentary trust for Barbara. Although the Will named Nancy as the initial PR, she is not named as the trustee of Barbara’s Trust. By Nancy’s own reading of the Will, then, Decedent

clearly did not intend for her to receive his assets *or* to manage the assets in his trust on behalf of their daughter. To grant Nancy standing to enforce her desires over the discretion and actions of the trustee, the GAL, and the PR as prescribed by the Will would therefore violate a fundamental tenet of Washington law by thwarting Decedent's testamentary intent.

Notably, the decedent in *Toland* died without a Will. Under Washington law, knowledge of the law is imputed to her. *Retired Public Employees Council of Washington v. State, Dept. of Retirement Systems*, 104 Wn. App. 147, 16 P.3d 265 (2001). Thus, the courts presume not only that she intended that her child inherit her estate outright under RCW 11.04.015, but also that the surviving parent exercise control over what then become the *child's estate* under RCW 26.16.125. Decedent, under Nancy's reading of his Will, intended a very different result. Barbara did not inherit outright. Instead, her interests are held in trust until age thirty.

3. *TEDRA Recognizes Different Interested Parties at Each Level of Administration.*

As discussed above, under TEDRA the levels of administration and the parties interested at each level are critical:



As shown above, different actions occur at each level and each subservient level, by definition, controls fewer assets than the superior levels. The Decedent has full control of his estate during his lifetime. Upon his death, the PR is charged with marshaling assets and identifying, investigating and paying the estate's creditors. RCW 11.48.010. Only the funds remaining after that process pass to the residual beneficiaries. If the PR fails to administer the estate, the trustee, as the beneficiary of the residue of the *estate*, may sue PR for breach of fiduciary duty and seek to remove the PR. RCW 11.68.070. The law does not, however, grant the beneficiary of a resulting testamentary trust standing to question the administration of the overarching estate. *In re Estate of Hitchcock*, 140 Wn. App. 526, 167 P.3d 1180 (2007)(holding that trust beneficiaries lacked standing to petition for removal of a PR). If the underlying trust beneficiary lacked standing to pursue that action in *Hitchcock*, surely a

parent of that trust beneficiary must also lack standing in the administration of the underlying estate.

TEDRA recognizes these levels and creates representative relationships to ensure that the interests of inferior parties are protected. Under RCW 11.96A.120, a PR, acting as the virtual representative of its distributee - a testamentary trust - can execute a Nonjudicial Binding Agreement which binds the trust, and ultimately its beneficiaries. The same statute provides that a trustee of a testamentary trust can execute a waiver in favor of the PR, which would bind the trust beneficiary.

TEDRA's representative relationships ensure the interests of a Level 3 beneficiary are protected. Until a Level 3 trust distribution occurs to a minor, RCW 26.16.125 cannot be implicated and there is no basis for a parent to assert standing in any dispute between the estate and third parties at Level 2. If any parent of a minor child potentially involved in a testamentary trust could claim standing regardless of the level of administration, then the parties alleging that duties are owed to them would be virtually endless and administration impossible.

Assume a Will provided for a long term trust benefiting decedent's child ("A") for A's lifetime, followed by grandchildren ("B"). A is divorced. Does A's former spouse have standing as the parent of B, the remainder beneficiaries, to veto a settlement between decedent's (grandparent's) estate and a creditor? Under a broad reading of *Toland*,

precisely that result could occur but that is clearly *not* the anticipated result under TEDRA.

TEDRA sets forth a variety of statutory “parties” in RCW 11.96A.030(5) – none of them mentions the parent of a minor child. Rather, TEDRA repeatedly references guardians ad litem and special representatives acting on behalf of minors. RCW 11.96A.160 & RCW 11.96A.250. Similarly, the doctrine of virtual representation allows a PR to represent the beneficiaries of an estate and the trustee to represent the beneficiaries of a trust, regardless of their age. RCW 11.96A.120. Nothing in TEDRA endows a parent, who does not also benefit from the trust by virtue of an identical or superior interest in that trust, with the right to represent a minor child beneficiary. To the contrary, the virtual representation statute anticipates *conflicts* between the minor child and the parent.¹⁴ Thus, TEDRA relies upon a multitude of possible representative parties, including wholly independent third parties, to ensure that estate and trust administration is overseen by persons who can act impartially in the best interests of the minor and assert those interests at the proper time. In light of the doctrine of virtual representation and anticipated use of GALs and special representatives for minors, if this Court held that any time a minor benefited from a testamentary trust, in any capacity, that

¹⁴ The prefatory language of RCW 11.96A.120 provides when delineating the representatives’ relationships that the potential representative may only set forward when “the interests of such fiduciary estate and the beneficiaries are not in conflict”.

minor's parents had a fundamental liberty interest in the administration of the estate, the whole of TEDRA would be thrown on its ear and the efficient administration of estates to the wind.

V. CONCLUSION

Until now, Nancy depended upon her personal interests to assert standing in Decedent's estate. Those arguments lost in the lower courts, and as has been amply briefed in those courts, they should not rule the day here. Nancy's new argument that despite the fact that her actions robbed the Estate of millions of dollars which would benefit her daughter's trust, she has a fundamental liberty interest in her daughter's estate that extends back through her daughter, to the testamentary trust, and to the administration of the Estate should not be countenanced. There is simply no precedent in Washington and nothing expressed within TEDRA that would grant her essentially unlimited fundamental rights in the ongoing administration of this Estate. This Court should uphold the well-reasoned decisions of both the trial court and the Court of Appeals.

DATED this 18th day of December, 2012.

GARVEY SCHUBERT BARER

By 
Bruce A. McDermott, # 18988
Teresa Byers, # 34388

DECLARATION OF SERVICE

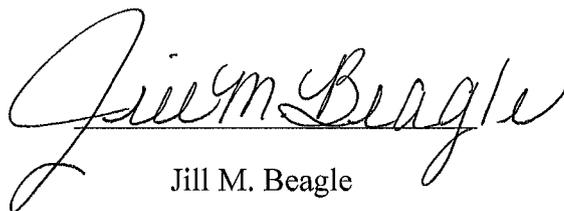
I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record via the means indicated:

Ladd Leavens
Davis Wright Tremaine LLP
1201 Third Avenue, #2200
Seattle, WA 98101
Via Hand Delivery

Richard P. Lentini
Ryan Swanson & Cleveland
Seattle, WA 98101-3034
Via Hand Delivery

Patricia H. Char
K&L Gates LLP
925-4th Avenue, Suite 2900
Seattle, WA 98104-1158
Via Hand Delivery

Dated at Seattle, Washington this 20th day of December, 2012.


Jill M. Beagle