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NO. 73209-9

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

In Re: The Richard C. Sweezy Trust of 1990,
RAE ANN ENGDAHL, Personal Representative of the
Estate of Richard H. Sweezy

Appellant,

v.

DAVID SWEEZEY and PAUL SWEEZEY as Co-Trustees of the
Richard C. Sweezy Trust of 1990, and

MICHAEL VRANIZAN, Trustee of Gary Sweezy Trust

Respondents.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- 1.** The trial court erred in the Order Granting Respondents' Motion for Summary Judgment entered on February 20, 2015 by granting Respondents' Motion for Summary Judgment and denying Petitioner's Motion for Summary Judgment.
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II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a TEDRA agreement that requires payment of an equalizing trust distribution to a remainder beneficiary as compensation for trust assets taken unlawfully by other remainder beneficiaries is defeated by survivorship language in the original trust document despite language in the TEDRA agreement stating the benefits inure to the benefit of the parties' estates and assigns. (Assignment of Error Nos. 2-5).

2. Whether a TEDRA agreement which provides that lifetime distributions to Beneficiaries “shall be” equalized, creates a mandatory payment obligation distinct from the final Trust distribution. (Assignment of Error Nos. 2-5).
3. Whether a survivorship requirement in a trust limiting inheritance to lineal descendants is amended by a subsequent TEDRA agreement that expressly inures to the benefit of the parties and their estates, heirs, executors, and assigns. (Assignment of Error No. 2).
4. Whether a trust beneficiary may assign their right to recover unlawfully taken trust assets to contingent remainder beneficiaries through a TEDRA agreement that requires payment to such beneficiaries without contingency. (Assignment of Error Nos. 2-5).
5. Whether a TEDRA agreement regarding the distribution of trust assets creates an obligation to distribute the assets according to the terms of the TEDRA agreement. (Assignment of Error Nos. 2-5).
6. Whether a court may award attorney fees against a party who brings an unsuccessful TEDRA action, when the issues presented are novel and unique and when the TEDRA petition sought to

define the disputed rights of the parties to a trust and TEDRA agreement. (Assignment of Error No. 6).

7. Whether attorney fees can be awarded under TEDRA absent specific findings of fact supporting the award. (Assignment of Error No. 6).

III. STATEMENT OF THE CASE

A. Introduction

This case involves interpretation of a settlement agreement entered into between the parties to a trust pursuant to Washington's Trust and Estate Dispute Resolution Act, RCW 11.96A ("TEDRA"). Appellant asks the Court to give meaning to all the provisions of this TEDRA agreement, including specifically the requirement that Respondents pay Appellant an equalizing payment to make up for previous unlawful trust transfers to two of the Respondents. Although the TEDRA agreement is unambiguous in requiring this payment to Appellant, it would also be unjust to allow Respondents to profit from past wrongdoing by avoiding their binding agreement to make the equalizing payment.

Respondents ask the Court to ignore the TEDRA Agreement and instead apply a trust survivorship requirement that would defeat Appellant's right to collect the equalizing payment. This argument misapplies Washington law, ignores the intent of the parties to the

agreement, renders express contractual language meaningless, incorporates language from one separate document into another when the language of the latter prohibits such result, and allows Respondents to profit from prior misdeeds that the TEDRA Agreement was intended to remedy.

Appellant respectfully requests this Court reverse the trial court, order summary judgment in favor of Appellant, award Appellant attorney fees, and reverse the trial court's award of attorney fees against Appellant.

B. The Sweezy Family

Richard C. Sweezy ("Dick") and June Sweezy ("June") had four sons, Richard H. Sweezy ("Rick"), respondent David Sweezy ("David"), respondent Paul Sweezy ("Paul"), and Gary Sweezy ("Gary"). CP 395. Gary Sweezy is also the beneficiary of respondent the Gary Sweezy Trust ("Gary Trust"). CP 406. Collectively David, Paul and the Gary Trust are referred to as "Respondents."

Rick married Rae Ann Engdahl ("Rae Ann") in 1985. CP 263. Rick had no biological children, but he raised Rae Ann's two children as his step-children, including designating them as his children in his will. CP 263, 268.

C. Dick Establishes the Trust for June's Benefit

In 1990, Dick established the Richard C. Swezey Trust of 1990 ("Trust") for the benefit of himself during his life and for the benefit of June after his death. CP 400-414, 416-419. The Trust provides that, upon June's death, the remainder is to be distributed in equal shares to the surviving remainder beneficiaries (Rick, David, Paul, and the Gary Trust) or to their descendants (not heirs) if Rick, David, Paul, or Gary died prior to June's death. CP 404-405. The Trust corpus consisted primarily of interests in closely held corporations. CP 439-440. The main operating company was City Electric. CP 264, 440.

Dick died in 1992. CP 264. The Trust became irrevocable upon Dick's death, and David, Paul, and Rick became co-trustees of the Trust. CP 264. After Dick's death and pursuant to the Trust terms, certain distributions were made to or for the benefit of his sons and the balance of the Trust was held for June's sole benefit during her life, with the co-trustees being required to pay all income to June during her life.¹ CP 405. No other Trust distributions were authorized. CP 400-414, 416-419.

¹ Apparently the Trust was a QTIP trust, which meant that to maintain QTIP status, the only permissible distributee of trust assets was June, as the surviving spouse. CP 307, 374.

D. David and Paul Take Control of the Trust

In 2004, David, Paul, and Rick executed a Joint Action and Consent of Trustees (“Joint Action”). CP 429-434. The Joint Action delegated day-to-day management of the Trust to an administrator (“Administrator”) - first David and then apparently Paul. CP 430, 439. The Joint Action also provided for a majority vote on Trust matters and provided that the Administrator would recommend the salaries for certain executive positions at Trust-owned corporations for approval by a majority of the co-trustees. CP 430, 433. The Joint Action also appointed David, Paul, and Rick to corporate executive positions at the Trust-owned companies. CP 431-432.

As June would later allege in her TEDRA petition, some of the new executive appointments were to defunct companies (*e.g.*, Trans-Alaska) or inactive companies (*e.g.*, Oilfield Electric). CP 431-432, 439-440. They were also appointed to executive positions at Rancho Del Sol, a Trust-owned ranch that provided employment for Paul, operated at a loss, and required significant infusions from the Trust to stay afloat. CP 431-432, 439. Under the Joint Action, Rick continued to act as CEO of City Electric, just as he had done since Dick’s death twelve years prior. CP 263, 432. The Joint Action also named Rick to various other management positions at the Trust-owned companies along with David

and Paul. CP 431-432. The Joint Action takes care to point out that these appointments were not intended to replace any existing employees, but the “change is a change in title only, and not employment unless relieved of duty.” CP 433.

E. David and Paul Unlawfully Take Trust Assets

June specifically alleged that David and Paul used their majority vote under the Joint Action to pay themselves huge salaries and bonuses for work they never performed for the Trust and alleged that Paul took a \$250,000 undocumented loan from the Trust. CP 440-441, 443-444. Collectively, David’s and Paul’s distributions of Trust assets to themselves in violation of the Trust terms and during their mother’s life are referred to herein as the “Unlawful Distributions.”

F. June Sues over the Unlawful Distributions

In 2009, June filed a TEDRA petition seeking recovery of the Unlawful Distributions taken by David and Paul (“June’s Petition”). June’s Petition also alleges that David and Paul had failed to meet their own trust administration standards as set forth in the Joint Action. CP 444. June’s Petition sought the removal of all three co-trustees, but acknowledged that only Rick had consented to resignation in favor of an independent fiduciary. CP 441.

June's Petition repeatedly points out that, of the three co-trustees employed by Trust-owned companies, only Rick actually performed work for a Trust-owned company. CP 440-441, 444. June's Petition punctuates this point by further alleging that David and Paul were not involved in the day-to-day operations and did not perform work for any Trust-owned company. CP 441.

G. The Parties Mediate and Execute a TEDRA Agreement

Prior to trial, the parties mediated and reached a settlement agreement resolving all claims, which they reduced to writing in a formal settlement agreement under TEDRA dated June 26, 2009 (the "TEDRA Agreement"). CP 448-453, 455-459. David, Paul, June, and Rick were all represented by counsel at the mediation and for negotiation of the TEDRA Agreement. CP 338-339. The trustee and beneficiaries of the Gary Trust received notice of the dispute and mediation, and the Gary Trust's interests were represented at mediation and in the TEDRA Agreement by the trustee of the Gary Trust.² CP 437, 448, 452, 455. After signing the TEDRA Agreement, the court approved the TEDRA Agreement, giving it the force of a final court order under RCW 11.96A.230. CP 337-339.

² The TEDRA Agreement is not clear on whether Paul was acting as sole trustee, or whether both June and Paul were acting as trustee of the Gary Trust. CP 448, 455.

H. The TEDRA Agreement Substantially Amends and Modifies the Trust

The preamble to Section III of the TEDRA Agreement states that the agreement's purpose is to resolve disputes, facilitate administration of the Trust, minimize risk, and avoid further expense of litigation. CP 449. The TEDRA Agreement proceeds to alter and amend the rights and obligations created by the Trust through multiple provisions governing the Trust and interested parties. For example:

1) Section III(C)(1) requires that any successor trustee be a corporate trustee, amending Trust provision 8.7, which placed no limitation on the identity of a trustee and allowed a trustee to designate a successor trustee;

2) Section III(C)(4) imposes new accounting requirements on the trustee, amending Trust provision 8.2, which contained no stated accounting requirement except when a beneficiary demanded one;

3) Section III(B)(4) mandates that the trustee maintain health insurance for the beneficiaries, altering the Trust by creating an entirely new duty for the trustee;

4) Section III(C)(5) requires a trustee obtain beneficiary approval for certain actions, altering the Trust by creating an entirely new duty for the trustee; and

5) Section III(G) fundamentally alters the Trust by allowing David and Paul to retain their Unlawful Distributions despite the fact that they were misappropriated from the Trust in violation of its express provision that June was to be the only beneficiary during her lifetime. CP 400-414, 416-419, 450-452.

The TEDRA Agreement also fundamentally alters and imposes new contractual duties upon the Trust through its three provisions most critical to the analysis in this appeal. First, it contains a provision requiring unconditional payments upon Trust termination to the Gary Trust and to Rick to compensate them for the Unlawful Distributions taken by David and Paul (“Unlawful Distribution Payment Provision”); second, it includes a provision expressly setting forth that the rights under the TEDRA Agreement inure to the benefit of the parties, their estates, assigns, and other successors (“Inurement Clause”); and third, it contains an express merger clause, stating that the TEDRA Agreement contains all the terms related to the issues it resolves (“Merger Clause”). CP 452.

1. The Unlawful Distribution Payment Provision

The Unlawful Distribution Payment Provision unambiguously requires a mandatory equalizing payment at June’s death:

Within three months of the brothers signing this Agreement, Rick, David and Paul will participate in an arbitration before Steve

Scott to determine the amount of distributions that the four brothers have received to date. Earned income shall not be considered a distribution. **To the extent the distributions are unequal, they shall be equalized** by the New Corporate Trustee upon June's death. (emphasis added).

Section III(G). CP 452. This mandatory payment provision makes no mention of any survivorship requirement.

2. The Inurement Clause

The Inurement Clause unambiguously requires that the benefits of the parties under the TEDRA Agreement inure to the parties' estates, executors, assigns, and other successors:

[The TEDRA Agreement] is conclusive and binding on and **inures to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each.** (emphasis added).

Section III(H)5. CP 452.

3. The Merger Clause

The Merger Clause clarifies that the TEDRA Agreement stands alone and contains the only terms to be considered when interpreting the rights and obligations arising from the TEDRA Agreement:

This Agreement contains the entire agreement between and among the parties with regard to the matters set forth herein ...

Section III(H)5. CP 452.

I. The Unlawful Distribution Payment Amount is \$829,490.94

After signing the TEDRA Agreement, and as required by the terms of the Unlawful Distribution Payment Provision, the parties engaged in binding arbitration to determine how much had been distributed to each of the beneficiaries, and what would be owed to those who had not received an unlawful advance Trust distribution. CP 462. The arbitrator entered an award finding David had received \$829,490.94³ (“Unlawful Distribution Payment”) and Paul had received \$679,062.31 in lifetime distributions from the Trust. CP 462. The arbitrator also found that Rick and Gary had received no advance or unlawful distributions from the Trust. CP 462.

J. David and Paul are Re-appointed as Co-Trustees and Breach Their Duty under the TEDRA Agreement

Rick died in July 2012, and June died in 2014. CP 264, 396. On June 2, 2014, the successor corporate Trustee filed a petition seeking to resign as Trustee of the Trust. CP 348. David and Paul filed a Response indicating that they agreed to the resignation and also denying the Trust’s obligation under the TEDRA Agreement. CP 351, 355. The court allowed the resignation, and re-appointed David and Paul as co-trustees. CP 360-367. However, the court required the Trust to grant a Deed of Trust in favor of the Estate to secure the Estate’s claim. CP 362. The

³ Apparently David and Paul reported these amounts as income. CP 645.

Estate subsequently filed its Petition for Declaration of Rights Under TEDRA, requesting the court enforce the plain language of the TEDRA Agreement and order David and Paul to pay the Unlawful Distribution Payment to Rick's Estate. CP 1-16.

K. Procedural History

The commissioner made no rulings at the initial hearing on the Estate's Petition, and set the matter for trial. CP 210-211. Prior to trial, the parties filed cross motions for summary judgment. CP 250-326, 368-390. In its Motion for Summary Judgment, the Estate asked the trial court to enforce the terms of the TEDRA Agreement as written by ruling that Rick's Estate had a right to receive the Unlawful Distribution Payment because the Trust survivorship requirement was amended by the TEDRA Agreement. CP 250-262. In their Motion for Summary Judgment, David and Paul asked the trial court to ignore the TEDRA Agreement's express language and instead apply the survival requirement from the Trust to disinherit Rick's heirs (Rae Ann and her children) as they were not Rick's descendants. CP 368-390. The Gary Trust joined David and Paul in opposing the Estate's Motion for Summary Judgment.

A hearing on the cross motions for summary judgment occurred on February 20, 2015. At the hearing, the trial court denied the Estate's Motion for Summary Judgment and granted summary judgment for David

and Paul (and the Gary Trust by association). CP 657-660. During oral argument, the trial court made clear in comments from the bench its belief that the determining issue was the Trust language and Rick's rights under the Trust, rather than the language of the TEDRA Agreement and how it altered Rick's and the Estate's rights:

“And so - - he [Rick] obviously has a - - an expectancy of - - in the trust, once she [June] dies - - why wouldn't he just figure that this is going to be equalized at the - - that the payment is going to take place as part of the equalization of the expectancies?”

RP 5.

The trial court confirmed this analysis during the oral ruling by stating that the parties' rights under the TEDRA Agreement were dependent on the language of the Trust:

“I think it is quite clear that you have to construe all of these agreements together - - the trust as the -- TEDRA agreement, and it is clear that this related to a right that Rick had as an expectancy, which is a - - a - - if he survived his mother, June, and he didn't, and so there's nothing to be paid out here.”

RP 10.

After granting summary judgment for Respondents, the trial court awarded attorney fees from Rick's Estate to both the Trust and the Gary Trust. CP 659. In making its decision, the court stated only: “I think an award of attorney fees is appropriate ...” RP 11.

The trial court then entered the Order Granting Respondents' Motion for Summary Judgment ("Order"), ruling that the TEDRA Agreement did not create a stand-alone payment obligation; that the Estate does not have an interest in the Trust because Rick did not survive June and died without leaving descendants; that the TEDRA Agreement did not create an obligation to pay Trust assets to Rick; that the deed of trust securing the Estate's claim should be released; and that it was equitable to award attorney fees against the Estate. CP 657-659. The Estate timely appealed. CP 781-787.

IV. ARGUMENT

A. Standard of Review

On review of summary judgment the court engages in the same inquiry as the trial court. *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 357, 110 P.3d 1145 (2005). Questions of law are reviewed de novo. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590 (1998). When parties dispute the legal conclusions resulting from facts, and not the facts themselves, the issues can be decided as a matter of law. *Blueberry Place Homeowners Ass'n.*, 126 Wn. App. at 358.

Attorney fee awards under TEDRA are reviewed under an abuse of discretion standard. *In re Wash. Builders Ben. Trust*, 173 Wn. App. 34, 84-85, 293 P.3d 1206 (2013).

B. The TEDRA Agreement is not Subject to the Survivorship Requirement of the Trust

A TEDRA agreement is a contractual arrangement between parties interested in a trust or estate. These agreements are authorized under both statute and common law, and they allow the parties to resolve any dispute they may have related to the trust or estate. These agreements are enforceable by the courts under general contract principles, and are not dependent on, or construed with, the terms of the disputed trust or will. These agreements can, and often do, create independent obligations in direct contravention of the underlying trust or will, or testator's or trustor's intent. Thus, when interpreting a TEDRA agreement, a court must interpret it as a stand-alone contract. The trial court failed to do this and instead incorrectly interpreted unambiguous language in the TEDRA Agreement through the lens of the Trust. This Court should reverse the trial court's decision, and apply Washington law to determine that the TEDRA Agreement created enforceable rights independent of the Trust.

1. The TEDRA Agreement is an Independent and Enforceable Contract

Under TEDRA, and specifically under RCW 11.96A.220, the legislature has created a mechanism for parties interested in a trust or estate to enter into binding agreements to resolve trust and estate disputes. If a TEDRA agreement is filed with the court, then it becomes the equivalent of a final court order. RCW 11.96A.230. When interpreting TEDRA agreements, a court applies general principles of contract law. *In re Estate of Bernard*, 182 Wn. App. 692, 709-714, 332 P.3d 484 (2014).

Even more generally, a TEDRA agreement settling a lawsuit (like this one), is a settlement agreement. Settlement agreements are construed in the same manner as contracts. *Condon v. Condon*, 177 Wn.2d 150, 162, 298 P.3d 86 (2013).

Washington has also long adhered to the family settlement agreement doctrine, which allows parties interested in an estate to enter into an agreement resolving their disputes that will be enforceable regardless of whether the agreement changes the distribution plan intended by the testator. *Collins v. Collins*, 151 Wn. 201, 215-216, 275 P. 571 (1929). In *Collins*, the court enforced a contract among the beneficiaries of a will that drastically altered the estate distributions. The Washington Supreme Court applied a pure contract analysis - reviewing offer,

acceptance and consideration. *Id.* at 210-17. The Court upheld the agreement, noting the importance of testamentary rights but also recognizing the right of heirs to enter into an agreement for an estate disposition different than that provided by the will. *Id.* at 215-216. The continued vitality of the family settlement doctrine is evident in the more recent case of *Hadley v. Cowan*, where the court applied general contract rules to interpret and enforce a family settlement agreement that changed the disposition provided for in the disputed will. 60 Wn. App. 433, 438, 804 P.2d 1271 (1991).

Thus, the TEDRA Agreement at issue here must be interpreted as a contract. The very first sentence of the TEDRA Agreement explicitly states that the agreement is entered into under RCW 11.96A.220. Even absent this statement, the TEDRA Agreement would need to be analyzed under contract law as a settlement agreement, and specifically under the family settlement agreement doctrine as a contract that will be enforced even if its terms directly contradict the terms of the Trust.

2. Contract Interpretation Generally

When interpreting a contract, a court looks to the objective manifestation of the intent of the parties. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this rule, “we generally give words in a contract their ordinary, usual, and popular

meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Id.* at 504. The court interprets what was written, and not what was allegedly intended to be written. *Id.* In short, a court looks to the plain language of the contract as the objective manifestation of the intent of the parties.

“Where the intention of the parties is clear from a written contract, the courts have nothing to construe and the contract language controls.” *Danielson v. City of Seattle*, 108 Wn.2d 788, 793-94, 742 P.2d 717 (1987) (appellate court reversed a trial court ruling that "essentially rewrote the clear language" of an agreement). Where language used is unambiguous, an ambiguity will not be read into the contract. *Wise v. Farden*, 53 Wn.2d 162, 167, 332 P.2d 454 (1958).

In addition to looking at the plain language, there is a strong presumption that the parties intend for each part of a contract to have some meaning, and therefore a court should give effect to each part of the contract, rather than render some of the language meaningless or ineffective. *Bogomolov v. Lake Villas Condo Ass'n of Apartment Owners*, 131 Wn. App. 353, 361, 127 P.3d 762 (2006). A court cannot expunge a lawful provision agreed to by the parties. *Warner v. Design & Build Homes, Inc.*, 128 Wn. App. 34, 41-42, 114 P.3d 664 (2005). Courts can neither disregard contract language which the parties have employed nor

revise the contract under a theory of construing it. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980).

Thus, the court must determine the intent of the parties to the contract, and the written words of the contract are the objective manifestation of that intent. The court gives the words their plain and ordinary meaning and cannot construe unexpressed meaning into or expunge words or provisions from the contract.

3. Trustor's Intent is Irrelevant when Interpreting a TEDRA Agreement

TEDRA contains no requirement that a TEDRA agreement comply with testator intent. To the contrary, TEDRA once contained such a provision and the Act was expressly amended to remove it. Specifically, former RCW 11.96.070 contained a requirement that actions could not be inconsistent with the testator's intent; however, this requirement was removed in the 1999 revisions to TEDRA, thereby allowing parties to agree to any resolution or modification of the document. Comments to SB 5196 (Ch. 42, Laws of 1999).⁴ This policy shift by the Legislature is profound, and has had a substantial impact on the law of trust and estate planning, administration, and disputes since its inception.

⁴ WSBA REAL PROPERTY, PROBATE & TRUST SECTION, COMMENTS TO THE TRUST AND ESTATE DISPUTE RESOLUTION ACT TEDRA § 104(1) (RCW 11.96A.030)—Matter at 1, (1999), available at www.wsbarppt.com/comments/tedra99.pdf.

Although there are not many published opinions addressing this issue, this Court recently upheld a TEDRA agreement that contradicted the trustor's intent. *In re Bernard*, 182 Wn. App. at 709-713. In *Bernard*, the court had to interpret both a trust, its amendment, and two TEDRA agreements. The trustor established a revocable living trust and later amended it. The trustor also entered into a TEDRA agreement with his son regarding the trust. *Id.* at 698-700. This Court used a standard analysis of trustor's intent for interpreting the trust, but also appropriate applied rules of contract interpretation to the TEDRA agreements. *Id.* at 704, 709-713.

This Court's recognition that trustor's intent is irrelevant when interpreting a TEDRA agreement is also consistent with decisions in other trust disputes involving statutory law. Washington courts recognize that common law duties to comply with trust terms can be superseded by statute. *Manary v. Anderson*, 176 Wn.2d 342, 360-62, 292 P.3d 96 (2013). In *Manary*, the Washington Supreme Court confirmed that while a common law revocation of a trust requires compliance with the trust instrument, the common law is irrelevant when the claimed revocation is based upon statutory authority. *Id.* at 360 ("Here, whether Homer satisfied the common law is irrelevant because Manary's claim is based on the

[Testamentary Disposition of Nonprobate Assets] Act.”)
(emphasis added).

Thus, it is clear that recent changes in TEDRA require a court to ignore trustor’s intent when interpreting a TEDRA agreement and instead to apply an unfettered contract analysis to determine the intent of the parties to the TEDRA agreement – even if doing so results in a complete unwinding of the trustor’s intent.

4. The Unlawful Distribution Payment Provision is an Absolute Obligation

The relevant part of the Unlawful Distribution Payment Provision provides: “to the extent the distributions are unequal, **they shall be equalized** by the New Corporate Trustee upon June’s death.” The meaning of this language is plain: whatever amounts had already been paid to some of the beneficiaries (*i.e.*, David and Paul), the amounts “shall be equalized” for the other beneficiaries (*i.e.*, Rick and the Gary Trust) at June’s death. That these obligations are mandatory is seen in the word choice “shall” and “will.” Shall and will are both words that impose a duty, and an ordinary and reasonable person would understand that obligation as absolute.

As required by *Hearst*, a court uses the ordinary and usual meanings unless “entirety of the document clearly demonstrates a contrary

intent.” 154 Wn.2d at 504. The TEDRA Agreement imposes no condition to receiving or paying the Unlawful Distribution Payment. The Unlawful Distribution Payment Provision simply provides that the lifetime distributions “shall be equalized.” Therefore, the Unlawful Distribution Payment Provision creates an absolute obligation for the trustee(s) of the Trust to make the Unlawful Distribution Payment to the Gary Trust and to Rick (or their successors, as argued below) without any condition or prerequisite. The trial court erred by reading the survival and descendants language from the Trust into this obligation.

5. The Inurement Clause Clarifies that the Parties’ Rights Inure to the Benefit of the Parties’ Estates, Heirs, and Assigns

Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it. *Farmers Ins. Co. of Washington v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976). An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective. *Newsom v. Miller*, 42 Wn.2d 727, 731, 258 P.2d 812 (1953). This should be especially true when the writing is the product of a long period of negotiation with both parties having been represented by competent counsel. *Wagner*, 95 Wn.2d. at 101; *accord*, *First Interstate Bank of Washington v. Lindberg*, 49 Wn. App. 788, 793,

746 P.2d 333 (1987) (“We prefer to construe the trust so as to give meaning to all words used.”).

The terms of the Inurement Clause in the TEDRA Agreement are clear and unambiguous. The Inurement Clause simply states that the TEDRA Agreement binds and benefits the parties and their “executors, administrators, personal representatives, heirs, successors, and assigns of each.” The plain and only meaning of these words is that the benefit (*i.e.*, the right to receive the Unlawful Distribution Payment) inures to the benefit of the parties’ specified successors. As a party to the TEDRA Agreement, Rick clearly had the right to receive the Unlawful Distribution Payment while he lived, so the only inquiry is whether the Estate fits within the definition of one of the enumerated successors that the Inurement Clause gives the right to enforce Rick’s right.

a. The word “inures” must be given its ordinary meaning

The word “inure” is defined as: “to come into operation: become operative,” and “to become legally effective.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1188 (2002).

Thus, the Inurement Clause language (that the TEDRA Agreement “inures to the benefit of the executors ... heirs, successors and assigns” of

the parties) means that the rights of the parties (to enjoy the benefits) become legally effective as to the parties' executors, heirs, and assigns.

b. The words “executors” and “personal representatives” must be given their ordinary meaning

It is beyond dispute that the words “executors” and “personal representatives” in the Inurement Clause refer to a party administering an estate. Here, of the two beneficiaries who did not take any advance unlawful distributions, only Rick was a natural person capable of having an estate upon death. Thus, the inclusion of these words must therefore have been intended to allow Rick's Estate to have the right to receive the Unlawful Distribution Payment in the event he pre-deceased June.

c. The word “heirs” must be given its ordinary meaning

The word “heirs” is defined as:

- (a) one who inherits or is entitled to succeed to the possession of property after the death of its owner, and
- (b) one who receives or is entitled to receive property during the lifetime of a former owner.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1050 (2002).

By contrast, the Trust only allowed the “descendants” of a beneficiary to inherit in the event the beneficiary pre-deceased June. The inclusion of the much broader term “heirs” in the TEDRA Agreement

therefore shows the intent of the parties to allow the right to receive the Unlawful Distribution Payment to pass to a broader class of “heirs” than the limited “descendants” already provided for in the Trust. Any reasonable person, especially a reasonable person like Rick who was in his 60s, happily married to his wife of nearly 25 years, and with only step-children as his “heirs” and no “descendants,” would read the inclusion of the word “heirs” in this clause as broadening the group of people who would receive the Unlawful Distribution Payment portion of the Trust to step-children,⁵ spouses, or any other party designated in Rick’s will.⁶

d. The word “assigns” must be given its ordinary meaning

The word “assigns” is synonymous with assignee, which is defined as “one to whom an assignment is made,” “one appointed to act for another,” and “one to whom a right or property is legally transferred.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 132 (2002).

The inclusion of “assigns” within the group of successors to whom the benefits of the TEDRA Agreement would inure can only be interpreted as allowing this right to be transferable to people other than those who

⁵ *See, e.g.*, RCW 11.04.095.

⁶ *E.g.*, parents, grandparents, nieces and nephews, etc.

already have the right to enforce the benefit (*i.e.*, descendants, estates, and heirs). This category of successor is very broad, has no corollary in the Trust, and alters the Trust and Dick's intent by allowing just about anyone to whom Rick or the Gary Trust assigned their right to be able to collect the Unlawful Distribution Payment upon June's death.

When read together, the Inurement Clause creates a broad class of people and entities who had the potential right to receive the Unlawful Distribution Payment. Because the Trust allowed only a narrow class of people to receive any distributions from the Trust, the Inurement Clause is therefore in direct conflict with the Trust's survivorship/descendants language, and must be interpreted to allow parties other than "descendants" to receive the contractually imposed Unlawful Distribution Payment in the event Rick or Gary pre-deceased June. Any other interpretation renders the Inurement Clause meaningless.

e. This Court's analysis should be guided by the Kansas decision of *Butts v. Lawrence*

Although interpretation of an inurement clause that amends a prior inheritance right is a *prima facie* question in Washington, the Kansas decision of *Butts v. Lawrence* is materially indistinguishable and should guide the Court here. In *Butts*, the court considered the enforcement of an inurement clause in the context of a statutory settlement agreement, and

determined the inurement clause expressly made the rights and obligations survive to the estates of the parties. 22 Kan.App.2d 468, 472, 919 P.2d 363 (1996). Specifically, the decedent's will gave his son a personal option to purchase estate-owned real estate. The son and other beneficiaries then entered into a settlement agreement resolving various estate-related disputes. The settlement agreement reiterated the purchase option and also included an inurement clause stating that the agreement was "binding upon the parties, their heirs, assigns and successors in interest, and is the full and complete agreement between the parties...." *Id.* at 470. The son died, the executor of his estate exercised the option, and the other parties objected by arguing the option was personal to the son since it had been personal under the will. The executor argued that, despite the language of the will, she could exercise the option due to the settlement agreement's inurement clause. *Id.*

The court agreed with the executor and enforced the inurement clause as written. The court found that family settlement agreements allow beneficiaries to agree to a distribution different than what is provided in the will and reasoned, because family settlement agreements are wholly contractual in nature, that the parties expressly made the agreement binding on the parties' estates, so the option survived to the son's estate. *Id.* at 471 -72.

The analysis in *Butts* is directly on point. Here, as in *Butts*, the TEDRA Agreement alters rights that were initially created in a testamentary document. In both *Butts* and this case, the interested beneficiary's right was one that required survival, but by executing a settlement agreement that plainly stated the agreement inured to the benefit of the parties and their heirs, executors, and assigns, the agreement transformed the right from one that required the beneficiary's survival to one that survived the death of the beneficiary. This Court should be guided by the *Butts* decision and give force and meaning to the Inurement Clause's plain language by determining that the right to receive the Unlawful Distribution Payment survived Rick pre-deceasing June and inured to the benefit of Rick's Estate.

6. By Including the Merger Clause, the Parties Intended the TEDRA Agreement to Stand-Alone

Generally, a merger clause states that the writing is the final expression of all the terms agreed upon and is a complete and exclusive statement of those terms. CALAMARI & PERILLO, CONTRACTS, s 3-6 142 (5th ed. 2003). If the writing is a complete integration, then any terms and agreements not contained in it are disregarded. *Lopez v. Reynoso*, 129 Wn. App. 165, 171, 118 P.3d 398 (2005). A merger clause is a strong indication that the parties intended a complete integration of the

written agreement. *Id.* at 173. Additional terms to a contract are incorporated only if the reference is clear and unequivocal. *W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 494, 7 P.3d 861 (2000). When there is a merger clause, a court cannot use extrinsic evidence to modify, vary, or contradict the terms of the contract. *King v. Rice*, 146 Wn. App. 662, 671, 191 P.3d 942 (2008).

Here, the Court must give the Merger Clause meaning since it is unambiguous and shows a clear intent to have the TEDRA Agreement speak for itself. Since the TEDRA Agreement modified the Trust distribution provisions, the Merger Clause is additional evidence that the TEDRA Agreement was intended to stand alone and not be overruled by inconsistent provisions of the Trust. Had the parties intended otherwise, they could have drafted a provision stating that the Trust would control in the event of any conflicts between the TEDRA Agreement and the Trust language. Not only did the parties not include such a provision, they instead drafted the Merger Clause to clarify that the TEDRA Agreement was not intended to draw in any language from the Trust and would stand alone as to every matter addressed by the TEDRA Agreement.

This analysis is confirmed by the fact that Respondents have stipulated that in every conflict between the TEDRA Agreement and the

Trust, with the exception of those provisions requiring the Trust to pay the Unlawful Distribution Payment to the Estate, the TEDRA Agreement controls. Respondents have provided no explanation why the other TEDRA Agreement provisions act to amend the express Trust terms (*i.e.*, accounting requirements, corporate trustee, allowing David and Paul to keep the Unlawful Distributions, etc.), but that the Unlawful Distribution Payment Provision, Inurement Clause, and Merger Clause all must be read to silently incorporate the Trust terms with which they conflict. No authority exists for such an interpretation.

The trial court erred by ignoring the Merger Clause and reading the Trust survivorship/descendants language into the TEDRA Agreement. This Court should give the Merger Clause its plain meaning.

7. The TEDRA Agreement is Itself an Assignment of Rights

The TEDRA Agreement must also be interpreted as an assignment of interests under a contract. It is first an assignment from June of her right to recover the Unlawful Distributions, and second an assignment from David and Paul to Rick and the Gary Trust of David's and Paul's right to receive the portion of the remainder of the Trust that would be used to pay the Unlawful Distribution Payment.

A beneficiary who has a remainder interest in a trust that requires surviving to trust termination has a vested interest subject to complete divestment. *Seattle First Nat. Bank v. Crosby*, 42 Wn.2d 234, 246-247, 254 P.2d 732 (1953). Under Washington law, a vested remainder subject to divestment is, absent a spendthrift provision in the trust, freely assignable. *Id.* Similarly, Washington courts will enforce agreements between remainder beneficiaries where the trust requires survival at termination, stating as a matter of fact that beneficiaries of such a trust can enter into agreements assigning their potential remainder interests, and that such an agreement is valid and enforceable. *Old Nat. Bank v. Campbell*, 1 Wn. App. 773, 779, 463 P.2d 656 (1970). Thus, a beneficiary of a trust that requires survival at termination, has a vested interest subject to complete divestment. Under Washington law, this interest is assignable, and Washington courts will enforce contracts that assign the remainder interest.

Here, David, Paul, Rick, and the Gary Trust all possessed vested remainder interests subject to divestment. Under Washington law, absent a spendthrift provision, which the Trust lacks, these interests are assignable. The TEDRA Agreement, and in particular the Unlawful Distribution Payment Provision which provides for a reallocation of that portion of the remainder of the Trust which makes up the Unlawful

Distribution Payment, functions as an assignment of a portion of the remainder of the Trust. This was effectively an assignment by David and Paul to Rick and the Gary Trust of David's and Paul's rights to receive the amount of the Unlawful Distribution Payment as part of their share of the Trust remainder distribution.

Likewise, June had a vested life income interest in the Trust, and the Unauthorized Distributions were amounts that rightfully should have been distributed to June. Thus, the TEDRA Agreement was effectively an assignment by June to Rick and the Gary Trust of her rights to recover the Unlawful Distributions. The fact that the Inurement Clause renders the TEDRA Agreement (and thus also the Unlawful Distribution Payment Provision) expressly assignable strengthens this conclusion.

8. Even Without the TEDRA Agreement's Unambiguous Language, the Right to Receive the Unlawful Distribution Payment Survives to Rick's Estate

In general, a contractual claim that is not for personal services is still valid after the death of a party. *MacDonald v. O'Shea*, 58 Wn. 169, 171-172, 108 P. 436 (1910). As one example, an assignable contract right extends beyond the death of a party. *Stark v. McCaw*, 8 Wn. App. 378, 381, 506 P.2d 863 (1973). The Washington Legislature has enacted a general survival statute, RCW 4.20.046, which allows causes of action arising out of contract or otherwise to "survive to the personal

representatives” of a deceased person, whether or not the action would have survived at common law. RCW 4.20.046(1). This general survival statute preserves causes of action a person could have maintained when alive. *Tait v. Wahl*, 97 Wn. App. 765, 772, 987 P.2d 127 (1999) .

Here, all parties interested in the Trust came to an agreement resolving their disputes. They executed the TEDRA Agreement to memorialize their settlement and filed that settlement agreement with the court, making it the equivalent of a court order. Washington statutes and common law allow and encourage such agreements, and Washington law requires they be enforced as contracts. It is immaterial to the analysis of these agreements whether they are compliant with testator’s intent. Thus, where the plain language of the TEDRA Agreement provides for an absolute payment obligation and provides that the agreement benefits the heirs, successors, and assigns of the parties, the TEDRA Agreement has created an absolute right that survives to a party’s estate. Ruling otherwise would require the Court to rewrite the contract for the parties.

Because the TEDRA Agreement is not a personal services agreement and is not personal to the parties, any cause of action arising from it therefore survives to a party’s personal representative. Rick’s right to receive the Unlawful Distribution Payment is such a claim, and it would survive to his Estate even absent the TEDRA Agreement’s plain language.

C. The TEDRA Agreement Created a Payment Obligation Distinct from the Trust

Under the family settlement agreement doctrine, property is viewed as passing between the beneficiaries via a contract, and not a testamentary transfer from the estate or trust. *Collins*, 151 Wn. at 216 (court conducts a survey of decisions, finds the great weight of authority supports enforcing family settlement agreements as agreement by one beneficiary “to pay money” to another). Family settlement agreements among beneficiaries (even contingent beneficiaries) are valid, enforceable, and are not a modification of the trust; rather they are a reallocation of the benefits due to the contracting parties. *Old Nat. Bank*, 1 Wn. App. at 779. Thus, rights under a family settlement or TEDRA agreement are wholly contractual, are in no sense testamentary, and the transfer of property among the beneficiaries is more appropriately viewed as a transfer subsequent to the receipt of the property from the testator.

This analysis clarifies that the Unlawful Distribution Payment is an obligation distinct from any distribution obligation from the Trust. Although David and Paul agreed the Unlawful Distribution Payment would be paid from the Trust remainder, this was just an allocation for funding the payment obligation. Thus, the TEDRA Agreement constitutes a reallocation of Trust assets between the beneficiaries and is now a valid

and enforceable obligation of the Trust, trustees, and beneficiaries. The trial court erred in ruling otherwise.

D. Respondents should be Equitably Estopped from Denying the Trust's Duty to Pay the Unlawful Distribution Payment to Rick's Estate

Even if the TEDRA Agreement were not enforceable under the statutory and contract rules cited above, David and Paul should be estopped from refusing to pay the Unlawful Distribution Payment. Equity in its broadest sense is fairness, and a most basic principle of equity is that a person should not profit from their wrongdoing. Equity should not be used to work an injustice, either by allowing a person to benefit from an unlawful act or by depriving an innocent person of a source of recovery. *In re Estate of Kissinger*, 166 Wn.2d 120, 131, 206 P.3d 665 (2009). In trust and estate cases, courts have great equitable authority.

In its technical application, equitable estoppel prevents a party from making a later claim where (1) one party has made an admission, statement or act inconsistent with the later claim; (2) another party reasonably relies on the admission, statement or act; and (3) the relying party would be injured if the first party is allowed to contradict or repudiate the admission, statement or act. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

Additionally, the Court has broad equitable authority under TEDRA. TEDRA grants the courts plenary power and “full and ample power and authority” to administer and settle all matters concerning estates and trusts. RCW 11.96A.020(1)(a), (b) . TEDRA further provides that if the title is in any case insufficient, the court nevertheless has full power to settle the matter in any manner that seems right and proper to the court. RCW 11.96A.020(2). Washington courts have upheld the trial court’s broad powers to settle matters under TEDRA. *E.g., In re Estate of Jones*, 170 Wn. App. 594, 604, 287 P.3d 594 (2012). Thus, courts in TEDRA matters have the equitable authority and plenary power to resolve matters in any way that seems right and proper to the court.

The trial court should have applied equitable estoppel to require Respondents to fulfill the promise they made to allow Rick’s Estate to receive the Unlawful Distribution Payment. During the Trust administration and prior to the signing of the TEDRA Agreement, David and Paul took the position that both their father’s intent and their mother’s rights were irrelevant by making distributions to themselves that violated their father’s intent as expressed in the terms of the Trust and that came at the expense of their mother’s current interest in the Trust. David and Paul further displayed their disregard for their father’s intent as trustor by

refusing to repay the Unlawful Distributions and instead negotiating to keep their ill-gotten gains through the TEDRA Agreement.

Rick, who had abided by the terms of the Trust and did not raid Trust assets, agreed, along with June and the Gary Trust, to allow David and Paul to keep the Unlawful Distributions. In return, those who had not taken unauthorized distributions (*i.e.*, Rick and the Gary Trust) were guaranteed an equalizing payment after June's death that would inure to the benefit of their heirs and assigns. Having no descendants and being beyond reasonable child rearing age and married to Rae Ann, it is reasonable to conclude that Rick relied upon the fact that his estate and heirs could enforce the promise if he died before June. Now, when Rick's Estate attempts to enforce the obligation that Rick and June negotiated for in good faith, Respondents seek to cloak themselves in the protection of the very Trust language and trustor's intent that David and Paul were earlier eager to ignore for their personal benefit. The reason for this sudden change is not hard to fathom – refusing to pay the Unlawful Distribution Payment will substantially increase their remainder share of the Trust. Respondents should be estopped from asserting their adherence to the Trust restrictions, and this Court, sitting in equity, should enforce the Trust's obligation to pay the Unlawful Distribution Payment to Rick's Estate.

E. The Court should Enforce the Promise to Pay the Unlawful Distribution Payment through Promissory Estoppel

Promissory estoppel applies to avoid injustice by enforcing a promise that the promisee reasonably relied on. A promise is a manifestation of intent to act so made as to justify a promisee “in understanding that a commitment has been made.” Restatement (Second) of Contracts s. 2 (1981). The promise is enforced by the court so that injustice can be avoided. *Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13, 32, 111 P.3d 1192 (2005). Promissory estoppel renders a promise made without consideration enforceable. *King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160 (1994).

The TEDRA Agreement contains a promise among the parties that Rick and the Gary Trust would receive a distribution equal to what David and Paul had given to themselves. It also shows Rick relying on that promise, altering his rights, and delaying his distribution until after his mother’s death. If this promise is not enforced, David and Paul, who already benefitted from unauthorized Trust distributions, further benefit by increasing their share of the Trust remainder by the amount that was promised to Rick. Rick, who took no unauthorized distributions, and who agreed to delay an equalizing distribution, will receive nothing. This is unjust and can be avoided by enforcing the promise.

F. The Trial Court Erred by Ordering the Deed of Trust Securing the Estate's Claim be Released

The trial court correctly required David and Paul to record a deed of trust in favor of Rick's Estate to secure the Estate's claim. For the same reasons set forth above, the trial court erred in ordering this security to be released. This Court should reverse this ruling and require the deed of trust to be replaced with similarly adequate security for the Estate's claim.

G. The Trial Court Erred in Awarding Attorney Fees to Respondents and Denying the Estate's Request for Fees

Attorney fees in TEDRA actions are available under RCW 11.96A.150, which provides:

[T]he 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. The court may enter the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines **to be equitable**. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved. (Emphasis added).

Attorney fees awarded under TEDRA are awarded under an equitable standard, and not a prevailing party standard. *In re Estate of Evans*,

181 Wn. App. 436, 450-452, 326 P.3d 755 (2014). Equity requires some finding of fault that in fairness requires a party to pay. *In re Guardianship of McKean*, 136 Wn. App. 906, 920, 151 P.3d 223 (2007).

The trial court appears to have incorrectly applied a prevailing party standard. At argument, David and Paul asked for fees for “defending the trust.” RP 11. The trial court, in granting the fees, stated, “I think an award of attorney’s fees is appropriate,” and provided no further oral explanation for the award. RP 11. The order entered by the trial court identifies RCW 11.96A.150 as granting the court authority to award fees, and further states it is equitable to award fees to the Trust for having to incur the cost of an “unsuccessful and meritless attack.” CP 659. This is not a sufficient equitable basis for a fee award under TEDRA.

As an initial matter, when a court makes an award of fees, the basis for and the calculation of an attorney fee award should be supported by appropriate findings and conclusions. *Bentzen v. Demmons*, 68 Wn. App. 339, 350, 842 P.2d 1015 (1993). *See also, Stover*, 178 Wn. App. at 564 fn 11 (appellate court reversed a TEDRA fee award on equitable grounds and noted that, in making the award of fees, the trial court’s findings of facts and conclusions of law failed to identify any statutory, contractual or equitable justification for the award). Here, the

trial court made almost no findings to support its award of attorney fees against the Estate, so this Court has little to analyze how the trial court exercised its discretion, or even whether the appropriate standards were considered.

Moreover, fees are unwarranted when a TEDRA case presents unique issues. *Bale v. Allison*, 173 Wn. App. 435, 461, 294 P.3d 789 (2013). When the dispute presents a novel issue, an award of fees is inappropriate. *In re Estate of Stover*, 178 Wn. App. 550, 564, 315 P.3d 579 (2013). When parties bring claims in good faith on a debatable issue, it is equitable for all parties to bear their own litigation costs. *Jones*, 170 Wn. App. at 612-613; accord *In re Estate of D'Agosto*, 134 Wn. App. 390, 401-402, 139 P.3d 1125 (2006) (appellate court reverses a trial court fee award to the prevailing party because the issue presented was a novel issue of statutory interpretation). A claim is not frivolous if it is not without legal support. *In re Estate of Wegner*, 157 Wn. App. 554, 563-564, 237 P.3d 387 (2010). Thus, if a party to a TEDRA petition raises a novel issue in good faith, it is an abuse of discretion to award fees against that party for not prevailing.

Furthermore, Washington courts typically only award fees in TEDRA litigation against parties personally upon a showing of misbehavior. *Foster v. Gilliam*, 165 Wn. App. 33, 48-49, 56-58,

268 P.3d 945 (2011) (fees awarded against the trustees personally because of their breaches of fiduciary duty); *In re Estate of Jones*, 152 Wn.2d.1, 20-21, 93 P.3d 147 (2004) (fees awarded against the personal representative personally because his breaches of fiduciary duty caused the litigation); *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 15, 177-78, 855 P.2d 680 (1993) (pre-TEDRA case applying similar rule where court equitably assessed fees against trustee where breach of its fiduciary duty caused litigation); *Allard v. Pac. Nat. Bank*, 99 Wn.2d 394, 407-08, 663 P.2d 104, 112 (1983) (pre-TEDRA case applying similar rule where court awarded fees from the trustee bank because the trustee bank's breach of fiduciary duty caused the litigation). Thus, Washington courts typically award fees using the TEDRA equity standard where a party's misconduct caused the litigation, as with a breach of fiduciary duty.

Not only does the application of the appropriate equitable standard require reversal of the fee award from the Estate, it also supports an award of fees to Rick's Estate. Based on the plain language of RCW 11.96A.150(1) and well established case law, it is proper for a court to award fees to all parties from the trust or estate when all beneficiaries participate and the issue is a novel issue of law. *Evans*, 181 Wn. App. at 452. Where all the beneficiaries are involved in the litigation, even with competing claims, an award against the estate can be justly imposed

because the litigation ascertains the respective rights of the parties. *In re Estate of Watlack*, 88 Wn. App. 603, 612-613, 945 P.2d 1154 (1997). The application of this rule is perhaps best set forth in the case of *In re Estate of Black*, where the Washington Supreme Court affirmed an appellate court decision finding it was an abuse of discretion to award attorney fees to only one party from the estate in a will contest, finding that fees should have been awarded to both or to neither. 153 Wn.2d 152, 173 -174, 102 P.3d 796 (2004). Thus, when all the beneficiaries are involved and litigation resolves doubtful rights, if a court awards fees to any party, it is appropriate to award fees to all the parties from the estate or trust, not to just the prevailing party against the other party personally.

Here, Rick's Estate brought a good faith claim with a reasonable basis. The Estate's position was based on a fair reading of the law on the question of the continued validity of a substantial preexisting right under the TEDRA Agreement. The claim has a legal basis on theories of TEDRA agreements, settlement agreements, and family settlement agreements, and attempts to determine the rights of all parties to the Trust. Therefore the trial court should have awarded the Estate its attorney fees regardless of how it decided the case.

Finally, equitable considerations support a reversal of the award and an award to Rick's Estate. As trustees of the Trust, David and Paul

were sued by their own mother for breach of fiduciary duty. As determined in the arbitration award, they took up to \$829,490.94 in Unlawful Distributions from the Trust. Rick, their co-trustee, was found to have taken no unauthorized distributions. Awarding David and Paul attorney fees from Rick's Estate punishes the innocent party and rewards David and Paul for breaching their fiduciary duty. This is the opposite of equity, and this Court should reverse the trial court's decisions.

V. THE ESTATE OF RICHARD H. SWEEZEY'S REQUEST FOR ATTORNEY FEES

If fees are allowed at trial, then the prevailing party may recover on appeal as well. *Landberg v. Carlson*, 108 Wn. App. 749, 758, 33 P.3d 406 (2001). RCW 11.96A.150(1) expressly provides for attorney fees at both the trial court and the appellate court: “[e]ither the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys’ fees, to be awarded to any party ... as the court determines to be equitable.” RAP 18.1(a) provides further authority for an award of fees on appeal.

For the reasons discussed above, namely that this case presents a novel and unique issue and the decision resolves the rights of all parties, an award of attorney fees to the Estate is appropriate. An award of attorney fees to the Estate would also confirm the equitable standards of

TEDRA by awarding fees to the estate of the only trustee/beneficiary who did not abuse his position to distribute Trust assets to himself. The Estate respectfully requests that the Court grant the Estate its attorney fees and costs on appeal.

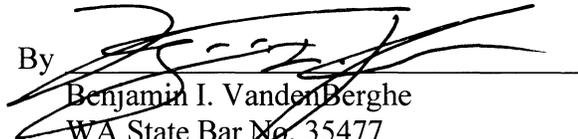
VI. CONCLUSION

A plain reading of the TEDRA Agreement and application of the cannons of contract interpretation require the Court to give force to the Unlawful Distribution Payment Provision, Inurement Clause, and Merger Clause, and result in a conclusion that Rick's Estate has the right to enforce the Trust's and Respondents' obligation to pay the Unlawful Distribution Payment independent of the survivorship/descendants language in the Trust. The Court should also use its broad equitable power to estop Respondents from denying this obligation, to reverse the trial court's award of attorney fees against the Estate, and to award attorney fees against Respondents.

RESPECTFULLY SUBMITTED this 3rd day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 3, 2015, I sent via legal messenger a true and correct copy of (1) Brief of Appellant and (2) Verbatim Transcript of Proceedings addressed to:

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