ORIGINAL

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Estate of Rose P. Sowder, Respondent

v.

Diane Thompson & Sandra Mitchell, Appellants

No. 40930-5-II

BRIEF OF APPELLANT

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I. INTRODUCTION

This case is an appeal from the Order on Respondent's Motion for Summary Judgment entered by Kitsap County Superior Court Judge Leila Mills on June 8, 2010, concerning the estate of Rose Sowder ("Rose"), who passed away on March 18, 2006 at the age of 102. Rose had long expressed her testamentary intent that her estate be divided equally between her three daughters, and she left a will and trust so providing. The dispute leading to this appeal concerns an ambiguous clause that was added to the trust in 2002, when Rose was 98 years old and after she had moved from her long-time home in Maryland to live with one of her daughters here in Washington. The trial court interpreted the clause to require a distribution that gave two of Rose's daughters $75,000 more than her third daughter, thereby defeating Rose's long-standing testamentary intent. This appeal is brought by two of Rose's daughters, even though one of them would benefit from the court's ruling. Both believe the court's ruling does not reflect their mother's wishes for her estate and tarnishes their mother's legacy.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Order on Respondent's Motion for Summary Judgment on June 8, 2010, determining that Diane Thompson's Distributive Share Of Rose Sowder's Estate Should Be Reduced By $50,000.

2. The trial court erred in entering Order on Respondent's Motion for Summary Judgment on June 8, 2010, dismissing appellants' claims that Trustee and Personal Representative Cynthia Picha breached her fiduciary duties and should be removed.

3. The trial court erred in failing to award attorney's fees to claimants Diane Thompson and Sandra Mitchell.

Issues Relating to Assignments of Error

1. Was it error for the trial court to enter summary judgment interpreting the a clause in the decedent's trust in a manner that omitted giving effect to some of the language of the clause and that was contrary to the decedent's long-stated intent? (Assignment #1)

2. Was it error for the trial court to enter summary judgment interpreting a clause in the decedent's trust when there are disputed issues of fact concerning the decedent's intent? (Assignment #1)

3. Was it error for the trial court to enter summary judgment interpreting a conditional clause in the decedent's trust when there are disputed issues of fact concerning whether the conditions were met? (Assignment #1)

4. Was it error for the trial court to enter summary judgment dismissing claims for breach of fiduciary duty by, and removal of, the

Trustee/Personal Representative, when there were disputed issues of fact regarding whether she had breached her fiduciary duties? (Assignment #2)

5. Was it error for the trial court to fail to grant appellants' request for attorney's fees for defending the summary judgment motion? (Assignment #3)

6. Are appellants entitled to attorney's fees on this appeal? (Assignment #3)

III. STATEMENT OF THE CASE

A. Facts

This matter concerns the estate of Rose Sowder ("Rose"), who died March 18, 2006 at the age of 102 . (CP 302). Rose lived most of her life in Sandy Spring, Maryland, near where her oldest daughter, Sandra Mitchell ("Sandra") and her youngest daughter, Diane Thompson ("Diane") still live. Rose's middle daughter, Cynthia Picha ("Cynthia") lives here in Washington. Rose had five grandchildren: Hugh Mitchell and Mariamne (Mitchell) Okrzesik, Frank Picha, and Lynn and Christine Thompson. (CP 77). Rose enjoyed close relationships with her daughters and grandchildren. (CP 397). Rose, Diane and Cynthia shared a hobby of gem collecting and jewelry making. They enjoyed attending gem shows and making jewelry which they shared with one another. Rose enjoyed wearing jewelry and accumulated a large collection of jewelry during her life. For safekeeping,

Rose would store many of her jewelry pieces along with her silver service in the safe that Diane had in her home in Potomac, Maryland. Rose would exchange jewelry with what was in the safe, depending on what she felt like wearing for different occasions. (CP 362).

In the 1980s and 1990s, Rose began planning for her estate. She had long expressed her desire to give items of personal property to family and friends and have her remaining estate divided equally between her three daughters. (CP 400). She wrote a will and established a trust expressing this intent, and gave copies to her daughters. (CP 52; CP 400). In line with her expressed intent, Rose commenced a pattern of giving away most of her jewelry, silver and other items of personal property. In 1982, she prepared detailed gift lists, giving away items of personal property including much of her jewelry to designated recipients. These lists were handwritten and signed by Rose, and many stated at the top "gift today." (CP 321-329). In 1998, Rose made additional gift lists. These were partly typed and partly handwritten on what appear to be fill-in forms. (CP 330-37). Although they were entitled "Bequeath" lists, everyone including Cynthia understood Rose intended to gift the property listed at that time. (CP 219 (silver to Lynn); CP 390 (silver to Lynn); CP 394 (china to Christine)). Rose gave some of the items directly to the designated giftees, (CP394; CP 397) and some she asked Diane to hold in her safe on behalf of the recipients. (CP 360; CP 395

(rings to granddaughters)). She left copies of both the 1982 and the 1998 lists with Diane for safe-keeping. (CP 360). Some of the recipients asked Diane to keep their gifts, because they were in school or in the military. (CP 391; CP 398). Rose also entrusted Diane with paying the utility bills for the family's vacation property located in Hayden Lake, Idaho. (CP 361).

In 2001, at the age of 97, Rose moved from Maryland to live with her middle daughter Cynthia in Manchester, Washington. (CP 360; CP 394; CP 400). Even after her move, Rose continued to make gifts of her property. For example, when her two granddaughters visited her in August of 2002, she gave Christine a set of handmade braided rugs. (CP 395).

On May 1, 2002, at the age of 98 and after living with Cynthia in Washington for a year, Rose executed a new will and a second amendment to her trust, naming Cynthia as the both Personal Representative under the will and successor Trustee of the trust. The will and trust still provided for distribution of items of personal property to family and friends and for division of the remaining estate equally between the three daughters. (CP 339-358). However, the amendment to the trust added a new clause, which is the source of this dispute. It provided:

> I have certain items of jewelry, and sterling silver and other tangible personal property, which I own, but are currently being held by my daughter Diane. I have requested that such items be returned to me. If they have not been returned to me, I direct that the Trustee deduct the sum of Fifty Thousand Dollars ($ 50,000.00) from the share

> otherwise due Diane and add Twenty Five Thousand Dollars ($25,000.00) each to the share due Sandra and Cynthia in subpart 4., below. To make the determination as to whether or not such items have been returned to me, I direct that any written correspondence from me or from the Trustee to my attorney shall be conclusive evidence that such items have been returned. In the event of no such confirmation, it shall be determined that such items have not been returned.

(CP348).

The specific items being referred to in this amendment have never been identified. (CP 218; CP 283-86). The attorney who drafted the amendment stated that he was only provided with the language used. (CP 224-25). The reference to "sterling silver" is particularly baffling, since even Cynthia admitted that Rose had given her sterling silver to her granddaughter Lynn before moving to Washington. (CP 219; CP 390). Further, despite the contrary statement in the amendment, there is no evidence Rose ever requested the return of any of the items being held for safekeeping by Diane on behalf of the family members to whom they were given as gifts. (CP 391; CP 395) Despite testifying at her deposition that Rose complained repeatedly, especially after this amendment was made, about not getting back items Diane was holding, Cynthia never wrote or called Diane or Sandra to tell them of Rose's distress or to ask what items Diane might be holding. (CP 281; CP 388; CP 400). Cynthia also did not send copies of the new will and trust amendment to either Sandra or Diane, so neither was

aware until after Rose's death that Rose believed Diane still had some of her personal property in storage. (CP 400). Interestingly, Rose's alleged distress about getting back personal property from Diane did not stop her from making further gifts of her personal property to Diane's daughter Christine when she visited Rose in Washington in August of 2002. (CP 232).

Following Rose's death, Diane distributed the remaining gifts she was holding to the owners, as Rose had requested she do. She attempted to give items belonging to Cynthia and her son to Cynthia in August, 2006, when the family met at the family lake cabin in Hayden Lake, Idaho, for Rose's memorial service. Cynthia refused to accept them, and asked Diane to send them to Rose's attorney. (CP 360). In her trial brief, Cynthia explained that she felt she had a fiduciary duty to make sure there was an accounting for the gifts in order to prevent the reduction to Diane's share provided for in the 2002 amendment:

> MS. PICHA was endeavoring to comply with Article IV B3 of the TRUST in order to confirm the receipt of the items on the Lists referenced by this provision as well as to prevent the reduction in the distributive share of MS. THOMPSON as required by this provision.

(CP 59). At Cynthia's request, Diane sent items intended for Cynthia and her son to Rose's attorney, Mr. Sherrard. She included copies of Rose's gift lists and, in a letter dated October 18, 2006, she provided a detailed accounting of who had received the various items on the lists and how she

had distributed the gifts she had been holding for various family members. She included signed receipts for those items. With reference to the items belonging to Cynthia, Diane stated:

> The enclosed jewelry items are the last that I have held in safekeeping *for any family member*. ... I attempted to give Cynthia the items that were designated for her while at Hayden Lake this summer. She refused to accept them and asked that I send them to you to distribute to her.

(CP 360, emphasis added). Diane asked the attorney to have Cynthia sign a receipt for the items, which Cynthia did. (CP 298).

Thereafter, Sandra and Diane had some concerns about Cynthia's management of the estate, including the lack of accountings, investment choices made, and delays in delivering items of Rose's personal property which were in Cynthia's possession. (CP 360; CP 400). Their concerns came to a head when Cynthia, as personal representative of the estate and successor trustee of the trust, proposed a distribution that reduced Diane's share of the estate by $50,000, pursuant to the 2002 trust amendment, even though Cynthia could not identify any item of personal property, owned by Rose at the time of her death and held by Diane, that had not been returned. Believing that Cynthia, as trustee of the trust, had a duty to send the written correspondence required by the 2002 trust amendment, and concerned that Cynthia's conflict of interest was causing her to breach her duty of loyalty to the trust beneficiaries, Diane filed a request for mediation pursuant to the

Washington Trust and Estate Dispute Resolution Act (TEDRA) hoping a professional mediator could assist in resolving this family dispute. (CP 6-10).

B. Prior Procedure

TEDRA Mediation Request. Judicial probate of the Rose's estate had been opened in Kitsap County Superior Court. On March 6, 2009, Diane Thompson filed a Notice of Mediation pursuant to the Trust And Estate Dispute Resolution Act (TEDRA), RCW 11.96.300, asking for issues concerning breach of fiduciary duty by Cynthia and her removal as both Trustee and Personal Representative be resolved by mediation. (CP 6-10). In response, Cynthia filed a Petition Objecting to Mediation and Requesting Judicial Determination of Matters, on March 26, 2009. (CP 1-4). In that Petition, Cynthia requested a judicial determination that Diane's share of the estate be reduced by $50,000 as provided in the 2002 trust amendment. Sandra appeared and joined Diane in filing a response seeking to have their dispute with their sister sent to mediation. (CP 16-37). In an order dated June 2, 2009, court determined that the matter should not be mediated and set for trial both the breach of fiduciary duty issues raised by Diane and Sandra, and the determination whether Diane's distributive share of the decedent's personal property should be reduced by $50,000, as requested by Cynthia. (CP 45-46).

Appellants' Motion for Partial Summary Judgment. On January 21, 2010, Diane and Sandra filed a Motion for Partial Summary Judgment seeking a determination that Rose had already made a gift of her silver prior to the 2002 trust amendment, and therefore did not own any silver that the 2002 trust amendment could apply to. They requested that the court find that Cynthia breached her fiduciary duty of loyalty by failing to inform the estate's attorney of this fact. (CP 102-140). The motion was based on Cynthia's admission in her deposition that Rose had given away her silver to her granddaughter before moving to Washington. (CP 219-220). In response, Cynthia admitted that:

> To determine if MS. THOMPSON's share should be reduced, it must be determined whether or not MS. THOMPSON returned "certain items of jewelry and sterling Silver and other tangible personal property," to MS. SOWDER.

(CP 147). She argued that there was a dispute of fact regarding whether there were other items of silver not given away (CP 144-152), and the court denied the motion on February 19, 2010. (CP 237-238).

On May 7, 2010, shortly before the trial which was then scheduled for June 21, 2010, Cynthia moved for summary judgment dismissing all the claims against her and determining that Diane's distributive share of the estate should be reduced according to the 2002 trust amendment. In support of the motion, she made three arguments. First, she argued that Diane

admitted she held jewelry belonging to Rose when she sent Cynthia's gifts to attorney Sherrard as Cynthia requested. The motion quoted Diane's statement that the "enclosed jewelry items are the last that I've held" but omitted the rest of the sentence: "in safekeeping for any family member." Second, Cynthia argued that as trustee, she "had no duty to investigate beyond confirming with the estates attorney whether or not the items were returned to MS.SOWDER." (CP 248). No support for this assertion was provided, except for an attached copy of the trust document which clearly provides that the successor trustee "shall assume all the duties imposed on the original Trustee." (CP 261). Third, Cynthia asserted that she had actual knowledge that items were not returned to Rose, because she had overheard Rose discussing this fact. (CP 242-252).

In response, Diane and Sandra contended, as they have throughout this dispute, that the reduction to Diane's share only applied if there were items still owned by Rose, in Diane's possession, requested by Rose and not returned. The little evidence presented by Cynthia—hearsay about statements Rose had made—at best created an issue of fact. Diane and Sandra also argued that the trust directed the trustee to send written correspondence to Roses' attorney if there were no items meeting the stated criteria. Cynthia's refusal to do so violated her fiduciary duty of loyalty to them as beneficiaries of the trust. (CP 303-319).

In her Rebuttal brief, Cynthia argued for the first time that she did not have a duty to determine if there were any items not returned to the estate, because the word "trustee" as used in Article IV B 3 of the 2002 trust amendment did not really mean trustee, but only meant the trustee before Rose's death, which was Rose herself. She also argued that the gifts Rose made and recorded in her 1982 and 1998 gift lists were not really gifts but bequeaths, contradicting her own deposition testimony that the items on the 1998 lists, such as Rose's silver flatware, were things Rose gave away before she moved to Washington. (CP 416-421).

At the end of oral argument on the motion, at which Ms. Carrie Eastman represented Cynthia, the judge introduced a new interpretation of the reduction clause of the 2002 trust amendment. The following exchange took place:

> THE COURT: So effectively, through this clause, Ms. Sowder had determined that even if she received everything back, this would effectively be a deduction of $50,000, if she chose to keep a deduction of $50,000, with no factual basis. In other words, she could have received everything back. Everything could have been complied with so far as the loan or caretaking of the jewelry. But if she received it all back, she would still, at the end of the day, have the ability to reduce the payout, if you will, by $50,000 simply because she wants to, for no factual reason.
>
> MS. EASTMAN: I suppose hypothetically that is accurate, Your Honor. We know items were not returned. We know that they were returned after the fact.
>
> THE COURT: But that would be an issue of fact.

> MR. VANE: That's a factual issue, Your Honor.
>
> THE COURT: That would be an issue of fact. The real question is, in this case, does it matter whether they were returned? If, in fact, that letter was not received by the attorney, is that the only issue in this case?

(VT 12). The court took the motion under advisement and on June 8, 2010, issued an order granting the motion, determining that the reduction should apply and dismissing the claims against Cynthia, without any findings or conclusions and without any explanation of the basis for her ruling. The court denied both parties' requests for attorney's fees. (CP 424-25). Since the judge's order failed to comply with the requirement of CR 56(h) that all evidence considered be listed in the order, Cynthia's attorney prepared and presented an Order of Dismissal containing such a list, which the judge signed on June 18, 2010. (CP 432-44). Diane and Sandra filed this appeal from the Order on Respondent's Motion for Summary Judgment on July 8, 2010. (CP 436-438). Cynthia did not appeal the denial of her request for attorney's fees.

IV. ARGUMENT

Standard on Review

The standard of review of an order granting summary judgment was set forth in *Trimble v. Washington State University*, 140 Wn.2d 88, 993 P.2d 259 (2000) as follows:

> The standard of review on summary judgment is well settled. Review is de novo; the appellate court engages in the same inquiry as the trial court. *Benjamin v. Washington State Bar Ass'n,* 138 Wash.2d 506, 515, 980 P.2d 742 (1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Clements v. Travelers Indem. Co.,* 121 Wash.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c). All facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Clements,* 121 Wash.2d at 249, 850 P.2d 1298 . "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clements,* 121 Wash.2d at 249, 850 P.2d 1298 (citing *Wilson v. Steinbach,* 98 Wash.2d 434, 656 P.2d 1030 (1982)).

140 Wn.2d at 92-93. *Accord, Korslund v. Dyncorp Tri-Cities Services, Inc.,* 156 Wn.2d 168, 177, 125 P.3d 119 (2005); *Hubbard v. Spokane County,* 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002).

A. Summary Judgment Should Be Reversed Because There Are Issues Of Fact Regarding Whether Diane's Distributive Share Of Rose's Estate Should Be Reduced By $50,000.

1. There Is A Dispute Of Material Fact Concerning The Testator's Intent.

The paramount duty of a court in construing a will is to give effect to the testator's intent. *In re Estate of Bergau,* 103 Wn.2d 431, 435, 693 P.2d 703 (1985); RCW 11.12.230. Similarly, the objective in interpreting a trust is to determine the intent of the trustor. *Old Nat'l Bank & Trust Co. of Spokane v. Hughes,* 16 Wn.2d 584, 587, 134 P.2d 63 (1943); *Seattle First Nat'l Bank v. Crosby,* 42 Wn.2d 234, 246, 254 P.2d 732 (1953). The determination of the testator's intent is a question of fact. *Eisenbach v.*

Schneider, 140 Wn. App. 641, 651, 166 P.3d 858 (2007); *In re Estate of Soesbe*, 58 Wn.2d 634, 636, 364 P.2d 507 (1961). If possible, the testator's intention should be ascertained from the language of the will itself, giving effect to every part thereof. *Bergau*, 103 Wn.2d at 435. Similarly, a court should construe provisions of a trust "so as to give meaning to all words used." *First Interstate Bank of Washington v. Lindberg*, 49 Wn. App. 788, 794, 746 P.2d 333 (1987). The court should consider the surrounding circumstances in interpreting the language used.

> Because a testator employs language in the will with regard to facts within his knowledge, the court must consider all the surrounding circumstances, the objects sought to be obtained, the testator's relationship to the parties named in the will, his disposition as evidenced by provisions to be made for them and the general trend of his benevolences as disclosed by the testament.

Bergau, 103 Wn.2d at 436. When any uncertainty arises regarding the testator's true intention, extrinsic evidence of surrounding facts and circumstances is admissible to explain the language of the will or trust. *Bergau*, 103 Wn.2d at 436; *In re Estate of Curry*, 98 Wn. App. 107, 113,988 P.2d 505 (1999), *rev. denied* 140 Wn.2d 1016 (2000). Where there is a dispute concerning the testator's intent or concerning the surrounding circumstances, summary judgment is not appropriate.

This Court should reverse the trial court's order granting summary judgment because there is an issue of fact, on which reasonable minds could

differ, concerning the testator's intent. Appellants have always contended that Rose intended that Diane's distributive share be reduced only if items of personal property owned by Rose, held be by Diane, and requested to be returned were not returned. The alternate interpretation the judge suggested at oral argument at best creates an issue of fact with regard to Rose's intent. As noted above, the determination of the testator's intent is a question of fact. *Eisenbach v. Schneider*, 140 Wn. App. at 651; In re *Estate of Soesbe*, 58 Wn.2d at 636. Courts "must endeavor to give effect to the testator's subjective intent...." *In re Estate of Smith*, 40 Wn. App. 790, 795, 700 P.2d 1181 (1985). Summary judgment would be appropriate only if, viewing the facts and reasonable inferences in the light most favorable to appellants, "reasonable persons could reach but one conclusion." *Trimble*, 140 Wn.2d at 93. Such is not the case here.

The language of the trust document does not support finding, as a matter of law, that Rose intended to reduce Diane's share, by simply not writing a letter, even if all property owned by Rose had been returned, as Judge Mills suggested in her discussion with counsel during oral argument. Had that been Rose's intent, she could easily have so stated. Instead, the clause focuses on whether property was returned to the estate, and provides for written correspondence confirming "that such items have been returned." *See, e.g. In re Estate of Price*, 75 Wn.2d 884, 888, 454 P.2d 411 (1969)

(court rejected argument that a bequest to testator's surviving children was meant to include the grandchildren of a child that later died, stating: "If the testator had wanted to provide for grandchildren, it would have been easy to do so in the customary way...."). Notably, even Cynthia's attorney did not argue that the reduction clause applied regardless of whether all property still owned by Rose was returned to the estate.

The interpretation suggested by the judge also ignores and makes superfluous the provision of the trust that "any written correspondence ... *from the Trustee* to my attorney shall be conclusive evidence that such items have been returned." (CP 164, emphasis added). Contrary to the argument Cynthia made in her rebuttal brief, nothing in the trust document suggests that the word "Trustee" used here means something different than the word "Trustee" as used throughout the document. Indeed, Article II C of the 2002 trust amendment states that "any Successor Trustee ... shall assume all the duties imposed upon the original Trustee." If Rose intended the clause to allow her to penalize Diane by simply not sending written confirmation to her attorney, she would not have provided for the Trustee to send that confirmation.

This clause in the 2002 trust amendment should be interpreted in light of the whole trust document and Rose's long-standing intent to divide her estate equally between her three children. This is what Rose had always

told her children. It was what Rose provided from when she first created the trust in 1993 until now. Section IV B 4 of the 2002 amendment to the trust still states that "all the rest, residue and remainder of the principal and income of the Trust shall be distributed in *equal shares* to: SANDRA S. MITCHELL, CYNTHIA S. PICHA and DIANE S. THOMPSON." (CP 164, emphasis added). In *Griffith v Sherry*, Court of Appeals No. 28373-9-III (October 19, 2010), the court reversed the lower court's interpretation of a will provision that ran counter to the testators' principal objective to treat their children equally. Similarly here, the reduction clause in the 2002 trust amendment should not be interpreted to run counter to Rose's long expressed intent to divide her estate equally among her three daughters. Under appellants' interpretation, this clause furthers supports Rose's primary intent to divide her property equally among her daughters, by ensuring that all the property Rose owned at the time of her death was included in her estate.

This Court should find either that there is a dispute of material fact regarding the testator's intent or that the deduction clause of the 2002 trust amendment should be interpreted as appellants' contend as a matter of law. Indeed, respondent Cynthia Picha based her motion argument on that same interpretation, contending in her Memorandum:

> To determine if MS. THOMPSON'S SHARE should be reduced, it must be determined whether or not MS. THOMPSON returned "certain items of jewelry and sterling silver and other tangible personal property," to MS. SOWDER.

(CP 246). The Order on Respondent's Motion for Summary Judgment should be reversed.

2. <u>There Are Issues Of Material Fact Whether There Were Any Items Of Personal Property Owned By Rose, Held By Diane, Requested By Rose, And Not Returned To Rose's Estate.</u>

This Court should reverse the trial court's order granting summary judgment because there are material issues of fact concerning 1) whether there are any items of Rose's personal property that were still owned by her that were being held by Diane, 2) whether Rose requested the return of any items, and 3) whether Diane had failed to return those items to Rose or her estate. All three criteria must be met before the penalty provision would apply. In response to Diane and Sandra's earlier motion for partial summary judgment, Cynthia argued that there were disputed issues of material fact regarding whether any property still owned by Rose was being held by Diane. (CP 144-152). The trial judge agreed at oral argument that there were issues of fact regarding whether there was any property that wasn't returned. (VR 12).

The evidence presented on the motion for summary judgment, viewed in the light most favorable to appellants, shows there remain issues

of material fact. In her Memorandum in support of her summary judgment motion, the only evidence Cynthia presented to show that there were items not returned was Diane's letter to attorney Sherrard dated October 18, 2006. Cynthia claimed that Diane admitted in this letter that the jewelry being returned to the estate with the letter was still owned by Rose, misquoting the letter to try to create the impression of an admission. What Diane actually stated in the letter was that the jewelry enclosed was "the last I have held in safekeeping for any family member." (CP 360). Her letter explains that before moving, Rose gave away most of her jewelry. This is confirmed by Sandra. (CP 400). What Rose didn't give away she took with her. (CP 362). At the time of Rose's death, Diane only had in her safe items Rose had asked her to accept and hold in her safe for other family members and items other family members had asked Diane to keep for them. *See* Affidavit of Mariamne Okrezesik, CP 397-98; Affidavit of Lynn Thompson, CP 390-91; Affidavit of Christine Thompson, CP 394-95. Diane gave these items to the family members they belonged to, as designated on Rose's lists. (CP 360). Sandra confirmed in her affidavit that there are no other items in Diane's safe, stating that Cynthia was "insisting that Diane return things that she didn't have...." (CP 400). The items Diane sent with her letter belonged to Cynthia. Upon receiving them, Cynthia signed the receipt Diane had provided acknowledging that they were "Items owned by Rose P. Sowder

and *given to Cynthia S. Picha, July 30 and 31, 1982....*" (CP 298, emphasis added).

In her Rebuttal brief, Cynthia contended that the gifts really weren't gifts, because the 1998 lists are entitled "Bequeaths." However, Cynthia herself viewed these items as gifts. For example, in her deposition, she said Rose's silver flatware had been given away to Lynn Thompson. (CP 219). This silver is included on the 1998 list of gifts to Lynn, and Lynn's affidavit confirms that Rose told her this was a gift to her. (CP 330; CP 390). Rose's actions also show she meant these as gifts. For example, Rose physically gave to Christine the Wedgwood China included on the 1998 gift list to Christine. (CP 333; CP 394). These "Bequeath" lists are similar in style to the 1982 gift lists. They were not attached to or referred to by name in the 2002 will, even though attorney Sherrard surely informed Rose of the requirements of RCW 11.12.260, which also indicates that Rose viewed them as gifts already made. As someone without legal training, Rose may not have understood the legal meaning of "bequeaths." In an analogous situation, the Washington court found that use of the word "executor" in an attachment to a will, drafted by someone who was not a trained legal advisor, did not prevent the court from interpreting the document as creating a trust. *Woodward v. Gramlow*, 123 Wn. App. 522, 95 P.3d 1244 (2004). The use of the word "bequeaths" similarly would not prevent a court from

finding that Rose meant to create gift lists, as she had in 1982. At best, the use of the word "bequeaths" creates an issue of fact whether Rose intended these to be gift lists.

Not only are there issues of fact concerning whether there were any items owned by Rose and held by Diane at the time of Rose's death, the parties also dispute whether Rose ever asked Diane to return any items. In support of her motion, all Cynthia submitted was her deposition testimony that she had heard Rose complain about Diane not returning things. Those overhead conversations did not identify any specific items, and although Cynthia characterized her mother as "very upset" (CP 281), she did not call or write to Diane to inquire about any items that Diane might still have. (CP 388). There is no evidence of any request by Rose for the return of any specific items. Lynn Thompson, to whom Rose gave her silver, stated in her affidavit that Rose never requested it be returned to her. (CP 391). Christine Thompson stated in her Affidavit that Rose never requested return of the rings she gave her granddaughters. (CP 395). Cynthia's contention in her Rebuttal brief that the deadman's statute, RCW 5.60.030, applies is incorrect. Cynthia's offering testimony of her conversations with Rose in support of her motion waives the application of the RCW 5.60.030. *In re Estate of Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001) ("The deadman's statute may be waived when the protected party introduces

evidence concerning a transaction with the deceased."). It would not apply to Lynn or Christine Thompson in any case, as they are not parties in interest. RCW 5.60.030.

Because there are issues of material fact whether there were any items of personal property owned by Rose, held by Diane, requested by Rose, and not returned to Rose's estate, entry of summary judgment was not proper and this Court should reverse the trial court's Order on Respondent's Motion for Summary Judgment.

B. Summary Judgment Should Be Reversed Because There Are Issues of Fact Regarding Whether Cynthia Has Breached Her Fiduciary Duty Of Loyalty As Trustee and Personal Representative.

This Court should reverse the trial court's order granting summary judgment because there is an issue of fact whether Cynthia breached her fiduciary duties as Trustee and Personal Representative, and whether she therefore should be removed. A trusted "owes to the beneficiaries of the trust the highest degree of good faith, diligence, fidelity, loyalty, and integrity; a trustee must act solely in the beneficiaries' interest." *Wilkins v. Lasater*, 46 Wn. App. 766, 774, 733 P.2d 221 (1987). "It is the duty of a trustee to administer the trust in the interest of the beneficiaries." *Tucker v. Brown*, 20 Wn.2d 740, 768, 150 P.2d 604 (1944).

> The law is that a trustee is under a duty to the beneficiary to administer the trust solely in the interest of such beneficiary, and, in doing this, an undivided loyalty to the trust is required. . . . An

> executor, executrix, or administrator of an estate of a deceased person acts in a trust capacity, and must conform to the rules governing a trustee. *In re Estate of Johnson,* 187 Wash. 552, 554, 60 P.2d 271, 272, 106 A.L.R. 217 (1936).

Matter of Drinkwater's Estate, 22 Wn. App. 26, 30, 587 P.2d 606 (1978). *See, also, Estate of Jordan by Jordan v. Hartford Acc. and Indem. Co.*, 120 Wn.2d 490, 502, 844 P.2d 403 (1993) ("A trustee owes undivided loyalty to the beneficiary of the trust."); *In re Johnson's Estate*, 187 Wash. 552, 554, 60 P.2d 271 (1936) ("an undivided loyalty to the trust is required").

The same duty of loyalty is owed to the beneficiaries of an estate by the personal representative, and a personal representative can be removed for breaching that duty.

> As with trustees, personal representatives owe a fiduciary duty to the heirs of the estate and must conform to the laws governing trustees. *In re Estate of Vance*, 11 Wash.App. 375, 381, 522 P.2d 1172 (1974). RCW 11.68.070 provides that if a personal representative does not faithfully execute his or her trust, the court, in its discretion, may restrict the personal representative's powers or remove him or her and appoint a successor.

In re Estate of Ehlers, 80 Wn. App. 751, 761-62, 911 P.2d 1017 (1996). As noted by the court in *Ehlers*, RCW 11.68.070 provides: "If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully ... then, in the discretion of the court the powers of the personal representative may be restricted or the personal representative

may be removed and a successor appointed." Similarly, RCW 11.98.039 provides for removal of a trustee for reasonable cause.

Here there is evidence showing that Cynthia, acting as both Trustee and Personal Representative, breached her duty of loyalty to protect Diane's beneficiary interest in the trust. Article IV B 3 of the 2002 trust amendment directs that written correspondence by the trustee is determinative whether any property owned by Rose and held by Diane was returned, so as to avoid reducing Diane's distributive share. As trustee, Cynthia had a fiduciary duty of loyalty to avoid the reduction in Diane's share by sending that written correspondence if there were no items to which the clause could apply. To make that determination, she had a duty to inquire and investigate, which she admitted she did not do. She notified Diane that her share would be reduced without explanation. This also violated Cynthia's duty of loyalty.

> The trustees, as fiduciaries, owe to the beneficiaries the highest degree of good faith, care, loyalty and integrity. *Monroe v. Winn,* 16 Wash.2d 497, 133 P.2d 952 (1943); Bogert, Trusts and Trustees § 543 (2d ed. 1960). This duty includes the responsibility *to inform the beneficiaries fully of all facts* which would aid them in protecting their interests.

Esmieu v. Schrag, 88 Wn.2d 490, 498, 563 P.2d 203 (1977). Cynthia had a duty to inform Diane what specific items of personal property had allegedly not been returned, causing Diane's share to be reduce (and Cynthia's share increased). Instead she has argued that unidentified pieces of silver, or

jewelry she acknowledged was gifted to her, met the criteria—arguments advanced to protect her own self-interest and not to protect Diane's interest, as she had a duty to do.

An analogy can be made to the case of *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 942 P.2d 1072 (1997), *rev. denied*, 134 Wn.2d 1027, 958 P.2d 313 (1998). There a real estate brokerage declared a purchaser in default and distributed her earnest money, partly to itself, without properly investigating whether a contingency of the sale had been fulfilled. The court found a breach of fiduciary duty, explaining:

> Upon receipt of Edmonds' earnest money, Scott was required to deposit the funds in an interest-bearing trust account. WAC 18.85.310(6). As trustee of Edmonds' funds, Scott owed her the highest degree of good faith, diligence, fidelity, loyalty, and integrity. See *Wilkins v. Lasater*, 46 Wash.App. 766, 774, 733 P.2d 221 (1987).
>
> Scott's actions leading to its decision to disburse the earnest money to itself and to the sellers are hardly consistent with the fiduciary duty it owed to Edmonds. At the same time it was supposed to be exhibiting the highest degree of fidelity and loyalty to Edmonds with respect to her earnest money, Scott was not only exercising sole decision-making authority over the issue of the disbursement of these funds but also was one of the potential recipients. *Scott could protect its own interest only by ignoring Edmonds'*. Scott's actions were entirely inconsistent with the duties imposed upon one owing a fiduciary duty to another.

Edmonds, 87 Wn. App. at 850-51 (emphasis added). Similarly here, Cynthia could protect her own interest in increasing her distributive share of the trust by $25,000 only by ignoring Diane's interest in not having her share reduced

and ignoring both Sandra's and Diane's interest in having their mother's long stated intent to divide her estate equally between her three daughters fulfilled. Her actions were inconsistent with the fiduciary duties imposed upon her as Trustee and Personal Representative.

This Court should either hold that Cynthia Picha has breached her fiduciary duties as Trustee and Personal Representative and should be removed, or that there is a dispute of material fact whether she had breached those duties and should be removed. The Order on Respondent's Motion for Summary Judgment, finding that insufficient facts were presented to sustain removal or find a breach of fiduciary duties, should be reversed and remanded with appropriate instruction.

C. Appellants Are Entitled To An Award Of Attorney Fees Both On Appeal And For Defending The Motion For Summary Judgment In The Trial Court.

Appellant respectfully requests an award of attorney's fees and costs associated with having to bring this appeal and with the defense of the summary judgment motion brought by respondents. RCW 11.96A.150 grants both trial courts and appellate courts broad discretion to order attorney fees in disputes involving trusts and estates.

> (1) 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.

> *The court may order 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.*
>
> (2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. ...

RCW 11.96A.150 (emphasis added).

Attorney's fees may also be awarded where an equitable basis exists for doing so. *PUD 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976); *State ex rel. Macri v. Bremerton*, 8 Wn.2d 93, 113-14, 111 P.2d 612 (1941). In a case concerning breach of fiduciary duty by a partner dealing with partnership assets, the Washington court upheld an award of attorneys fees in equity, stating: "Respondent's negligent breach of his fiduciary duty to petitioner is tantamount to constructive fraud." *Hsu Ying Li v Gordon Tang*, 87 Wn.2d 796, 800, 557 P.2d 342 (1976).

The Court should award attorneys fees in this matter both on the statutory basis set forth in RCW 11.96A.150 and on the basis of equity. Cynthia brought this motion for summary judgment even though she had previously contended that material issues of fact existed in response to

appellants' earlier partial summary judgment motion. (CP 144-152). The only supposedly undisputed "fact" her motion was based upon was that Diane had sent Cynthia's jewelry to attorney Sherrard as Cynthia had requested. (CP 246). Her Memorandum misquoted Diane's letter to assert that Diane admitted the jewelry belonged to Rose, even though the letter clearly states that the items were being held for family members and that Cynthia had requested the jewelry be sent to the attorney, and even though Cynthia had signed a receipt acknowledging that these were items gifted to her by Rose in 1982. Cynthia and her attorneys clearly were aware that the "fact" they relied on was disputed, but made Diane and Sandra expend fees to respond to their summary judgment motion anyway.

Cynthia's refusal to resolve the parties' differences under the less expensive provisions of TEDRA should be given heavy consideration. The costly litigation which followed the TEDRA hearing has cost the estate substantial attorney's fees and can only benefit Cynthia, who wants to give herself an additional distribution of $ 25,000. The third beneficiary of the estate, Sandra Mitchell, has taken a position against her pecuniary interest and stated in her affidavit that she does not agree with Cynthia's interpretation that the penalty clause applied. (CP 400). A primary purpose of TEDRA is to minimize the cost of probate and trust disputes.

> The intent of RCW 11.96A.260 through 11.96A.320 is to provide for the efficient settlement of disputes in trust, estate, and nonprobate matters through mediation and arbitration by providing any party the right to proceed first with mediation and then arbitration before formal judicial procedures may be utilized.

RCW 11.96A.270. Cynthia frustrated this intent by petitioning the court to resolve this matter judicially, without first following the mediation and arbitration procedures provided for in TEDRA.

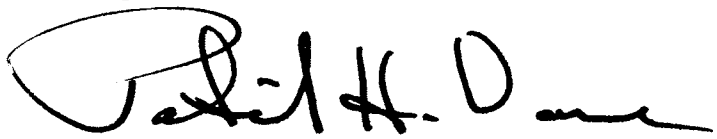
Additionally, this court should award attorney's fees to Diane and Sandra based on the evidence of Cynthia's breach of her fiduciary duties. This whole dispute could have been avoided had Cynthia sent copies of the new will and the 2002 trust amendment to Diane and Sandra, as Rose had done with her wills in the past. A simple phone call, letter or email to either Sandra or Diane could have identified what, if any, items Rose was remembering were still in Diane safe and not gifted. Choosing extensive litigation over a simple phone call shows that Cynthia was more concerned with her own pecuniary gain than with her fiduciary duty of loyalty to Diane and Sandra as beneficiaries of the trust and estate. Yet Cynthia's attorney's fees are all being paid out of the estate. It is only equitable that this court award Diane and Sandra their attorney's fees, both for this appeal and for the summary judgment proceedings in the trial court.

V. CONCLUSION

Because, when viewing the evidence and all references therefrom in the light most favorable to appellants Diane Thompson and Sandra Mitchell, there are issues of material fact and respondent is not entitled to judgment as matter of law, appellants respectfully request that this Court reverse the trial court's Order on Respondent's Motion for Summary Judgment entered on June 8, 2010, determining that Diane Thompson's distributive share of the Rose Sowder's estate should be reduced by $50,000 and dismissing appellant's claims for breach of fiduciary duty and removal of Cynthia Picha as Trustee and Personal Representative. Appellant's also request that this matter be remanded for trial and that they be awarded their attorney's fees on appeal and also for defending the summary judgment motion in the trial court.

Dated this 3rd day of January, 2011.

Respectfully submitted,



Patrick Vane
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Form 23

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DECLARATION OF SERVICE

ESTATE OF ROSE P SOWDER	)	
	)	
Respondent,	)	
	)	No. 40930-5-II
v.	)	
	)	DECLARATION, ACKNOWLEDGEMENT AND PROOF OF SERVICE OF OPENING BRIEF
DIANE THOMPSON & SANDRA MITCHELL	)	
	)	
	)	
AppellantS.	)	

Pursuant to RAP 18.5, I, Erin Bogdanski, being over the age of 18 and a competent adult, hereby declare, under penalty of perjury, the following:

1. **Service** - On January 3, 2011, I personally served two copies of the Appellants opening brief upon Kenneth Masters at the law offices of Wiggins and Masters located at 241 Madison Avenue North, Bainbridge Island WA 98110 at approximately 4:45 in the afternoon.
2. **Acknowledgement of Service** - Upon acceptance of service, Mr. Kenneth Masters acknowledged service by date stamping a copy of the cover page of said brief, attached hereto, and entered the acknowledgement of service date in a handwritten fashion and returned it to me for filing with the court.
3. The cover page bearing Mr. Masters original "received" stamp is attached hereto and incorporated by reference herein.

I declare the above statements to be true under penalty of perjury.

ERIN BOGDANSKI

Date: January 4, 2011 Signature: _____

[December 24, 2002]

received
1/3/11

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Estate of Rose P. Sowder, Respondent

v.

Diane Thompson & Sandra Mitchell, Appellants

No. 40930-5-II

BRIEF OF APPELLANT

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