

COURT OF APPEALS  
DIVISION II

NO. 40930-5-II

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

STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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Estate of ROSE P. SOWDER,  
DIANE THOMPSON and SANDRA MITCHELL,  
Appellants

v.

Estate of ROSE P. SOWDER, Cynthia Picha, Personal  
Representative,  
Respondents.

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**BRIEF OF RESPONDENT**

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## INTRODUCTION

This Court should not review Diane Thompson and Sandra Mitchell's<sup>1</sup> appeal because they did not appeal the trial court's final judgment. No RAP saves their appeal.

If the Court reaches the merits, it should affirm the trial court's grant of Cynthia Picha's motion for summary judgment. Rose P. Sowder's trust unambiguously states that Diane would not receive an equal share of Rose's estate if Diane did not return jewelry, silver, and other personal property to Rose. A confirmation letter from Rose or her trustee to Rose's attorney determines whether Diane complied. The undisputed evidence shows that Diane still possessed Rose's jewelry after Rose's death and that Rose's attorney never received a confirmation letter. This Court should affirm the summary judgment.

Cynthia did not breach her fiduciary duties and was not removed as Rose's personal representative and trustee because Cynthia followed the terms of Rose's trust. This Court should affirm, and award Rose's estate its appellate attorney fees because the appeal lacks merits and frustrates the purpose of Rose's trust.

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<sup>1</sup> We refer to the parties by their first names for convenience only. No disrespect is intended.

## STATEMENT OF THE CASE

**A. In 2001, Rose moved from Maryland to Washington to be with her daughter Cynthia.**

Until 2001, Rose lived in Maryland, near two of her daughters, Diane and Sandra. CP 28, 361-62. While there, she amassed a collection of jewels, jewelry, and silver. CP 362, 391. Although Rose drafted bequeath lists in 1982<sup>2</sup> and 1998 regarding her collection, Rose kept her jewelry in Diane's safe and continued to wear her jewelry. CP 362, 367-83.

In 2001, Rose moved to Manchester, Washington, to be with her daughter Cynthia. CP 362. Before leaving Maryland, she gave some of her collection to her children and grandchildren. CP 360-66. While many of Rose's gifts were consistent with her bequeath lists, Rose gave several items to different people from those named in the lists, and she kept several items in Diane's safe. CP 360-66.

**B. Rose executed a trust that, upon her death, would distribute her property equally to her three daughters, so long as Diane returned jewelry, silver, and other items to Rose.**

In 2002, after moving to Washington, Rose retained attorney Roger Sherrard to amend her estate plan. CP 296, 344, 346.

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<sup>2</sup> Although the 1982 lists state they "gift today" or were "a gift" (CP 375-83) they were bequeath lists. See *infra*, Arg. § B.3.

Rose executed a will and an amendment to her Revocable Trust dated December 29, 1993 (trust). CP 339-42, 344-58. The will nominated Cynthia as personal representative, and it poured over the residuary estate into the trust. CP 339-40.

The trust designated Rose as both trustor and trustee, and it named Cynthia as successor trustee. CP 345. The trust stated that a successor trustee had the same duties as the original trustee, but the successor trustee was not required to inquire into a predecessor trustee's acts and was not liable for a predecessor's acts or omissions. CP 346. The trust waived any inherent conflicts of interest a successor trustee might have. *Id.*

While she was alive, Rose received as much of the income and principal as she desired. CP 347. Upon her death, tangible personal property would be distributed pursuant to a list. CP 347-48. The trustee had absolute discretion to distribute remaining tangible personal property. CP 348.

In Article IV.B.3., Rose stated that Diane possessed certain items of Rose's jewelry, sterling silver, and other tangible personal property. CP 348. Rose asked Diane to return these items to her. *Id.* ("I have requested that such items be returned to me"). If Diane did not do so, then Diane's share would be reduced by \$50,000,

adding \$25,000 each to Sandra's and Cynthia's shares. CP 348-49 (attached). Rose directed that only a confirming letter could determine that Diane had complied (CP 349):

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.

Article IV.B.4. distributed the residue and remainder of the trust in equal shares to Sandra, Cynthia, and Diane, subject to Diane returning Rose's property to her. CP 349.

**C. Diane possessed Rose's jewelry and personal property when Rose died in 2006.**

Rose died on March 18, 2006, and Cynthia then became her trustee. CP 296, 302, 345. Sherrard remained the trust's attorney. CP 297, 346. He sent Diane a letter. CP 360.<sup>3</sup>

Diane responded to Sherrard with a letter, enclosing some of Rose's jewelry. CP 360-66. Diane's letter explained, "The enclosed jewelry items are the last that I have held in safekeeping for any family member." CP 360. Cynthia and Sherrard's paralegal sorted Rose's items. CP 300. Diane's letter added that Rose had

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<sup>3</sup> This cite is to Diane's letter responding to Sherrard's letter, discussed in the next paragraph. Sherrard's letter to Diane is not in the record.

gifted items through the 1982 and 1998 lists and that Rose gave away many items in 2001. CP 362-66. In her own itemized list, Diane disclosed that she kept several of the enclosed items in her safe that should be distributed to Cynthia (e.g., a sapphire pin and earrings). CP 365. Rather than returning Rose's jewelry to her estate, Diane distributed it to people on Rose's lists. CP 362-63. She even distributed items to herself (a coral pin and earrings) that were not on any of Rose's lists. CP 364.

Diane asked Cynthia to sign a receipt documenting that Diane had "distributed" to Cynthia at least 15 of Rose's items that Diane had held. CP 298. Cynthia signed the receipt. *Id.* It is undisputed that Diane did not return these items to Rose. Sherrard never received a letter confirming delivery to Rose. CP 297.

**D. Cynthia reduced Diane's share of the distribution.**

Cynthia informed Diane that her share would be reduced by \$50,000 because she failed to return Rose's items to her. CP 302. Diane and Sandra filed a notice of mediation under chapter 11.96A RCW, the Trust and Estate Dispute Resolution Act, arguing that Diane's share should not be reduced and that Cynthia should be removed as trustee and personal representative for breaching her fiduciary duties. CP 6-10. Cynthia objected to mediation and

petitioned the Kitsap County Superior Court to make a judicial determination, which the court granted. CP 1, 45-46.

**E. The trial court granted Cynthia's motion for summary judgment, reducing Diane's share and refusing to remove Cynthia as trustee and personal representative.**

Diane and Sandra moved for partial summary judgment, arguing that it was undisputed that Rose had given away all of her silver before she died. CP 102-16. The trial court denied their motion, and awarded the estate attorney fees. CP 237-38.

Cynthia moved for summary judgment that Diane's share should be reduced and that Cynthia did not breach her fiduciary duties. CP 241, 246-48. The trial court granted Cynthia's motion for summary judgment on June 9, 2010, reducing Diane's share by \$50,000, and ruling that Cynthia did not breach her fiduciary duties as a matter of law. CP 424-25.

On June 21, 2010, the trial court entered an order of dismissal. CP 432-34. Diane and Sandra appealed from the June 9, 2010 order granting summary judgment, but did not appeal from the June 21, 2010 order dismissing the action. CP 436-38.

## ARGUMENT

**A. The Court should dismiss this appeal because Diane and Sandra failed to timely appeal from the final judgment.**

Cynthia moves to dismiss Diane and Sandra's appeal because they failed to appeal from the final judgment. RAP 10.4(d), 17.4(d). Diane and Sandra could appeal only the final judgment or a "written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a). A judgment is "the final determination of the rights of the parties in an action and includes any decree and order from which an appeal lies," while an order is "[e]very direction of a court or judge, made or entered in writing, not included in a judgment." CR 54(a).

**1. The June 9, 2010 order was not a final judgment and did not discontinue the action.**

Here, the June 9, 2010 order did not dismiss the matter, so it is not a judgment. Rather, the June 21, 2010 order of dismissal is the appealable order because it makes the final determination of the rights of the parties. CP 432-34; see *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 826, 155 P.3d 161 (2007) (order granting summary judgment and dismissing all claims is the "final, dispositive judgment").

The June 9, 2010 order did not prevent a final judgment or discontinue the action. See *also* RAP 2.2(a)(3). As Diane and Sandra admit, the June 21, 2010 order was necessary to satisfy CR 56(h)'s requirements that the trial court designate the documents and evidence presented. See BA 13. Diane and Sandra failed to appeal from the dispositive order. They never amended their Notice of Appeal.

This issue is controlled by ***State v. Fortun***, 94 Wn.2d 754, 626 P.2d 504 (1980), *partially overruled on other grounds by State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (1995). ***Fortun*** dismissed the State's appeal from an order suppressing evidence, where it did not appeal from, assign error to, or argue about, the order dismissing the case. *Id.* at 755-57. Even if the State prevailed on the suppression issue, the dismissal order "would remain unchanged and the case below would still be at an end." *Id.* at 756.

In ***Olson***, the opposite occurred: the court refused to dismiss an appeal where the State appealed from the order of dismissal, but not from the suppression order it argued should be reversed. 126 Wn.2d 317-18, 321. The court nonetheless reaffirmed that it will not consider the merits of an appeal if the "appellant fails to raise an issue in the assignments of error, in violation of RAP

10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation.” *Id.* at 321. The court overruled **Fortun** only to the extent that it conflicted with this rule. *Id.*

**Fortun** and **Olson** require dismissal of Diane and Sandra's appeal. They did not designate the June 21 dismissal order in their Notice of Appeal or mention it in the Assignments of Error or Argument. CP 436-38; BA 1-3, 13-30. In the unlikely event they were to prevail on appeal, the order of dismissal would remain unchanged. CP 432-34. Under **Fortun** and **Olson**, the Court should dismiss this appeal. **Olson**, 126 Wn.2d at 321; **Fortun**, 94 Wn.2d 756-57.<sup>4</sup>

## 2. No other RAP allows review.

No other RAP allows review. The later June 21, 2010 order of dismissal cannot prejudicially affect the earlier June 9, 2010 order granting summary judgment, so Diane and Sandra cannot

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<sup>4</sup> Diane and Sandra might cite **S&K Motors, Inc. v. Harco Nat'l Ins. Co.**, 151 Wn. App. 633, 213 P.3d 630 (2009), which is inapposite. There, the Court reviewed an order denying summary judgment because that order was entered contemporaneously with the final order granting summary judgment and because the Court had discretion to review a denial of summary judgment. *Id.* at 638-39. Here, by contrast, the order of dismissal was not entered contemporaneously with the order granting summary judgment and Diane and Sandra do not seek review the denial of their partial summary judgment motion. **S&K Motors** does not permit review of an undesignated final judgment.

obtain review of the later order. RAP 2.4(b). While RAP 2.4(c) allows review of non-designated judgments preceding certain posttrial motions, the June 9, 2010 order is not from a posttrial motion. RAP 2.4 does not assist Diane and Sandra.

Finally, RAP 5.3(f) provides the Court will disregard “defects in the form of a notice of appeal” if it reflects a party’s intent to seek review. This does not help Diane and Sandra because there was no defect in the form of their notice. CP 436-38. The notice explicitly designates only the June 9, 2010 order. That order was not appealable. RAP 5.3(f) does not apply.

In sum, Diane and Sandra appealed from an unappealable order. They cannot now appeal from the final order of dismissal. RAP 2.5(a). This Court should dismiss their appeal.

**B. The trial court properly granted Cynthia’s motion for summary judgment because there is no disputed material fact and she is entitled to judgment as a matter of law.**

If the Court nonetheless reaches the merits, the trial court properly granted Cynthia’s summary judgment motion because Rose’s trust unambiguously reduced Diane’s share if she did not return Rose’s property to her or if Sherrard did not receive a confirmation letter. CP 348-49. It is undisputed that Diane

possessed Rose's jewelry when Rose died and that Sherrard never received a confirmation letter. CP 297-98, 348-49, 360-83. Summary judgment was appropriate.

**1. The standard of review is *de novo*.**

This court reviews an order granting summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party. ***Fitzpatrick v. Okanogan County***, 169 Wn.2d 598, 604-05, 238 P.3d 1129 (2010). Summary judgment is appropriate only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). The nonmoving party must establish specific facts disclosing a genuine issue of material fact. ***Seven Gables Corp. v. MGM/UA Entm't Co.***, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). Mere allegations, speculation, argumentative assertions, or conclusory statements of fact unsupported by evidence are not sufficient. ***Baldwin v. Sisters of Providence in Wash., Inc.***, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); ***Seven Gables***, 106 Wn.2d at 13.

2. **The trust unambiguously reduced Diane's share unless (a) she returned Rose's property to Rose and (b) Sherrard received a confirmation letter, neither of which occurred.**

The trial court determined that the trust language unambiguously required a \$50,000 reduction in Diane's share. CP 424. The court did not need to interpret Rose's trust or look at extrinsic evidence because the trust is unambiguous. It properly granted Cynthia's motion for summary judgment

The court looks for the trustor's intent as manifested in the trust agreement. *In re Estate of Preston*, 59 Wn.2d 11, 16, 365 P.2d 595 (1961). While ascertaining testamentary intent is a question of fact, *Eisenbach v. Schneider*, 140 Wn. App. 641, 651, 166 P.3d 858 (2007), the interpretation of a provision of a will or trust is a question of law. *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010). Whenever possible, intent must be gathered from the instrument as a whole, giving effect to every part. *In re Estate of Griffen*, 86 Wn.2d 223, 226, 543 P.2d 245 (1975); *In re Riemcke's Estate*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972); *Sherry*, 158 Wn. App. at 78.

If the trust is unambiguous, it does not require construction or interpretation, and the trustor's intent may not be changed.

*Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986); *Griffen*, 86 Wn.2d at 226. If an ambiguity exists, extrinsic facts are admissible to explain the language used. *Sherry*, 158 Wn. App. 82 (citing *Reimcke*, 80 Wn.2d at 727). The terms are ambiguous if they are susceptible to more than one reasonable interpretation. *Waits v. Hamlin*, 55 Wn. App. 193, 200, 776 P.2d 1003 (1989); see *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005) (court did not consider extrinsic evidence because the contractual provisions were susceptible to only one reasonable interpretation).

Rose articulated her unambiguous intent through her trust. In Article IV.B.3., Rose declared, "I have certain items of jewelry and sterling silver and other tangible personal property, which I own, but are currently held by my daughter, Diane." CP 348. Rose asked Diane to return those items to her: "I have requested that such items be returned to me." CP 348. Rose directed that Diane would not get an equal share of the trust corpus if she did not return Rose's property to her:

If they have not been returned to me, I direct the Trustee [to] 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.

CP 348-49. Finally, Rose directed that only a letter to her attorney could confirm compliance. (CP 348-49):

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.

Thus, Rose's trust unambiguously directs that (1) Diane must return Rose's property to her, and (2) Sherrard must receive a letter from Rose or her trustee confirming that Diane returned the items to Rose, or else (3) Diane's share is reduced by \$50,000. Rose unambiguously required that her items must be "returned to me." CP 348. This is the only place in the trust where Rose refers to herself in the first person. CP 344-58. If Rose wanted the items returned after she died, she would have indicated as much, using terminology she used in other sections. *See e.g.*, CP 346 ("Trust estate"), 347 ("property held in the Trust"). Diane undisputedly failed to return Rose's items to her.

Rose made equally clear that only a letter to Sherrard from Rose or her trustee could confirm Diane's compliance. CP 349. Rose unambiguously directed that this letter would be "conclusive evidence" that Diane had returned her property to her and that no

such letter meant “such items have not been returned” to her. CP 349.

These unambiguous terms in Article IV.B.3. are consistent with the trust as a whole. *Griffen*, 86 Wn.2d at 226; *Riemcke*, 80 Wn.2d at 728. Article IV.B.3. supersedes the residuary distribution clause. CP 349. The residuary distribution clause also envisions that the shares might be distributed unequally, stating that the equal distribution is subject to “[a]ny adjustment called for in [Article IV.B.]3.” CP 349. Article II.D., which waives any conflicts of interest a fiduciary might have, anticipates the successor trustee as beneficiary. CP 346.

The trust also accounts for the scenario in which Diane returns Rose’s property while Rose is alive but incapacitated. Article VI.B. provides that if Rose is incapacitated, then the alternate trustee shall have the same powers as the trustee. CP 353-54. Thus, either Rose or her trustee could send a confirmation letter to her attorney. CP 349.

In sum, Article IV.B.3. plainly reduces Diane’s share unless she returned the property to Rose, and Rose or her trustee sent Sherrard a confirmation letter. Neither condition occurred. Diane’s letter to Sherrard states that when Rose left for Washington, Diane

held onto some of Rose's jewelry and distributed it. CP 360. Diane admitted that the "enclosed jewelry items are the last that I have held in safekeeping for any family member. All other items have been distributed." CP 360. For instance, Diane "distributed" Rose's sapphire pin and earrings to Cynthia. CP 364-65. Moreover, Diane's receipt says she is distributing at least 15 pieces of Rose's jewelry to Cynthia after Rose died. CP 298. Under the trust, Cynthia had sole and absolute discretion to distribute these items. CP 348.

This undisputed evidence establishes that Diane possessed Rose's jewelry after her death, so Sherrard never received a confirmation letter. Article IV.B.3. thus reduces Diane's share by \$50,000. CP 348-49. Since both conditions are necessary and neither alone is sufficient, the trial court properly granted Cynthia's motion for summary judgment. This Court should affirm.

**3. Diane and Sandra fail to raise a genuine issue of material fact.**

Diane and Sandra argue that the trial court should have denied Cynthia's motion for summary judgment because: (1) the trust language was ambiguous (BA 15-19); (2) the trial court determined there were disputed material facts when it denied their

motion for partial summary judgment (BA 19-20); (3) the 1982 and 1998 lists show that Rose gifted away all of the items before her death (BA 20-21); and (4) they dispute whether Rose ever asked Diane to return any specific items (BA 22). These arguments fail.

Diane and Sandra offer several arguments that the trust is ambiguous. They first argue that if Rose intended to reduce Diane's share simply by not writing a letter (even if Diane had returned all of her property) Rose would have said so. BA 16-17. But Rose did say so: her confirmation-letter requirement unambiguously expresses her desire for an objective test to determine Diane's compliance. CP 349. While Diane and Sandra may not like the test, it is unambiguous. Their attempt to create an ambiguity reads the confirmation-letter requirement out of the trust. *But see In re Estate of Shaw*, 69 Wn.2d 238, 242, 417 P.2d 942 (1966) (courts are obliged to give effect to every part of a will); *Sherry*, 158 Wn. App. at 78 (same). This argument fails.

Diane and Sandra next argue that Article IV.B.3. is ambiguous because it conflicts with Rose's intent in Article IV.B.4. to equally distribute the residue to the three sisters. BA 18. But Article IV.B.3 and Article IV.B.4. confirm each other. CP 349. Rose gave the Article IV.B.3. restriction full force and effect. CP 344,

348-49. Diane and Sandra read Article IV.B.3. out of the trust, contrary to Rose's intent. **Shaw**, 69 Wn.2d at 242. This argument fails.

Diane and Sandra also argue that this Court's holding in **Sherry** shows that the trust language is ambiguous. *Cf.* BA 18. But the will in **Sherry** had a provision that was ambiguous and potentially inconsistent with a directive to equally divide some farmland. 158 Wn. App. at 82. Here, the provision at issue does not conflict with other trust provisions, which contemplate an unequal division. CP 348-49. **Sherry** is inapplicable.

In any event, Diane and Sandra do not offer a reasonable alternative to the plain language of Article IV.B.3., so extrinsic evidence is irrelevant. **Griffen**, 86 Wn.2d at 226. Even if extrinsic evidence were relevant, Diane and Sandra did not present any evidence that contradicts the unambiguous and controlling trust language. Their ambiguity arguments all fail.

Diane and Sandra also argue that the trial court determined there are disputed issues of material fact when it denied their motion for partial summary judgment. BA 19, 28-29. But Diane and Sandra moved solely on the ground that Rose gave away all of her silver, so Diane could not return it to Rose. CP 103; RP (Feb.

19, 2010) 3-4; BA 10. By denying that motion, the trial court did not find a disputed issue of material fact about Rose's jewelry, other items of her personal property, or the absence of a confirmation letter. See CP 237-38. This argument lacks merit.

Diane and Sandra next argue that the 1982 and 1998 lists show that Rose gifted away all of Rose's items before her death. BA 20-21. While Rose gave away many items (CP 362-66, 390-91, 394-95, 397-98) the jewelry in Diane's possession was not gifted. It was bequeathed to be distributed after Rose died. Under Maryland law (where Rose lived when she wrote the 1982 and 1998 lists) a valid gift occurs only when there is "an intention on the part of the donor to transfer the property, a delivery by the donor and an acceptance by the donee. Moreover, the delivery must transfer the donor's dominion over the property." **Rogers v. Rogers**, 271 Md. 603, 607, 319 A.2d 119 (1974); see **Moore v. Layton**, 147 Md. 244, 247, 127 A. 756 (1925).<sup>5</sup> To be a gift, "the transfer of both possession and title shall be absolute and shall go into immediate effect." **Snyder v. Stouffer**, 270 Md. 647, 650, 313 A.2d 497

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<sup>5</sup> Washington courts similarly require "an actual delivery at the time" of the gift. **Henderson v. Tagg**, 68 Wn.2d 188, 192, 412 P.2d 112 (1966); **In re Estate of Lennon**, 108 Wn. App. 167, 180-81, 29 P.3d 1258 (2001).

(1974). Without these transfers, “the owner may make any other disposition of the property that he may think proper.” **Moore**, 147 Md. at 247.

Both Rose’s and Diane’s actions indicate they viewed the lists as testamentary in nature and not gifts. After drafting the lists, Rose kept her jewelry in Diane’s safe and wore it when she wanted. CP 362. Many of the items, including the sapphire pin and earrings, were mentioned in both the 1982 and 1998 lists, so the lists did not automatically give the property away. CP 374, 383. Rose took some of her listed jewelry with her to Washington. CP 360. Rose waited until 2001 or her death to physically transfer the property to the recipients. CP 362-66; BA 5, 20. Prior to that, Rose sometimes gave an item to a different person than indicated in her lists. CP 365. Diane distributed some listed property after Rose died. CP 360-66. Rose did not transfer or deliver dominion and control over her property, and the recipients did not accept the listed property until 2001 or after her death. CP 298, 360-66. Under Maryland law, therefore, Rose did not complete the undelivered gifts. **Moore**, 147 Md. at 247. She owned her jewelry

until her death. The lists are testamentary in nature, not gifts.<sup>6</sup> CP 362-83.

Diane and Sandra argue that Cynthia “admitted” the items were given away in 1982, by signing the receipt for Diane’s package. CP 298; BA 20-21. All this receipt proves, however, is that Diane did not send Rose’s items to Cynthia until after Rose’s death. CP 298. The receipt supports the summary judgment decision because it proves Rose did not completely gift the items during her lifetime.

Diane and Sandra lastly argue that it is disputed whether Rose ever asked Diane to return any specific items. BA 22. Rose “requested that such items be returned to me,” and Cynthia testified that she witnessed Rose asking Diane to return the items. CP 263, 348, 276-77. Diane did not submit a declaration, affidavit or deposition, either in her motion for partial summary judgment, or in her response to Cynthia’s motion for summary judgment. CP 118-40, 216-35, 320-404. While Rose’s granddaughters averred that

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<sup>6</sup> Although Rose drafted the lists in Maryland, they also qualify as writings disposing of tangible personal property under RCW 11.12.260 because the trust refers to lists; Rose handwrote, signed, and dated the lists; and these lists describe the property with reasonable certainty and designate who receives the property. CP 348, 367-83.

Rose never asked them to return gifts, CP 391, 395, those statements do not prove that Rose never asked Diane to return the items she requested from Diane. The only evidence is that Rose asked Diane to return them.

Diane and Sandra's argument that Cynthia waived the deadman's statute, RCW 5.60.030, is a red herring. *Contra* BA 22-23. Diane never testified that Rose did not ask her to return the items. The deadman's statute has no application if the party in interest offers no testimony. RCW 5.60.030.

The undisputed facts show that after Rose's death, Diane still possessed Rose's jewelry, and Sherrard never received a letter confirming that Diane had returned Rose's property. CP 297, 360-83. The trial court correctly granted Cynthia's motion for summary judgment and reduced Diane's share by \$50,000. This Court should affirm.

**C. Cynthia did not breach her fiduciary duties.**

Cynthia fulfilled her duties as personal representative and trustee by following the terms of Rose's trust. Accordingly, the trial court properly dismissed Diane and Sandra's claims that Cynthia should be removed for breaching her fiduciary duties. Again, this Court should affirm.

“A trustee’s duties and powers are determined by the terms of the trust, by common law, and by statute.” **Cook v. Brateng**, 158 Wn. App. 777, 785, \_\_\_ P.3d \_\_\_ (2010) (citing **In re Estate of Ehlers**, 80 Wn. App. 751, 757, 911 P.2d 1017 (1996)). Unless impossible, illegal, or where it would impair the purposes of the trust, “the nature and extent of the duties and powers of a trustee are determined by the trust agreement.” **Allard v. Pac. Nat’l Bank**, 99 Wn.2d 394, 402-03, 663 P.2d 104 (1983). The court looks to the trust’s four corners, construing all of its provisions together, to determine the trustor’s intent. **Cook**, 158 Wn. App. at 786; **Templeton**, 106 Wn.2d at 309. At common law, a trustee owes beneficiaries the “highest degree of good faith, care, loyalty, and integrity” and must exercise the care, skill and diligence of an ordinary prudent person. **Cook**, 158 Wn. App. at 785 (quoting **Esmieu v. Schrag**, 88 Wn.2d 490, 498, 563 P.2d 203 (1977)); **In re Nontestamentary Trust of Parks**, 39 Wn.2d 763, 767, 238 P.2d 1205 (1951).

The decision to remove a trustee or personal representative is within the discretion of the trial court, and the trustee or personal representative will be removed only for reasonable cause. RCW 11.68.070, 11.98.039; **Ehlers**, 80 Wn. App. at 761-62. The trial

court's decision to remove the trustee will seldom be reversed absent a manifest abuse of discretion. 80 Wn. App. at 762 (citing ***Fred Hutchinson Cancer Research Ctr. v. Holman***, 107 Wn.2d 693, 732 P.2d 974 (1987)). While conflicts of interest and bad will generated by litigation constitute reasonable cause, the petitioning party must prove that removal is necessary to save the trust property. *Id.* (citing ***In re Estate of Cornett***, 102 Wash. 254, 264, 173 P. 44 (1918); ***Waits***, 55 Wn. App. at 198-99). Mere disagreements with a trustee's decision do not warrant removal. ***Bartlett v. Betlach***, 136 Wn. App. 8, 21, 146 P.3d 1235 (2006).

Here, the trial court properly determined that a matter of law Cynthia should not be removed as trustee. The trust limits the successor trustees' obligations. CP 346. While the trust provides that successor trustees shall have the same duties as the original trustee, Article II.C. provides that successor trustees shall not be obligated to inquire into the acts of any predecessor trustee or be liable for the acts or omissions of any predecessor trustee. CP 346. Tracking RCW 11.98.200, the trust waives any inherent conflict of interest a trustee might have. CP 346.

Cynthia satisfied her duties to protect the beneficiaries while also following the trust provisions. Cynthia became a trustee only

after Rose's death. CP 302. Until that point, Cynthia owed no fiduciary duties to the beneficiaries. CP 302, 346. When Cynthia became trustee, she did not have a duty to investigate Rose's acts and omissions. CP 346. She did have a duty determine if there was any evidence that Diane returned Rose's property or if Sherrard had received a confirmation letter. CP 348-49.

To make that determination, Sherrard sent Diane a letter informing her of the penalty clause. CP 360. Diane responded with a letter and a package of Rose's jewelry. CP 360-83. The letter explained that Diane possessed Rose's jewelry when Rose died and that she had distributed other items of Rose's property. CP 360-83. Cynthia thus satisfied her duty to inquire whether Diane had returned Rose's items to her: she did not.

When Cynthia determined that Diane had not returned Rose's property to her, the trust reduced Diane's share by \$50,000. CP 348-49. Cynthia followed the trust. CP 302. Cynthia did not breach her fiduciary duties, and she made decisions that did not reduce the trust's property. *Ehlers*, 80 Wn. App. at 761. Viewing the evidence in the light most favorable to Diane and Sandra, the trial court had no reasonable cause to remove Cynthia. *See id.*

Diane and Sandra argue that Cynthia breached her fiduciary duties in several respects. First, they argue that Cynthia breached her duty of loyalty by failing to send a written confirmation to Sherrard. BA 25. This argument fails because the undisputed evidence shows that Diane possessed Rose's items after Rose's death. CP 298, 360-83. Cynthia would have breached her duty of loyalty to the other beneficiaries if she had written to Sherrard, falsely confirming that Diane had returned the items to Rose.

Second, Diane and Sandra contend that Cynthia "admitted" she failed to investigate and inquire whether Diane returned the items. BA 25. They misstate Cynthia's testimony. Cynthia testified that she did not ask Diane to return Rose's items while Rose was alive because the dispute was between Rose and Diane. CP 387-88. Cynthia was not then a trustee, so she had no duty to do so. While Cynthia did not call Diane after Rose's death, Sherrard sent Diane a letter regarding the issue on her behalf. CP 360, 386. Cynthia did not "admit" she failed to properly investigate.

This argument also fails because Cynthia did not need to inquire any further after she learned that Diane still possessed Rose's items and went through the jewelry herself. CP 300, 360-83. Further investigation would have been superfluous. Cynthia

also met her obligations when she had Sherrard send a letter to Diane asking about the items and then went through the property Diane disclosed. CP 300, 360. Cynthia did not reduce Diane's share without investigating. She looked into the matter, determined that Diane had not returned the items, and only then reduced Diane's share as the trust required.

Diane and Sandra also contend that Cynthia was required to inform Diane of the specific items she failed to return to Rose. BA 25-26. A trustee has a responsibility to inform the beneficiaries of all facts that would aid them in protecting their interests. **Allard**, 99 Wn.2d at 404. Cynthia fulfilled her duty to inform by having Sherrard send Diane a letter informing her of the trust provisions. CP 360. Diane responded with a package of Rose's jewelry and a letter. CP 360-83. The letter itemized specific items belonging to Rose that Diane possessed, including at least 15 jewelry pieces. CP 298, 360-83. Cynthia did not need to inform Diane what specific items she failed to return because Diane provided that information herself.

Finally, Diane and Sandra posit that Cynthia breached her duty of loyalty by acting in her own interest. BA 25-26. But the trust waives successor trustees' conflicts of interest and provides

that part of Diane's share could be given to Cynthia. CP 346, 348-49. The mere fact that Cynthia benefited from following the trust cannot mean that she breached her fiduciary duties. Cynthia followed Rose's wishes, so she did not breach her fiduciary duties.

Diane and Sandra attempt to analogize this case to ***Edmonds v. John L. Scott Real Estate, Inc.***, 87 Wn. App. 834, 942 P.2d 1072 (1997). There, a real estate agent breached his fiduciary duties by declaring his client in default and distributing her earnest money without any investigation. 87 Wn. App. at 840, 850-51. ***Edmonds*** is inapposite because it deals with a real estate transaction, not a trust distribution. Unlike in ***Edmonds***, Cynthia investigated and learned that Diane failed to fulfill the contingencies. Unlike in ***Edmonds***, Cynthia did not ignore Diane's interest but gave Diane an opportunity to show that she had returned Rose's items to her. CP 360. Unlike in ***Edmonds***, the trust specifically directed that Diane's share would be reduced in these circumstances. CP 348-49. ***Edmonds*** is no help here.

In short, Cynthia's removal would not save the trust property, and the trial court had no reasonable cause to remove Cynthia.<sup>7</sup> RCW 11.98.039; *Ehlers*, 80 Wn. App. at 761.

**D. The Court should award the estate its appellate attorney fees and deny Diane and Sandra's attorney fee request.**

This Court should award the estate its attorney fees on appeal, to be paid by Diane and Sandra. RAP 18.1 allows a party to recover attorney fees on appeal if there is a legal basis for the award. RCW 11.96A.150 allows the trial and appellate courts to award attorney fees and costs as they deem equitable, based on factors they deem relevant. This Court has previously awarded attorney fees when a party used litigation to frustrate the trust's purpose and deplete its assets. *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 345, 183 P.3d 317 (2008).

Here, even though Diane sent the letter admitting she possessed Rose's jewelry and distributed several of those items to Cynthia, CP 298, 360-84, Diane and Sandra have persisted in this litigation, raising arguments that lack any merit. This litigation has

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<sup>7</sup> Diane and Sandra ask this Court to hold that Cynthia should be removed as trustee and personal representative. BA 27. Nothing supports this extraordinary request. In any event, their arguments on appeal, even if correct, would establish only that there is a dispute of material fact. CR 56.

cost the trust attorney fees and prevented Cynthia from following Rose's wishes. Like in **McKean**, this Court should award appellate attorney fees to the estate from Diane and Sandra.

Diane and Sandra's request for trial and appellate attorney fees should be denied. This Court will not disturb a trial court's refusal to award attorney fees unless there was a clear abuse of discretion. **Bartlett**, 136 Wn. App. at 22. Here, the trial court properly granted summary judgment in Cynthia's favor, so it acted within its discretion in denying Diane and Sandra's request for attorney fees. This Court should affirm that decision.

Diane and Sandra argue that they should receive attorney fees on equitable grounds. BA 28. A court may award fees in equity when a party's conduct constitutes bad faith or wantonness. **Pub. Util. Dist. No. 1 v. Kottsick**, 86 Wn.2d 388, 390, 545 P.2d 1 (1976). Cynthia did not act in bad faith or wantonly.

A court also may award attorney fees if the trust litigation deals with substantial issues, resolves the meaning of the trust's ambiguous language, is essential to the proper administration of the trust, and benefits the trust as a whole. **Peoples Nat'l Bank of Wash. v. Jarvis**, 58 Wn.2d 627, 632, 364 P.2d 436 (1961) (citing **In re Atwood's Trust v. Holmes**, 227 Minn. 495, 501, 35 N.W.2d

736 (1949)). Diane and Sandra's litigation does not meet any of these conditions. This Court should not award them attorney fees.

Diane and Sandra argue they should be awarded fees because Cynthia and her attorneys brought the summary judgment motion knowing that there was a disputed material fact, because Cynthia breached her fiduciary duties, and because a "simple phone call" would have prevented the litigation. BA 29-30. Diane and Cynthia present no evidence supporting these assertions. As shown above, the undisputed evidence demonstrates that Rose asked Diane to return the property and that she did not do so. CP 298, 348-49, 360-84. A phone call would not have made any difference. The Court should reject these arguments.<sup>8</sup>

Finally, Diane and Sandra should not be awarded attorney fees even if they are successful on appeal. Disputed issues of material fact would remain. Any fee award should await a final disposition. See *In re Estate of Stockman*, 59 Wn. App. 711, 715, 800 P.2d 1141 (1990).

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<sup>8</sup> Similarly, Diane and Sandra cannot support their argument that they should be awarded attorney fees because Cynthia objected to a proposed mediation. BA 29-30. They cannot prove mediation would have resolved the dispute, and if anything, mediation would have added more costs and attorney fees.

## CONCLUSION

This Court should decline to review Diane and Sandra's appeal because they failed to appeal the final judgment. If the Court nonetheless reaches the merits, the trial court properly granted Cynthia's motion because Diane never returned Rose's property to Rose and because Sherrard never received a letter confirming that Diane complied with Rose's unambiguous wishes. Cynthia followed Rose's testamentary intent and did not breach her fiduciary duties. This Court should award the estate its reasonable appellate attorney fees and costs.

RESPECTFULLY SUBMITTED this 4<sup>TH</sup> day of March, 2011.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **BRIEF OF RESPONDENT** postage prepaid, via U.S. mail on the 4<sup>th</sup> day of March 2011, to the following counsel of record at the following addresses:

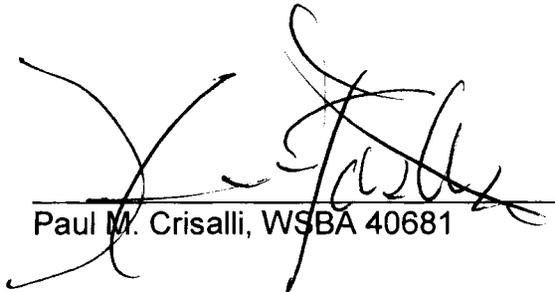
Counsel for Appellants

Patrick H. Vane  
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Seattle, WA 98109

Counsel for the Estate

Roger D. Sherrard  
P.O. Box 400  
Poulsbo, WA 98370

COURT OF APPEALS  
DIVISION II  
11 MAR -7 AM 9:49  
STATE OF WASHINGTON  
BY Paul M. Crisalli  
DEPUTY

  
Paul M. Crisalli, WSBA 40681

shall make the following distributions:

1. To the persons designated on a list to receive items of tangible personal property, the Trustee is hereby authorized to distribute such property as may be designated on such list. It is the Trustor's intent that this list be interpreted in accordance with RCW 11.12.260. The Trustor directs that such list will only refer to tangible personal property, will be dated, and will be in the Trustor's handwriting or signed by the Trustor and will describe the items to be distributed pursuant to the list and the recipients of such items, with reasonable certainty. The Trustee shall be held harmless and indemnified from any distribution made in accordance with any such list, notwithstanding any other provisions of this Trust, and may, in her sole discretion, pay all or any portion of the cost to ship any item to a distributee.

2. Any item not distributed as part of the List in subpart 1., above, shall be distributed to family or friends, sold at an estate sale, given to a charity or discarded, all in the sole and absolute discretion of the Trustee.

3. I have certain items of jewelry and sterling silver and other tangible personal property, which I own, but are currently 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 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.

4. After distributions have been made in parts 1 thru 3, above, 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 subject to the following:

a. If any does not then survive, her share shall be distributed to her lawful lineal descendants, by right of representation;

b. The trustee shall satisfy any distribution hereunder, in cash or in kind, or partly in each, and the assets to be distributed in satisfaction of any such distribution shall be selected in a manner that the distribution will have an aggregate fair market value fairly representative of the distributee's proportionate share of the appreciation or depreciation of the value to the date or dates of distribution; and,

c. Any adjustment called for in subpart 3., above.

C. If any beneficiary under this Trust, in any manner, directly or indirectly, contests or attacks this Trust or any of

**RCW 5.60.030**

**Not excluded on grounds of interest —  
Exception — Transaction with person since  
deceased.**

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

[1977 ex.s. c 80 § 3; 1927 c 84 § 1; Code 1881 § 389; 1877 p 85 § 391; 1873 p 106 § 382; 1869 p 183 § 384; 1867 p 88 § 1; 1854 p 186 § 290; RRS § 1211.]

## **RCW 11.12.260**

# **Separate writing may direct disposition of tangible personal property — Requirements.**

(1) A will or a trust of which the decedent is a grantor and which by its terms becomes irrevocable upon or before the grantor's death may refer to a writing that directs disposition of tangible personal property not otherwise specifically disposed of by the will or trust other than property used primarily in trade or business. Such a writing shall not be effective unless: (a) An unrevoked will or trust refers to the writing, (b) the writing is either in the handwriting of, or signed by, the testator or grantor, and (c) the writing describes the items and the recipients of the property with reasonable certainty.

(2) The writing may be written or signed before or after the execution of the will or trust and need not have significance apart from its effect upon the dispositions of property made by the will or trust. A writing that meets the requirements of this section shall be given effect as if it were actually contained in the will or trust itself, except that if any person designated to receive property in the writing dies before the testator or grantor, the property shall pass as further directed in the writing and in the absence of any further directions, the disposition shall lapse and, in the case of a will, RCW 11.12.110 shall not apply to such lapse.

(3) The testator or grantor may make subsequent handwritten or signed changes to any writing. If there is an inconsistent disposition of tangible personal property as between writings, the most recent writing controls.

(4) As used in this section "tangible personal property" means articles of personal or household use or ornament, for example, furniture, furnishings, automobiles, boats, airplanes, and jewelry, as well as precious metals in any tangible form, for example, bullion or coins. The term includes articles even if held for investment purposes and encompasses tangible property that is not real property. The term does not include mobile homes or intangible property, for example, money that is normal currency or normal legal tender, evidences of indebtedness, bank accounts or other monetary deposits, documents of title, or securities.

## **RCW 11.68.070**

# **Procedure when personal representative recreant to trust or subject to removal.**

If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of any unpaid creditor of the estate who has filed a claim or any heir, devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, 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. In the event the court shall restrict the powers of the personal representative in any manner, it shall endorse the words "Powers restricted" upon the original order of solvency together with the date of said endorsement, and in all such cases the cost of the citation, hearing, and reasonable attorney's fees may be awarded as the court determines.

[2010 c 8 § 2057; 1977 ex.s. c 234 § 23; 1974 ex.s. c 117 § 19.]

## **RCW 11.96A.150**

### **Costs — Attorneys' fees.**

(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. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

**RCW 11.98.039**

**Nonjudicial change of trustee — Judicial appointment or change of trustee — Liability and duties of successor fiduciary.**

(1) Where a vacancy occurs in the office of the trustee and there is a successor trustee who is willing to serve as trustee and (a) is named in the governing instrument as successor trustee or (b) has been selected to serve as successor trustee under the procedure established in the governing instrument for the selection of a successor trustee, the outgoing trustee, or any other interested party, shall give notice of such vacancy, whether arising because of the trustee's resignation or because of any other reason, and of the successor trustee's agreement to serve as trustee, to each adult distributee or permissible distributee of trust income or of trust principal or of both trust income and trust principal. If there are no such adults, no notice need be given. The successor trustee named in the governing instrument or selected pursuant to the procedure therefor established in the governing instrument shall be entitled to act as trustee except for good cause or disqualification. The successor trustee shall serve as of the effective date of the discharge of the predecessor trustee as provided in RCW 11.98.041.

(2) Where a vacancy exists or occurs in the office of the trustee and there is no successor trustee who is named in the governing instrument or who has been selected to serve as successor trustee under the procedure established in the governing instrument for the selection of a successor trustee, and who is willing to serve as trustee, then all parties with an interest in the trust may agree to a nonjudicial change of the trustee under RCW 11.96A.220. The successor trustee shall serve as of the effective date of the discharge of the predecessor trustee as provided in RCW 11.98.041 or, in circumstances where there is no predecessor trustee, as of the effective date of the trustee's appointment.

(3) When there is a desire to name one or more co-trustees to serve with the existing trustee, then all parties with an interest in the trust may agree to the nonjudicial addition of one or more co-trustees under RCW 11.96A.220. The additional co-trustee shall serve as of the effective date of the co-trustee's appointment.

(4) Unless subsection (1), (2), or (3) of this section applies, any beneficiary of a trust, the trustor, if alive, or the trustee may petition the superior court having jurisdiction for the appointment or change of a trustee or co-trustee under the procedures provided in RCW 11.96A.080 through 11.96A.200: (a) Whenever the office of trustee becomes vacant; (b) upon filing of a petition of resignation by a trustee; or (c) for any other reasonable cause.

(5) For purposes of this subsection, the term fiduciary includes both trustee and personal representative.

(a) Except as otherwise provided in the governing instrument, a successor fiduciary, absent actual knowledge of a breach of fiduciary duty: (i) Is not liable for any act or omission of a predecessor fiduciary and is not obligated to inquire into the validity or propriety of any such act or omission; (ii) is authorized to accept as conclusively accurate any accounting or statement of assets tendered to the successor fiduciary by a predecessor fiduciary; and (iii) is authorized to receipt only for assets actually delivered and has no duty to make further inquiry as to undisclosed assets of the trust or estate.

(b) Nothing in this section relieves a successor fiduciary from liability for retaining improper investments, nor does this section in any way bar the successor fiduciary, trust beneficiaries, or other party in interest from bringing an action against a predecessor fiduciary arising out of the acts or omissions of the predecessor fiduciary, nor does it relieve the successor fiduciary of liability for its own acts or omissions except as specifically stated or authorized in this section.

[2005 c 97 § 13; 1999 c 42 § 618; 1985 c 30 § 44. Prior: 1984 c 149 § 72; 1959 c 124 § 5. Formerly RCW 30.99.050.]

## **RCW 11.98.200**

### **Beneficiary trustee — Limitations on power.**

Due to the inherent conflict of interest that exists between a trustee and a beneficiary of a trust, unless the terms of a trust refer specifically to RCW 11.98.200 through 11.98.240 and provide expressly to the contrary, the powers conferred upon a trustee who is a beneficiary of the trust, other than the trustor as a trustee, cannot be exercised by the trustee to make:

(1) Discretionary distributions of either principal or income to or for the benefit of the trustee, except to provide for the trustee's health, education, maintenance, or support as described under section 2041 or 2514 of the Internal Revenue Code and the applicable regulations adopted under that section;

(2) Discretionary allocations of receipts or expenses as between principal and income, unless the trustee acts in a fiduciary capacity whereby the trustee has no power to enlarge or shift a beneficial interest except as an incidental consequence of the discharge of the trustee's fiduciary duties; or

(3) Discretionary distributions of either principal or income to satisfy a legal obligation of the trustee.

A proscribed power under this section that is conferred upon two or more trustees may be exercised by the trustees that are not disqualified under this section. If there is no trustee qualified to exercise a power proscribed under this section, a person described in RCW 11.96A.080 who is entitled to seek judicial proceedings with respect to a trust may apply to a court of competent jurisdiction to appoint another trustee who would not be disqualified, and the power may be exercised by another trustee appointed by the court. Alternatively, another trustee who would not be disqualified may be appointed in accordance with the provisions of the trust instrument if the procedures are provided, or as set forth in RCW 11.98.039 as if the office of trustee were vacant, or by a nonjudicial dispute resolution agreement under RCW 11.96A.220.