69608-4

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NO. 69608-4-I (Consolidated with No. 69702-1-I)

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

In re Estate of

**J. Thomas Bernard,**

Decedent.

# APPELLANTS' OPENING BRIEF

Bruce A. McDermott, Bar# 18988
Teresa Byers, Bar# 34388
GARVEY SCHUBERT BARER
Attorneys for Appellant
Leah Karp & Diane Viars

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

Kim D. Stephens, P.S. Bar# 11984
Shannon M. Whitemore, Bar# 31530
TOUSLEY BRAIN STEPHENS PLLC
Attorneys for Daniel Reina

1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
206.682.5600



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## I. INTRODUCTION

This controversy involves a challenge to the estate plan of J. Thomas Bernard ("Tom Bernard" or "Mr. Bernard"). The challenge hinges not on Mr. Bernard's testamentary intent, his testamentary capacity, or even the form of his testamentary documents. A challenge on any of those bases would require the contestants to prove their case by clear, cogent and convincing evidence. Instead, the trial court by summary judgment effectively invalidated both Mr. Bernard's last will and the last amendment to his trust, based solely upon an interpretation of the relationship between two related nonjudicial binding agreements (the "March TEDRA" and the "August TEDRA"). In the starkest terms, the trial court's decision renders irrelevant, on a lesser burden of proof, the last expression of Mr. Bernard's valid testamentary intent, which the Washington Supreme Court has declared must be the "polar star" in any adjudication of a will in this state.

This error was compounded by a subsequent series of conflicting orders that allegedly terminated the Personal Representative's and Trustees' rights to appeal the trial court's decision. After finding that the first nonjudicial binding agreement Mr. Bernard had executed controlled *all* of his testamentary documents and prevented their further modification, and consequently finding the Mr. Bernard's will codicil and trust amendment invalid, the trial court held that the Personal

Representative and Trustees could not appeal that ruling, despite their continuing conviction that the latter documents reflected Mr. Bernard's last intent, and must cease defending the will admitted to probate and the trust amendment and instead align themselves with the will and trust contestants. In so doing, the trial court made itself the court of first and last resort for the Personal Representative and Trustees.

Appellants therefore appeal the trial court's denial of reconsideration of its October 19, 2012 order on Summary Judgment, and the oral ruling incorporated therein. They also appeal the Order holding that the Personal Representative and Trustees may not appeal summary judgment entered in a will or trust contest. Those appeals are consolidated before this Court and addressed in the assignments of error below.

## II. ASSIGNMENTS OF ERROR

The trial court erred in holding that:

1. The first nonjudicial binding agreement ("March TEDRA") expressly required a court order to modify the March TEDRA.

2. The March TEDRA could not be nonjudicially amended by a later nonjudicial binding agreement ("August TEDRA").

3. Because the Court found the August TEDRA invalid, the Codicil and Amendment to the Trust were also invalid and ineffective.

4. The *Button* case prohibited amendment of the Trust absent a Court Order approving the proposed amendment.

5. The Personal Representative and the Trustee cannot appeal a summary judgment ruling invalidating the Codicil and Amendment.

## III. STATEMENT OF THE CASE

### A. Mr. Bernard and his Son Entered into the March TEDRA, March Trust Agreement and Will to Protect Mr. Bernard's Assets During his Final Illness.

Tom Bernard enjoyed a successful career as a real estate developer. CP 171. His first wife predeceased him, and his second marriage ended in divorce. CP 142 & 182. Thus, his sole immediate family member was his adopted son, James. CP 5, 173 & 182. Sadly, in 2008, at the age of 64, Mr. Bernard developed frontal lobe dementia. CP 1042 & 1049. That disease ultimately took his life. CP 1039-1052.

Soon after Mr. Bernard's diagnosis, James became concerned with his father's health and safety, stemming primarily from financial predators hawking artwork at grossly inflated prices. CP 183-184, 187-188. Concerned that his father could become vulnerable, James filed a petition for guardianship in April 2008[1]. CP 410-419. On March 9, 2009, Mr. Bernard moved to dismiss the guardianship petition. CP 410-419. The guardianship petition had languished for almost a year and James had failed to prosecute the action. *Id.* James did not conduct any discovery and was no longer represented by counsel. *Id.* Furthermore, the Guardian

[1] Mr. Bernard objected to the guardianship petition, but importantly, for the purposes of this appeal, and the underlying motion for summary judgment, *Mr. Bernard is presumed to have capacity*.

ad Litem had not filed interim reports as required by RCW 11.88.090. *Id.* The petition was granted and the Order dismissing the guardianship petition was entered on March 27, 2009. CP 420-421.

Guardianship was clearly not the proper remedy to address Mr. Bernard's anticipated decline, and James and Mr. Bernard agreed that less restrictive alternatives might be beneficial, especially in serving to insulate Mr. Bernard from potential predators. Mr. Bernard agreed to transfer his assets to a revocable living trust and designated independent co-trustees. CP 447-450. Mr. Bernard contacted his business lawyer, Kenneth Hart, and his divorce counsel, Douglas P. Becker, and asked them to serve as co-trustees of his trust, along with his business partner, Daniel Reina. *Id.* These were the people with whom Mr. Bernard worked most closely on his business and personal matters and whom he most trusted. *Id.*

Mr. Bernard retained an experienced estate planning attorney, Ryan Montgomery of Montgomery Purdue Blankinship & Austin PLLC, to prepare his estate planning documents. CP 422-425. The estate planning documents served a dual purpose of putting Mr. Bernard's trusted advisors in charge of managing his assets in the event of his incapacity and effectuating a plan to avoid a future guardianship proceeding. *Id.* Because an irrevocable trust would have negative gift tax consequences, Mr. Montgomery proposed a revocable trust with a notice requirement to James if Mr. Bernard wanted to modify the trust. *Id.*

On March 25, 2009, Mr. Bernard executed his Will and the J. Thomas Bernard Revocable Trust Agreement (hereinafter "Trust"). CP 4-8, 207-228, 422-425. The Trust provided that, in the event of his death, Mr. Bernard's entire estate, including assets held in the trust, would pass to his son, James. CP 4-8, 207-228. The Trust further provided that, if James did not survive Mr. Bernard, the trust estate would pass to Mr. Bernard's niece and nephews, in 20 percent shares to each, with the remainder passing to various charities. *Id.* Mr. Montgomery and Mr. Bernard discussed the estate planning documents for approximately 90 minutes, during which time Mr. Montgomery confirmed that Mr. Bernard met the test for testamentary capacity in that he: (1) understood the transaction in which he was engaged; (2) comprehended the nature and extent of the property which constituted his estate and of which he was contemplating disposition; and (3) recollected the objects of his bounty. *Id.* Mr. Bernard clearly comprehended the documents, expressed his intent and understood that his only son James was to be the sole beneficiary of his estate, if he survived him. *Id.* Mr. Bernard also understood that the Trust provided only contingent bequests for his niece and nephews, the Linger Parties, and, therefore, they would receive benefits under the Trust only if James failed to survive him. *Id.*

Two days later, Mr. Bernard and James entered into a nonjudicial binding agreement under RCW Ch. 11.96A, the "March TEDRA." CP 427-432. Mr. Bernard and James were the only necessary parties to that

agreement. *Id.*, CP 422-425. Both Mr. Bernard and James acknowledged that Mr. Bernard had "full testamentary and contractual capacity to revoke his existing testamentary instruments and execute the Trust and Will." CP 427-432. As stated in the March TEDRA, Mr. Bernard and James also agreed that establishing the Trust was "a mutually acceptable less restrictive alternative to a guardianship of the estate." *Id.* In deference to James' concerns regarding his anticipated decline, Mr. Bernard included the following language in the March TEDRA:

> Although both the Trust and Will remain revocable and/or modifiable by Tom during his lifetime, the Parties agree that no exercise of Tom's Modification Powers over either or both of the Trust and/or the Will shall be effective unless and until:
>
> i. Tom files a petition for a hearing under RCW 11.96A in King County Superior court which clearly and specifically sets forth a particular proposal for an exercise of his Modification Powers.
>
> ii. timely provides James with a summons for such hearing pursuant to RCW 11.96A.100 (and otherwise complies with the substantive and procedural provisions of RCW 11.96A), and
>
> iii. as a result of such a hearing, the court issues an order approving the exercise of some or all of the particular Modification Power(s) expressly requested in Tom's petition.

CP 476.

On June 10, 2009, as authorized by RCW 11.96A230(1), a memorandum summarizing the terms of the March TEDRA was filed with the court. CP 422-425, 433-434. Pursuant to RCW 11.96A230(2), upon

filing, the March TEDRA was deemed approved by the court, equivalent to a final court order, and became binding on all persons interested in the estate or trust. CP 427-432, 433-434.

**B. Due to the Deterioration of his Relationship with the Linger Parties, Mr. Bernard Sought to Amend His Trust and Will to Change the Potential Distributions to His Contingent Beneficiaries.**

Mr. Bernard was not close to the Linger Parties. Any relationship they did have deteriorated over time, in part due to their constant demands for money. CP 376-378, 447-450. Mr. Bernard met his nephews only a few years prior to his death. CP 982-983. While Mr. Bernard had been generous to his niece, Rose Linger, financing her education and loaning her and the company she owned with her husband, David Linger, large sums of money, she refused to acknowledge these debts and refused to honor repayment terms. CP 376-378, 447-450. Despite this failure, Rose continued to make demands on Mr. Bernard, including claims that as Mr. Bernard's only biological heir, she was entitled to own and run his companies. CP 382-393, 447-450.

Matters came to a head in June 2009. On June 5, 2009, Rose made a demand to Mr. Bernard that he not meet with his son, James, without her present. CP 447-450. Later that day, while they attended a social event, Rose physically attacked and verbally assaulted Mr. Bernard and James. CP 382-393, 447-450. Rose told Mr. Bernard that because James was adopted, he was not Mr. Bernard's family and that therefore she should

receive the entirety of Mr. Bernard's estate. *Id.* Rose threatened to "take over" Mr. Bernard's companies. *Id.* She then proceeded to stalk Mr. Bernard, James, and other guests around the event. *Id.* She acted physically aggressive with James, yelling, "I'm Tom's only blood relative and I've been here longer than you." *Id.* Ultimately, security guards subdued and escorted Rose off the premises. *Id.*

Deeply disturbed by Rose's outbursts and ultimately frustrated by her failure to honor her commitments to repay the loans, Mr. Bernard filed a lawsuit against Rose, her husband, and their company, Linger & Associates LLC, to collect the outstanding loans. CP 376-378, 447-450. He also obtained a restraining order preventing Rose and David Linger from contacting him, based in large part on Rose's actions on June 6, 2009. CP 382-393, 447-450. Meanwhile, during 2008 and 2009, neither of Mr. Bernard's nephews made any attempt to contact him. CP 40.

Based on these events, Mr. Bernard decided to change his contingent beneficiaries under the Revocable Trust Agreement and arranged to meet with Mr. Montgomery for that purpose. CP 422, 425. During an August 2009 meeting with Mr. Montgomery, Mr. Bernard stated that "his niece and nephews 'only cared about [his] money!'" CP 422-425. At that meeting, Mr. Montgomery again determined that Mr. Bernard met the standards of testamentary capacity: he understood the transaction, comprehended the nature and extent of the property in his estate, and recollected the natural objects of his bounty. CP 783-789.

At Mr. Bernard's direction, Mr. Montgomery prepared an amendment to the Trust and a codicil to his Will, which substantially reduced Mr. Bernard's bequests to Petitioners as contingent beneficiaries to cash bequests of $20,000 each. CP 239-242 & 244-247. While retaining several charitable organizations as contingent remainder beneficiaries, Mr. Bernard replaced the Linger parties as contingent beneficiaries of his Trust; naming instead, Leah Karp, Diane Viars, and Daniel Reina, three of his long-time employees ("Appellants"). *Id.* & CP 425 & 447-448. The amendment to the Trust affected only the contingent remainder beneficiaries. Mr. Bernard's estate plan still focused on his nuclear family: providing for income and principal to Mr. Bernard for his life, with the remainder going to his then twenty-seven year old son, James, at his death. CP 4-8, 207-228, 9-12, 239-242. Mr. Bernard executed the amendment to the Trust and the codicil (hereinafter respectively "Trust Amendment" and "Codicil") on August 27, 2009, in the presence of Mr. Montgomery, his legal staff, and Mr. Becker, a Trustee and the Personal Representative.[2] CP 422-425.

[2] In its Oral Ruling incorporated in the October 19 Order, the trial court identifies the date of Mr. Bernard's execution of the amending documents as August 22, 2009. RP 6. However, Mr. Montgomery's testimony and the documents themselves clearly identify the effective date and execution date as August 27, 2009. CP 239-242, 244-247, 422-425, 435-440, & 783-789.

### C. To Satisfy the Three-step Process for Modification in the March TEDRA, Mr. Bernard and James Executed the August TEDRA.

When he prepared the Trust Amendment and Codicil, Mr. Montgomery also prepared a second nonjudicial binding agreement, the "August TEDRA," to satisfy the three-step modification process set out in the March TEDRA. CP 422-425, 783-789. As required by the March TEDRA, Mr. Bernard gave James notice of his intent to modify the terms of his Trust and Will. CP 422-425, 427-432, & 435-446. In satisfaction of the three-step process for modification set out in the March TEDRA, Mr. Bernard and James executed the August TEDRA, which acknowledged Mr. Bernard's desire to modify his Trust and Will, specifically recognized that Mr. Bernard had satisfied the notice requirement to James and acknowledged that "because the Modification Restrictions *are imposed solely by virtue of the Agreement between the Parties,"* Mr. Bernard and James were the *"sole necessary parties* and have the power to modify such restrictions by further agreement." CP 427-432 & 435-446 (emphasis added). Consistent with the March TEDRA, the August TEDRA provided that once a memorandum was filed with the court, "the Amended Agreement will satisfy the Agreement's requirement to obtain a court order prior to any exercise of Tom's Modification Powers." *Id.* The parties viewed the August TEDRA as a more efficient method of enabling Tom to exercise his modification powers. *Id.*

Both Mr. Bernard and James signed the August TEDRA, with an effective date of August 27, 2009, the same date as Mr. Bernard executed the Trust Amendment and Codicil. CP 9-12, 239-242, & 435-446. Mr. Montgomery later filed a memorandum summarizing the August TEDRA. CP 422-425 & RP 7:2-4 & 8:2-6. Just as the memorandum of the March TEDRA had the effect of a final court order under RCW 11.96A.230, the execution of the August TEDRA, and filing of a memorandum summarizing it, became binding on all persons interested in the Trust.

Mr. Bernard died on January 13, 2011, after battling complications with his dementia for several months. CP 1-3. His son and sole heir, James, predeceased him, dying by suicide on September 11, 2010. *Id.*

**D. The Linger Parties Seek to Invalidate Mr. Bernard's Estate Plan**

Following Mr. Bernard's death and the filing of the Will and Codicil by the Personal Representative, the Linger Parties filed a Petition to Contest Will, later amending their petition to contest the Trust Amendment. CP 1-3, 4-8, 9-12, 13-14, & 979-1038. The Personal Representative, the Trustees, and Appellants all opposed the petition. CP 15-18, 19-21, 22-24, 25-56, 57-73. In their Motions for Partial Summary Judgment re: Trust Invalidity based on the amended petition ("Summary Judgment Motion"), the Linger Parties sought to invalidate both the March estate documents and the August estate documents. CP 111-135. Following extensive briefing in opposition to the Summary Judgment

Motion by Appellants, the Personal Representative and the Trustees, the trial court denied the Linger Parties' motion in its September 10, 2012 Order Denying Petitioners' Motion for Partial Summary Judgment re: Trust Invalidity (the "September 10 Order"), finding material facts in dispute as to the validity of the March estate documents, and deferring any decision with regard to the August estate documents. CP 353-373, 374-421, 422-446, 447-450, 487-499, 500-506, 507-511, & 1039-1052.

The Linger Parties sought reconsideration of the September 10 Order solely on the trial court's deferral regarding the August estate documents. CP 512-519. The Linger Parties failed to appeal the September 10 Order as to the trial court's decision regarding the March estate documents, so that decision is final and unappealable. Following additional briefing, the trial court granted the Linger Parties' motion for reconsideration in its October 19 Order, incorporating its Oral Ruling made October 12, 2012. CP 520-534, 535-547, 558-561, & RP 4:15-11:16. Appellants sought reconsideration of the October 19 Order, joined by the Personal Representative and the Trustees. The trial court ultimately denied the reconsideration in its November 16, 2012 Order Denying Respondents' Motion for Reconsideration (the "November 16 Order"). CP 715-827, 850-853, 912-917, & 935. This appeal arises, in part, out of the November 16 Order. CP 943-944.

### E. Trial Court Revises Commissioner's Order, Finding Personal Representative and Trustees Have No Right to Appeal

While the Motion for Reconsideration was pending, the Personal Representative and the Trustees filed a Petition for Instructions Regarding Offset Claim, Motion for Certification for Review of Order Granting Motion for Reconsideration of Summary Judgment Re: August Agreement Validity (the "Petition for Instructions") seeking, among other directions, the trial court's instruction as to whether the Personal Representative and the Trustees had a right to appeal the October 19 Order. CP 604-623, 828-834, & 835-849. Appellants joined in support of the Petition for Instructions. CP 711-712 &713-714.

On October 31, 2012, the court commissioner heard argument on the Petition for Instructions, and concluded that the Personal Representative and the Trustees "have an absolute right to appeal" the October 19 Order ("Commissioner's Order"). CP 854-857. However, upon the Linger Parties' motion, the trial court revised the Commissioner's Order, holding that Personal Representative and the Trustees "do not have the right to appeal" the October 19 Order ("Revision Order"). CP 968-969.

## IV. ARGUMENT

### A. Standard of Review

Because summary judgment may only be granted when the court finds there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law, the standard of review on appeal from an order on summary judgment is *de novo*. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006); *In re Parentage of J.M.K.*, 155 Wn. 2d 374, 119 P.3d 840 (2005). Likewise, in matters brought under the TEDRA, the Court reviews a trial court's order revising a commissioner's order *de novo*. RCW 11.96A.200; *In re Estate of Bracken*, 175 Wn.2d 549, 562, 290 P.3d 99, 105 (2012).

The appellate court on *de novo* review is charged with the same inquiry as the trial court and should affirm the grant of summary judgment only if, from all the evidence, it is clear that reasonable persons could reach but one conclusion. *In re Parentage of J.M.K.*, 155 Wn.2d at 386. Moreover, the evidence must be construed in the light most favorable to the party opposing summary judgment, and all reasonable inferences must be drawn in favor of that party. *Miller v. Jacoby*, 145 Wn.2d 65, 71, 33 P.3d 68 (2001); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 846, 292 P.3d 779 (2013). As applied here, this principle means that it must be taken as established that Mr. Bernard had full testamentary capacity and was not unduly influenced, since Appellants presented (and the trial court found) genuine issues of fact as to those issues.

As set forth below, the trial court improperly granted summary judgment in this case. The evidence relied on by the parties presents genuine issues of material fact. In addition, the trial court improperly decided issues of law in a manner unsupported by the statutes, the

statutory history and the case law. Moreover, if the trial court's decision is upheld, and its improperly narrow interpretation of both TEDRA and the caselaw is thereby affirmed, it will undercut more than twenty years of work by practitioners and severely restrict the practice of the entire community of trust and estate lawyers in this state going forward.

**B. Error 1: The Terms of the March TEDRA Expressly Required a Court Order Prior to Modification.**

The Court found that "[t]he March TEDRA agreement expressly provided that the parties could not modify that agreement without prior court approval." CP 811. However, the March TEDRA does not so provide. The March TEDRA states as follows:

> Although both the Trust and Will remain revocable and/or modifiable by Tom during his lifetime, the Parties agree that no exercise of Tom's Modification Powers *over either or both of the Trust and/or the Will* shall be effective unless and until:
>
> i. Tom files a petition for a hearing under RCW 11.96A in King County Superior court which clearly and specifically sets forth a particular proposal for an exercise of his Modification Powers.
>
> ii. timely provides James with a summons for such hearing pursuant to RCW 11.96A.100 (and otherwise complies with the substantive and procedural provisions of RCW 11.96A), and
>
> iii. as a result of such a hearing, the court issues an order approving the exercise of some or all of the particular Modification Power(s) expressly requested in Tom's petition.

CP 204 (emphasis added). The clear language of the March TEDRA provides only that *the Will and the Trust* are subject to the three step

process. The March TEDRA does not provide that the March TEDRA *itself* is subject to modification through that three step process. The trial court's finding to the contrary is clear error.

Because the trial court erroneously held that the March TEDRA required a court order to be modified, the Court failed to consider whether the August TEDRA effectively modified the March TEDRA. Thus, there is an unresolved issue of law as to whether the August TEDRA modified the March TEDRA – a critical question, in light of the Court's associated erroneous holding that absent modification of the March TEDRA, the Amendment and Codicil are null and void. The domino effect of this error necessarily means that summary judgment was improper. This Court should reject this rationale and remand for determination of the effect of the August TEDRA in modifying the March TEDRA.

### C. Error 2: A Nonjudicial Binding Agreement May Not be Modified by a Later Nonjudicial Binding Agreement.

From the extensive briefing in the trial court, it is clear that the Linger Parties agree that the issues properly before the Court of Appeals include whether the August TEDRA, and by association, the Trust Amendment and Codicil, are valid. CP 864. Thus, the threshold technical question before this Court is simply this: can a nonjudicial binding agreement executed under RCW 11.96A.220 be modified by a later nonjudicial binding agreement? CP 866, fn. 2. The answer, under both

Washington statutory and common law, as well as long-established practice within the estate planning community, is yes.

1. TEDRA Grants Expansive Powers and Contemplates Nonjudicial Modification of Agreements.

The Trust and Estate Dispute Resolution Act ("TEDRA") is explicit that its overarching purpose is to minimize litigation and facilitate nonjudicial resolution of trust and estate disputes, largely via the use of nonjudicial binding agreements. *See* RCW 11.96A.010 ("The provisions are intended to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement"), RCW 11.96A.210 ("The purpose of RCW 11.96A.220 through 11.96A.250 is to provide a binding nonjudicial procedure to resolve matters through written agreements among the parties interested in the estate or trust") & RCW 11.96A.260. TEDRA does not provide that nonjudicial binding agreements may be used only once as to each estate or trust; rather, the statute makes clear that the agreements may be used on a matter by matter basis:

> RCW 11.96A.210 through 11.96A.250 shall be applicable to the resolution of *any matter*, as defined by RCW 11.96A.030. If all parties agree to a resolution of any such matter, then the agreement shall be evidenced by a written agreement signed by all parties...*The agreement shall identify the subject matter of the dispute and the parties.*

RCW 11.96A.220 (emphasis added). Matter is expansively defined by RCW 11.96A.030(2) as any issue, question, or dispute involving a variety of topics effecting trusts and estates, many which affect the trust or estate

multiple times during the course of the entity's administration.[3] The Official Comments to TEDRA note that the definition of "matter" was specifically changed to

> remove the requirement that there be a determination that the requested action not be inconsistent with the purposes of the will or trust. By making this change Washington ***formally adopts recent practice and adopts a rule that allows all interested parties to agree to the resolution of an issue or modification of the applicable document.*** (Emphasis added.)

Comments to SB5196 (1/28/1999) TEDRA §104(1) RCW 11.96A.030. Thus, when considering the definition of "matter", the drafters specifically intended to facilitate resolution through the use of agreements that *modified the underlying documents* and anticipated that modifications would occur on a per *matter*, versus a per document, basis. Because modification of single document multiple times to address different matters falls within the scope of TEDRA, the statute necessarily contemplates and allows modification of an earlier nonjudicial binding agreement by a later agreement with the consent of the necessary parties.

TEDRA's imprimatur on modification of agreements is in step with longstanding Washington law. Nonjudicial binding agreements are specifically contemplated as a means to resolve potential and actual disputes among interested parties -- they are in effect settlement agreements. Settlement agreements are analyzed as contracts. *Evans & Son, Inc. v. City of Yakima*, 136 Wn. App. 471, 149 P.3d 691 (2006) *and*

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[3] RCW 11.96A.030(2).

*Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357 (1993). As contracts, nonjudicial binding agreements may be changed by the parties to the agreement:

> It is well settled in Washington that 'a contact may be modified or abrogated by the parties thereto in any manner they choose, notwithstanding provisions therein prohibiting its modification or abrogation except in a particular manner.'

*Pac. Nw. Group A. v. Pizza Blends*, 90 Wn. App. 273, 278, 951 P.2d 826 (1998)(quoting *Kelly Springfield Tire Co. v. Faulkner*, 191 Wash. 549, 555, 71 P.2d 382 (1937)); *see also Columbia Park Golf Course, Inv. v. City of Kennewick*, 160 Wn. App. 66, 82, 248 P.3d 1067 (2011)).

When Washington law is applied to the facts at issue, it is obvious that the authority to modify the March TEDRA rested solely with the parties to that document—Mr. Bernard and his son, James. No other individuals or entities were signatories to the Agreement between them and only James asserted the right to *notice* of a change in his father's testamentary scheme. The notice requirement arose entirely from the March TEDRA because under Washington law the court lacks jurisdiction over an individual's estate plan during the testator's lifetime:

> [t]he court had no jurisdiction whatsoever, either to 'compel a surrender and cancellation of the will, or to perpetuate testimony as to the mental condition of Miss Pond at the time the will was executed,' as prayed alternatively by the respondent. In Lloyd v. Wayne Circuit Court, 56 Mich. 236, 23 N. W. 28, 56 Am. Rep. 378, it was declared that even a statute providing for the ante mortem adjudication of the validity of a will and its admission to probate was invalid. This is upon sound principle and

> reason; and manifestly the converse is equally true, that courts have no power to inquire into the validity of wills prior to the death of the maker, to determine the *incompetency* of the maker.

*Pond v. Faust*, 90 Wash. 117, 120-121, 155 P. 776, 778 (1916). Thus, the Court had no inherent jurisdiction to grant James notice of changes to his father's testamentary scheme; instead that notice requirement was entirely a function of their contract.

In the absence of contractual rights to the contrary, contingent beneficiaries under a revocable living trust agreement have no enforceable interest or rights in a revocable trust during the lifetime of the trustor.[4] Since none of the contingent beneficiaries of Mr. Bernard's trust were parties to or intended beneficiaries of the March TEDRA, they do not meet the RCW 11.96A.030(5) definition of a "party with an interest in the subject of the particular proceeding." Nor do they meet the RCW 11.96A.030(6) definition of "persons interested in the estate or trust."[5] Nor can they claim to be beneficiaries of the March TEDRA and assert claims arising from that contract. A third-party beneficiary contract exists only when the parties intend to create an obligation to third parties.[6] In *Ridder v. Blethen*, 24 Wn.2d 552, 556, 166 P.2d 834 (1946), the court

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[4] RCW 11.103.040 provides, "While a trust is revocable by the trustor, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the trustor."

[5] "Persons interested in the estate or trust' means the trustor, if living, all persons beneficially interested in the estate or trust, persons holding powers over the trust or estate assets, the attorney general in the case of any charitable trust where the attorney general would be a necessary party to judicial proceedings concerning the trust, and any personal representative or trustee of the estate or trust." RCW 11.96A.030(6).

[6] *Postlewait Construction, Inc. v. Great American Insurance Cos.*, 41 Wn. App. 763, 768, 706 P.2d 636 (1985), *aff'd*, 106 Wn.2d 96, 720 P.2d 805 (1986).

(quoting *Sayward v. Dexter Horton & Co.*, 72 F. 758, 765, 19 C.C.A. 176 (9th Cir.1896)) stated that:

> It is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions.

(emphasis added).[7] Via the August TEDRA, Mr. Bernard and James, as the only parties to the March TEDRA, could validly modify the March TEDRA to allow Mr. Bernard to execute the Codicil and Amendment.[8]

2. The Practice in the Estate Planning Community Is to Allow Modification of TEDRA Agreements by subsequent TEDRA Agreements.

The state of Washington law under TEDRA, namely to encourage nonjudicial resolution of trust and estate matters, has been borne out by the actual practice of estate planners. Thus, if the trial court's holding that the March TEDRA could not be modified by a later TEDRA agreement is upheld, a tool commonly used by practitioners vanishes and a multitude of practitioners face an untenable problem – how to address all historic amendments to nonjudicial binding agreements?

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[7] In *Ridder*, 24 Wn.2d at 556, the court held that decedent's son was a mere incidental beneficiary under a contract which required the testator to "leave his class B Stock to his surviving sons" in his last will and testament. He later disinherited one of his sons, and that son brought suit claiming specific performance of the contract, which was denied.

[8] Once the contract was created under TEDRA, James could act as virtual representative under RCW 11.96A.220 for any other person who could claim to be "interested" in Mr. Bernard's estate plan. RCW 11.96A.220.

This is not a merely hypothetical question. In recent years, practitioners under TEDRA have done precisely what the legislature wanted them to do—exercise the broad discretion TEDRA grants to address thousands of issues without need for judicial intervention. TEDRA itself notes that "chapter 11.96 RCW, has resulted in the successful resolution of thousands of disputes since 1984." RCW 11.96A.260.[9] Since first implemented, nonjudicial binding agreements have been used to modify trusts to accommodate changes in intent and circumstances and to resolve conflicts among the beneficiaries. Nonjudicial binding agreements are used to address changes in the lives of the settlers and beneficiaries because "none of us has a crystal ball." *See* Ken Schubert Jr., *Revoking or Amending Irrevocable Trusts Under TEDRA,* 52ND ANNUAL ESTATE PLANNING SEMINAR § 16 (2007). Other commentators note, "both the Uniform Trust Code and TEDRA provide the parties interested in a trust (trustees and beneficiaries alike) with the ability to deal with situations that arise that may not have been foreseeable by the trustor when the trust was formed." Gail E. Mautner and Heidi L. G. Orr, "A Brave New World: Nonjudicial Dispute Resolution Procedures

[9] When practitioners were polled in 1993, a mere nine years after the original act was implemented, 119 King County practitioners indicated that they used nonjudicial binding agreements more than 550 times. Bruce P. Flynn, Richard A. Klobucher, Douglas C. Lawrence, & Kenneth L. Schubert, Jr., "Nonjudicial Dispute Resolution Agreements in Trusts and Estates – The Washington Experience and a Proposed Act" 20 ACTEC Notes 138, 144 (1994-1995). The uses of nonjudicial binding agreements included: i) nonjudicial change of fiduciary; ii) termination of a trust no longer serving its purposes; iii) modification of documentary provisions to accommodate original intent or changed circumstances; iv) resolution of disputes among various beneficiaries; and v) modification of documentary terms to comply with tax laws. *Id.*

Under the Uniform Trust Code and Washington and Idaho's Trust and Estate Dispute Resolution Acts," 35 ACTEC Journal 159, 173 (2009).

Adapting the underlying testamentary documents for unforeseen developments is precisely what the first and second nonjudicial binding agreements signed by Mr. Bernard attempted. He signed the March TEDRA reflecting his initial intent and a methodology for revising that intent should circumstances change. The August TEDRA recognized the change in his intent and modified the provisions of the necessary documents, including the March TEDRA, to effectuate that intent.

It has clearly been the understanding and practice of estate planning practitioners to use nonjudicial binding agreements to address an initial issue or concern and to subsequently address that issue in a later agreement as necessary. Professor Karen Boxx, a professor of law at the University of Washington School of Law in the area of trust and estate planning, as well as ethics, submitted a declaration to the trial court. CP 792-804. As that declaration made clear, the understanding of and instruction to the estate planning community is that:

> [o]ne of the primary purposes of TEDRA is to promote efficient non-judicial resolution of disputes and other matters involving trusts and estates...an important part of those procedures is RCW 11.96A.220, allowing parties to reach a binding agreement affecting a trust or estate...RCW 11.96A.230 is not meant to prevent the parties to a binding agreement from subsequently amending the original agreement and altering its terms. Allowing the parties who initially reached a non-judicial resolution to a matter involving a trust or estate to subsequently change their agreement regardless of whether the original agreement or

> memorandum of the agreement was filed with the court is without question within the intent and purposes of TEDRA.

CP 793-794.[10] In light of this community practice, ongoing for more than twenty years, the trial court's holding that nonjudicial binding agreements may not be used to amend earlier agreements should be evaluated with skepticism from a purely practical point of view.

### D. Error 3: Because the August TEDRA Was Invalid, the Codicil and Amendment to the Revocable Living Trust were Also Invalid and Ineffective.

Assuming then that the March TEDRA could be modified by a later TEDRA, this Court must determine if the trial court's remaining holdings as to the validity of the Codicil and Amendment, which are based in whole or part on the manner in which the August TEDRA modified the March TEDRA, should be upheld. No one disputes that the Will, the Trust, the Codicil and the Amendment as stand-alone documents meet the procedural requirements of valid testamentary instruments in that they are signed by the appropriate individuals, with appropriate witnesses and notarization.[11]

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[10] *See* Bruce P. Flynn *Nonprobate Transfers – Revocable Trusts*, WASHINGTON ESTATE PLANNING DESKBOOK §14.2(3)(a) (2005)("To remedy these situations in a trust governed by Washington law, any person interested in the trust (settlor, trustee, beneficiary) can bring a judicial proceeding under RCW 11.96A.080 to determine the trust's revocability. The issue could *also* be resolved through a 'nonjudicial binding agreement.' RCW 11.996A.220")(emphasis added). Commentators' note that "[t]he ability of parties to modify or terminate trusts under TEDRA *without court approval* is an important component of TEDRA because it allows the issue to be resolved without ever becoming a matter of public record." Gail E. Mautner and Heidi L. G. Orr, "A Brave New World: Nonjudicial Dispute Resolution Procedures Under the Uniform Trust Code and Washington and Idaho's Trust and Estate Dispute Resolution Acts," 35 ACTEC Journal at 176 (emphasis added).

[11] Under Washington law, a Will need only be in writing, signed by the testator and attested to by two witnesses to be presumed to be valid. RCW 11.12.020. RCW

1. The Court Erred in Holding that the August TEDRA's Modification Was Too Late to Allow Mr. Bernard to Exercise His Powers of Modification.

The trial court held that even if a subsequent nonjudicial binding agreement *could* modify a prior nonjudicial binding agreement, that modification was ineffective here because the August TEDRA was not filed until after the associated Amendment and Codicil were executed, and the March TEDRA required a court order *prior* to the execution of the Amendment and Codicil. CP 811-812. In doing so, the trial court ignored RCW 11.96A.230(1) which makes filing of nonjudicial binding agreements optional; and states that regardless of whether the agreement filed, it is immediately effective, binding, and conclusive on all persons interested in the trust.[12] Consequently, the trial court's holding that the filing of the August TEDRA after the execution date of the Amendment and Codicil affects their validity and ineffectiveness is clear error.

In addition, the ruling ignores the explicit provision in the August TEDRA which provides that the Amendment and Codicil are effective *as of their date of execution*. CP 236. It similarly ignores the provision of the August TEDRA that makes the execution date of the documents the

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11.98.011 sets forth the criteria for the creation of a valid trust, namely: i) the trustor has the capacity to create a trust; ii) the trustor indicates intent to create the trust; iii) the trust has a definite beneficiary; iv) the trustee has duties to perform; and v) the same person is not sole trustee and beneficiary. Decedent's Trust on its face meets statutory requirements (ii) – (v) and (i) is assumed for the purposes of this appeal. Although the Linger Parties allege that the documents were invalid based upon Mr. Bernard's alleged lack of capacity and as a result of undue influence, the trial court deferred on those issues of *fact* and, consequently those allegations are not at issue in this appeal.

[12] "Failure to complete any action authorized or required under this subsection does not cause the written agreement to be ineffective and the agreement is nonetheless binding and conclusive on all persons interested in the estate or trust." RCW 11.96A.230 (1).

effective date "notwithstanding any provision of the Agreement, Trust or Will," thereby explicitly modifying the provisions in the March TEDRA, the Trust and the Will which otherwise require a court order *prior* to the effective date of the modification documents. CP 236. Finally, it ignores the provision of the August TEDRA which makes that agreement effective as of August 27, 2009, the same day that the Amendment and Codicil were signed. CP 237. Regardless of when the August TEDRA was filed, by its own terms, it and any modifications it contemplated were in fact effective as of August 27, 2009. The trial court's holding that the belated filing of the August TEDRA affected the validity of the modifications to the March TEDRA, the Trust and the Will is erroneous.

2. The Trial Court Erred In Holding that a Breach of Contract Invalidated the Codicil and Amendment.

The Codicil and the Revocable Trust Amendment indisputably meet the procedural requirements of valid testamentary instruments, even without the August TEDRA. Nonetheless, the trial court held that because the August TEDRA was invalid, the Codicil and Amendment were necessarily also invalid. Even if the August TEDRA was invalid, and it is not, Washington law does not allow a contract to invalidate a testamentary instrument. When reviewing the effect of a breach of contract to make mutual wills, the Washington Supreme Court held:

> If there has been no attempted revocation by either party during the lifetime of both ... courts generally will enforce such contracts, if a valid agreement is proven, and it is the general rule that a party or a beneficiary to such a contract

*may maintain a suit for specific performance or some other appropriate relief.*

*Allen v. Dillard*, 15 Wn.2d 35, 44-45, 129 P.2d 813 (1942)(emphasis added). Abandonment or revocation can be "proved through the actions of the promisee indicating that he no longer considered the contract to be in effect." Reutlinger, Mark, Washington Law of Wills and Intestate Succession, Ch. 8, "Will Substitutes and Will Contracts, Reutlinger, § B.3.b.(2)(d), p. 283(citing *Ferris v. Blumhardt*, 48 Wn.2d 395 (1956); *Thomas v. Hensel*, 38 Wn.2d 941(1951)). Washington law does not provide that testamentary documents are *invalidated* by breach of a contract; and specific performance is not the equivalent of invalidating a will in probate. In fact, "court cannot write a will for the decedent; nor can it avoid either the decedent's revocation of a conforming will or the probate of a nonconforming will validly executed." Reutlinger, Ch. 8, § Ch. B3b(5), Remedies, Enforcement After Promisor's Death.

Under Washington law, failure to abide by the March TEDRA could only create potential breach of contract claim – a claim enforceable only by James.[13] Thus, even if the March TEDRA was breached, the Amendment and Codicil are still valid stand-alone testamentary documents, subject only to as-yet-undetermined issues of fact, such as capacity and undue influence.

[13] As James died intestate survived by his father and his estate passed to Mr. Bernard as James's sole heir at law, then merger as a matter of law extinguished James's breach of contract claims against Mr. Bernard.

3. The Trial Court Erred in Holding that It Is Contradictory to Give Effect to Mr. Bernard's Intent in the March TEDRA and His Intent Expressed in the August TEDRA.

The trial court held that it would be contradictory to give effect to Mr. Bernard's intent as set forth in the March TEDRA and the Trust, while also giving effect to Mr. Bernard's later expressed intent as set forth in the August TEDRA. CP 814-815. This holding is in error.

The August TEDRA explicitly recognized Mr. Bernard's intent to follow the procedure for modification of the underlying testamentary documents set forth in the March TEDRA and the Trust, and then expressly modified both the March TEDRA and the Trust to allow Mr. Bernard to exercise his evolved testamentary intent by supplanting the procedure for modification with an appropriate substitute procedure. CP 236. The August TEDRA provides that the March TEDRA is "hereby amended to provide that notwithstanding any provision of the Agreement, Trust or Will, the Parties agree that the Trust and Will are hereby amended..." *Id.* Thus, Mr. Bernard did not express a "contradictory intent" at all. Instead, Mr. Bernard recognized the prior March TEDRA and amended it, using a process with force and effect of a court order. Moreover, Mr. Bernard incorporated and reinforced his intent that an additional procedure, beyond that required by Washington statutes, would need to be followed to modify his testamentary document, stating in the August TEDRA that "[f]ollowing execution of the First Amendment and the First Codicil, the Modification Restrictions [from the March TEDRA]

shall remain in full force, subject to further unanimous amendment of the parties." CP 237. Thus, Mr. Bernard manifested a clear chain of evolving testamentary intent, effectuated and confirmed by a supplemental procedural process, precisely as contemplated by Washington law and by Mr. Bernard when he self-imposed additional protections.

Because Washington law properly recognizes and accommodates an ongoing evolution of testamentary intent throughout an individual's lifetime, wills are not given effect until a decedent's death. *Pond v. Faust*, 90 Wash. at 120-121. Testamentary rights are considered sovereign and fundamental, and are not to be abrogated. *See In re Elliott's Estate*, 22 Wn.2d 334, 350-351, 156 P.2d 427, 435 (1945) . Moreover, testamentary rights, and more specifically the right to revoke or amend testamentary distributions, are protected by statute. RCW 11.12.040, RCW 11.12.230 & RCW 11.103.030. *See also* Watson B. Blair, *Wills*, WASHINGTON ESTATE PLANNING DESKBOOK §16 (2005). The only person with an interest in a testator's testamentary intent during the life of the testator is the testator himself. *White v. White*, 33 Wn. App. 364, 371, 655 P.2d 1173, 1176 (1982)("a testamentary disposition is revocable during the life of the testator and, at least in the absence of a valid contract not to do so, is solely within one's unfettered discretion"). A change in a testator's intent, informed by events which occurred since the last statement of his testamentary intent, cannot be said to be "contradictory."

Thus, it is the decedent's *last* intent that is given effect. The primacy of the decedent's *last* expressed wish regarding the disposition of his property is so clear under Washington law that a later dated Will will be probated even after the four month period to initiate a will contest. *In re Estate of Campbell*, 46 Wn.2d 292, 280 P.2d 686 (1995).

In this situation, between the time when Mr. Bernard executed the March TEDRA and when he executed the August TEDRA, Amendment and Codicil, he had been accosted by Rose Linger and subsequently obtained a protection order against her. CP 382-393. His evolved intent is unsurprising given these circumstances. It is simply wrong as a matter of law *and* public policy to hold that a competent testator is bound to name an individual as his contingent remainder beneficiary when the actions of that individual amply demonstrate to him that he would prefer another in her place as beneficiary or contingent beneficiary, or that a decision to revise his documents in light of that contingent remainder beneficiary's actions is contradictory to his prior express intent. Certainly, the testator's intent changed, and justifiably so – that is not "contradictory" but instead perfectly natural and quite common.

In sum, because Washington law contemplates evolution of testamentary intent throughout an individual's lifetime, it is not contradictory to ask the trial court to review the March TEDRA in light of the later August TEDRA, the *last* statement of Mr. Bernard's intent.

## E. Error 4: The *Button* Case Unconditionally Prohibited Amendment of the Trust Absent a Court Order.

The trial court held that regardless of whether a subsequent nonjudicial binding agreement could modify a prior nonjudicial binding agreement, Article 3.3 of the Trust required the parties to obtain a court order to amend the Trust. CP 813. In support, the trial court cited *In re Button Estate*, 79 Wn.2d 849, 490 P.2d 731 (1971), noting that when a trust sets forth a particular method for revocation, only that method may be used. However, the trial court's conclusion failed to account for more recent applicable case law. First, the Washington Supreme Court subsequently qualified the *Button* opinion, holding that "we do not believe Button forecloses the concept of substantial compliance as a means to amend a trust, as substantial compliance was sufficient to ensure that the decedent 'unequivocally desired to make that change.'" *Williams v. Bank of California*, N. A. 96 Wash.2d 860, 868, 639 P.2d 1339, 1344 (1982). Second, while it may be true that when only the common law of trusts is involved revocation must use the form specified in the trust, when a *statutory* basis exists for modification or revocation of a trust provision, that methodology may supersede the common law. *Manary v. Anderson*, 176 Wash.2d 342, 292 P.3d 96 (2013)(While common law revocation requires compliance with the trust, *the common law is irrelevant* when the claimed revocation was based upon statutory authority).

Both qualifications to the *Button* opinion affect the application of the law here. First, Mr. Bernard substantially complied with the process

for amending his Trust and unequivocally stated his desire to make the modification. Second, he based his modification upon statutory authority, specifically RCW 11.96A.220, to enter into a nonjudicial binding agreement that modified the terms of the underlying Trust Agreement.

The August TEDRA explicitly recognized Article 3.3 of the Trust and the expectation of notice and court orders, but then stated that:

> ...once this Amended Agreement (or a summary memorandum of such agreement) is filed, this Amended Agreement will satisfy the Agreement's requirement to obtain a court order prior to any exercise of Tom's Modification Powers. Accordingly, the Parties agree that this Amended Agreement is a more efficient method of enabling Tom to exercise such powers.

CP 235-236 (emphasis added). The parties understood that the August TEDRA amended the requirement set forth in Article 3.3 of the Trust and fulfilled the modification requirements in their entirety – substantially complying with the modification provisions and expressing unequivocal intent to modify the Trust. Moreover, the parties then engaged in a belt and suspenders exercise, acknowledging not only the requirements of Article 3.3 of the Trust and waiving them in the August TEDRA, but also acknowledging and amending Article 3.3 in the Trust Amendment:

> Article 3.3 of the Trust Agreement shall be amended to read in its entirety as follows:
> 3.3 Rights Personal to Trustor Subject to Binding Non-Judicial Agreement...Notwithstanding any other provision of this Agreement, such rights are subject to that certain Non-Judicial Agreement regarding the J. Thomas Bernard Revocable Living Trust Agreement effective May 27, 2009, *and any amendments thereto* (the "TEDRA"), and

> are not exercisable by Trustor unless and until Trustor complies with the terms of and otherwise satisfies all of the requirements imposed by the TEDRA.

CP 239. (emphasis added). The parties to the contract thus clearly and unequivocally, in writing, modified their prior Agreement *and* the underlying Trust in order to effectuate Decedent's intent. The parties took all possible care to ensure that the documents were consistent as to the form and effect of the modification and clearly set forth the intent of the testator in that process. In addition, Decedent and James' intent was memorialized in a nonjudicial binding agreement, a *statutory* device that explicitly authorizes modification of trust instruments in a manner not contemplated by the initial trust agreement itself.[14] In so doing, the parties complied with longstanding Washington contract law and invoked and complied with the statutory provisions of TEDRA.

The parties not only substantially complied with the Trust, they strictly complied with it. As set forth above, the August TEDRA amended the March TEDRA and, thereby, specifically recognized and approved the contemplated Amendment, noting:

> ...once this Amended Agreement (or a summary memorandum of such agreement) is filed, this Amended Agreement will satisfy the Agreement's requirement to obtain a court order prior to any exercise of Tom's Modification Powers. Accordingly, the Parties agree that this Amended Agreement is a more efficient method of enabling Tom to exercise such powers.

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[14] TEDRA explicitly defines "matter" to include amendment and reformation of a trust instrument. RCW 11.96A.030(2)(c), (f) & (h) *and* RCW 11.96A.125.

CP. 235-236 (emphasis added). By the express terms of the August TEDRA, it changed the requirements and the new requirements were fulfilled. Thus, the parties strictly complied with the amended specified method of revocation.[15]

Amendment of an active trust has been blessed by the Washington Supreme Court, which held:

> the rule that an active trust cannot be terminated upon the consent of all the interested parties does not apply when the trustor is living...(1) If the settlor and all of the beneficiaries of a trust consent and none of them is under an incapacity, they can compel the termination or modification of the trust, although the purposes of the trust have not been accomplished... Where all of the parties were of full age and the trust was created by an arrangement to which the trustor and the cestuis que trust were the only parties, the trust may be terminated at any time. 26 R.C.L. 1211, § 53; Matthews v. Thompson, 186 Mass. 14, 71 N.E. 93, 66 L.R.A. 421, 104 Am.St.Rep. 550. See cases collected in annotation in 38 A.L.R. 965 to the effect that the immediate parties to a trust may by mutual agreement change or revoke the same...There seems to be a generally recognized principle that a trust may be revoked at any time by the consent of all the interested parties, and the 'interested parties' seem to have been held to be the settlor and the *cestuis que trustent*.

*Fowler v. Lanpher*, 193 Wash. 308, 318-319, 75 P.2d 132, 136-137 (1938)(internal citations omitted). The Court in *Fowler* also looked to a trust allegedly revoked by agreement of the settlor and the initial beneficiaries. There, the Court upheld the right of those individuals, over the objections of the contingent beneficiaries, to revoke the trust. Thus,

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[15] This presupposes that the March TEDRA requirements were specifically incorporated into the Trust Agreement and not merely a contractual obligation between Mr. Bernard and James. *See supra* IV.D.2.

Washington law has previously blessed agreements to modify or terminate trusts by a separate agreement of the settlor and primary beneficiary, here Mr. Bernard and James. If the August TEDRA amended the March TEDRA and incorporated the amendment process contemplated therein, then by abiding by that process, the parties strictly complied with the amendment process set forth in the amended Trust; thus, *Button* is inapplicable. Neither *Button* nor the Restatement (Second) of Trusts § 330 applies to unilateral acts of revocation or modification by the trustor, and neither applies to a *mutual amendment* by both the trustor and trustees of a revocable living trust agreement (such as the Revocable Trust Amendment).[16] Nor do they apply to alleged methods of revocation incorporated by reference from a separate contract that is at all times subject to modification by its parties (who include persons other than the

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[16] Both *Button* and the Restatement (Second) of Trusts, Section 330 cited by the trial court are applicable only to unilateral revocations or modifications of a revocable living trust by the trustor (and not to mutual amendments to the revocable trust by both the trustor and trustee). The title to Section 330 is "Revocation of Trust *by Settlor*" (emphasis added) and Section (1) states: "*The settlor* has power to revoke the trust if and to the extent that by the terms of the trust he reserved such a power" (emphasis added). Section (2) states: "Except as stated in §§ 332 and 333, *the settlor* cannot revoke the trust if by the terms of the trust *he* did not reserve a power of revocation" (emphasis added). In *Button*, the issue was whether the trustor's unilateral act of delivering to his attorney his written revocation of the revocable trust was sufficient when the trust instrument required that the written notice must be delivered to the trustee. ("The first question presented is whether the trustor, during his lifetime, *manifested an intent to revoke the trust which he had created in 1940 and to substitute a new and different trust .... The 1940 trust instrument specified that it could be revoked or modified by an instrument in writing, signed by the trustor and delivered to the trustee.* Button signed such instruments, *but they were never delivered to the trustee*" (emphasis added).) However, if the *Button* trustor and trustee had instead executed a mutual amendment of the revocable trust instrument that indisputably proved delivery of the required written notice, there is no doubt that the amendment would have been effective.

trustees) under applicable law.[17] The parties strictly complied with the modification provisions as amended by the August TEDRA and, therefore, the Amendment is fully effective.

## F. The Court's Ultimate Obligation is to Effectuate Mr. Bernard's Last Intent.

"It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and punctually observed so far as it is consistent with the established rules of law." *In re Elliott's Estate*, 22 Wn.2d at 350-351. Thus, testamentary instruments express a decedent's fundamental rights. "The right to dispose of one's property by will is not only a valuable right but is one assured by law, and will be sustained whenever possible." *Id.* To ensure this valuable right, the courts rely not only upon the common law, but also a statute which instructs the judiciary: "[a]ll courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them." RCW 11.12.230. In applying this statute, the Supreme Court in *Elliot's Estate, supra*, observed:

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[17] *Button* and the Restatement upon which that ruling is based involved only a specific method of unilateral revocation by the trustor that was expressly stated in the trust agreement itself. They did not involve the incorporation by reference of the terms of a separate contract that could be further modified by its parties under other applicable law. There exists no authority under any jurisdiction that the rule expressed in *Button* and the Restatement upon which it relies has ever been so radically expanded as to invalidate both the (1) *joint* amendment of revocable trust agreements between the trustor *and* trustees and the (2) *joint* amendment of a separate contract made by the parties to that contract *(who include persons other than the trustees)*.

> Courts go to the utmost possible length to carry into effect the testator's wishes, provided always that he has given them lawful expression. It is not only the testator's will which must be given effect, but it is his last will which must prevail. **Where possible, the last will of a competent testator will be upheld, and *courts will not by technical rules of statutory or other legal construction defeat the right of the testator to have effect given to the latest expression of his testamentary wishes*...** Statutes should not be construed so as to defeat the will of the testator, unless such construction be absolutely required. ***Neither should the will of a testator be defeated, as here, by the carelessness of the persons whose duty it was to present the codicil for probate. It is not their rights which are taken away, but the right of the testator to have his will carried out.*** One could be well content if the only result of such negligence as is disclosed by the record in the case at bar were to deprive the negligent person of some property right. But such is not the case.

*In re Elliott's Estate*, 22 Wn.2d at 351-352 (emphasis added)(offer of later-discovered will to probate was permissible, even though the statute of limitations for a will contest expired, because offering of newly discovered will is not a contest of the prior will and is necessary to protect decedent's intent). *See also Campbell's Estate*, 46 Wn.2d at 297("By so holding, we simply give effect to the testator's last expression. To hold otherwise would be to defeat his plain and unambiguous wishes"). Ultimately, the Court's "paramount duty in construing wills is to give effect to the testator's intent." *In re Riemcke's Estate*, 80 Wn.2d 722, 728, 497 P.2d 1319, 1323 (1972).[18]

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[18] The Linger Parties argued that a trust was somehow exempt from the interpretative rules which apply to wills. Washington law is to the contrary. Trusts are increasingly used as will substitutes and as a result, courts routinely apply the same rules for interpreting the disposition of property at death regardless of whether the decedent chose to use a will or a trust as the decedent's primary vehicle for disposition of property at death. *See* Restatement (Third) of Trusts § 25(2) and comment e (Tentative Draft No.1,

By dismissing the August TEDRA and, consequently, the Trust Amendment, on summary judgment based upon a contractual argument, the trial court turned away from the "polar star" of testamentary disputes—determination of the decedent's last intent expressed in those documents. The Order entered on October 19, 2012 fails to honor that intent, and instead quite literally exalts the form it is given in the August TEDRA over its substance.

Doing so is out of step with Washington law. "It is a universal rule that the courts will seek for, and give effect to, the testator's or testatrix' intention, if it be lawful." *In re Long's Estate,* 190 Wash. 196, 198, 67 P.2d 331, 332 (1937). Mr. Bernard fully and clearly expressed his testamentary intent in March 2009. He supplemented that statement of intent with a nonjudicial binding agreement that invoked additional protections to address his son's concerns about future planning. Those protections were never intended to stop Mr. Bernard from engaging in future planning; rather, all the documents executed in March expressly contemplated that Mr. Bernard's intent might change in the future. And,

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approved 1996); Uniform Trust Code § 112. Washington courts have long recognized the similarity between wills and trusts which dispose of property at death and applied the same rules of construction and interpretation to both. For instance, in *Estate of Button,* 79 Wn.2d at 854, handed down before the Legislature enacted TEDRA, the Court recognized the equivalence of an *inter vivos* trust and a will, stating, "[a] gift to be enjoyed only upon or after the death of the donor is in practical effect a legacy, whether it is created in an inter vivos instrument or in a will." The Legislature recently removed all doubt, codifying RCW 11.97.020 which provides that "[t]he rules of construction that apply in this state to an interpretation of a will and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." The Linger parties' distinction between wills and trusts is spurious.

in fact, Mr. Bernard's intent changed and he effectuated his changed intent the following August. Aware of and advised regarding the protections in the March TEDRA, Mr. Bernard not only executed the Trust Amendment, but also an amendment to the March TEDRA—the August TEDRA—by which he sought to recognize and address the protections of the March TEDRA. In doing so, he relied on his estate planning attorney to effectuate his latest expression of testamentary intent. Based upon his attorney's advice, Mr. Bernard, the Trustees and James invoked the same statute that controlled the March TEDRA and executed an amended agreement which expressly incorporated and then waived all of the requirements of the March TEDRA, giving full force and effect to what the Supreme Court in *Elliot* referred to as the decedent's "latest expression of his testamentary wishes." Just as in *Elliot*, it is not the attorney who suffers if the Court determines that the Amendment to the March TEDRA is ineffective; it is Mr. Bernard, and by extension, his intended devisees.

Mr. Bernard's reliance on his estate planning attorney's advice is wholly understandable. Mr. Bernard was not a lawyer by trade or training. Rather, he relied on his attorneys, estate planning, dissolution and business counsel, to ensure that his wishes were carried out. Mr. Bernard's estate planning attorney submitted to the trial court a declaration confirming that amendments to nonjudicial binding agreements are standard practice. CP 788. His interpretation of TEDRA as allowing for such agreements

follows the standard practice of Washington's estate planning community, as confirmed by Professor Karen Boxx in her declaration. CP 792-804.

Those declarations are key to determining Mr. Bernard's intent, because "[i]f there is ambiguity as to the testator's intent, extrinsic facts are admissible to explain the language in the will. *Washington cases provide that testimony of the drafter, including as to the testator's intent, is one piece of evidence admissible to explain the language*." *In re Estate of Sherry*, 158 Wn. App. 69, 82, 240 P.3d 1182 (2010)(internal citations omitted and emphasis added). Washington courts have time and again looked to the drafting party to explain the circumstances surrounding the execution of testamentary documents, even allowing such testimony to "admit" probate documents which no longer can be found. *See* RCW 11.20.070 and *In re Auritt's Estate*, 175 Wash. 303, 305-306, 27 P.2d 713, 714 (1933)(when admitting a copy of decedent's lost will to probate the Court noted "no better proof could be supplied" than the testimony of the drafting attorney). Here, the drafter of Mr. Bernard's testamentary documents and the associated nonjudicial binding agreements has testified "I am certain that the amended documents express Tom's clear testamentary intent, and any finding that refuses to carry out the terms of such documents is a clear frustration of such intent." CP 788. This confirmation of Mr. Bernard's *last* intent cannot be ignored.

In addition to testimony by the estate planning attorney who drafted the documents, the parties rely upon a contemporaneously

executed document which confirmed, in writing, Mr. Bernard's intent that the Amendment be considered the last valid expression of his testamentary intent. When a testamentary document is executed with another document, the Court is bound to consider the two documents together. This is the concept underlying a contract to make a will. The Washington Supreme Court has noted, when asked whether the omitted spouse statute could be applied to disinherit the named beneficiaries of a decedent's will in favor of the later acquired spouse, that it was obligated to determine the decedent's intent not merely in light of the statute and the will but also the contract executed with the will. *See In re Drown's Estate*, 60 Wn.2d 110, 114, 372 P.2d 196 (1962)(a surviving spouse may not claim as an omitted spouse when the will and contract to make a will entered simultaneously made clear decedent's intent to disinherit any future spouse in favor of her deceased husband's children and her niece). Here, the simultaneously executed Trust Amendment to the March TEDRA confirmed that Mr. Bernard's last intent was incorporated into the Amendment and that Mr. Bernard believed that he had properly effectuated that intent. Mr. Bernard's belief was neither unreasonable nor misplaced.

Whatever the terms of the original March TEDRA, Mr. Bernard believed, based on advice of counsel, that those terms were properly modified by the August TEDRA and, therefore, that his last statement of testamentary intent would be honored. Washington law is clear that so long as the traditional formalities of execution are followed, a decedent's

intent should not be held hostage to the legal advice or judgment of the persons with the duty to draft and effectuate that intent. It is not their rights which are harmed thereby, but that most fundamental right of the testator to have his will carried out after his death. *See In re Elliott's Estate*, 22 Wn.2d at 351-352. This Court is charged with protecting Mr. Bernard's fundamental testamentary rights and in doing so, the Court's "first and greatest rule, the sovereign guide, the polar star" is to give effect to the testator's "latest expression of his testamentary wishes." *Id.* In light of the equities at issue in such a determination, this Court should not declare *as a matter of law* that Mr. Bernard's intent as expressed in the August TEDRA is irrelevant because he did not precisely follow the technical requirements previously adopted for changing his testamentary scheme, when the proper parties were given notice of the waiver of those requirements, and he is presumed to have capacity and be free from undue influence at the time of execution.

### G. The Personal Representative and the Trustee cannot appeal a summary judgment ruling invalidating the Codicil and Revocable Trust Amendment.

The trial court erred in revising the commissioner's order, barring the Personal Representative and Trustees' appeal on the issue of the validity of the Trust Amendment and Codicil, which left the Personal Representative and Trustees with no avenue for review. Because the Personal Representative and Trustees owe a fiduciary duty to defend the instruments as Mr. Bernard's final testamentary intent and because they

have a right to appeal, the trial court improperly acted as the court of first and last resort in leaving them with no avenue for review. The trial court's Revision Order was in error and should be vacated.

1. The Personal Representative and Trustees have a Duty to Defend the August Amendments

Washington courts have consistently held that a personal representative has a duty to defend the terms of a will. *See, e.g., Estate of Jolly,* 3 Wn.2d 615, 623-25, 101 P.2d 995 (1940); *Estate of Shaugnessy*, 104 Wn.2d 89, 95-96, 702 P.2d 132 (1985). The rule is explained in *In re Klein's Estate*, 28 Wn.2d 456, 475, 183 P.2d 518 (1947):

> Where a will is contested, whether before or after its probate, **it is the duty of the executor to take all legitimate steps to uphold the testamentary instrument**; and if he does so in good faith, he is entitled to an allowance out of the estate for his costs and reasonable attorney fees necessarily incurred by him, regardless of whether or not he is successful in his defense against the contest of the will.

*Id.* (emphasis added). The Court in *Klein's Estate* held that the trial court properly awarded attorney's fees and costs incurred by the personal representative in defending the will, even though the trial court found the will invalid and the appellate court later affirmed the trial court. *Id.; see also Estate of Reilly*, 78 Wn.2d 623, 479 P.2d 1 (1970); *In re Chapin's Estate*, 19 Wn.2d 770, 782, 144 P.2d 738 (1944).

Likewise, a trustee has a duty to defend the terms of a trust. As explained in the Restatement (Third) of the Law of Trusts § 76, Reporter's Notes to comment d (2012):

> It is widely asserted that a trustee has a duty to defend the trust and is not to stand by as a mere stakeholder when the validity of the trust or a trust provision is challenged. See, e.g., Bogert, Trusts § 98 (Hornbook, 6th ed. 1987): "A trustee has a duty to defend the trust and the interests of its beneficiaries against attack from the settlor or his successors or others who claim that the trust is invalid in whole or in part, where reasonable prudence would dictate a defense."
>
> . . . Scott on Trusts, supra, § 178 (p. 496) states: "It is the duty of the trustee ... to prevent the destruction of the trust. Thus, where the settlor or his successors in interest seek to rescind the trust on the ground that the settlor was induced by undue influence or mistake to create the trust, it is the duty of the trustee to defend the trust and resist the proceeding to the extent to which it is reasonable to require him to do so.

The Personal Representative and the Trustees each have duties here to defend the all of Mr. Bernard's testamentary instruments, including the Trust Amendment and the Codicil. They sought to discharge these duties by appealing the October 19 Order, seeking the trial court's guidance as allowed by TEDRA.

2. Under Washington Law, the Personal Representative and Trustees Have an Absolute Right to Appeal the October 19 Order.

Several Washington cases support a personal representative's right to appeal an adverse decision in a will contest. *See, e.g., Klein,* 28 Wn.2d at 475; *In re Richardson's Estate*, 96 Wash. 123, 165 P. 656 (1917); *In re Estate of Moulton*, 1 Wn. App. 993, 465 P.2d 419 (1970). *Moulton* is particularly instructive, it involved an appeal filed solely by a personal representative of a decision revoking the probate of a will. The personal representative in that case unquestionably had no personal interest in the

outcome of the litigation, since the personal representative was a bank acting as successor personal representative. After reversing the trial court and reinstating probate of the will, the Court of Appeals noted:

> While this case was pending on appeal in the Supreme Court, contestants filed a motion to dismiss upon the ground the executor could not be an aggrieved party. Following the filing of briefs and oral argument, the Supreme Court entered a notation order denying the motion. No opinion was issued with respect to this ruling. Petitioners, while arguing the appeal on the merits, again contended their motion to dismiss should have been granted. In view of the Supreme Court's previous ruling, this court denies the motion.

*Id.* at 1000-01.

No Washington cases directly address a trustee's ability to appeal in a trust contest. However, as set forth in Restatement (Third) of the Law of Trusts § 79, Reporter's Notes to comment c and d (2012), a trustee may appeal an order attacking the validity of a trust:

> "[A] trustee may appeal from an order terminating a trust" to protect a material purpose of the settler, otherwise "the trial court, when all beneficiaries consent [or those participating acquiesce], could completely disregard the provisions of the trust, even though there is no justification for a deviation from its terms". . . "There is no substantial difference in this respect between an order that terminates a trust and an order that modifies it.... In either case the litigation does not involve merely the conflicting claims of beneficiaries to a particular fund, but concerns the performance of a duty by the trustee to protect the trust against an attack that goes to the very existence of the trust itself.... To deny the trustees an appeal [in the present case] would render them helpless to prevent invasions of the corpus that might defeat the plan of the trustor or even destroy the trust itself.

*Id.*, (citations omitted) (quoting *In re Ferrall's Estate*, 33 Cal.2d 202, 200 P.2d 1, 2 (Cal. 1948)).

Further, TEDRA affords the Personal Representative and the Trustees the right to appeal the October 19 Order. "An interested party may seek appellate review of a final order, judgment, or decree of the court respecting a judicial proceeding under this title." RCW 11.96A.200. "Parties" and "persons interested in the estate or trust" expressly include the trustee and personal representative. RCW 11.96A.030(5) and (6). As "parties" and "persons interested in the estate or trust," the Estate Parties have a statutory right to appeal the trial court's October 19 Order.

The Linger Parties' reliance in the trial court on RCW 11.98.078, requiring that a trustee to administer a trust solely in the interests of the beneficiaries, fails to recognize that the Trustees here cannot identify the beneficiaries of the Trust until the present appeal of the court's October 19 Order is resolved. Further, none of the cases relied on by the Linger Parties in the trial court support their assertion that a personal representative or trustee has no duty to defend the terms of a will or trust against attacks on their validity, and therefore no right to appeal a decision invalidating those instruments. One of the cases relied on by the Linger Parties in the trial court, *In re Cannon's Estate*, actually supports the Personal Representative and the Trustees' right to appeal the October 19 Order. *In re Cannon's Estate,* 18 Wash. 101, 50 P. 1021 (1897). *Cannon's Estate* involved a petition for an award in lieu of homestead and

a family allowance by a surviving spouse. The facts are somewhat convoluted in that the deceased spouse's previous wife's probate was still pending when he died nineteen months after his previous wife's death, having remarried in the interim. The administrator of both deceased spouses' estates was not a beneficiary of either estate. The administrator appealed an award of an allowance to the surviving spouse payable from her husband's share of the community property of him and his previous wife. The surviving spouse moved to dismiss the appeal on the grounds that the administrator was not an aggrieved party under the statute and had no personal interest in the appeal. The court refused to dismiss the appeal, finding that the administrator was an aggrieved party and stating:

> We also are of the opinion that the executor could take the appeal even though any of the parties interested in the proceeds of the estate could have prosecuted one. The case is essentially different from that of a contest between claimants to the estate as heirs or devisees when it is ready for distribution. There the administrator or executor may not take sides, for, if so, he might resist the rightful claimant at the expense of the estate, to which he might ultimately be found entitled. Such claims do not impair the estate, but relate only as to who is entitled to the same.

*Id.*, at 105 (emphasis added).

Read by itself, the quoted language at the end of the paragraph might appear to be broad enough to apply to any will contest. *Id.* It is clearly not the law in Washington that a personal representative, as such, may not take sides in a will contest--the personal representative has a duty to defend a will. *See, e.g., Estate of Jolly*, 3 Wn.2d at 623-25. In context,

the quoted language admonishes personal representatives not to take sides between claimants where neither claimant challenges the validity of the will itself. *Cannon's Estate,* 18 Wash. at 105. *Cannon's Estate* provides authority for the proposition that a personal representative may appeal an order of the superior court, even where the personal representative does not have a personal financial stake in the outcome of the appeal. *Id.*

Here, the Linger Parties challenged the validity of the Trust and the Will, and the later Amendment and Codicil, and the trial court found the later August estate documents invalid. CP 979-1038, 558-561. RP 4:15-11:16. The Personal Representative and the Trustees believed the October 19 Order to be in error and in direct contravention of the law. CP 605-06, 619. They believed that appealing the October 19 Order would be a prudent step to defending those instruments and fulfilling Mr. Bernard's intent. *Id.* The Personal Representative and the Trustees have a right to appeal, regardless of whether other parties could also appeal. *Cannon's Estate,* 18 Wash. at 105. The trial court's Revision Order finding that they had no right to appeal the October 19 Order puts the Personal Representative and Trustees in breach of this duty, and further improperly operates as a final, unappealable order as to them, in contradiction with RCW 11.96A.200 and the Rules of Appellate Procedure.

## V. CONCLUSION

The issues on appeal in this matter ripple far beyond those of the facts at hand. The issues go to the very heart of the practice within the estate planning community and the sphere of remedies available through the judicial system. This Court should reverse the trial court and hold that the August TEDRA, Amendment, and Codicil are all valid and enforceable documents; remand to the trial court to address the outstanding issues of fact regarding capacity and undue influence; and confirm that the Personal Representative and Trustees have the right to appeal any adverse determination of those issues.

DATED this 29th day of May, 2013.

TOUSLEY BRAIN STEPHENS PLLC

By _____
Kim D. Stephens, WSBA #11984
Shannon Whitemore, Bar #31530
Attorneys for Daniel Reina

GARVEY SCHUBERT BARER

By _____
Bruce A. McDermott, Bar #18988
Teresa Byers, Bar #34388
Attorneys for Leah Karp & Diane Viars

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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

In re Estate of

**J. THOMAS BERNARD,**

Decedent.

**CERTIFICATE OF SERVICE**


Bruce A. McDermott, Bar# 18988
Teresa Byers, Bar# 34388
GARVEY SCHUBERT BARER
Attorneys for Appellant
Leah Karp & Diane Viars

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

Kim D. Stephens, P.S., Bar # 11984
Shannon M. Whitemore, Bar #31530
TOUSLEY BRAIN

STEPHENS PLLC
Attorneys for Appellant Dan Reina
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101-4416




ORIGINAL

I, Jill M. Beagle, certify under penalty of perjury under the laws of the State of Washington that on May 30, 2013, I caused to be served on the persons below, in the manner indicated for each, true and correct copies of the following:

- Appellants' Opening Brief; and
- This Certificate of Service.

Michael L. Olver
Christopher C. Lee
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
*Via Electronic Mail*

Ken Hart
Carney Badley Spellman
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
*Via Electronic Mail*

Kim D. Stephens
Paul W. Moomaw
Tousley Brain Stephens
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
*Via Electronic Mail*

Chris Wenger
Colorado School of the Mines Foundation
PO Box 4005
Golden, CO 80401
*Via Electronic Mail*

Boston University
Attn: Glenn Vivian
Director of Planned Giving
595 Commonwealth Avenue, Suite 700
Boston, MA 02215
*Via US Mail*

Sarah B. Bowman
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
*Via Electronic Mail*

Jim Laugen
Children's Home Society of Washington
PO Box 15190
Seattle, WA 98115
*Via Electronic Mail*

Dudley Panchot
Jason C. Hawes
Wolfstone, Panchot and Bloch PS
1111 Third Avenue, Suite 1800
Seattle, WA 98101
*Via Electronic Mail*

Seattle Academy of Arts & Sciences
Attn: Allison Rabbitt
Director of Development
1201 East Union Street
Seattle, WA 98122
*Via US Mail*

Larry Garrett
Holman Cahill Garrett Ives Oliver & Andersen PLLC
5507 35th Avenue NE
Seattle, WA 98105
*Via Electronic Mail*

Karolyn A. Hicks
Stokes Lawrence P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101-2393
*Via Electronic Mail*

Karen Bertram
Kutscher Hereford Bertram Burkart PLLC
705 Second Ave., Hoge Building, Suite 800
Seattle, WA 98104
*Via Electronic Mail*

Ann Wilson
Law Office of Ann T. Wilson
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
*Via Electronic Mail*

Ladd Leavens
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
*Via Electronic Mail*

DATED this 30th day of May, 2013.

GARVEY SCHUBERT BARER

By Jill M. Beagle

Jill M. Beagle
Legal Assistant