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NO. 69608-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF
J. THOMAS BERNARD

RESPONDENT'S BRIEF

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I. INTRODUCTION

The issue before this Court is a matter of basic contract interpretation with the twist that the document to be analyzed is a TEDRA agreement. The trial court granted summary judgment in favor of Respondents Rose Linger, Rick Emery and Larry Emery ("Family Beneficiaries") because a trust amendment had not been procured in compliance with the specific protocol set forth in a TEDRA agreement. That agreement specifically outlined a protective mechanism by which J. Thomas Bernard could in the future amend, modify or revoke his own Trust. Due to the trial court's order, the Trust amendment was found to be "null and void" and Appellants Daniel Reina, Leah Karp and Diane Viars ("Former Beneficiaries") were no longer beneficiaries of the Trust.

J. Thomas Bernard ("Tom")[1] executed a TEDRA agreement that had specific protective restrictions that were required to be followed in order to modify, amend or revoke his trust. Under the plain language of the TEDRA agreement "any exercise" of the modification powers without following the procedures set forth would make the attempted modifications "null and void." (CP 203-204, March TEDRA p.3:23)

Having failed to follow the protective procedure set forth in the TEDRA agreement and separately incorporated by reference into the

[1] First names are used to avoid confusion between individuals with the same surname. No disrespect is intended by this informality.

Trust, the amendment to the Trust was "null and void."

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the trial court correct when it ruled that the self protective language of the March 2009 TEDRA agreement limited the protocol by which the agreement itself could be modified?

2. Was the trial court correct when it ruled that failure to comply with the substantive and procedural requirements of RCW 11.96A prevent the August 2009 TEDRA from becoming the equivalent of a court order?

3. Was the trial court correct when it ruled that failure to substantially comply with the protective procedures set forth in the TEDRA agreement which described the limited way that J. Thomas Bernard's estate planning documents could be modified, render the attempted modifications null and void?

4. Was the trial court correct when it ruled that a trustee cannot appeal a trial court's decision that determines who the beneficiaries of the trust are when to do so would place the trustee in direct conflict with the beneficiaries in violation of the trustee's absolute duty of loyalty to all beneficiaries?

III. STATEMENT OF THE CASE

A. J. Thomas Bernard's Estate Plan Prior to March TEDRA, March Trust Agreement, and Will

On November 10, 2004, Tom signed a last will and testament. (CP 985.) The primary beneficiary of Tom's will was his son James. In the event that James predeceased Tom with no descendants, Tom directed that his niece, Rose Linger, respondent herein, would receive 60 percent of his estate. (*Id.*) The remaining 40 percent went to a number of charitable organizations.

Rose was the daughter of Tom's only brother, John Paul Bernard. (CP 982.) Growing up, Rose frequently spent summers with Tom and his first wife Jackie in Seattle. (*Id.*) When she was still a teenager, Rose had a son, Nicholas. At just about the same time, Tom adopted his son James. (*Id.*) Tom and Jackie visited Rose in Colorado, and Rose would visit them in Seattle. James and Nicholas played together on those occasions. Tom and Jackie also helped Rose financially throughout her lifetime, and when Rose's father passed away in 1984, Tom and Jackie became surrogate parents, providing greater financial assistance and support. (*Id.*)

In the late 1990's, Tom's first wife Jackie, passed away. (*Id.*) After Jackie passed away, Rose visited Tom more often. During the five years

prior to 2009, Rose visited Tom at least 6 or 7 times each year. (*Id.*) Tom even invited Rose and her family to move to Seattle. (*Id.*)

B. Concerns Regarding Tom's Vulnerability to Undue Influence.

An understanding of the events occurring prior to the March 2009 TEDRA is important to understand the significance of and rational for the protective protocol set in place by that agreement, that required actual court approval of future estate planning changes.

1. Litigation GAL is Requested.

In 2005, four years before the TEDRA agreement, Tom was a party in a litigation involving a limited liability partnership in which he was a partner. (*LD3 LLC v. South 1-90 Ltd. Partnership*, King County Cause No. 05-2-20929-1 SEA.) (CP 986.) During the litigation, Tom's own counsel sought appointment of a Title 4 litigation guardian ad litem for him. (*Id.*) Rather than appoint a litigation guardian ad litem, the court approved and authorized Tom to execute a limited power of attorney for litigation purposes. (*Id.*)

2. Title 11 Guardianship Petition is Filed by Son.

Tom's capacity problems did not improve and on April 10, 2008, Tom's son, James, filed a petition for guardianship of his father. (*In re Guardianship of Bernard* [2008], King County Cause No. 08-4-02728-4 SEA.) (*Id.*; CP 169 – 177, Guardianship Petition.)

A guardian ad litem was appointed and a medical report obtained from Dr. R. Renee Eisenhauer, who evaluated Tom on June 16, 2008. (CP 179 – 192, medical report.) Dr. Eisenhauer, a clinical psychologist, opined that Tom might have frontal lobe dementia. (CP 181.) Tom was 64 years old at the time.

3. Medical Report: "Unable to Manage" 2008.

Dr. Eisenhauer further reported: "Due to his impaired memory, disinhibited behavior, reduced executive functioning and poor judgment, Mr. Bernard **is vulnerable to undue influence and financial exploitation**." (CP 188 (emphasis in original).) In conclusion, Dr. Eisenhauer stated: "**He is not able to manage his own finances or enter into complex contracts independently.** He **needs oversight of all financial matters**." (CP 189 (emphasis in original).)

4. GAL Report "Serious and Immediate Risk of Financial Exploitation.

The Guardian ad Litem appointed for Tom concluded: "I believe that Mr. Bernard is at serious and immediate risk of financial exploitation." (CP 198, GAL Report, p.9:25-26.) The Guardian Ad Litem stated that with respect to a guardianship, "no viable alternative exists." (CP 199, GAL Report, p.11:25.) Although the guardian ad litem recommended the appointment of a guardian and the court certified the matter for trial based on

Tom's opposition, the capacity of Tom was never tried. Instead, Tom and James entered into a TEDRA (Trust and Estate Dispute Resolution Act, RCW 11.96A) agreement to resolve the guardianship by creating a trust.[2] Tom and James agreed to the creation of a trust and will whereby most, if not all, of Tom's multimillion dollar estate was transferred into the trust controlled by two of his attorneys, Doug Becker and William Hart, and a business associate, Daniel Reina. (CP 227 – 228.) As protection from financial exploitation the TEDRA agreement also required Tom, if he wish to modify the agreement in the future, to follow certain steps, including a court hearing, and that "as a result of such hearing, the court issues an order approving" the modification. (CP 204 (underlined added).)

C. Tom Enters into the March TEDRA Agreement.

1. Tom and his son sign a TEDRA agreement restricting Tom's ability to modify his estate planning documents.

In March 2009, Tom and his son executed a TEDRA agreement ("March TEDRA"). Contemporaneous to the execution of the March TEDRA Agreement, Tom executed a new will and a trust agreement. (CP 203 – 205, March TEDRA; CP 207 – 228, Trust; CP 230 – 233, Will.) Tom signed all three documents on the same day, March 25, 2009. (CP 205,

[2] On May 20, 2009, Ryan Montgomery who was Tom's attorney that prepared the Trust, Will and TEDRA agreement wrote to Tom, "your desire to move forward with the trust planning was largely driven by your desire to resolve your conflict with Jamie." (CP 907.)

March TEDRA; CP 223, 225, Trust; CP 232, Will.) In the final form, each of the three documents referenced and incorporated by reference the other documents. (CP 203, March TEDRA, p.1:17-20; CP 208, Trust; CP 231, Will.) Thus the three documents together formed one integrated agreement. Contained in the March TEDRA agreement and the Trust were explicit provisions restricting Tom's ability to amend or otherwise alter the disposition of Tom's estate as set forth in his will and Trust. (*Id.*)

The parties had put into the March TEDRA very specific language limiting his ability to modify, revoke or amend his estate planning documents.

> b. Power to Revoke. Pursuant to Article 3 of the Trust, Tom has reserved the right (a) to revoke the Trust in its entirety, (b) to partially revoke or modify the Trust, and (c) to withdraw from the operation of the Trust any part or all of the Trust estate. Moreover, under Washington State law, Tom reserves the right at any time to amend or revoke the Will. **Collectively, the rights described in the immediately two proceeding sentences shall be referred to as Tom's "Modification Powers."** The Modification Powers are personal to Tom and may not be exercised by his attorneys-in-fact appointed under a duly executed durable power of attorney or by any guardian of his estate absent court order. However, although both the Trust and the 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 the Modification Powers.
>
> ii. timely provides James with a summons for such hearing pursuant to RCW 11.96A.100 **(<u>and otherwise complies with the substantive and procedural provisions of RCW 11.96A</u>)** and
>
> iii. **<u>as a result of such a hearing, the court issues an order</u> approving the exercise** of some or all of the particular Modification Power(s) expressly requested in Tom's petition.
>
> Accordingly, the Parties **expressly acknowledge and agree that <u>any exercise</u> by Tom of his Modification Powers over the Trust and/or the Will <u>without first obtaining</u> such a court order (and otherwise complying with the terms of this Agreement) <u>shall be null and void</u>.**

(CP 203 – 204, March TEDRA, p.2:25 – 3:23 (emphasis added).)

A memorandum of agreement, was filed with the court on June 10, 2009, under King County Cause No. 09-4-03011-9.

2. <u>The March 2009 Trust Still Directed the Bulk of Tom's Assets to Family Members</u>.

The trust that was created in March 2009 largely followed Tom's 2004 will. (*Compare* CP 1020 – 1030, 2004 Will to CP 207 – 228, Trust.) The beneficiary of the Trust when Tom died was James so long as James survived Tom. The same contingent charitable beneficiaries were named in the Trust as in the 2004 Will. However, the 60 percent gift to Rose was split between Rose, Larry Emery and Rick Emery. Under the trust each of the

three received 20 percent. (CP 215-16.)

Larry and Rick are also children of Tom's brother, John Paul Bernard. John Bernard was married twice. (CP 982.) John's sons, Larry and Rick, were born to him by his first wife, and Rose was born to him by his second wife. Larry and Rick met Tom at John Bernard's funeral in 1984. (*Id.*)

Larry and Rick had not been a significant part of Tom's life as long as Rose had, but their involvement in Tom's life increased in the last ten years of Tom's life. (CP 983.) Around 2000, Tom began assuming the role of Patriarch to the extended family. (CP 982.) He called Larry and Rick to tell them that his father (their grandfather) had passed away. (*Id.*) After Grandfather Bernard's funeral, Tom would call Larry and Rick on occasion to talk to them. They would discuss Tom's business and Tom would encourage them to have a closer relationship with their half-sister Rose. (*Id.*) Rick and his family met with Tom several times after 2008, which included a trip by Tom to Fort Collins, Colorado with his girlfriend Judy Huerter and Rose, Rose's husband David Linger, and their son Nick to visit with Rick and his family. (CP 983.)

D. Tom's Trust Undergoes a Radical Change in its Distributive Scheme Just Five Months Later.

Sometime in August and September 2009, less than five months after

the March Agreement was signed, a second document was prepared ("August Document"). (CP 235 – 237) following NONE of the required procedures inherent in the Modification Powers. Tom signed the document on August 22, 2009, and James signed it a month later on September 23, 2009. (CP 237.) Tom did not a) file a petition and b) note a hearing; he did not c) notify all of the necessary parties of a hearing in accordance with the procedural rules of TEDRA; and d) no court order was entered after a hearing on the petition.

Concurrent with the August Document, on August 22, 2009, Tom executed a Codicil to his 2009 Will and a First Amendment to the Trust. (CP 239 – 242, Trust Amendment; CR 245 – 246, Codicil.) In the Trust Amendment, the contingent gifts to Rose, Larry and Richard were changed from 20 percent each to $20,000 each. (CP 240.) The Trust amendment now directed that the bulk of Tom's multi-million dollar estate would be distributed to business associates of Tom. (CP 241.) David Reina, a business associate and co-trustee of the Trust, was added as a 25 percent contingent residuary beneficiary. *Id.* Leah Karp and Diane Viars who were employees of Tom each received 15 percent as contingent residuary beneficiaries. (*Id.*)

A memorandum of agreement for the August Document was filed with the court on February 2, 2010. (CP 992.)

E. Tom's Lack of Capacity and Vulnerability to Undue Influence is Undisputed by 2010.

1. Litigation GAL #2

In 2010, only eight months after signing the August Amendment, Tom admitted in a declaration submitted in the dissolution proceeding between he and his second wife Gloria, "I have been diagnosed with dementia and I experience substantial, consistent short-term memory impairment." (CP 992.) Tom's dementia was such a concern that, again, a motion for appointment of a litigation guardian ad litem was also filed in his dissolution action. (CP 993.)

2. Guardianship Petition #2.

On October 14, 2010, a second petition for guardianship was filed. (*Id.*) Dr. Eisenhauer, who had already examined Tom with respect to the 2008 guardianship proceeding, examined Tom again on November 11, 2010. (*In re Guardianship of Bernard*, King County Cause No. 10-4-05897-7 SEA.) (CP 263 – 278, medical report.)

3. Medical Report #2.

Dr. Eisenhauer noted numerous incidents and deficiencies that included:Three months prior Decedent had attempted to bite and choke his friend, and put his arm around the neck of his girlfriend in a threatening manner. (CP 269.)

- "He did not know the date, month, year, season or the day of the week." "He also did not remember his own age." (CP 270.)
- "He could not clearly outline his business holdings or properties nor was he able to indicate his income." (CP 273.)
- Diane Viars indicated he had had 24 hour care for about the past year and that he had expressed paranoid ideas over the past few years, "e.g. people are trying to kill him." (CP 272 (underline added).)

With respect to Tom's vulnerability to undue influence, Dr. Eisenhauer opined:

> Due to his impaired memory, disinhibited behavior, reduced executive functioning and poor judgment, Mr. Bernard **is vulnerable to undue influence and financial exploitation**. If he were to manage his own finances, he would be at serious risk to be victimized.

(CP 273 (bold in original).)

F. J. Thomas Bernard's Involuntary Commitment and Passing.

On September 8, 2010, less than a year after the August Amendment, Tom was admitted to NW Hospital Geropsychiatric Center shortly following Tom's physical attack on his friend and his friend's companion. Tom's son, James, had committed suicide on September 11, 2010, but Tom was never informed of this fact because of Tom's admission to a hospital for psychiatric reasons. (CP 998.)

On January 13, 2011, at the age of 67, Tom passed away.

G. Tom's Vulnerability was Known by the Co-Trustees.

The co-trustees of the Trust were acutely aware of Tom's vulnerability to undue influence when they attempted to amend the trust. After the creation of the Trust, one of the first tasks that the co-trustees focused on was protecting Tom from merchants who had exploited him. On May 22, 2009, Ken Hart prepared a "Bad Boy" letter addressed to "Dear Mr. Bad Boy", which stated in part:

> "If you attempt to have any further direct or indirect contact or communication with Mr. Bernard, our instructions are to immediately file a lawsuit against you on Mr. Bernard's behalf. We will ask the court to enter a restraining order against you and to order you to pay our clients' attorney fees and costs pursuant to the Vulnerable Adult Protection Act, RCW 74.34. et. seq."

(CP 122; CP 298 – 304; CP 299, "Bad Boy" letter (underline added).)

Before the second amendment on May 29, 2009, Ken Hart corresponded with the Ryan Montgomery law firm to see whether the Trust could nullify several contract/agreements regarding personal property items that Tom had purchased, and again mentioned injunctive relief and the Vulnerable Adult statute. (CP 300.) Daniel Reina prepared a list of individuals who had exploited Tom in the past. (CP 301 – 303.) The list included comments such as "takes Tom to the bank for $", "scammed Tom for $150,000 in Art"; and "Predator Real Estate Agent Sold Honey Farm

overpriced by 1 million & contact Tom despite being told to leave Tom and BDC alone" with regard to the exploiters actions. (CP 303.)

There were also allegations of mismanagement and overreaching against the co-trustees. In his complaint against Tom and several other entities, Daniel Reina alleged: "Shortly after these agreements were reached [in early 2009], Messrs. Becker and Hart advised Mr. Bernard to transfer essentially all of his assets to a revocable trust to be known as the J. Thomas Bernard Revocable Trust (the "Trust") . . . . Messrs. Becker and Hart not only created the Trust, but they made themselves trustees of the Trust." (*Reina v. Bernard*, King County Cause no. 10-2-20322-2 SEA.) (CP 123; CP 323, Reina Complaint, p.7:21-25.)

Mr. Reina was very direct about his allegations of potential abuse and exploitation by the co-trustees. In October 2009, Kenneth Hart wrote: "Do you think we are going to get a coherent declaration from Tom to support a summary judgment motion?" Mr. Reina responded: "**We prepare it he signs.**" (CP 899.) These words echo what Mr. Reina alleged in his June 2010 complaint that Mr. Becker stated near the end of 2009:

> "When Mr. Reina questioned whether Mr. Bernard understood and had agreed to this transaction, Mr. Becker informed Mr. Reina that Mr. Bernard's consent and competency was irrelevant. "Bring Tom (Bernard) in to [sic] the hold the pen and we'll (Messrs. Becker and Hart) will move the paper."

(CP 325, Reina Complaint, p.9:19-22.)

H. The Former Beneficiaries Exaggerate and Misrepresent Conflicts in Tom's Relationship with Rose.[3]

The Former Beneficiaries recount an event wherein "Rose physically attacked and verbally abused Mr. Bernard and James." (Appellants' Opening Brief, p.7.) There is no evidence that Rose ever physically attacked Tom. The closest evidence to such an act is Tom's declaration that Rose put her finger on Jamie's chest. (CP 743.) Interestingly Tom declared in the same statement, "I have serious memory problems." (CP 744.)

The Former Beneficiaries also claim that "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 and Associates LLC, to collect the outstanding loans." (Appellants' Opening Brief.) Tom, however, was not even aware of the lawsuit. (CP 896.)

The process of collecting on the alleged debts began with Daniel Reina having his long-time friend, Clay Hinkle, draft a letter trying to undo a year arrangement between Tom and Rose for Rose and David to move to Seattle to help take care of Tom – the letter stated that Rose and David would not have housing or financial assistance, and "if Tom has given you a

[3] These facts are not material to the issues before the Court because the Court is asked to address a question of law. Nevertheless, the misrepresentations to the Court cannot go unaddressed.

different impression we are sorry for the confusion." (CP 887.) It was in that letter, that the debt issue was first raised. Dan Reina circulated the ghost written letter as if it had come from Tom although the exchanges of emails showed that Tom never originated the letter. (CP 889 – 890, 892 - 894.)

The co-trustees were in fact concealing the lawsuit from Tom. On May 13, 2009, Doug Becker responded to a question from Dan Reina whether they "should [have] this letter from you instead of Tom." Mr. Becker stated:

> "Yes, absolutely. I'm still looking it over and it's best if we keep Tom at a distance from the dispute."

(CP 896.)

Tom's knowledge and participation in the collection of the alleged debts by Rose is further placed into question when examining some of the discussions regarding the 2009 complaint filed against Rose. In October 2009, David (Rose's husband) prepared a response to the complaint and included with it a "gift card" that claimed to gift "All those tuition, books, and family living costs" related to her college education. In attempting to determine what the "gift card" meant the co-trustees communicated with one another, and Daniel Reina stated he would check with Diane Viars, not Tom, with respect to the date when the card was sent. (CP 899 - 900.) These

personality comments in the record included by way of response and background but are largely irrelevant to the legal issues.

The question, however, before the Court of Appeals does not relate to these facts but relates to the interpretation of the modification restrictions in the March 2009 TEDRA agreement that set forth a specific procedure if Tom wanted to modify or amend his Will or Trust.

IV. ARGUMENT

A. Standard of Review.

The standard of review on appeal from a summary judgment is *de novo*. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 138 P.3d 943 (2006). "[T]he construction of a contract and the legal effect of its terms present questions of law for the trial court which may be properly resolved by summary judgment." *Marquez v. Univ. of Wash.*, 32 Wn. App. 302, 306, 648 P.2d 94 (1982). Accordingly, the Court of Appeals may properly resolve the issues presented in this appeal.

B. The August TEDRA Agreement Is Not Valid.

1. The August 2009 Document was an ineffective attempt to modify the March 2009 TEDRA agreement.

The Former Beneficiaries agree that there are specific mandatory restrictive provisions in how the Trust and Will can be modified, (what their brief refers to as "the three step process") but tortuously tries to argue that there are no restrictions to how the March 2009 TEDRA

agreement could be modified[4]. The August document fails as a valid exercise of Tom's "Modification Powers" for two reasons. First, the express language in the March TEDRA did, in fact, restrict changes to the March TEDRA agreement itself. Second, by attempting to employ RCW 11.96A.230 to modify the March TEDRA agreement, there were procedural and substantive requirements to follow under RCW 11.96A that were not followed.

The Former Beneficiaries present a legal issue that is not necessary for this Court to consider – whether a subsequent document can amend or modify a prior TEDRA agreement. The Court can come to the same ruling as the trial court by analyzing that the August document was not effective nor valid as the trial court did. (See below).

2. <u>The March TEDRA explicitly restricted "any exercise" of Tom's modification powers without complying with the modification restrictions.</u>

The Former Beneficiaries argument that because the March TEDRA agreement did not expressly state that it could not be modified, the Trust and Will could be modified by modifying the March TEDRA itself is a clever distraction, but the three step process modification

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[4] This is an alleged differenced without a distinction because the raison d'atree of the August document is to modify Tom's estate plan. (Appellants' Opening Brief, p.15-16, "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 modifications through the three step process.")

restrictions that they admit applies to the Trust and the will does encompass the TEDRA agreement itself. The clear intent was to require a court hearing, with notice before disabled Tom changed his estate planning.

"In construing instruments creating trusts, the sole object of the courts is to ascertain the intent and purpose of the settlor, and to effectuate that purpose in so far as 'it be consistent with the rules of law.'" *Old Nat. Bank & Trust Co. of Spokane v. Hughes*, 16 Wn.2d 584, 587, 134 P.2d 63 (1943) (internal citation omitted). The court will, "...ascertain a settlor's intent and purpose from the four corners of the trust instrument, construing all of its provisions together." *Cook v. Brateng*, 158 Wn. App. 777, 786, 262 P.3d 1228 (2010); *citing Templeton v. Peoples Nat'l Bank*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986).

"Where the terms of a contract taken as a whole are plain and unambiguous, the meaning of the contract is to be deduced from its language alone, and it is unnecessary for a court to resort to any aids to construction." *Hastings v. Continental Food Sales, Inc.*, 60 Wn.2d 820, 823, 376 P.2d 436 (1962).

All rules of construction are "supportive and or subordinate to the court's primary duty of determining the intent of the testator and giving it effect." *In re Riemcke's Estate*, 80 Wn.2d 722, 727, 497 P.2d 1319

(1972).

The March TEDRA specifically stated:

> [T]he Parties expressly acknowledge and agree that <u>any exercise</u> by Tom of his Modification Powers over the Trust and/or Will without first obtaining such a court order (and otherwise complying with the terms of this Agreement) shall be null and void.

(CP 204.)

The August document was nothing but an attempt to circumvent the requirements of the March agreement and exercise Tom's Modification Powers without first giving notice and obtaining an order of the court. Accordingly, as an attempted exercise of Tom's modification powers the August document was immediately "null and void." The drafters had failed to comply with the March TEDRA. The conclusion that the August document was an attempt to exercise of Tom's modification powers is evidenced by the fact that the August document explicitly attempts to satisfy the requirements of the modification restrictions.

The August TEDRA stated:

> [B]y virtue of RCW 11.96A.230, once this Amended Agreement (or a summary memorandum of such agreement) is filed, this Amended Agreement <u>will satisfy the Agreement's requirement</u> to obtain a court order prior to any exercise of Tom's Modification Powers.

(CP 236 (underline added).)

The modification provisions set forth in the March TEDRA required that as a result of a hearing, after notice, "the court issues an order" and that Tom could not exercise his modification powers "without first obtaining such a court order." Under RCW 11.96A.230 (2), upon filing of the agreement or memorandum of agreement, the agreement is "equivalent to a final court order." "Equivalent" to a court order is not "obtaining a court order" as is required under the March TEDRA. When the Trust and March TEDRA specifies notice, hearing, and a "court order" to make an amendment valid it does not apply to the "equivalent" of a court order. "Equivalent" as used in RCW 11.96A.230 is used in the statutory context of binding the parties and enforcing the agreement. A judicial officer signing a document after notice to all affected parties makes "obtaining a court order" substantially different then the "equivalent" of a court order.

The fact that Tom and James could not merely agree to change the Modification Restrictions is supported by contemporaneous communications to Tom from the attorney who prepared the March TEDRA, Trust and Will. In a letter dated March 20, 2009, Mr. Montgomery very simply wrote:

> [Y]ou have agreed that you cannot exercise your powers to revoke, modify, or remove assets from

> the Trust without first obtaining a court order (this agreement is discussed more fully below).

(CP 909 (underline added).) Later in the letter, Mr. Montgomery writes:

> [Y]ou agree that you will not have the power to revoke, amend, or remove assets from your Trust, or revoke or amend your Will, without first obtaining an order from King County Superior Court.

(CP 910 (underline added).) The letter mentions twice that Tom must obtain an order from the court.

The Court cannot retroactively adopt the argument that Tom and James could agree to change the modification restrictions without notice or a court order. Such a position cannot be found in the language of the March TEDRA and would require the Court to wholly ignore a significant part of the March TEDRA, the requirement of obtaining a court order after notice.

As the trial court held: "By invoking the jurisdiction and authority of the court, the parties could not waive or rescind the court order requiring prior court approval for modification. Respondents cite no legal authority for doing so." The Former Beneficiaries still have not presented any legal authority for doing so.

As the trial court further stated:

> Tom's clear and unequivocal intent in March was that he not be allowed to modify the terms of the will and trust without a very expressly specified procedure, including a petition to the court and prior court approval. If this Court gives full effect to Tom's intent

as set forth in the March TEDRA agreement, then it cannot enforce the August agreement entered in contravention of the terms of the prior agreement.

(RT 9:19 – 10:1.)

3. <u>The August Document did not comply with the procedural and substantive requirements of RCW 11.96A.</u>

a. *The August Document did not resolve a "matter" as defined by RCW 11.96A.030.*

RCW 11.96A.220 provides in pertinent part:

> RCW 11.96A.210 through 11.96A.250 shall be applicable to the resolution of any matter, as defined by RCW 11.96A.030, other than matters subject to chapter 11.88 or 11.92, or a trust for a minor or other incapacitated person created at its inception by the judgment or decree of a court unless the judgment or decree provides that RCW 11.96A.210 through 11.96A.250 shall be applicable. 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.

11.96A.030 (1) provides the following definition of "matter":

> "Matter" includes any issue, question, or dispute involving:
>
> (c) The determination of any question arising in the administration of an estate or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitations, questions relating to: (i) The construction of will, trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee;

RCW 11.96A.030 (2) defines "matter" as "any issue, question, or dispute." Specifically with RCW 11.96A.030 (1)(c), there must be a question regarding the trust that needs to be addressed. There was no legitimate issue, question, or dispute leading to the August document. The March TEDRA identifies a "dispute" in the third paragraph of the agreement. (CP 203.) The August document does not purport to identify any dispute, instead representing that "Tom desires, and James desires for Tom, to modify …" (CP 236.) RCW 11.96A.220 is expressly directed to the "resolution of any matter." There was no matter to resolve. There was no question as to how the trust could be modified. A set of precise, contractual procedures were already in place for trust modification, and simply ignored on purpose.

Even the arguments of the Former Beneficiaries indicate that TEDRA is not intended merely to allow parties to create court orders as they please, but that TEDRA agreements are designed to resolve adversarial or at least controverted arguments: "when considering the definition of 'matter,' the drafters specifically intended to facilitate resolution" (Appellant's Opening Brief, p.18 (underline added)); and "Nonjudicial binding agreements are specifically contemplated as a means to resolve potential and actual disputes among interested parties." (*Id.* (underlined added).) The authority of TEDRA is not to be abused to give

unnecessary or unauthorized agreements the equivalent authority as a binding court order when no *bona fide* issue, question, or dispute exists.

b. *Tom did not obtain the signatures of "all parties" as required by RCW 11.96A.220.*

In pertinent part, RCW 11.96A.220 states: "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." (Underline added.) The August document added an additional charitable beneficiary, the U.W. School of Business, thus reducing the share of the charities set forth in his 2004 will and repeated in his March 2009 Trust. The share of the Family Beneficiaries changed from 60% of a multi-million dollar estate, to $60,000. They were parties entitled to notice under the Three Step Process of the March TEDRA Agreement.

RCW 11.96A.030 (4)(e) and (i) and .030 (5)[5] provide the following relevant definitions:

> (4) "Party" or "parties" means each of the following persons who has an interest in the subject of the particular proceeding and whose name and address are known to, or are reasonably ascertainable by, the petitioner:
> ....
> (e) A beneficiary, including devisees, legatees, and trust beneficiaries;
> ....

[5] Citations in this instance are to the statutes effective at the relevant time period. RCW 11.96A.030 was amended effective 2012. The cited provisions have been renumbered in the amendment but remain substantively the same.

> (i) Any other person who has an interest in the subject of the particular proceeding.
>
> ....
>
> (5) "Persons interested in the estate or trust" means the trustor, if living, <u>all persons beneficially interested in the estate or trust</u>, 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.

For purposes of RCW 11.96A, a "party" is unambiguously defined as "trust beneficiary." RCW 11.96A.030 (5)(c). Any question as to whether the Family Beneficiaries and the charities as contingent beneficiary are included in the term "trust beneficiary" is answered in the affirmative by *Nelsen v. Griffiths*, 21 Wn. App. 489, 494, 585 P.2d 840 (Div. 1 1978) (contingent beneficiary is included in general rubric of "beneficiary") (interpreting RCW 30.30.040 recodified as RCW 11.106.040). RCW 11.106.040 states in relevant part: "beneficiary of a trust may file a petition under RCW 11.96A.080 with the superior court." Thus when read within the statutory scheme of RCW Ch. 11, a contingent beneficiary is a "trust beneficiary" and is therefore a necessary "party" under TEDRA's notice requirements, RCW 11.96A.110, and their signatures are required to create a TEDRA agreement for the purpose of RCW 11.96A.220. If they had advanced notice of these proposed changes, they could have challenged Tom's capacity and the undue

influence that was exerted on him to make these changes.

The Former Beneficiaries ask this Court to ignore all the definitional provisions of RCW 11.96A and the framework of RCW Ch. 11 when arguing that the Family Beneficiaries and the charitable beneficiaries were not parties interested in the proceedings who were required to be part of any TEDRA agreement following the March TEDRA.

Simply stated, the August document was not entered into by all parties, purposefully because given the documented incapacity and vulnerability to undue influence, the proper notice parties and a judicial officer would not have allowed the changes to be made.

The Former Beneficiaries argue that only James and Tom were necessary parties to the August document agreement because they were the only parties to the March TEDRA agreement. <u>This reasoning ignores the fact that when Tom created the Trust other "interested parties" to the Trust were created</u>. Prior to the March TEDRA there was no trust. The Trust and March TEDRA were signed the same day. By creating the Trust and naming alternate contingent beneficiaries, the parties created a separate class of interested parties. The alternate contingent beneficiaries became necessary parties to modify the March TEDRA. This conclusion is highlighted by the language quoted by the Former Beneficiaries from

the Official Comments to TEDRA.

The Former Beneficiaries note that:

> 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 documents.
>
> Comments to SB5196 (1/28/1999) TEDRA §104(1) RCW 11.96A.030

(Appellants' Opening Brief, p.18 (original bold in text removed; underline added)).

C. The Trust Incorporated the Modification Restrictions set forth in the March TEDRA Agreement Requiring that The Modification Restrictions Be Followed.

Paragraph 3.3 of the Trust agreement states, in pertinent part:

> **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 ("TEDRA") of even date herewith and are not exercisable by Trustor unless and until Trustor obtains the court order required by such agreement and otherwise satisfies all of the requirements imposed by the TEDRA. If and to the extent such TEDRA is determined to be unenforceable for any reason, the restrictions on Trustor's right to revoke, modify, and/or withdraw property from this Trust as stated therein shall be incorporated in this Agreement by reference and shall remain fully enforceable against the Trustor.

(CP 208 (underline added; bold in original).)

The Trust specifically set forth that, if for any reason, the March TEDRA was unenforceable, the restrictions "shall be incorporated in this Agreement and shall remain fully enforceable against the Trustor."

1. It was Tom's intent that the modification restrictions be followed.

As case law sets forth, the intent of the trustor is determined from the language of the trust document. *Hastings*, 60 Wn.2d at 823.

As set forth in the statement of facts above, it is easy to see why the modification restrictions would be important to someone in Tom's vulnerable position. He was suffering from a significant mental decline and he was aware that he was suffering from a mental decline. (CP 744, "I have serious memory problems"; CP 992, "I have been diagnosed with dementia and I experience substantial, consistent short-term memory impairment.") The modification restrictions make sense given Tom's diminishing mental health. (Recall that Dr. Eisenhauer diagnosed Tom with frontal lobe dementia in June 2008, almost a year before the March Agreement, as part of the guardianship proceeding commenced by Tom's son.)

In order to protect himself from any unwanted or mischievous changes to his estate planning, Tom required that a specific protocol be

followed before any one of his estate planning documents could be changed. None of the three conditions were met: (1) no petition for a hearing was served or filed; (2) no portion of the notice requirements nor the substantive and procedural provisions of RCW 11.96A were complied with; and (3) no hearing was held and (4) no court issued an order approving the amendment, all explicitly required by the March TEDRA and Trust.

2. <u>The Trust required Tom to substantially comply with the modification restrictions, which he failed to do.</u>

The Washington Supreme Court has held: "Where the trust instrument specifies the method of revocation, only that method can be used." *In re Button's Estate*, 79 Wn.2d 849, 852, 490 P.2d 731 (1971) (where trust required written document delivered to the trustee to revoke or amend trust, written document delivered to attorney held insufficient); *In re Estate of Furst*, 113 Wn. App. 839, 842, 55 P.3d 664 (2002) *citing In re Button's Estate*, 79 Wn.2d 849. Strict compliance with the method of revocation is not required, but there must be at least substantial compliance. *In Re Estate of Tosh*, 89 Wn. App. 158, 161-62, 920 P.2d 1230 (1996) (actual or substantial compliance with trust language is required for trust amendment).

The Former Beneficiaries argue that while a statutory basis for modification may supercede the common law, that substantial compliance to the manner specified to modify a trust must occur. In support of this proposition, the Former Beneficiaries cite *Manary v. Anderson*, 176 Wn.2d 342, 292 P.3d 96 (2013). *Manary* addressed the application of RCW 11.11.020, the "superwill statute," regarding the testamentary disposition of nonprobate assets and whether it could alter the disposition set forth in a trust where trust property was gifted through the will. *Manary* is only instructive to the extent that the *Manary* court held that the testator in that case correctly complied with the requirements of the "super will statute." Here the Former Beneficiaries argument that a statutory basis may supercede the common law falls on its face because Tom did not comply with the subject matter, notice, and hearing requirements of the statute and trust agreement to satisfy the requirements for a TEDRA modification.

3. Substantial compliance requires near strict performance.

"Substantial compliance" has been defined by the Washington Supreme Court to mean "closely in conformance." *Williams v. Bank of California, N.A.*, 96 Wn.2d 860, 639 P.2d 1339 (1982). Substantial compliance or performance is a doctrine applied to many areas of contract law, including trusts. *Williams v. Bank of California, N.A.*, 96 Wn.2d 860,

639 P.2d 1339 (1982) (applying "substantial compliance" to trust issue); *Allen v. Abrahamson*, 12 Wn. App. 103, 529 P.2d 469 (1974) (applying "substantial compliance" to amendment of life insurance beneficiary); *Mortimer v. Dirks*, 57 Wash. 402, 107 P. 184 (1910) (applying "substantial performance" to dispute over construction defects).

> The equitable doctrine of substantial performance is intended for the protection and relief of those who have faithfully and honestly endeavored to perform their contracts in all material and substantial particulars, so that their right to compensation may not be forfeited by reason of mere technical, inadvertent, and unimportant omissions or defects.

Mortimer, 57 Wash. at 405 (emphasis added).

Taken together, the above cases indicate that substantial compliance requires near perfect compliance with the terms of the contract while forgiving any deviations are so trivial as to have no effect on the overall purpose and intent of the contract. The changes herein substantially changed Tom's estate plan by adding a new charity; disinheriting the Family Beneficiaries; and bequeathing 55% of the estate to recent employees. The modification restrictions were specifically and expressly designed to require court oversight of any changes to Tom's estate planning, and this attempted use of a second TEDRA agreement to circumvent those requirements entirely does not meet "substantial compliance."

a. Requirement 1: There was no petition for a hearing.

It is undisputed that there was no petition for a court hearing to approve the Trust amendment and codicil signed on August 22, 2009. The filing of a petition was a material term of the trust. Failure to petition the court was not a mere "technical, inadvertent, and unimportant omission," it was an intentional and substantial deviation from the express terms of the trust. *Mortimer*, 57 Wash. at 405. The significance of a petition for a hearing is underscored by the fact that the petition must "clearly and specifically set[] forth a particular proposal for an exercise of his [Tom's] Modification Powers." (CP 204.) In other words, Tom desired that a court would review the modifications sought to be made.

b. Requirement 2: Tom did not comply with the substantive and procedural provisions of RCW 11.96A, as required by the trust.

The second restriction that was required to be met before Tom could exercise his modification powers was to serve a summons on James "and otherwise compl[y] with the substantive and procedural provisions of RCW 11.96A."

Clearly the summons requirement to James was so that James would receive notice of the proposed change and have an opportunity to object. It is conceivable that James' execution of the August TEDRA agreement was substantial compliance with the notice provision to James.

This, however, should not be confused or conflated to mean that no hearing was required because James approved of the changes via the August TEDRA agreement.

i. To comply with the substantive and procedural provisions of RCW 11.96A, all interested parties must also receive notice of the hearing.

No notice was given to any of the alternate contingent beneficiaries of the change to the Trust. The requirement that the Family Beneficiaries and charities receive notice of any modification was included in the Trust for Tom's protection. Failure to file a petition and notify all beneficiaries of his intent to exercise his modification powers rendered the Trust modification "null and void," by its own specific language.

The first modification restriction required that there be a petition for a hearing under RCW 11.96A. Accordingly, in order to meet the second provision that Tom comply with the substantive and procedural provisions of RCW 11.96A, he was required to give notice to all interested parties as set forth in RCW 11.96A.110 (1).

RCW 11.96A.110 (1) provides in pertinent part:

> …, in all judicial proceedings under this title that require notice, the notice must be personally served on or mailed to all parties or the parties' virtual representatives at least 20 days before the hearing on the petition unless a different period is provided by

statute or ordered by the court.

(Emphasis added.)

As was set forth in section B.1.b, *supra*, the Family Beneficiaries and charities are included in the definition of parties for purposes of RCW 11.96A.

The Former Beneficiaries ask this Court to ignore all the definitional provisions of RCW 11.96A when arguing that the Family Beneficiaries and the charitable beneficiaries were not parties interested in the proceedings who should have received notice.

The Former Beneficiaries argue that no other parties required notice because "the notice requirement arose entirely from the March TEDRA because under Washington law the court lacked jurisdiction over an individual's estate plan during the testator's lifetime." (Appellants' Opening Brief, p.19.)

This argument is flawed in at least two respects. First, the Former Beneficiaries ignore the fact that the provision of the modification restrictions requiring notice; a hearing; and court order; and "otherwise comply with the substantive and procedural provisions of RCW 11.96A", which was specifically incorporated into the Trust. (CP 204; CP 208.)

Second, the case law that Former Beneficiaries rely on for the proposition that "the court lacks jurisdiction over an individual's estate

plan during the testator's lifetime" is inapplicable because such case law deals just with wills, and not court established trusts. Wills and trusts, although sharing some similarities, are different legal vehicles. A hallmark of the will is that it is ambulatory until death; it is the death of the testator that makes the will effective. *Young v. O'Donnell*, 129 Wash. 219, 224-25, 224 P. 682 (1924) (citations omitted). Since a will has no legal effect until the death of a testator, it stands to reason that courts would not have jurisdiction over a will, absent a contract that governs the will. In this instance, the March TEDRA also created a Trust, over which a court could have immediate or periodic jurisdiction during the life of the trustor depending on whether the court creates a trust. However, a trust, which as in this case is effective prior to death, is governed by the terms and provisions of the trust as it then exists, and the Court must give weight and significance to the terms of the Trust, which, by it's terms, submitted the parties to the jurisdiction of the court, should they wish to exercise the "Modification Powers."

ii. James was not the virtual representative for the Family Beneficiaries and charities with respect to the August TEDRA Agreement.

In the alternative to the Former Beneficiaries argument that the Family Beneficiaries and charities are not parties that required notice, the Former Beneficiaries argue that even if notice was required, James was

the virtual representative of the contingent remainder beneficiaries. This is not an accurate statement of the law because it ignores the fact that the Family Beneficiaries as well as the charitable beneficiaries do not take through James, as his children would, if he had any a necessary condition to act as a virtual representative. Instead the Family Beneficiaries and the charitable beneficiaries receive their status via the document itself and are named therein as alternate contingent remainders and James is the other alternate contingent remainder. The contingency of whether James or the Family Beneficiaries and charitable beneficiaries receive anything a function of the document not the descent and distribution statute. RCW 11.04.015.

The Washington statute on virtual representation that was applicable at the time of the attempted trust amendment stated as follows:

> (2) Any notice requirement in this title is satisfied if notice is given as follows:
>
> (a) Where an interest in an estate, trust, or nonprobate asset or an interest that may be affected by a power of attorney has been given to persons who comprise a certain class upon the happening of a certain event [ie contingent beneficiaries], notice may be given to the living persons who would constitute the class if the event had happened immediately before the commencement of the proceeding requiring notice, and the persons shall virtually represent all other members of the class;

RCW 11.96A.120 (emphasis added).

The above statute is in part an adoption of the common law principal of virtual representation. There are no Washington state cases addressing the doctrine of virtual representation in an estate planning context with contingent residual beneficiaries. For a review of virtual representation in such a context, a California case relying upon a United States Supreme Court case provides appropriate guidance.

In *Los Angeles County v. Winans*, 13 Cal. App. 234, 109 P. 640 (1910) (a copy of which is attached for the Court's convenience as an addendum) the question arose whether grandchildren should have been given notice of a hearing that disposed of property pursuant to a court order prior to the contingencies coming into effect. *Id.* at 240. The interests of the grandchildren were contingent upon the grandchildren's parents being dead, with the primary beneficiary, their grandmother Emma Means, passed away. *Id.*

The grandchildren argued that they had not been given notice of the prior court hearing transferring property, and therefore, the court did not have authority to make those transfers. *Id.* Those opposing the grandchildren's interest argued that the grandchildren had been virtually represented by their grandmother and mother in the prior proceedings. *Id.*

For the doctrine of virtual representation to apply, two requirements must be met: (1) the virtual representative represents someone who is not "in being" (*see* RCW 11.96A.120 (2)(a), "notice may be given to the living persons who would constitute the class if the event had happened" (underline and bold added)); and (2) the virtual representative must have the same interests as the class he purports to represent (*see* RCW 11.96A.120 (2)(a), "notice may be given to the living persons who would constitute the class if the event had happened" (underline added)).

The California Court of Appeals provided a detailed analysis of virtual representation and determined that only individuals who are not in being at the time of the proceeding may be virtually represented. *Los Angeles County*, 13 Cal. App. at 245. Regardless of the closeness of the connection, "...all persons in being capable of appearing who are interested must be brought into court." *Id.* at 246. The reason for this rule being simply that if an entity is "in being" there is no need for a virtual representative. This comports with RCW 11.96A.030 (4) that defines "parties" who should receive notice as persons that are known or can be "reasonably ascertained."

Further, the virtual representative must have the identical interests to those he represents.

> The doctrine is said by some of the cases to be applied only where the law regards the interest of the representative so identical with that of the person represented that motives of self-interest will induce the person acting as the representative to defend the property as his own.

Id. at 246 (underline added). In other words, the virtual representative must be a member of the class he purports to represent.

Prior to Tom's death, James had no greater interest in Tom's estate than did the Family Beneficiaries and charities. Only by surviving Tom would James inherit. The fact that it was James's existence at the time of Tom's death that was the contingency, does not give him any greater interest in the estate then the Family Beneficiaries and the charitable beneficiaries. Their interest was not subsequent to James's but contemporaneous, the contingency being whether James survived Tom. Accordingly, James could not have represented the Family Beneficiaries and charities as a class.

Even the August Document gave a nod to the fact that James can only virtually represent those who would take through him:

> **Virtual Representation under RCW 11.98A.120**. The Parties acknowledge and agree that, to the extent that James' born and/or unborn issue or other kindred have any interest in the subject matter of this Agreement, if any, under RCW 11.96A.120, James would be entitled to receive notice of any judicial proceeding regarding those interests on behalf of his issue or other kindred.

(CP 237, August Document, p.5:13-17 (underline and bold in original).)

c. *Requirement 3: There was no hearing and the Court did not issue an order before the amendments occurred to the Trust and will of J. Thomas Bernard.*

"Substantial compliance" is compliance with the express provisions except for "mere technical, inadvertent, or unimportant omissions or defects." *Mortimer*, 57 Wash. at 405.

The language of the third modification restriction is very specific. It states that the court "issues an order" "as a result of" a hearing. (CP 204.) Said restriction was beneficial to Tom because it should have protected him against potential undue influence and the financial exploitation of others. The terms of the trust requiring court approval of any changes protected Tom from himself, as much as from any other person in so much as the express language of the Trust sets forth Tom's intent. *See Old Nat. Bank & Trust Co. of Spokane*, 16 Wn.2d at 587 (must ascertain intent and purpose of trustor from terms of the instrument).

Accordingly, a petition should have been filed explaining clearly and specifically the proposed modification. Following a hearing from which the court issued a ruling granting modification, the trust and will could then be amended. However, this did not occur. There was no hearing, no notice of a hearing, no order following a hearing, and no order

prior to the amendments.

4. In Circular Reasoning, the Former Beneficiaries depend on the August Document for the authority that the August Document is valid.

The August Document_agreement set forth:

> The Parties agree and acknowledge that because the Modification Restrictions are imposed solely by virtue of the Agreement between the Parties, the Parties agree and represent that they are the sole necessary parties and have the power to modify such restrictions by further agreement.

(CR 236.)

As explained above, despite Tom and James' claim in the August Document that they "agree and acknowledge" that the modification restrictions are "imposed solely by virtue of the agreement," they are incorrect. They further claim "they are the sole necessary parties and have the power to modify such restrictions by further agreement" which is also incorrect. Tom and James cannot alter the statutory definitions in RCW 11.96A that define party nor alter the substantive and procedural requirements in creating a valid TEDRA agreement. As a result, they may not rely on the August Document as support for the proposition that the trial court's "ruling ignores the explicit provision in the August Document which provides that the Amendment and Codicil are effective as of their date of execution." (Appellants' Opening Brief at 25.) Such an argument is circular in nature and is an attempt to validate the otherwise invalid

August Document merely by including a provision in the document itself that declares it to be valid. If such a practice were permissible, there would never again be an action to contest a will or trust because the drafting attorney would simply include a provision declaring the document to be valid.

5. The Court cannot consider Karen Boxx's opinions.

> "Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony. It is the responsibility of the court deciding a [] motion to interpret and apply the law."

WA State Physicians Ins. Exchange & Assoc. v. Fisons Corp., 122 Wn.2d 299, 344, 858 P.2d 1054 (1993) (italics in original); and, *Parkin v. Colocousis*, 53 Wn. App. 649, 769 P.2d 326 (1989) (trial court cannot consider conclusions of law contained in affidavits).

The Former Beneficiaries cite to the Declaration of Karen Boxx as authority supporting their position. (CP 535 – 547.) Karen Boxx's opinions are inadmissible and cannot be considered if they speak to the legal questions before this Court, and if Ms. Boxx's opinions are intended to be presented as a representation of the "estate planning community," it is irrelevant. What is relevant is Tom's intent which was clearly and specifically set forth in the restriction modifications.

D. The Trial Court's Ruling that the Trust Could Not Appeal the Grant of Summary Judgment was Appropriate.

1. The Appellants do not have standing to appeal the trial court ruling prohibiting the Trust from appealing the trial court's grant of summary judgment.

Only an aggrieved party has a right to appeal. *In re Tucker's Estate*, 116 Wash. 475, 477-78, 199 P. 765 (1921).

Appellants Daniel Reina, Leah Karp and Diane Viars did not bring the motion for instructions to the court asking whether they could appeal the trial court's grant of summary judgment. The personal representative of the Estate and the co-trustees of the Trust brought that motion. The revision ruling by the trial court that held the Estate and Trust could not appeal the trial court's grant of summary judgment did not infringe upon any of the Former Beneficiaries' right to appeal.

Appellants Daniel Reina, Leah Karp and Diane Viars do not have standing to appeal the trial court's ruling as to whether the Trust can appeal the trial court's grant of summary judgment.

2. If the Trust were permitted to appeal the trial court's grant of summary judgment, it would place the Trustees in direct conflict with the beneficiaries of the Trust.

Prior to October 12, 2012, the date of Judge Erlick's ruling, the Trust consisted of the main trust document and an amendment. Prior to October 12, 2012, the Trust, being presumed valid, had a duty and right to defend against the challenge to the trust instruments.

After October 12, 2012, the Trust no longer included the August Amendment. The Court found the August Amendment to be null and void. From that time forward, the Former Beneficiaries were no longer beneficiaries to the Trust.

It is an undisputed axiom of trust law that a trustee owes a duty to the beneficiaries to administer the trust solely for the interest of such beneficiaries. Accordingly, the trustee is required to have "undivided loyalty." *Matter of Drinkwater's Estate*, 22 Wn. App. 26, 30, 587 P.2d 606 (1978). A trustee owes the highest degree of good faith, diligence, and undivided loyalty to the beneficiaries. *In re Estate of Ehlers*, 80 Wn. App. 751, 757, 911 P.2d 1017 (1996).

Given the undisputed duty of loyalty, the trial court appropriately decided that it would be improper for the trustees to appeal the trial court's grant of summary judgment because it would place the trustees in direct conflict with the individuals that the trial court had adjudicated to be the beneficiaries of the trust. Although trustees and beneficiaries can be in direct conflict, a trustee attempting to remove a beneficiary is unlike a dispute over interpretation or administration of a trust. A trustee's attempted removal of a beneficiary directly contradicts the statutes and case law holding that the trustee has an undivided duty of loyalty to the beneficiaries.

A line of cases regarding the executor's right to appeal in a probate is instructive. These cases have held that where the dispute is about who has a right to receive, and there is no impairment of the estate, the estate itself does not have a right to appeal. *See In re Cannon's Estate*, 18 Wash. 101 (1897); *Cairns v. Donahey*, 59 Wash. 130, 133 (1910); *In re Tucker's Estate*, 116 Wash. 475, 476 (1921); *In re Maher's Estate*, 195 Wash. 126 (1938). The reasoning behind the line of cases is well laid out in *In re Cannon's Estate*:

> '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. <u>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</u>.'

In re Cannon's Estate, *supra* at 105-106 (underline added). The Restatement (Third) of the Law of Trusts §79 Reporter's Notes on comments c and d (2007) uphold the trustee's right to appeal "if it is necessary to protect <u>the interests of those whom he represents</u>." (Underline added.)

Appellants cite to *In re Klein's Estate*, 28 Wn.2d 456, 475, 183 P.2d 518 (1947) for the proposition that "it is the duty of the executor to take all legitimate steps to uphold the testamentary instrument." The specific issue addressed in *Klein* was whether it was appropriate for the trial court to award attorneys' fees to the executor for an unsuccessful will challenge at the trial level. The *Klein* court did not address when it would be appropriate for a trustee to appeal. The issue in this instance is whether the co-trustees can appeal from a decision that determines who the beneficiaries of a trust are.

The ruling that the trustees cannot appeal in a situation where they would be in direct conflict with the beneficiaries fits into the statutory scheme under RCW 11.96A and in particular RCW 11.96A.150. Under RCW 11.96A.150, the court is given discretion to award costs, including attorneys' fees, from any party to any party based on equity. Rather than have the trustees be put into a direct conflict with the beneficiaries and violate the duty of loyalty, the aggrieved Former Beneficiaries have the right to appeal. If they are vindicated on appeal then they can seek attorneys' fees from the Trust or the Family Beneficiaries. The trustee never faces the dilemma of violating his duty of loyalty. To put the decision in the hands of the trustees as whether to appeal, puts the trustees

in potential liability for having advanced an appeal against the party that is ultimately determined to be the true beneficiary.

E. An Award of Attorneys' Fees to the Family Beneficiaries is Appropriate.

Rules on Appeal, Rule 18.1 permits the Court of Appeals to award attorneys' fees "if applicable law grants to a party the right to recover reasonable attorney fees or expenses."

RCW 11.96A.150 provides that the court on appeal may award attorneys' fees from any party to any party in the manner that the court deems equitable.

The Family Beneficiaries request an award of attorneys' fees from the Former Beneficiaries, jointly and severally or alternatively from the trust.

VI. CONCLUSION

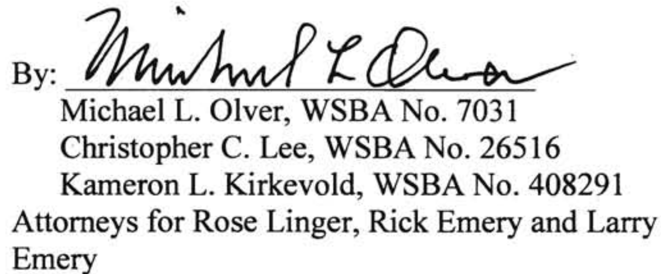
The August TEDRA agreement did not have the binding effect of a court order because it did not satisfy the "Three Step Process" for creating a TEDRA agreement – principally all the parties did not sign the agreement. Nor could the August TEDRA agreement be effective without first providing notice; scheduling a hearing; and receiving a court order authorizing the Modification Powers because the plain words of the March TEDRA, required them to obtain a court order, following a hearing, after

complying with the substantive and procedural requirements of RCW 11.96A, principally notice to persons or entities who could be effected by the court's ruling.

The trial court correctly ruled that the August TEDRA was invalid and ineffective. This court is respectfully requested to affirm the trial court's decision. Further it is requested that this court award Rose Linger, Larry Emery and Rick Emery attorneys' fees and costs jointly and severally against the appellants Daniel Reina, Leah Karp and Diane Viars and alternatively from the Trust itself.

Dated this 31 day of July, 2013.

HELSELL FETTERMAN LLP



By: ______________________
Michael L. Olver, WSBA No. 7031
Christopher C. Lee, WSBA No. 26516
Kameron L. Kirkevold, WSBA No. 408291
Attorneys for Rose Linger, Rick Emery and Larry Emery

CERTIFICATE OF SERVICE

I, MICHELLE N. WIMMER, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Helsell Fetterman LLP, 1001 4th Avenue, Suite 4200, Seattle, WA 98154.

3. In the appellate matter of Estate of Bernard I did on the date listed below (1) cause to be filed with this Court the Respondent's Brief; (2) caused the same to be delivered via email to Bruce McDermott & Teresa Byers, Garvey Schubert Barer, 1191 2nd Avenue, Ste. 1800, Seattle, WA 98101; Kim Stephens & Shannon Whitemore, Tousley Brain Stephens, 1700 7th Avenue, Ste. 2200, Seattle, WA 98101; Karolyn Hicks, Stokes Lawrence, 1420 5th Avenue, Ste. 3000, Seattle, WA 98101; Ann Wilson, Law Offices of Ann T. Wilson, 1420 5th Avenue, Ste. 3000, Seattle, WA 98101; Karen Bertram, Kutscher Hereford Bertram Burkart, 705 2nd Avenue St. 800, Seattle, WA 98104.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: August 1, 2013

MICHELLE N. WIMMER

COUNTY OF LOS ANGELES, Respondent,
v.
E. H. WINANS, CHARLES A. COLE et al., Appellants; MRS. EMMA MEANS and J. W. MEANS, Her Husband, et al., Respondents.

Civ. No. 693.

District Court of Appeal, Second District, California.
April 15, 1910.

HEADNOTES

EMINENT DOMAIN--MONEY IN COURT--SETTLEMENT OF INTERESTS--PROTECTION OF UNBORN GRANDCHILDREN.

--In this proceeding in eminent domain it is held that the court properly settled the rights of conflicting claimants to the property out of the money paid into court, and subjected the rights of the appellants to the rights of unborn grandchildren to an alternative contingent remainder in the property.

ID.--CONVEYANCE OF ESTATE FOR LIFE--REMAINDER TO HEIRS OF BODY--PURCHASE.

--When property in this state is conveyed to a mother for life, with remainder to the heirs of her body, those interested in the remainder take by purchase and not by inheritance.

ID.--CONTINGENT FUTURE INTEREST.

--Such remainder is a contingent interest, future in character, and the person to whom and the time of the happening of the event upon which it is limited to take effect were both uncertain at the time of its creation.

ID.--CONTINGENT REMAINDER NOT VESTED.

--Since the uncertainties at the time of the creation of the contingent remainder continue to exist until the death of the life tenant, it did not and could not vest until her death, because she could have no 'heirs of her body' prior to her decease. In the interval, all of her children may die, and the entire estate might vest wholly in her unborn grandchildren.

ID.--INTERESTS OF UNBORN GRANDCHILDREN NOT VOID FOR UNCERTAINTY, NOR MERE POSSIBILITIES.

--The interests of unborn grandchildren in the contingent remainder are not void because of the improbability of the contingency on which they are limited to take effect; nor can such interests be regarded as mere possibilities, such as the expectancy of an heir apparent, as they do not depend upon the law of succession to determine whether or not they will take effect, and they cannot be defeated by the testamentary or other act of the ancestor.

ID.--CODE SECTION AS TO VESTED FUTURE INTERESTS INAPPLICABLE.

--Section 694 of the Civil Code relating to a vested future interest 'in a living person' has no application to a future contingent remainder in unborn grandchildren.

ID.--DISTINCTION BETWEEN VESTED AND CONTINGENT REMAINDERS.

--Where the preceding estate is limited to depend on a certain event which must happen, and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may determine prior to the expiration of the estate in remainder, the remainder is vested; but where the preceding estate is to determine upon an event which may never happen, or where the remainder is limited to a person not *in esse*, nor ascertained, or requires the concurrence of a dubious, uncertain event, independent of preceding estates, to give it a capacity of taking effect, the remainder is contingent.

ID.--ALTERNATIVE CONTINGENT REMAINDER.

--The future contingent remainder in unborn

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grandchildren is an 'alternative contingent remainder,' under section 696 of the Civil Code. Such contingent remainder will vest in the unborn grandchildren whose father or mother, the child of the life tenant, fail to survive her decease. In that case, the grandchildren become the alternative substitutes for the deceased children of the life tenant, in taking the same vested fee in remainder which would otherwise have vested in her children. The taking of the unborn children is not a contingency dependent on a contingency, nor a subsequent contingency, bit it is the same contingency which may happen, at the same time, in more than one way.

ID.--VIRTUAL REPRESENTATION OF UNBORN GRANDCHILDREN.

--The conclusion that the rights of unborn grandchildren are contingent and not vested does not preclude the application to them of the principle of virtual representation, if the proceeding in which such representation was exercised was such as to justify it.

ID.--NECESSARY RULE OF REPRESENTATION OF UNBORN REMAINDERMEN--PROTECTION IN PROCEEDS OF SALE.

--When an estate in persons living is subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, not only for themselves, but also for the persons unborn, as a necessary rule. The rights of persons unborn are sufficiently cared for if, when the estate is sold under a valid judgment, the proceeds take its place, and are secured in some way for such persons.

ID.--VIRTUAL REPRESENTATION CONFINED TO MATTER OF NECESSITY.

--The better rule is that virtual representation of unborn persons can be applied in support of a judgment only as a matter of necessity. The necessity of relying thereupon to acquire jurisdiction of the estate of unborn persons is apparent when the estate is sold and the proceeds take its place, and are so secured as to include the caring for and preserving the rights of the persons so represented.

ID.--VIRTUAL REPRESENTATION LIMITED BY GOOD FAITH.

--The rule of virtual representation is confined to cases where the representation is in good faith, so that what is done by the representation is all that the represented person could do if personally present. The interests of representative and represented must be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each. If the sole purpose of the living person interested is to secure some advantage for himself, or to serve the convenience of one whose title is being quieted against the unborn remaindermen, virtual representation could not be permitted to exist.

ID.--PROTECTION OF PERSON REPRESENTED AGAINST FRAUD.

--The protection of a person brought into court by representation which is fraudulent is to be found in his right when he becomes capable of suing in his own right to attack the decree on the ground of fraud and collusion in its procurement.

ID.--STATUTORY REPRESENTATION IN FORECLOSING LIENS OF STREET ASSESSMENTS.

--The street improvement act of 1885, under which the land was sold under foreclosure of liens of street assessments, recognizes a constructive or virtual representation of unborn persons who have contingent rights in the property, by contemplating that the decree of foreclosure and sale shall subject the entire title to the property charged with the lien. All interests therein are constructively before the court when the service is made according to the statute.

ID.--FORECLOSURE PROCEEDING NOT IN REM--VIRTUAL REPRESENTATION NOT PRECLUDED.

--The action to foreclose the lien of the street

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assessment is not *in rem*. If it were, there would be no need of any principle of representation. The fact that the judgment will not bind the entire world does not prevent the application of the doctrine of virtual or constructive representation contemplated by the statute.

ID.--ACQUISITION OF INTERESTS OF UNBORN GRANDCHILDREN PREVENTED--TRUST AGREEMENT FOR 'HEIRS OF BODY.'

The acquiring of jurisdiction of the interests of the unborn grandchildren in the action to foreclose the assessment did not effectually vest those interests in the purchasers at the sales, where respective agreements made by them with the life tenant and with each other were merged in a declaration of trust for the benefit of herself 'and the heirs of her body.'

ID.--ACTIONS TO QUIET TITLE--VIRTUAL REPRESENTATION PRECLUDED--PRIOR CONVEYANCE BY LIFE TENANT AND DAUGHTER.

--Where before the commencement of actions to quiet title, the life tenant and her daughter had conveyed their interests to a predecessor of the plaintiff, their interests became hostile to that of other 'heirs of her body,' and neither she nor the daughter nor the plaintiff could represent the unborn grandchildren in actions to quiet title as against the other 'heirs of her body,' for the purpose of shutting off all other interests.

ID.--PARTIES TO ACTION TO QUIET TITLE--'ADVERSE CLAIMANTS.'

Under section 738 of the Code of Civil Procedure, the action to determine adverse claims must make the 'adverse claimants' parties to the action, whether the service be personal or by publication, and where the virtual representation of unborn remaindermen is precluded, such unborn persons not parties to the action cannot be bound by the decree therein.

ID.--LEASE BY LIFE TENANT--BUILDING BY LESSEE--FORECLOSURE OF MECHANICS' LIENS--ABSENCE OF REPRESENTATION.

--The life tenant having the possession of the property was authorized to lease the same so as to bind her interest, and where the lessee contracted to improve the property, the unborn grandchildren were not so connected with the lease as to be affected by the foreclosure of a mechanic's lien against the property. The life tenant could not ask a court of equity to preserve her interest at their expense.

ID.--GUARDIANSHIP OF MINOR BY HUSBAND--POWER LIMITED BY ORDER OF COURT.

--Where the husband was appointed as guardian of the minor children by the probate court, he had no power to bind their interests by contract or by mechanics' liens, without an order of the court.

ID.--JUDGMENT FORECLOSING LIENS NOT INVOLVING REPRESENTATION--INTERESTS NOT IDENTICAL.

--The judgment foreclosing the mechanics' liens could not affect the interests of unborn grandchildren where there is nothing in its language to comprehend them, and it does not appear that any interests foreclosed were identical with their interests so as to permit of virtual representation.

ID.--CONSENT OF MINORS TO DECREE NOT BINDING GRANDCHILDREN.

--Where the minors were not held bound as owners of the property, but solely as having consented through their guardian to the decree, such consent could not bind the unborn grandchildren.

ID.--ACTION BY PURCHASER AT SALE TO QUIET TITLE--ABSENCE OF REPRESENTATION.

--There being no transfer of the interests of the unborn grandchildren to the purchaser at the sale, in an action by him to quiet title against the husband and children, he having already acquired their interests in the property, he cannot represent the interests of the grandchildren therein.

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ID.--COLLUSIVE SALE UNDER STREET SEWER ASSESSMENT--QUESTION OF FACT.

--A sale under a street sewer assessment which the court found upon sufficient evidence was a collusive one to cure a defect in the title of one of the appellants, and initiate an adverse claim in favor of his wife, must be disregarded, the question being one of fact for the court.

SUMMARY

APPEALS from a judgment of the Superior Court of Los Angeles County, and from orders denying a new trial. Walter Bordwell, Judge.

The facts are stated in the opinion of the court.

COUNSEL

Waldo M. York, and John M. York, for E. H. Winans, Appellant.

Waldo M. York, and Haas, Garrett & Dunnigan, for Chas. A. Cole, Appellant.

Haas, Garrett & Dunnigan, for Margaret M. B. Anderson, Appellant.

Bernard Potter, for T. F. Joyce, Appellant.

Smith & Smith, for S. C. Joyce, Appellant.

J. D. Fredericks, District Attorney, and Hartley Shaw, Chief Deputy, for Plaintiff, Respondent.

Valentine & Newby, for Means and Hendricks, Respondents.

Davis & Rush, for Wannop & Forbush, Respondents.

Mott & Dillon, for Henry J. Pauly & Company, Respondents.

TAGGART, J.

This is a proceeding in eminent domain brought by the county of Los Angeles to acquire lands upon which to construct a hall of records. Interlocutory decree and final order or judgment of condemnation were entered in favor of plaintiff. By the former the court, besides finding the value of the premises condemned, ascertained and adjudged the rights of the respective defendants in the property and apportioned among them the sum decreed to represent the value of the property condemned.

Separate appeals were taken by each of the appellants Winans, Cole, Anderson and Joyce from the final judgment, from the interlocutory judgment, and from the orders denying their respective motions to vacate and set aside certain findings, and their motions for a new trial. No objection is made to the value of the property fixed by the court, but its apportionment among the various defendants is questioned.

On June 27, 1881, J. E. Hollenbeck, who was the owner in fee simple of all the lands affected by this proceeding, ***239** executed a deed conveying said lands to Mrs. Emma Means 'for and during the term of her natural life and upon her death to the heirs of her body'; the *habendum* clause of said deed reading: 'To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second party, for life, remainder to the heirs of her body.' J. E. Hollenbeck died in the year 1885, leaving, as the sole executrix of his will and residuary devisee of his estate, his wife, Elizabeth Hollenbeck, who, after the regular distribution to her of said premises, and on the twenty-eighth day of June, 1887, made a deed of all her interest in said lands to said Emma Means. At the time of the making and delivery of the former deed there were living three children, heirs of the body of said Emma Means, to wit: Elfie O. Means, Claude E. Means and J. Worthington Means; two other children have since been born to her, as follows: Fairy A. Means (now Blee), about three years thereafter, and Juliet E. Means, born in the year 1890. The defendants Chester Kenneth Hendricks, Elizabeth Rosine Hendricks, James Bryan Hendricks, Merle Raymond Hendricks, Esther Georgia Hendricks and Clarence Donald Hendricks

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are grandchildren of said Emma Means and children of the defendant Elfie O. Hendricks (formerly Means); and the defendants Claude Edward Means and Dorothy Matele Means are also grandchildren of said Emma Means, being children of said defendant Claude E. Means.

The defendants who are appellants here claim to have succeeded to the title to various portions of said premises, together including the entire property, by sales thereof made in various proceedings to foreclose street assessments, mechanics' liens, etc., had in the superior court of Los Angeles county, and by virtue of certain decrees quieting their titles so acquired, made by the same court. The portions claimed by the appellants are respectively designated as follows: That of Winans as lot 4; that of Cole as lot 5; and that of Joyce as lot 6, all of the 'Court House Block' in the city of Los Angeles. Lot 4 comprises the east half of the condemned lands; lot 5 the southwest quarter, and lot 6 the northwest quarter thereof.

The trial court found, in effect, as to each of the said appellants Winans, Cole and T. F. Joyce that he had acquired ***240** all the right, estate and interest of Emma Means as life tenant and as successor to the estate of J. E. Hollenbeck, deceased, and of her children as remaindermen in and to the portion of the condemned property claimed by said appellant, but that he did not acquire the rights, interest or estate of the grandchildren of Emma Means in said premises. The finding in this respect as to the Hendricks grandchildren and lot 4 being as follows: 'The defendants Hendricks, children of defendant Elfie O. Hendricks, have an interest in said lot four (4) contingent upon the death of their mother, Elfie O. Hendricks, during the lifetime of the said Mrs. Emma Means, and also contingent upon their surviving said Mrs. Emma Means; and upon the happening of the said contingencies they, or the survivor or survivors of them, will be the owners of an interest and estate in fee in said lot four by virtue of said deed of J. E. Hollenbeck as heirs of the body of said Mrs. Emma Means, the extent of which cannot now be determined.' Similar findings were made as to the other lots, and also as to all the lots, in favor of the other grandchildren, Claude Edward Means and Dorothy Matele Means, children of Claude E. Means. The appellant Anderson's interest is found to be that of mortgagee of the interest of appellant Cole in lot 5.

The appellants attack these findings (other than the last) and the conclusions of law drawn therefrom and the directions of the court as to the disposition of the funds in accordance therewith, and contend: (1) That the remainder created by the deed of J. E. Hollenbeck vested at once in the children of Emma Means,. under the provisions of section 694 of the Civil Code; (2) That whether such remainder be regarded as vested or contingent, service of process upon and the appearance in the various proceedings by Mrs. Means, her children with the guardian of the latter, by application of the principle of virtual representation, operated to bind the interests of the grandchildren yet unborn; and (3) that certain of the proceedings were *in rem* and jurisdiction of the interests of the grandchildren was obtained by following the statutory method of bringing the property into court.

The proceedings in which it is claimed jurisdiction of the interests of the unborn grandchildren was thus acquired so as to estop or bar them from now claiming any interest in ***241** the sum found to be the value of the property are as follows: In support of the titles of Cole and Winans (which may be considered together), the following judgment-rolls: (a) The rolls in actions Nos. 14,109 and 10,983 to foreclose street assessment liens against certain portions of said property, brought against Mrs. Emma R. Means, her husband J. W. Means, the defendants named herein who are children of Emma R. Means, and W. E. Rogers, who is the lessee of Mrs. Means, and also of the children under a proceeding in equity (No. 8,616) by their mother and guardian to obtain consent to the execution of a lease in their name; (b) that in an action to quiet title, No. 18,501, by Abbott, the successor in title of

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the purchasers at the sales made pursuant to the decrees in the above-mentioned foreclosure proceedings, against Mrs. Means, her husband and children; (c) that in an action, No. 21,002, brought by Winans against Abbott, trustee, etc., Mrs. Means, husband and children, to foreclose a mortgage on the portions of the premises now claimed by Winans and Cole; (d) that in an action to quiet title to the same premises, No. 24,146, by Gosch, the successor in title to the purchaser (McCollum) at the commissioner's sale made in execution of the decree in action No. 21,002, against four of the Means children, J. Worthington Means, Claude E. Means, Fairy A. Means and Juliet E. Means, minors; (e) and that in an action by the same plaintiff to quiet title (No. 28,196) against Mrs. Means, her husband and five children. Incidental to and explanatory of these proceedings, it is also necessary to consider the effect of the proceeding No. 8,616 above referred to, and of probate proceeding No. 5,874, of the lease of Mrs. Means and children to W. E. Rogers, and the deeds, mortgages and other instruments through which the parties to these respective actions and proceedings acquired the rights upon which such actions were based. These are as follows: Sheriff's deed in No. 14,109 to A. J. Mead, and deed of latter to R. W. Abbott; sheriff's deed in No. 10,983 to Stella M. Johnson; her deed to Charles A. Cole and the deed of the latter to R. W. Abbott; a declaration of trust by R. W. Abbott for the benefit of Emma Means and the heirs of her body; mortgage of Abbott, trustee, to Winans; a deed by Mrs. Means to Charles A. Cole; deed by Mrs. ***242** Means and her daughter Elfie O. to M. McCollum; deed by McCollum et ux. to C. H. Gosch, and the deed of Emma R. Means, Elfie O. Means and J. W. Means to C. H. Gosch.

In support of the contention of appellants Joyce (T. F. and S. A.) that the interests of the grandchildren in lot 6 were acquired by them, the following additional proceedings and matters are relied upon: The judgment-rolls in (f) a consolidated action to foreclose certain mechanics' liens on the building constructed by Rogers, lessee, under the lease above mentioned, No. 12,444, against Rogers, Mrs. Means, her husband and children; and (g) in an action to quiet title, No. 19,205, brought by Horace Hiller, who purchased the property at the sale under the decree foreclosing the mechanics' liens, against Mrs. Means, her husband individually and as guardian of the children, the five children and others whose names are not material here.

Under the code of this state the remainder granted to the heirs of the body of Emma Means by the deed of J. E. Hollenbeck was an interest which the remaindermen took by purchase, and not by inheritance (Civ. Code, sec. 779). It was a contingent interest, since it was future in character, and the person in whom, and the time of the happening of the event upon which it was limited to take effect, were both uncertain at the time of its creation. These uncertainties both continued to exist until after the various proceedings were had upon which appellants base their respective titles (sec. 695). It did not and could not become vested until the death of the life tenant, since she could have no 'heirs' until her decease. In the interval all of her children might die, leaving the entire estate to the second generation, or the grandchildren. The interests of the latter are not void because of the improbability of the contingency on which they are limited to take effect (sec. 697). Neither can their interests be regarded as mere possibilities, such as the expectancy of an heir apparent (sec. 700), as they do not depend upon the law of succession to determine whether or not they will take effect, and they cannot be defeated by the testamentary or other act of the ancestor. It is also apparent that section 694 has no application here. That section is, in effect, the enactment into a statute of the rule laid down in Fearne on Contingent Remainders and Executory Devises: ***243** 'The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.' (Butler's 6th ed., p. 216.) This declaration should be read in connection with the

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language of Fearne which immediately follows it, to wit: 'In short, upon a careful attention to this subject we shall find, that wherever the preceding estate is limited, so as to determine on an event which must certainly happen; and the remainder is so limited to a person *in esse*, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, such remainder is vested. On the contrary, wherever the preceding estate is limited so as to determine only on an event which is uncertain, and may never happen; or wherever the remainder is limited to a person not *in esse* or not ascertained; or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent.' (Page 217.)

In *Williamson v. Williamson*, 57 Ky. 329, 368, it was said of the rule distinguishing a contingent from a vested remainder, first above quoted from Fearne: 'This principle, however general and universal it may be, has no application in a case like this, where the event which renders the possession vacant also resolves the contingency upon which the limitation depends, and makes that certain which was before uncertain. The possession becomes vacant by the death of the ancestor, and by the same event the persons who properly sustain the character of 'heirs' are ascertained and rendered certain. This rule, therefore, cannot operate as a test in a case like this, where the estate in remainder is given to the heirs of the same person who is devisee for life.'

The remainder which we are considering is a future interest which will vest in those grandchildren of Mrs. Means whose father or mother, child of Mrs. Means, fails to survive the grandmother, and is an alternative contingent remainder under section 696 of the Civil Code. In some of its characteristics it resembles the 'contingent remainder, ***244** or alternative remainder in fee, with a double aspect,' of the common law. Such estates usually arose where a remainder was limited to the issue of some person named and, upon failure of such issue before the death of the life tenant, to some other person in the alternative. Of the estates so created it is said they are both contingent fees limited merely as substitutes or alternatives one for the other, and not to interfere, but so that only one shall take effect; for instance, the fee of the grandchild in the case at bar being substituted in place of the fee of its father or mother if the latter should fail of effect by the grandmother surviving such father or mother. (Pingrey on Real Property, sec. 1008.) The one remainder is a substitute for, and not subsequent to, the other. Neither is, by its terms, to wait until the other shall have once taken effect and afterward been determined. (Washburn on Real Property, 6th ed., sec. 1575; Tiedeman on Real Property, sec. 415; Fearne on Contingent Remainders, 373; *Waddell v. Rattew, 5 Rawle*, 234.) They are not remainders expectant, the one to take effect after the other, but are contemporary. (*Luddington v. Kime*, 1 Ld. Raym. 203, [91 Eng. Reprint, 1035].) The taking by the unborn remainderman is not a contingency dependent upon a contingency, but the same contingency which may happen several ways. (*Plunket v. Holmes*, T. Raym. 28, [83 Eng. Reprint, 17].)

The conclusion that the interests in remainder of the defendant grandchildren were and are contingent instead of vested does not preclude the application to them of the principle of virtual representation, if the proceedings in which such representation was exercised were such as to otherwise justify it. The rule as to virtual representation is stated broadly by the supreme court of the United States in *Miller v. Texas & Pacific R. R. Co.*, 132 U. S. 672, [10 Sup. Ct. Rep. 206], by recognizing the holding of Lord Redesdale in *Giffard v. Hort*, 1 Schoale & L. 386, as follows: 'Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant

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for life, remainder to his first son in tail, remainder over, and he is brought before ***245** the court *before he has issue*, the contingent remaindermen are barred. Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life.' So, also, the New York court in *Kent v. Church of St. Michael*, 136 N. Y. 10, [32 Am. St. Rep. 693, 32 N. E. 704], uses the following language: 'Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons.' The rule is declared in Story's Equity Pleadings, section 144, and its limitations considered in the sections following. (See, also, *Finch v. Finch*, 2 Ves. Sr. 491, [28 Eng. Reprint, 316]; *Reynoldson v. Perkins*, Amb. 564, [27 Eng. Reprint, 362]; *Cockburn v. Thompson*, 16 Ves. Jr. 321, [33 Eng. Reprint, 1007]; *Harrison v. Wallton*, 95 Va. 721, [64 Am. St. Rep. 830, 30 S. E. 372, 41 L. R. A. 703]; *Hale v. Hale*, 146 Ill. 227, [33 N. E. 858, 867]; *McCampbell v. Mason*, 151 Ill. 500, [38 N. E. 675]; *Miller v. Foster*, 76 Tex. 479, [13 S. W. 531]; *Hermann v. Parsons*, 117 Ky. 239, [78 S. W. 125]; *Dunham v. Doremus*, 55 N. J. Eq. 511, [37 Atl. 62]; *Gavin v. Curtin*, 171 Ill. 640, [49 N. E. 523]; *Loring v. Hildreth*, 170 Mass. 328, [64 Am. St. Rep. 301, 49 N. E. 652].)

The rule and its reason are declared in *Sweet v. Parker*, 22 N. J. Eq. 455, as follows: 'Many exceptions exist to the general rule that in equity all must be parties who have an interest in the object of the suit. The reason or principle of such exceptions is stated as follows in Calvert on Parties, section 2, page 20: 'If they are required to be parties merely as the owners and protectors of a certain *interest*, then the proceedings may take place with an equal prospect of justice if that interest receives an effective protection from others. It ***246** is the *interest* which the court is considering, and the owner merely as the guardian of that interest; if, then, some other persons are present, who, with reference to that interest, are equally certain to bring forward the entire merits of the question, the object is satisfied for which the presence of the actual owner would be so required, and the court may, without putting any right in jeopardy, take its usual course and make a complete decree.'' The rule is made applicable to representation of persons living, as well as those unborn, as in the case of an association whose members are numerous. (*Cockburn v. Thompson*, 16 Ves. Jr. 321, 326, [33 Eng. Reprint, 1007].) This principle is carried into our statutes by the provisions of section 388 of the Code of Civil Procedure, where the joint property of all may be bound by serving the summons upon one or more of a larger number of associates. Other statutory proceedings based thereon might be named. The doctrine is said by some of the cases to be applied only where the law regards the interest of the representative so identical with that of the person represented that motives of self-interest will induce the person acting as the representative to defend the property as his own. Other cases following the suggestion in Calvert on Parties urge in support of the rule the motives of affection where the representative of the unborn child is its parent; all, however, holding that all persons in being capable of appearing who are interested must be brought into court. The protection of a person whose property is brought into court by such representation is to be found in his right to attack the decree on the ground of fraud or collusion in its procurement. In the absence of such attack, the decree is final and conclusive as to the status of the property. (*Baylor v. Dejarnette*, 13 Gratt. 152; *Faulkner v. Davis*, 18 Gratt. 651, 690, [98 Am. Dec. 698].) These two cases have been

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more recently approved in the case of *Harrison v. Wallton*, 95 Va. 721, [64 Am. St. Rep. 830, 30 S. E. 372]. (See, also, *Ruggles v. Tyson*, 104 Wis. 500, [79 N. W. 766, 81 N. W. 367]; *Mayall v. Mayall*, 63 Minn. 511, [65 N. W. 942]; *Mathews v. Lightner*, 85 Minn. 333, [89 Am. St. Rep. 558, 88 N. W. 992] ; *Gray v. Smith*, 76 Fed. 525, 532; *Arndt v. Griggs*, 134 U. S. 321, [10 Sup. Ct. Rep. 557].) ***247**

The application of the principle as here contended for is not a common one, and no decision by a court of this state so applying it has been called to our attention. The convenient use, which it served in extricating involved real estate titles at common law and in common-law jurisdiction, does not appeal with equal force to conditions existing under the code, although it is true, as said by some of the cases, that it is in accord with the trend of modern law toward making real property as readily transferable as is consistent with fair dealing and protection against fraud. That it tends to furnish some certain and convenient method of determining all unsettled questions respecting such titles, and that the well-being of every community requires the latter (*Arndt v. Griggs*, 134 U. S. 321, [10 Sup. Ct. Rep. 557]), is not alone sufficient to justify its indiscriminate adoption. So well have these matters been covered by statute that its application has become not only unusual, but generally unnecessary.

The better reasoned of the later cases hold that it can be relied upon in support of a judgment only as a matter of necessity and never merely as a matter of convenience. The form of the action is not controlling, but is, of course, to be considered in connection with the circumstances of the case. The necessity for relying upon some such principle to acquire jurisdiction of the interest in real property of persons unborn is apparent, 'where the estate is sold under a regular and valid judgment, and the proceeds of sale take its place and are secured in some way for such persons' (*Kent v. Church of St. Michael*, 136 N. Y. 10, [32 Am. St. Rep. 693, 32 N. E. 704]), since this includes the caring for and preserving of the rights of the persons so represented; it is also readily apparent where the purpose of the suit in which such persons are said to be so represented is for the administration of a trust estate by a court of equity so as to protect the interests of the unborn, as well as those who are in being, against the danger of destruction by tax and other liens which affect the entire title (*Ruggles v. Tyson*, 104 Wis. 500, [79 N. W. 766, 81 N. W. 367]); or in a case such as the one at bar where the property is necessary for a public use and the court can by decree protect the interests of the party said to be so represented. So where a trust is created ***248** without a power of sale and it is necessary for the preservation of the trust estate that it be sold, this principle is properly invoked to acquire jurisdiction of the persons not in being. (*Mayall v. Mayall*, 63 Minn. 511, [65 N. W. 942].) It is more difficult, however, to follow the reasoning underlying these decisions into those cases in which it has been held that, where a mortgagor after making the mortgage conveys the mortgaged property upon such conditions as to create an interest therein in unborn persons, a foreclosure suit brought by the mortgagee against all interested persons living, or all the parties that could be brought before the court, enables a court of equity to enter a decree barring the equity of redemption of the persons not *in esse*. (*Sweet v. Parker*, 22 N. J. Eq. 455; *Nodine v. Greenfield*, 7 Paige, 544, [34 Am. Dec. 363].) In these cases, however, the interest of the unborn person, who is so represented, is such only as his grantor had in the property at the time the deed was made, that is, whatever would be left after the debt secured by the mortgage had been paid. So, also, in cases in which the judgment has been adverse, thus absorbing the entire estate of both the living and those not *in esse*, it is not easy, at first sight, to see how it can be said that anything is being done to preserve or protect the interest of the unborn. In such cases, as in those first mentioned, the living remainderman is called upon to protect such an estate as he and the other party has, and if the result of the decree of the court be to declare there is no estate, or that such as there is should be applied to the payment of the liens which exist against it, the representative has done

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all that the represented could have done had he been present. If the sole purpose of the appearance of a living remainderman in an action were to secure some advantage to himself, or merely to serve the convenience of the party whose title was being quieted against the unborn remainderman, virtual representation could not be presumed to exist, and any judgment obtained by virtue of such pretended representation could be set aside on the ground of fraud or collusion when the unborn remainderman became capable of suing in his own right. Where, however, he has the same interests to preserve in the property that the unborn person would have if he were present, and his acts in connection therewith are such that, from the advantage to ***249** the person not *in esse*, it can be assumed the latter will adopt them, the acts of the living remainderman in protecting the property against attack may said to come within the reason of the rule. The interests of representative and represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each.

Considering the effect of this doctrine upon the various judgment-rolls and documents hereinabove mentioned, we are of opinion that the proceedings under the street improvement act of 1885, as the statute read at the time when the foreclosures in actions Nos. 10,983 and 14,109 were decreed, were intended to subject to the lien created by the law the entire title of the property affected thereby. As was said in *Gillis v. Cleveland*, 87 Cal. 217, [25 Pac. 351]: 'Thus it appears that the expense of the improvement is a charge upon the property benefited, and not a charge against the owner personally, in furtherance of this end, the identity of the lot assessed, and not the person who may be the owner, is made the essential requirement of the statute; the first must be specifically described, while the latter may be designated as 'unknown,' as in the present case. No where in the statute does any intention appear to charge the owner personally.' But section 12 of the act also provides that the contractor may sue 'the owner of the land, lots or portions of lots'; that the suit must be brought in the superior court within whose jurisdiction the work was done, service in such actions to be had in such manner as is prescribed in the codes and laws of this state; and that, 'The court in which said suit shall be commenced shall have power to adjudge and decree lien against the premises assessed, and to order such premises to be sold on execution, as in other cases of the sale of real estate by the process of said courts.' (Stats. 1889, p. 168.) It was also said in *Page v. Chase*, 145 Cal. 578, 583, [79 Pac. 278]: 'In this state the legislature has authorized its enforcement by means of a suit in equity against the 'owner' of the land; and in section 16 of the Street Improvement Act (Stats. 1885, p. 159), the 'owner' is defined to be, for the purposes of that act, 'the person owning the fee, or in whom appears the legal title to the land by deeds duly recorded in the county recorder's office of the county.' There ***250** is no provision that the land shall be made the defendant in such action, or that service of process shall be made upon it. ... It would not be contended that (because the assessment was made to an unknown owner), the contractor could select any person he might choose as the defendant in his action and bind the land by the judgment therein, as against its actual owner, as defined in section 16.' The quotation from section 16 by the court in this opinion was no doubt sufficient for the purposes of that case, but it omits a portion of the definition important here, that is, the provision which makes the executor administrator or guardian of the 'owner,' and persons in possession under claim, or exercising acts of ownership over the same also 'owners' for the purpose of the law. The statute itself thus recognizes a constructive or virtual representation as sufficient to give the court jurisdiction of the property in the equitable action to foreclose the lien provided for, even though the proceeding be held not to be one *in rem*, for the reason that the *res* is not made a defendant.

If the view expressed in *Page v. Chase*, 145 Cal. 578, 583, [79 Pac. 278], that a judgment for the sale of the property in such a proceeding will

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not bind the entire world, or affect the interests in the property of any owner not made a party defendant to the action, be accepted, this does not prevent the application of the rule of virtual representation. If the proceeding were strictly *in rem*, there would be no necessity to invoke any principle of representation except the one that the property in court represents all its owners and claimants. It is not necessary that a suit in equity be strictly *in rem* to subject the entire property to the payment of the debt. All interests in the property are constructively or virtually before the court when the service is made in accordance with the statute, whether this be upon the person or the thing. A decree in equity may be made effective as to all persons interested in the property to the value thereof in the same manner that the law makes a judgment against an estate a judgment *in personam* against the administrator, which is enforceable only to the extent or value of the estate held by him. Decrees in equity are frequently made effective in this way and the property is as effectually bound as if it were attached or seized or made the defendant in the ***251** action. (*Richards v. Blaisdell*, 12 Cal. App. 101, [106 Pac. 732]; *Stacy v. Thrasher*, 6 How. 44, 61; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, [5 Sup. Ct. Rep. 135].)

The acquiring of jurisdiction of the interests of the grandchildren by these proceedings did not effectually vest these interests in the purchasers at the sales made under the respective decrees, because of the respective agreements made by them with Mrs. Means and with each other, and which became merged in and were succeeded by the declaration of trust by R. W. Abbott for the benefit of Emma R. Means and the heirs of her body. None of the subsequent proceedings or steps taken released the successors in title of Abbott from the trust obligation to hold for the benefit of the unborn remaindermen. The action to quiet title by Abbott (No. 18,501) resulted in the making of the declaration of trust by him for the benefit of Mrs. Means and 'the heirs of her body.' The mortgage of Abbott to Winans was executed by the former under and by virtue of a contract with Mrs. Means and was to secure obligations primarily imposed upon her as life tenant of the property. The most favorable view for appellants that can be taken of this transaction is that the amount named in the mortgage was the sum found necessary to prevent the sale of the entire property under the street foreclosure proceedings, and, the transaction being for the preservation of their estate, the interests of the unborn remaindermen were bound by the decree in the action (No. 21,002) to foreclose the mortgage. While of opinion that the case before us is to be distinguished from those cited by appellants in this connection (*Sweet v. Parker*, 22 N. J. Eq. 455; *Nodine v. Greenfield*, 7 Paige, 544, [34 Am. Dec. 363], and English cases), we regard this as unnecessary, because, as in the case of the street assessments, the purchaser at the sale (M. McCollum) entered into an agreement whereby he became only the legal holder of the title with the equitable rights of the remaindermen in the property fully acknowledged. He, like the previous purchasers of the property, was bound to know that he was dealing with the life tenant, who might be protecting her own holding at the expense of the remaindermen, and yet whose efforts to protect the property, and all agreements made by her having this effect, must redound to the advantage of the remaindermen. ***252**

In the first action to quiet title by Gosch (No. 24, 146), Mrs. Means and her daughter Elfie O. Means were not made parties defendant, they having prior to that time conveyed the property to McCollum by a grant deed, and Gosch having succeeded to McCollum's interests therein. So also, as above stated, subsequent to the conveyance by McCollum to Gosch and prior to the commencement of the second action to quiet title (No. 28, 196), Mrs. Means, her husband and her daughter made a quitclaim deed of said premises to Gosch. By the making of the grant deed the interests of Mrs. Means and her daughter Elfie became hostile to that of the other 'heirs of her body.' Their legal obligation to protect the title of their grantee rendered them incompetent to represent the other in the man-

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ner in which they had theretofore done. It could no longer be said that there was an identity of interest and motive between them and the other contingent remaindermen. Their appearance no longer operated to give jurisdiction of the others to the court. The plaintiff had succeeded to the interests of Mrs. Means and her daughter in the property, and being himself hostile he could not appear for the contingent remaindermen, although he had acquired the interests of one of them. The first action being by the vendee of the life tenant for the purpose of destroying the remainder, and the second by the successor of the life tenant and one of the contingent remaindermen for the same purpose, the doctrine of virtual representation could not be applied. It is apparent, then, that in neither of these actions was jurisdiction of the grandchildren acquired upon this theory. The special reasons stated distinguish this case from those cited bearing upon the application of the doctrine to actions to quiet title.

Without applying the principle of virtual representation, we know of no theory upon which the court can be said to have acquired jurisdiction of the interests of the grandchildren, who were not parties thereto, in these actions to quiet title. The proceeding authorized by section 738 of the Code of Civil Procedure may be broader in some respects than the suit in equity called by the same name, but it does not authorize the adjudication of the right, claim, interest, or title of anyone not before the court. In terms it says: 'An action may be brought by any person *against another* who claims ***253** an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim,' etc. Where the service of summons is made constructively under the code, the proceeding becomes to a certain extent one *in rem*, but the decree entered in such a case cannot adjudge the rights of any person not included in the constructive service, any more than it can do so where the persons named in the summons have been personally served within the state. In case of either personal or constructive service, only the interests of the persons served and of those whom they expressly or virtually represent are affected by the decree. The only proceeding purely *in rem* given by the statutes of this state for the determination of the rights in real property of persons whose interests are unknown, to which our attention has been called, is that provided by sections 749, 750 and 751 of the Code of Civil Procedure.

An examination of proceeding No. 8616, relied upon by appellant Joyce, is important on this appeal only for the purpose of determining whether the interests of the unborn contingent remaindermen were so connected with the lease of Rogers as to be affected by the judgment foreclosing the mechanic's lien in suit No. 12,444. The duty of paying the taxes and street assessments (actions Nos. 10,983 and 14, 109 above), by reason of the nonpayment of which the property was about to be lost, rested primarily upon the life tenant, Mrs. Means. She was entitled to the possession and might lease the property at her pleasure for any term, subject only to the limitations of her own estate, but there were no grounds upon which she could ask a court of equity to preserve her estate at the expense of that of the remaindermen. So far as she was concerned, this was the only purpose served by proceeding No. 8616. As the application of Mrs. Emma Means, life tenant, it failed to set forth any cause for relief, and in her capacity of mother Mrs. Means was not authorized to sue, as her husband J. W. Means was the regularly appointed general guardian of the children who were living. The husband was the appointee of the probate court (No. 5874), and if the authority or consent of any court were necessary in order that he might make a lease of his wards' property, application should have been made to the court to which he owed his appointment. He could not go into a court of equity***254** and procure this authority. No power is given to the guardian to subject an interest in the real estate of his ward to the maintenance or support of the latter (Code Civ. Proc., secs. 1768, 1770), or to change the form of such an investment (sec. 1792) without an order of court. There was no special procedure for this purpose provided by the code at the time application No. 8616 was made to

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the superior court; nevertheless, we are of opinion that proceeding No. 8616 did not affect the interests of the minors because not addressed to the probate side of the court in No. 5874. That the guardian cannot bind the property of his ward by a contract without an order of court is well settled in this state. (*Guy v. Du Uprey*, 16 Cal. 195, [76 Am. Dec. 518] ; *Morse v. Hinckley*, 124 Cal. 154, [56 Pac. 896].) As he cannot make such a contract, so an attempt on his part to do this cannot result in giving to the party with whom he has contracted the right to a lien for labor done or materials furnished under the contract. (*Fish v. McCarthy*, 96 Cal. 484, [31 Am. St. Rep. 237, 31 Pac. 529]; *San Francisco Paving Co. v. Fairfield*, 134 Cal. 220, 224, [66 Pac. 255].) If the guardian could not by his direct act impose a lien upon the interests of his ward, it could not be done indirectly by the lessee of the life tenant. If the question whether the minor children of Mrs. Means were required to give the notice provided by section 1192, or have the lien foreclosed in action No. 12,444 imposed upon their interests in the property, had to be here decided, we should be inclined to accept the view that they were not. (James on Mechanics' Liens, sec. 105, p. 114.) The attack upon the sufficiency of the judgment in that action, however, is a collateral one, and it appears from the findings therein that the court found that these minors were the owners of the property and 'that all of the material furnished and labor performed by any or all of the plaintiffs was furnished and performed with the knowledge and consent of the owners of the real estate described in the complaints.' The guardianship of the father is also found, and in support of the judgment we are bound to presume this finding of knowledge and consent meant such consent as would sustain the decree. The complaint sufficiently alleges such ownership and consent, and the authority of the guardian ***255** to consent, to sustain the findings mentioned. (*Collins v. O'Laverty*, 136 Cal. 31, [68 Pac. 327].)

The language of the judgment, however, does not comprehend by name or description among those whose claims to the property and equity of redemption are barred and foreclosed any of the grandchildren contingent remaindermen. Neither do we think, under the principle of virtual representation hereinabove applied in the proceedings to foreclose street assessment liens, they were brought within the jurisdiction of the court in proceeding No. 12,444. It does not appear upon the face of the judgment-roll in that action that the interests of the persons appearing and contesting the lien were identical with that of the unborn remaindermen. Indeed, it appears from the findings in the case, including those last above considered, that the liens foreclosed were created by the act of the lessee of the life tenant under a contract with her, and that her interest alone was chargeable. The minors who were before the court were not held bound because they were owners who failed to give the notice under section 1192, but because of their consent to the judgment against them. They could not bind the grandchildren in this way. Accepting the rule laid down in the decision of Justice Matthews of the United States supreme court in *Heidritter v. Elizabeth Oil-Cloth Co.*, 122 U. S. 294, 301, [5 Sup. Ct. Rep. 135], that the proceeding to foreclose a mechanic's lien is 'in its essential nature' *in rem*, we find nothing therein to warrant us in holding that any transfer of the title of the unborn remaindermem was made to Hiller by virtue of the deed to him as purchaser at the sale made in execution of the judgment. This was not a proceeding whereby the property alone is made defendant in the action and the world foreclosed. The owner must be made a party to such an action if his property is to be made chargeable with the claim for which the lien is given.

When action No. 19,205 to quiet title was brought by Hiller against Mrs. Means, her husband and children, and others, he had already acquired the interests of Mrs. Means and her children in the property the title of which he sought to quiet, and these persons could not be brought into court solely to represent the interests of the grandchildren. The issue raised by the answer of the children who appeared in the action ***256** related to a charge of

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fraud upon the part of their father and mother in consenting to the former judgment (No. 12,444) on their behalf, but upon this issue the court found against them. This was not an issue affecting the interests of the grandchildren, and it cannot be said that the living remaindermen represented the interests of the unborn in presenting the matter.

The claim of title of S. A. Joyce to lot 6, the same property claimed by T. F. Joyce, is based upon a sale pursuant to the foreclosure of a street sewer assessment and a deed to her from the board of public works of the city of Los Angeles, dated July 1, 1908. This sale the court found to be a collusive effort of T. F. Joyce to cure the defect in his title by refusing to meet his obligations as successor of the life tenant and as a coremainderman, and to thus initiate an adverse holding in the lot by causing the same to be brought in by his wife S. A. Joyce. The question here was one of fact, and we are of opinion that there is evidence to sustain the finding of the court.

We do not think it necessary to consider the question of which appeal properly presents the matter to the court. Suffice it that the cause is before us on its merits in either view.

The findings of the court holding that the contingent interests of the grandchildren of Mrs. Means acquired by the Hollenbeck deed did not pass to appellants find support in the evidence, and the disposition of the proceeds of the judgment made in accordance therewith properly apply the law and, therefore, the judgment and orders appealed from are affirmed.

Allen, P. J., and Shaw, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 13, 1910.

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