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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CASE NO. 91614-4

In Re the Estate of:

MARGARET WIMBERLEY,

Deceased.

RESPONDENT STEPHEN W. TREFTS' ANSWER TO APPELLANT'S
PETITION FOR REVIEW

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 ORIGINAL

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I. INTRODUCTION

STEPHEN W. TREFTS d/b/a NORTHWEST TRUSTEE & MANAGEMENT SERVICES (hereinafter “Mr. Trefts” or “Northwest Trustee”) is one of the two respondents before this Court and the Court of Appeals-Division III. The other is CARROLL WESLEY WIMBERLEY (hereinafter “Wes”)¹. Respondents are filing separate answers to Appellant James Keith Wimberley’s (hereinafter “Jim”) Petition for Review.

Jim was the trustee of C.W. Wimberley’s decedent’s trust and Margaret Wimberley’s survivor’s trust. These trusts were sub-trusts of the Wimberley Family Trust. He was also personal representative of Margaret Wimberley’s estate. Jim was removed by the Yakima County Superior Court on March 2, 2012 under Case No. 10-4-00415-3 for breaches of fiduciary duty. Mr. Trefts was appointed as his replacement.

This appeal arises from Mr. Trefts’ petition for instructions to, among other things, approve an accounting he was ordered to prepare upon his appointment as successor trustee and successor personal representative on March 2, 2012. During the eleven months following his appointment, Mr. Trefts attempted to work with Jim and Wes to create the accounting.

¹ The first names “Wes”, “Jim”, “C.W.”, “Margaret”, and surname “Mr. Trefts” are used to clarify persons or parties’ identities as recommended by RAP 10.4(e). No disrespect is intended and none should be inferred. C.W. is Wes and Jim’s father who died on January 20, 2002. Margaret is Wes and Jim’s mother who died on August 2, 2010. C.W. and Margaret were the co-grantors and original trustees of the Wimberley Family Trust.

Jim was uncooperative and non-responsive. As a result, Mr. Trefts filed his petition with the Yakima County Superior Court on February 1, 2013. A hearing was held on May 24, 2013, and an order approving the accounting was issued June 4, 2013. The gravamen of the order compelled Jim to reimburse the trust estate \$254,437.91 which he over-distributed to himself, pay interest on the over-distribution at 12% per annum and pay Northwest Trustee's accounting and litigation fees.

Mr. Trefts was served with Jim's Notice of Appeal on June 20, 2013. Briefs were submitted, and oral argument was heard on October 23, 2014. The Court of Appeals affirmed the trial court's ruling on January 29, 2015. Jim filed a motion for reconsideration on February 10, 2015. It was denied on March 5, 2015. Mr. Trefts filed a Motion to Publish on February 18, 2015 on grounds that (1) the intent of both grantors should be honored and control the disposition of assets held in an A-B bypass trust after the death of the first grantor; and, (2) a published opinion would reiterate to the estate planning community the importance of strict compliance with the terms of this type of trust. An Order Granting Motion to Publish Opinion was issued on March 31, 2015.

The purpose of Mr. Trefts' Answer is to (1) reiterate that the Court of Appeals was correct in affirming the trial court's approval of the start date of his accounting; and, (2) convince the Court that publication by the

Washington State Supreme Court is not necessary because the Court of Appeals opinion accurately recites the factual background and properly adjudicates this case utilizing current law.

Mr. Trefts raises no new issues for review in his Answer pursuant to RAP 13.4(d) and therefore requests that review be denied.

II. RE-STATEMENT OF ISSUES PRESENTED FOR REVIEW

A.

(1) Should review be denied when the Court of Appeals properly recognized that Mr. Trefts' accounting comported with both C.W. and Margaret's intent to split the trust upon the death of the first grantor?

(2) Should review be denied when the Court of Appeals properly recognized Jim's failure to cooperate with Mr. Trefts in preparing his accounting, which culminated in Mr. Trefts filing the petition for instructions for its approval?

B.

Should review be denied when the Court of Appeals' published opinion is sufficient to satisfy the public's interest by directing to the public that trust terms must be followed even after one of the trustors is deceased?

III. STATEMENT OF THE CASE

Jim mischaracterizes certain evidence as undisputed and enters facts not into evidence in an attempt to bolster damages and give credibility to a position which has already been adjudicated and affirmed as meritless. First, the Building Fund never contained the amount Jim is now alleging. Second, Margaret was not deemed incapacitated.

(A). The Building Fund never contained more than a few thousand dollars. Jim exaggerates both his share of the trust and mischaracterizes a Trust account as the Building Fund. In regards to the former, Jim states that “[he] may only receive all of Margaret’s 50 percent of each individual asset plus one half of C.W.’s 50 percent in each asset for a total of 75 percent. See p. 3 of *Petition for Review*. This implies that Jim is entitled to 75 percent of the entire trust estate. That is clearly not the case. Jim is entitled to 75 percent of the value of the Fromherz Property² and 75 percent of the cash held in the Building Fund on the date of Margaret’s death. Values for both of these are shown on the reconciliation page of Mr. Trefts accounting. CP 51. Jim is not entitled, however, to 75 percent of the cash held in the Trust account at Yakima Federal Savings as he now claims. This Trust account, as well as all other Trust assets outside of the Fromherz Property and Building Fund, are subject to a 50 percent split between Wes and Jim because C.W.’s share of the Trust became irrevocable upon his death. CP 51; CP 148; CP 151. Mr. Trefts’ accounting properly reflects this split, to which the Court of Appeals agreed. See *App. A-032 of Pet. for Rev.*

² Court filings refer to this property as the “Fromherz Property”, “Fromherz home”, “Fromherz Rd”, or “Fromherz Dr”. The deed by which Jim, as former trustee, wrongfully quitclaimed the property from the Wimberley Family Trust to himself refers to this property as “386 Fromherz, Yakima, WA. See *App. A-039 of Pet. for Rev.* These terms each identify the same parcel of real property and are interchangeable. This property was Margaret’s residence at the time of her death.

In regards to the latter, Jim's rationale for claiming 75 percent of the Trust account is it would entitle him to an additional distribution of \$229,500. See p. 4 of *Pet. for Rev.* Jim arrives at this figure because \$229,500 is 75 percent of the \$306,000 that Jim alleges that Wes misappropriated from the Building Fund held at Yakima Federal Savings and Loan in December 2009. See p. 3 of *Pet. for Rev.* However, the record shows that the Building Fund never contained that much money. Further, deposition testimony from Wes shows withdrew the \$306,000 from the Trust account, not the Building Fund. CP 211-213. These funds were later deposited into an advisory account for the benefit of the Trust. CP 212 Jim's claim that the Building Fund contained \$306,000 in December 2009 is a blatant misrepresentation.

For much needed clarification, the Building Fund account has held significantly lower balances than the Trust account during the period at issue. Richard Greiner, Margaret's estate planning attorney who had served her for years, states in a declaration prepared by Jim's counsel and signed under the penalty of perjury that the Building Fund consisted of two Yakima Federal accounts: Checking Account No. 5734, and Savings Account No. 5370. CP 194-195. A Yakima Federal statement dated February 21, 2002 shows that Account No. 5734 contained \$8,544.92 during that month. CP 225. This account was titled to the Trust and the

statement was issued only a month after C.W. had passed away. The \$8,544.92 is the largest balance for Account No. 5734 on record.

A Yakima Federal statement of that same account dated July 19, 2007, the day after Margaret first amended the Trust to grant Jim her share of the Building Fund, shows an ending balance of \$5,002.60. CP 178-180; CP 184. Further the name on the account had been changed from the Trust to, "Margaret V Wimberley or James Wimberley". CP 184. This change appears to comport with Margaret's intent for Jim to utilize the Building Fund to finish the ongoing work on the Fromherz Property. CP 179. For instance, Jim would be able to purchase supplies and pay contractors without obtaining Margaret's authority every time he needed to draw funds.

The Building Fund was also utilized by Margaret to render payments to Lone Pine Construction and Standard Paint in July 2007. CP 185. So, it appears that the Building Fund was being utilized for its intended purpose. The balance Account No. 5734 was only \$295.67 on April 17, 2008, the month which Margaret executed the second amendment to the Trust. CP 187-191.

There were no Yakima Federal statements submitted into evidence for the second Building Fund account, Savings Account 5370. CP 195. On

Margaret's date of death Account 5370 had a balance of zero.³ CP 39; CP 51.

On the other hand, Yakima Federal Account No. 1351 was titled to the Trust.⁴ Account No. 1351 account contained \$387,485.40 in cash on April 1, 2009. CP 192. The purpose of Account No. 1351 appears to have been a holding account for some if not all of the Trust's liquid assets. Wes, in deposition testimony, distinguishes between the Trust account and the Building Fund account. CP 211-213. Wes confirmed that two separate withdrawals totaling \$306,000 were made from Account No. 1351 in December 2009. CP 212. \$280,000 of these funds were subsequently deposited into another institution, Yakima Valley Credit Union, for the benefit of the Trust. CP 212. The remaining \$26,000 was for annual gifting. CP 212. These funds were never in the Building Fund.

The Yakima Federal statements were submitted by Jim's counsel in his response to Mr. Trefts' petition to approve his accounting.

³ Mr. Trefts' accounting shows substantial amounts of money transferred in and out of Account 5370 while Jim was trustee and personal representative of Margaret's estate. CP 44-45. However, there is no evidence that Account 5370 contained funds in December 2009. Funds deposited and withdrawn from Account 5370 after Margaret's death should not be characterized as Building Funds.

⁴ Jim, in his *Appellant's Opening Brief*, wrongly states that the Building Fund balance was \$96,739.87 in April 2008 by attaching a Yakima Federal statement as Appendix "C". The ending balance on this statement shows \$96,566.19. Therefore, it does not match the amount Jim alleged belonged in the account at that time. But more importantly, this account was the Trust account because its account number ends in 1351.

(B). Margaret was never deemed incapacitated. Jim also attempts to enter facts not in evidence by stating that Margaret was incapacitated as early as December 2009. See p. 3 of *Pet. for Rev.* This is a weak attempt to open the door to having Wes disinherited under the slayer and abuser statutes contained in Chapter 11.84 RCW because incapacity is one of the criteria for a vulnerable adult.⁵ Since “incapacitated” is a codified term it has legal import. However, there are no findings of fact or conclusions of law that Margaret was incapacitated at any point prior to her death. Furthermore, Jim played this ruse only three days prior to the trial court hearing to approve the accounting. Therefore, it was untimely under RCW 11.96A.100(5), which provides:

(5) The answer to the petition and any counterclaims or cross-claims must be served on the parties or the parties' virtual representatives and filed with the court **at least five days before the date of the hearing** . . .(Emphasis added)

The Court of Appeals rightly recognized Jim's response as untimely, deemed it improper and affirmed the trial court's ruling to reject it. See *App. A-043 of Pet. for Rev.* This was a thinly disguised attempt by Jim to smear Wes and distract the Court's attention from the real issues pertinent to this case. It lacks credibility and should not be re-examined by review.

⁵ RCW 74.34.020(17)(b) defines a “vulnerable adult” as a person who is found incapacitated under Chapter 11.88 RCW-Washington's guardianship chapter.

IV. ARGUMENT AS TO WHY REVIEW SHOULD BE DENIED

A(1) The Court of Appeals properly recognized that Mr. Trefts' accounting comported with both C.W. and Margaret's intent to split the trust upon the death of the first grantor, and took into account Margaret's 2007 amendment to grant her interest in the Building Fund and Fromherz Property to Jim.

The start date for Northwest Trustee's accounting was August 2, 2010-Margaret's date of death. In confirming its accuracy, the Court of Appeals opined as follows:

Stephen Trefts' accounting delineated a 75-25 split of the Fromherz home and building fund between James and Wesley Wimberley respectively. Trefts arrived at this division by interpreting Margaret's 2007 amendment as devising her 50 percent interest in the two assets to James, in addition to the 25 percent interest James received under the terms of the 1999 trust instrument through his father. Under this delineation, the 1999 trust document remained binding and thus Margaret Wimberley did not control the half interest in the home previously owned by C.W. that should have been placed in one of the Decedent's Trusts upon C.W.'s death. We agree with this division. *App. A-032 of Pet. for Rev.*

As Stephen Trefts correctly determined, the terms of the Wimberley Family Trust did not permit Margaret Wimberley to adjust James and Wesley Wimberley's inheritance after C.W.'s death. The instrument read:

The Trustors may, *during the joint lives of the Trustors*, by signed instruments delivered to the Trustee: change the beneficiaries, their respective shares and the plan of distribution; amend this Trust in any other respect; or, revoke this Trust in its entirety or any provision therein, *except as to any share or Trust created herein which has become irrevocable by the terms hereof or by operation of law.* *App. A-032, A-033 of Pet. for Rev.*; CP 122.

The Court of Appeals went on to note that “Margaret could not give Wesley’s 25 [percent] interest in the Fromherz home and building fund to James, since C.W. was not alive to consent to the trust amendments. . . Margaret violated the terms of the trust and considered all property to be under her full ownership.” *App. A-033, A-034 of Pet. for Rev.*

A(2) The Court of Appeals properly recognized Jim’s failure to cooperate with Mr. Trefts in preparing his accounting which culminated in Mr. Trefts filing the petition for instructions; Jim is responsible for his own alleged harm.

Jim cites *State v. Taylor*, 58 Wn. 2d 252, 258, 362 P. 2d 247 (1961), A closer analysis of *Taylor* shows its holding supports Mr. Trefts and harms Jim. *Taylor* involved beneficiaries who requested the Washington Attorney General’s assistance in compelling an accounting from a long-term trustee of a charitable trust. 58 Wn. 2d at 254. The *Taylor* court affirmed the trial court’s dismissal of the beneficiary’s complaint on grounds that the Attorney General had no authority to compel the trustee to continue communicating information and duplicate records for the beneficiaries if such actions were unreasonable. *Id.* at 264. The *Taylor* court noted that reasonableness is a factor in a court-compelled accounting. *Id.* at 260. Specifically, it noted:

It lies within the discretion of the court, if there is no

relevant statute, to order an account of the trustee of his successor in interest, at the suit of any interested party, **at such a time as seems reasonable to the court in view of the time which has elapsed since the last account and the nature and status of the particular trust.** *Taylor*, 58 Wn. 2d at 260 (citing 4 (Part 2) Bogert: Trusts and Trustees 243, § 963 (Emphasis added)).

The present case involved a court order which compelled Mr. Trefts to prepare an accounting upon Jim's removal as trustee. CP 7-8. *Taylor* actually supports Mr. Trefts because it is more reasonable for his accounting to have a later start date than an earlier one. The Court of Appeals observed that Mr. Trefts requested a later start date because of the expense of reconstructing finances. *App. A-027 of Pet. for Rev.* Of course, the less time that had elapsed would mean less of an administrative cost to prepare the accounting. The Court of Appeals also took into consideration Mr. Trefts' statutory duty to settle the estate as quickly and rapidly as possible. *Id.* It should also be noted that Mr. Trefts is mandated by the order removing Jim to distribute trust assets upon completion of his accounting. CP 8.

Looking back, Margaret served as sole trustee from C.W.'s death on January 20, 2002 until she relinquished her role to Jim on April 3, 2008 upon her execution of the second amendment CP 187-189. Subsequently, Jim was trustee from April 3, 2008 until he was removed by the Yakima County Superior Court on March 2, 2012- a term of nearly four years. By

December 2009, the time Jim is now claiming, Jim had been trustee for nearly two years by operation of Margaret's second amendment. CP 4-8; CP 187-189.

Jim was ordered by the court to provide records upon his removal in March 2012, yet failed to despite repeated requests from Mr. Trefts during the remainder of that year and into early 2013. CP 7; CP 58-71. So, Jim is essentially now asking that the Court to compel Mr. Trefts to do a job which Jim himself had the duty to complete several years ago on his own watch. Jim misinterprets *Taylor* for his proposition that he has a right to demand for accounting back to December 2009. 58 Wn. 2d at 258; p. 9 of *Pet. for Rev.* It would be unreasonable for the Court to compel Mr. Trefts to back up his accounting to that point in time.

Furthermore, the Court of Appeals made an accurate assessment of the nature and status of the Trust as follows:

- The evidence showed that Margaret violated the terms of the trust and considered all property to be under her full ownership. *App. A-033-34 of Pet. for Rev.*
- James submitted insufficient information [to Trefts]. *App. A-034 of Pet. for Rev.*
- James bickered and dickered with Trefts about the amount of the loans, the transfer from the building fund . . . *App. A-034 of Pet. for Rev.*
- James Wimberley had ample opportunity to supplement Stephen Trefts' accounting with his own documentation of

trust versus personal expenses. James chose to wait until three days before the trial court hearing on the accounting to produce incomplete, self-serving evidence that omitted benefits he received from Margaret while living in her house. *App. A-037 of Pet. for Rev.*

- The preliminary accounting is as accurate as Jim allowed it to be. *App. A-037 of Pet. for Rev.*
- Trefts' petition benefitted the trust because it expedited the administration of a trust prolonged for three years by James' mismanagement and self-dealing with trust funds, and his unwillingness to cooperate with Trefts' subsequent management of the trust. Therefore, the trial court did not abuse its discretion in ordering James to pay the trust monies it spent in petitioning the court. *App. A-038 of Pet. for Rev.*
- The trial court also did not exceed its discretion when ordering James Wimberley to pay Stephen Trefts' accountant fees in preparing the forensic accounting for the Wimberley Family Trust because the court found the accounting accurate. *App. A-039 of Pet. for Rev.*

Furthermore, *Taylor* is factually distinguishable because the case did not involve a trustee who refused to turn over trust records to his successor and obstructed with the successor's preparation of an accounting. The *Taylor* court was primarily concerned about the inherent authority of the District Attorney in enforcing charitable trusts. 58 Wn. 2d at 255-57; 259-60. The actual duties of the trustee were secondary. Jim goes on to cite *Tucker v. Brown*, 20 Wn. 2d 740, 150 P. 2d 604 (1944), for basically the same proposition as *Taylor*-that Mr. Trefts is directly responsible for accounting for trustee activity prior to his appointment.

Tucker, 20 Wn.2d at 770-71; pp. 10-12 of *Pet. for Rev.* Again, Jim is demanding that Mr. Trefts atone for Jim's own sins.

Finally, Jim attempts to utilize *Tucker* to imply that that Mr. Trefts has the duty to trace funds removed from the Building Fund and return them. *Tucker*, 20 Wn.2d at 784; p. 11 of *Pet. for Rev.* As mentioned in Section III(A), *supra.*, the Building Fund never contained the amount of money Jim is claiming; its balance was never more than \$8,544.92 according to the record. CP 225. The balance of the Building Fund was \$2,488.77 on the date of Margaret's death. CP 39. Jim's position is not supported by evidence, not even evidence submitted by his own counsel.

B. Review should be denied because the Court of Appeals' published opinion is sufficient to provide guidance to trustees and estate planning attorneys that A-B bypass trust terms should be followed.

Jim seeks review by this Court on grounds of substantial public interest. See p. 16 of *Pet. for Rev.* Review is not necessary because an order granting publication of the Court of Appeals opinion has been granted. See *App. A-055* of *Pet. for Rev.* As this Court is aware, public interest is one of criteria for both a motion to publish and for review.⁶ Mr. Trefts is astonished that attorney Richard Greiner, an attorney for 30 years who focuses on estate planning and who provided counsel to

⁶ The publication rule, RAP 12.3(e)(5), requires the decision to be of public interest or importance. The review rule, RAP 13.4(b)(4), requires that the issue be of substantial public interest.

Margaret for years, failed to advise Margaret to split the Trust. CP 194-195. Trusts akin to the Wimberley Family Trust are common estate planning tools. The Court of Appeals opinion will reiterate to the estate planning community and the trustees under its advisement the importance of following the directives contained in the trust document still applies to an A-B bypass trust. The directives must be followed even if the surviving grantor has failed to honor the intent of the deceased grantor to split the trust, and is making decisions with no authority which alter distributions to the benefit of one beneficiary to the detriment of another. The Court of Appeals opinion will clarify trustee duties, manage beneficiary expectations and reduce the chance of future litigation. The interest of the public has been served.

Review will only result in more delay. Upon Jim's removal, Mr. Trefts was also appointed as successor personal representative of the Estate of Margaret Wimberley on March 2, 2012. CP 7. As personal representative, Mr. Trefts is mandated to comply with RCW 11.48.010.

This statute provides, in relevant part:

It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate . . . (Emphasis added).

Review will interfere with Mr. Trefts' duty to administer the estate quickly. Mr. Trefts has been at the helm for over three years and has not made a single distribution to the beneficiaries. Furthermore, review will only result in more of the trust estate being sacrificed for substantial fees and costs due to the over-litigation of this case. Northwest Trustee has already accrued several thousand dollars in trustee fees to prepare its accounting, and tens of thousands of dollars in attorney fees to have the accounting approved and defend against Jim's baseless claims. Further litigation will only increase fees and costs while diminishing distributions. Margaret and C.W. did not intend for that to happen.

V. CONCLUSION

The Court of Appeals was correct in affirming the Yakima County Superior Court's approval of Mr. Trefts accounting. The accounting properly allocated trust assets according to both Margaret and C.W. Wimberley's intent when they formed the Wimberley Family Trust in 1999, and Margaret' intent when she amended her share of the Trust in 2007.


Jim Wimberley is now resorting to desperate measures to salvage his failed case. He now contends that the Building Fund contained \$306,000 in December 2009 when evidence submitted by his own attorneys proves that the Building Fund did not contain anywhere near that

amount. The amount that Jim is now claiming is over three times the amount he first asserted was in the Building Fund at the onset of this case. This blatant misrepresentation is grounds on its own for denial of review and should result in sanctions.

Jim also represents that Margaret was incapacitated when there is no supporting evidence. Jim first floated this ploy in his 225 page response brief to Mr. Trefts' accounting which he attempted to blindside opposing parties with only three days before the hearing in May 2013. This was nothing more than an elaborate litigation by ambush tactic which ultimately backfired. The Court of Appeals properly rejected it.

The Court of Appeals has ordered publication of its opinion. The opinion is a proper recitation the facts and applies relevant statutory and case law. It is sufficient to satisfy the public interest's when honoring grantor intent and administering A-B bypass trusts such as the Wimberley Family Trust. Mr. Trefts respectfully requests that review be denied.

RESPECTFULLY SUBMITTED THIS 4th day of June, 2015.


CAM C. MCGILLIVRAY, WSBA No. 38330
Attorney for Stephen W. Trefts d/b/a
Northwest Trustee & Management Services
Successor Trustee
Successor Personal Representative

DECLARATION OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington. On June 4th, 2015, I caused to be served the document to which this is appended as follows:

Via electronic mail and First Class Mail, postage pre-paid to:

Attorneys for James Wimberley:

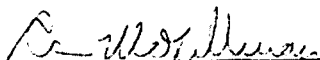
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Signed at Spokane, Washington on June 4th, 2015.



Cam McGillivray, WSBA No. 38330
Attorney for Stephen W. Trefts

OFFICE RECEPTIONIST, CLERK

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Subject: RE: In re the Estate of Margaret Wimberley, Case No. 91614-4: Respondent Trefts' Answer to Petition for Review

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To: OFFICE RECEPTIONIST, CLERK
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Subject: In re the Estate of Margaret Wimberley, Case No. 91614-4: Respondent Trefts' Answer to Petition for Review

Dear Clerk of the Supreme Court and Counsel:

Attached as a .pdf file is *Respondent Stephen W. Trefts' Answer to Appellant's Petition for Review*. Paper copies are being provided to counsel via First Class Mail.

Please contact my office immediately if you did not receive or are unable to open this attachment.

Sincerely,

Cam McGillivray
Trust Officer, In-House Counsel
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