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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 317579

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re The Estate of:

MARGARET WIMBERLEY,

Deceased.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

James Wimberley (hereinafter “Jim”¹) was the care provider for his mother Margaret Wimberley (hereinafter “Margaret”) for nine years after the death of his father C.W. Wimberley (hereinafter “C.W.”). Not only did Jim assist her with day-to-day living, he completed the process of building the retirement home on Fromherz Road in Yakima that she and C.W. had begun shortly before his death in 2002. In recognition of Jim’s actions, Margaret hired an attorney to assist her with revising the revocable living trust that she and C.W. had established as an estate tax planning strategy in 1999. The validity of Margaret’s 2007 and 2008 amendments is undisputed.

The 2007 and 2008 Trust amendments accomplished multiple purposes. First, the 2007 amendment altered the distributive portion of the Trust. It directed that the Fromherz Road home and approximately \$97,000 in cash would pass to Jim as a specific bequest before the remainder of the estate was distributed equally between Jim and his brother Carol Wesley Wimberley (hereinafter “Wes”).

Approximately one year later, fearing that her son Wes would attempt to financially exploit her and take her money, Margaret signed the 2008 Amendment. Margaret was again represented by counsel when the

¹ First names are used as a matter of convenience where multiple family members have the same surname, no disrespect is intended.

2008 Amendment was created. This amendment made the Trust irrevocable, and Margaret voluntarily withdrew as Surviving Trustee in favor of her trusted son Jim. Unfortunately and despite her best efforts, Wes was still able to financially exploit Margaret by having her withdraw \$306,000 from a Trust account in December 2009, appropriating \$26,000 to himself immediately and placing the remainder in a separate non-trust account.

After Margaret's death, the dispute between Wes and Jim continued, eventually resulting in an order appointing an independent trustee, Northwest Trustee & Management Services (hereinafter the "Successor Trustee"), to finalize administration of the Trust and do a forensic accounting of Trust assets. However, despite an order requiring the newly appointed Successor Trustee to complete an accounting going back to the date of C.W.'s death in 2002, the Successor Trustee inexplicably chose to do the accounting back only to the date of Margaret's death. The result was that the financial exploitation of Wes went unnoticed by this new trustee. The Successor Trustee further failed to adhere to the terms of the 2007 Amendment, thus reducing Jim's share of Trust assets by \$200,000 or more. Despite these mistakes, the Superior Court approved the preliminary accounting of the Successor Trustee and ordered that Jim repay the Trust \$254,437.91 for allegedly over-distributing assets to himself as trustee.

This and other errors in the trial court's June 4, 2013, Order have resulted in a grossly improper proposed distribution of Trust assets, and the erroneous imposition of damages against Jim while, Wes, who financially exploited his own mother, receives a substantially larger portion of the Trust estate than his parents ever intended. In fact, as the financial abuser of Margaret—a vulnerable adult—Wes should not receive any inheritance or property from the Trust, much less the substantial amount that has been erroneously calculated by the Successor Trustee. This Court must remand this matter to the Superior Court (1) to direct the Successor Trustee to properly recalculate the distribution of Trust assets and (2) for entry of a finding that Wes was, as a matter of law, a financial abuser who cannot receive any interest of property through Margaret, a statutorily-protected vulnerable adult.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered the June 4, 2013, Order Approving Preliminary Accounting and Petition for Instructions. Clerk's Papers (hereinafter "CP") at 344-346.

2. The trial court erred when it determined that the start date for the accounting period is August 2, 2010 (the date of Margaret Wimberley's death). CP at 345.

3. The trial court erred when it accepted the accounting of

Northwest Trustee & Management Services dated August 24, 2012. CP at 345.

4. The trial court erred when it ordered Jim Wimberley to reimburse the Wimberley Family Trust \$254,437.91. CP at 345.

5. The trial court erred when it ordered Jim Wimberley to reimburse the Trust interest accruing from the date of the entry of the Order at a rate of 12 percent a year. CP at 345.

6. The trial court erred when it ordered Jim Wimberley to reimburse the Trust for the fees and costs associated with bringing the Petition Approving Preliminary Accounting and Petition for Instructions, including reasonable attorney fees and costs. CP at 345.

7. The trial court erred when it ordered Jim Wimberley to pay fees accrued by Northwest Trustee & Management Services related to its forensic accounting. CP at 345.

8. The trial court erred when it concluded that the deed executed by Jim Wimberley as trustee of the Wimberley Family Trust quitclaiming the home located at 386 Fromherz Drive in Yakima, Washington, to himself in his individual capacity as a trust beneficiary was null and void. CP at 345.

9. The trial court erred when it ordered Jim Wimberley to pay the Trust rent of \$800 per month for the period commencing August 2, 2010 (the date of Margaret Wimberley's death). CP at 345.

10. The trial court erred when it concluded that the Successor Trustee has the right to amend his accounting to include newly discovered evidence, including, without limitation, the \$67,000 debt from Jim Wimberley to C.W. and Margaret Wimberley as indicated on Jim's dissolution decree. CP at 345.

11. The trial court erred when it failed to enter a finding or certify for trial the issue of whether Wes Wimberley should be disinherited under the Slayer and Abuser statute for financial exploitation of Margaret. *See* CP at 87, 88, 102-04.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the trial court's June 4, 2013, Order be reversed and the Successor Trustee be directed to complete a detailed and proper accounting where the trial court's was premised on an improper and incorrect legal interpretation of the Trust document and the 2007 and 2008 amendments thereto? (Assignment of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9).

2. Did the Successor Trustee arbitrarily and improperly use the date of Margaret Wimberley's death as the start date for the trust accounting when (a) that date has no relevance to the facts and circumstances involved

in this matter and (b) the Successor Trustee had been directed to do an accounting going back to the date when Margaret Wimberley removed herself as trustee? (Assignment of Error Nos. 1, 2, 3, 4, 5, 6, 7).

3. Is Wes a financial abuser who must be disinherited pursuant to Chapter 11.84 RCW where Wes admits to taking Margaret to the bank to withdraw \$306,000 from a Trust account, immediately appropriating \$26,000 for himself, at a time when multiple sources describe her as being vulnerable to undue influence and incapable of managing her own finances? (Assignment of Error Nos. 1, 2, 3, 11).

4. Did the Successor Trustee improperly fail to account for and characterize Trust assets back to the time when Margaret Wimberley stepped down as trustee and made the Trust irrevocable where the Successor Trustee's failure artificially excluded assets Wes invalidly transferred from the Trust account that Margaret specifically bequeathed to Jim Wimberley pursuant to the 2007 and 2008 Trust amendments, eliminating offsets Jim was entitled to raise as a defense to reimbursement claims by the trust? (Assignment of Error Nos. 1, 2, 3, 4, 5, 6, 7, 9).

5. Did the trial court err when it failed to invalidate Margaret Wimberley's transfer of over \$300,000 in Trust assets at the behest of Wesley Wimberley from an account specifically designated for Jim Wimberley into a different non-trust account when she was an incapacitated

vulnerable adult, was no longer trustee, and lacked legal authority to make the transfer? (Assignment of Error Nos. 1, 2, 3, 4, 5, 6, 7, 11).

6. Did the trial court fail to effect Margaret Wimberley's intent where (a) Margaret made a specific gift of 100 percent of the Fromherz Road property to Jim Wimberley in 2007 and 2008 Trust amendments, and (b) Margaret controlled sufficient Trust assets to gift 100 percent of the Fromherz Road property to Jim? (Assignment of Error Nos. 1, 2, 3, 4, 8, 9).

7. Can the trial court require Jim Wimberley to pay rent on his own home and interest on other amounts where (a) the trial court improperly denied Margaret Wimberley's right to gift 100 percent of the Fromherz Road property to Jim and funds in a specified account and (b) where the court erroneously approved the Successor Trustee's accounting that incorrectly required Jim Wimberley to reimburse the Trust \$254,437.91? (Assignment of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9).

8. Is the Successor Trustee precluded from investigating the alleged debt of Jim Wimberley to his parents where that debt is solely identified in a 1994 divorce decree between he and his ex-wife and when the statute of limitations and the doctrine of laches would preclude legal action? (Assignment of Error No. 1, 7, 10).

IV. STATEMENT OF THE CASE

A. During Their Marriage, C.W. and Margaret Conducted Estate Planning by Creating a Community Property Agreement and, Later, a Revocable Living Trust.

C.W. and Margaret Wimberley were married on July 7, 1945. They had two children during their marriage, Carroll Wesley Wimberley and Jim Wimberley, who are the interested parties to the current lawsuit.

Over the course of many years, C.W. and Margaret established an estate plan. First, on August 17, 1967, the couple entered into a community property agreement whereby all property owned or later acquired by the couple would be held as community property. CP at 108-09. The agreement stated as follows:

1. That in case of the death of the said C.W. Wimberley, while Margaret V. Wimberley survives, the whole of said properties, together with any other property by them or either of them hereafter acquired, shall at once vest in Margaret V. Wimberley in fee simple.

CP at 108. There is no evidence that this Community Property Agreement was ever modified or terminated.

On January 15, 1999, C.W. and Margaret completed further estate planning in the form of a revocable living trust entitled “The Wimberley Family Trust, dated January 15, 1999, C.W. Wimberley and Margaret Wimberley, Trustor and/or Trustees.” See CP at 111-76. Pursuant to the terms of the Trust, after the death of the first spouse, the surviving spouse

would divide Trust assets in half placing one half of the Trust assets into an irrevocable Decedent's trust and would retain full control over the survivor's share. CP at 138 (*Wimberley Family Trust*, pg. 28). "The Surviving Trustee [in this case Margaret] shall have the sole discretion to select the commonly owned, community and quasi-community assets or the proportionate share of any such assets which shall be included in the Decedent's Trust B and Trust C." CP at 139 (*Wimberley Family Trust*, pg. 29). Margaret, and **only Margaret**, had authority under the terms of the Trust to select those assets that would be retained in her trust. The Trust did not authorize C.W. as the deceased trustor or any subsequent trustee to make this division of assets.

At the risk of over-simplifying, any property owned by C.W. and Margaret at the time of C.W.'s death passed directly to Margaret in fee simple. Thus, any property not held in a trust was Margaret's property to dispose of as she pleased, and only Margaret could make the division of assets held in the trust.

B. At the Time of C.W.'s Death, Less Than Half of the Couple's Assets Were Held in Trust.

C.W. died on January 20, 2002, leaving Margaret as the "Surviving Trustee." See CP at 138. At the time of C.W.'s death, he and Margaret owned assets totaling approximately \$1,089,035.20, but not all of those

assets had been placed into the Trust.² The Trust held total assets of \$500,729.16³, a portion of which included real property located at 386 Fromherz Road (hereinafter “Fromherz Road Property”). The couple owned non-trust assets worth \$588,306.04⁴, which were subject to the terms of the community property agreement and passed to Margaret in fee simple at the time of C.W.’s death.

Between the time of C.W.’s death and the execution of Margaret’s later Trust amendments, Margaret continued to administer all Trust assets as a single trust without making an affirmative allocation of assets into a decedent’s trust. Margaret transferred portions of her own separate property into the Trust, beginning on May 15, 2002, with real property located at 1209 North 16th Avenue in Yakima, Washington. CP at 238-42. This property was business property owned equally by C.W. and his business partner at the time of C.W.’s death. After C.W.’s death, Margaret became owner of C.W.’s half interest, which she then transferred into the Trust as her separate asset. *See Appendix B*. The property was subdivided, and one

² From a purely legal perspective, any assets contained in trust are owned by the trust *for the benefit* of the trust beneficiaries, in this case C.W. and Margaret, and not owned by the beneficiaries directly.

³ *See Appendix A* showing Trust account balances and assets at time of C.W.’s death, with citations to supporting documents.

⁴ *See Appendix B* showing Non-Trust account balances and assets at time of C.W.’s death, with citations to supporting documents.

parcel was sold for \$175,000, with proceeds from the sale being placed into the Trust by Margaret on November 13, 2004. The other subdivided parcel is still held by the Trust with an estimated value of \$215,000.

In addition to the business property described above, C.W. had a 50-percent interest in the business, itself valued at approximately \$84,906.04 when it was liquidated in 2008. This property was also a non-trust asset that belonged to Margaret as her separate property after the death of C.W. by virtue of the community property agreement. The proceeds from the sale were deposited into a bank account owned by the Trust as Margaret's separate assets on November 21, 2008. CP at 247.

A second parcel of property, owned individually by Margaret, was sold on November 19, 2004, with Margaret placing the proceeds of the sale into the Trust as her separate assets. CP at 234-236. The property is located at 906 South 19th Avenue in Yakima, Washington, and it sold for \$113,400. CP at 234-236. The property was owned by Margaret and C.W. prior to creation of the trust. CP at 234-236. The property itself was never transferred into the Trust and became the separate property of Margaret by virtue of the community property agreement after the death of C.W. CP at 235. When placed into the Trust by Margaret, the proceeds of the sale continued to be her separate assets. *See* CP at 112 (“[P]roperty held in any

Trust created herein as the separate property of either Trustor shall be solely administered under the authority of the Trustor whose property it is”).

Margaret received additional separate property resulting from a wrongful death settlement arising out of the facts and circumstances of C.W.’s death. C.W. had been exposed to asbestos during his lifetime and Margaret received approximately \$379,730.39 in settlement proceeds after C.W.’s death. CP at 249-76. Margaret retained \$126,576.79 of these proceeds, dividing the remainder equally between her sons Jim and Wes. Margaret placed her share of the proceeds into the Trust bank account as her separate trust assets.

Thus, after C.W.’s death Margaret transferred substantial amounts of her separate assets into the Trust after the death of C.W. The transfer of these assets is easily traceable through the information contained in **Appendix A** and **Appendix B** attached to this brief, and the source documents cited therein.

C. Margaret Executes the July 2007 Trust Amendment, Making Important Modifications to the Trust.

On July 18, 2007, Margaret executed an amendment to the Trust. CP at 178-81 (hereinafter the “2007 Amendment”). Margaret retained attorney Richard C. Greiner of Yakima to assist her by drafting the amendment. See CP at 194-98 (*Declaration of Richard C. Greiner*). At the

time the 2007 Amendment was drafted, Mr. Greiner described Margaret as follows:

Through the years as Margaret's attorney I grew to know her physical and mental abilities. Margaret was a very strong willed person and very mentally sharp. She knew exactly what she wanted and knew exactly what she owned. She knew exactly how she wanted to leave her bounty and she was clear in expressing the same to me.

CP at 194-95 (*Declaration of Richard C. Greiner*, ¶ 5).

The 2007 Amendment made several changes to the original Trust. First, in paragraphs A and B, Margaret modified her own powers as trustee to increase her authority over all assets contained in the Trust. CP at 178 (*2007 Amendment*). The 2007 Amendment states, "Given the changes to the Federal Estate Tax laws, the Surviving Trustor/Trustee [Margaret] elects to not fund trust assets into what would be a 'decedent's trust.'" CP at 178 (*2007 Amendment*, ¶ A). It goes on to state, "The Surviving Trustor shall have full use and control over all trust assets." CP at 178 (*2007 Amendment*, ¶ A). Margaret also reaffirmed Jim Wimberley as first successor trustee, as he was previously designated in the original 1999 Trust document.

Margaret also made important modifications to the distributive provisions of the Trust. Paragraph D of the 2007 Amendment states as follows:

D: The Trustor further elects to modify the distributive provisions of the trust beginning at page 50 of the trust agreement as follows:

Primary Residence: The Trustor's primary residence located at 386 Fromherz Road, Yakima Wa[,] and all of the surrounding property, buildings, improvements and fixtures and supporting equipment used on that property shall be distributed unto James K. Wimberley as compensation time, labor and other resources in improving the property. This distribution shall not be subject to offset against his share of the residual trust.

Further, the entire balance of the building fund account held with Yakima Federal Savings and Loan Association shall be set aside from all of the Trustor's other accounts and investments and be distributed to Jim for the purpose of finishing the ongoing work on the property. Jim shall use this fund at his sole discretion toward finishing the property and the fund shall not be offset against his share of the residual trust.

Residual Distribution: The rest, residue and remainder of the trust assets shall be divided in equal shares between Jim and Wes as forth in the trust document and shall be subject to the specific distribution set forth above.

CP at 179-80 (*2007 Amendment*, ¶ D).

Jim Wimberley had been assisting his parents with the construction of the home at 386 Fromherz Road since before his father's death. *See* CP at 179, 187. Thus, Margaret wished to compensate Jim for the time and sacrifice he made in constructing the house, and she wished for this to be a

specific distribution to Jim prior to an equal distribution of the remaining assets after her death. According to Mr. Greiner:

6. During our series of conversations in 2007 Margaret was concerned about the relationship between her sons. She characterized Wesley as “the one who went out and made his way in the world” and she characterized James as “the one who stayed with us to help and protect us.” (her quotes, not mine)

7. During the 2007 conversations, Margaret wanted to ensure that James would have the house, free from any interest by Wesley. She explained that James and C.W. built the house and James continued to work on the house after C.W.’s passing. She wanted James to have the house as repayment for the time and labor that he put into the house.

8. Margaret also explained that there was much work to be done to finish the house so she had established an account that she named the “building fund” account at Yakima Federal. The “building fund” actually consisted of two accounts, a checking account No. 5734, and a savings account No. 5370. Margaret wanted those funds to be James’ fund to finish the house and to be James’ inheritance, free from Wesley’s share of the trust.

9. Therefore at Margaret’s direction I prepared the 2007 amendment to the trust which Margaret edited multiple times and signed on July 18, 2007.

CP at 195 (*Declaration of Richard C. Greiner*, ¶¶ 6-9).

As of July 19, 2007, shortly after Margaret executed the 2007 Amendment, the Yakima Federal Savings “building fund” account held \$116,010.33 in the checking account, and \$5,002.60 in savings. CP at 183-84.

D. Margaret Signs the April 2008 Amendment, Relinquishing Her Own Authority As Surviving Trustee in Favor of Her Son Jim Wimberley.

On April 3, 2008, Margaret executed a second Trust amendment (hereinafter “2008 Amendment”) to the Wimberley Family Trust. CP 187-189. The 2008 Amendment accomplished three primary purposes. First, it made the entire Trust irrevocable. CP at 187 (*2008 Amendment*, pg. 1, ¶ A). Second, Margaret withdrew as Surviving Trustee in favor of her son Jim, and she gave up all authority over the assets contained in the Trust. CP at 187 (*2008 Amendment*, pg. 1, ¶ B). Third, it established Richard C. Greiner as the “Trust Protector,” whose duty it was to “amend the trust where necessary to effect the initial intent of the Trustor and to appoint Trustees of the Trust, when necessary.” CP at 188 (*2008 Amendment*, pg. 1, ¶ D).

According to Mr. Greiner, Margaret’s attorney and the Trust Protector, the 2008 Amendment was made because she was concerned that Wes Wimberley would attempt to exploit her financially. Mr. Greiner described the situation in his declaration as follows:

11. In February of 2008, Margaret again made an appointment to amend the trust. When we spoke, she was more deeply concerned about the relationship between James and Wesley and was very concerned that Wesley would try to do something to manipulate her.

12. Margaret did not want to be in the position that she could be manipulated by Wesley and therefor directed me to prepare a document for her

resignation as Trustee and to appoint James as the Trustee. She also asked me to be the Trust Protector of the Trust, to ensure that the Trust plan could not be altered.

13. After numerous edits by Margaret, she signed the 2008 amendment. The purpose of the amendment was threefold:

- i. First, to remove Margaret's ability to control the trust; and
- ii. Second, to establish James as the sole Trustee of the Trust; and
- iii. Third, to make the trust irrevocable

14. Again, Margaret met with me in my office alone when we talked about these goals and changes.

CP at 195-96 (*Declaration of Richard C. Greiner*).

At the time Margaret relinquished her authority as Surviving Trustee in favor of her son Jim, the "building fund" account held \$96,739.87 in total assets.⁵

E. Margaret's Concerns Prove Valid When Wes Wimberley Financially Exploits Her.

⁵ Attached as **Appendix C** to this Brief is a Copy of the April 2008 statement from Yakima Federal Savings and Loan "building fund" account. In preparing this brief, it was discovered that the Exhibit F of the *Response to the Trustee's Preliminary Accounting and Request for Instructions* inadvertently presented the April 2009 bank statement, not the April 2008 statement as was intended. Please note that the correct amount of assets, \$96,739.87 (including checking and savings account), was presented in the briefing to the Superior Court, it was merely the supporting document that was inadvertently switched. There was no objection and the mistake was not noted in the Superior Court. To the extent this Court finds this document necessary for resolution of any issue on appeal, this can be put into the trial court record and the appellate record duly supplemented. See RAP 7.2(b); RAP 9.10; RAP 9.11.

Beginning in September 2009, approximately a year and a half after execution of the 2008 Amendment, Margaret began to show signs of cognitive impairment. CP at 196 (*Declaration of Richard C. Greiner* ¶ 16). As a result of this cognitive impairment, she became increasingly vulnerable to undue influence and financial exploitation from Wes Wimberley. CP at 196 (*Declaration of Richard C. Greiner*); CP at 203 (*Declaration of Krystyan Calhoun*). In his declaration, Mr. Greiner describes the circumstances of Margaret's vulnerability and eventual exploitation by Wes:

16. While I occasionally saw Margaret after April of 2008 our next purposeful meeting was September of 2009 when she asked me to prepare a deed of the house on Fromherz to James. At that time I became concerned that Margaret was not thinking as clearly as I had witnessed in our past meetings. However, Margaret was very clear and determined that she wanted to sign over the entire house to James at that time. Upon Margaret's insistence, I prepared a Quit Claim Deed to effect the transfer, but I did not record said deed. I specifically talked to Margaret about whether James had put pressure on her to transfer the house and I was convinced that he had not. At Margaret's request, I held the deed and it was not filed but remained in my files.

17. The next time that we had a purposeful conversation was on January 11, 2010. On that occasion, James brought Margaret into my office. He explained that he had discovered that Margaret had removed some \$306,000 of Trust money from the Irrevocable Trust account at Yakima Federal Savings and had transferred \$26,000 to Wes, and

deposited the remaining \$280,000 into her personal name. I discovered that Margaret and Wesley had met with Ms. Suzie Williams at Members Financial, located at then Yakima Valley Credit Union.

18. Margaret's demeanor on January 11, 2010, struck me as very frail. While she recognized me and called me by name, she had remarkably aged and was very frail physically and mentally.

19. She did not remember going to either Yakima Federal or going to Yakima Valley Credit Union.

20. She did not remember moving any money from the trust.

21. She did know that James was the Trustee of the trust.

22. When I talked to Margaret alone, she was very confused about her finances and did not know where any of her money was located.

23. Margaret was so mentally frail that she would have signed anything that I asked her to sign or do anything that I asked her to do.

CP at 196-97 (*Declaration of Richard C. Greiner*).

Mr. Greiner was not the only individual who noted a significant decline in Margaret's cognitive ability and a substantial vulnerability to the undue influence of Wes. As part of an attempt by Wes Wimberley to gain further control of Margaret's remaining assets by instituting a guardianship action and/or action for removal of Jim as trustee, Wes hired Kristyan Calhoun to conduct a geriatric care assessment of Margaret. CP at 202 (*Declaration of Krystyan Calhoun*). Ms. Calhoun has owned and operated

her own geriatric care management service since 2004, and is well respected in her field. On April 29, 2010, approximately four months after the above described transfer of assets, Ms. Calhoun conducted a geriatric care assessment of Margaret in which she visited with Margaret on five occasions. CP at 202. This report was submitted to the Superior Court in this matter as a sworn declaration. CP at 200-09.

Ms. Calhoun made the following findings in her geriatric care assessment of Margaret:

- “She stated that the home [on Fromherz Road] was to [be] Jim’s when she passed away but it was hers for now.” CP at 203.
- “She would like her son, Jim Wimberley to provide the majority of her care.” CP at 202.
- “She did express concern that Wes not have access to her accounts. She stated that he has struggled with managing his finances.” CP at 203.
- Ms. Calhoun stated, “I do believe that she is highly susceptible to undue influence.” CP at 203.
- Ms. Calhoun also suggested that Wes and Deb Wimberley should not be allowed to have contact with Margaret outside the presence of professional care givers. CP at 207.

These findings have gone unchallenged and un rebutted. *See* CP at 200-209 (*Declaration of Kristyan Calhoun*).

Overall, Ms. Calhoun’s evaluation reflected the reality that Margaret was in no position to make any financial or estate planning decisions in late

2009 and early 2010. When Wes and his counsel received the geriatric report, they ended attempts to pursue a guardianship or removal of Jim as trustee. It is apparent that when Ms. Wimberley was capable of making decisions (and even when she was losing control), she chose Jim. Even when she was suffering impaired cognitive reasoning, she knew that she should trust Jim over Wes, and she continued to be concerned about Wes attempting to exploit her. Margaret did not even remember Wes taking her to the bank to transfer \$306,000 out of the Yakima Federal Savings “building fund” account.⁶

On August 2, 2010, Margaret Wimberley died.

F. Procedural History

Jim was appointed personal representative of Margaret’s estate by order of the Yakima County Superior Court on August 11, 2010. After receiving proper notice of the probate, Wes filed a request for special notice on October 6, 2010. One year later, on November 1, 2011, Wes filed a Petition to Remove Jim as Personal Representative and Trustee.

⁶ The transfer of assets out of the “building fund” account materially altered the intended distribution of trust assets as directed by Margaret in her 2007 Amendment. Not only was the transfer invalid due to the undue influence and financial exploitation of Wes, Margaret was not trustee and lacked any legal authority to transfer money out of the Yakima Federal Savings account. CP at 187. However, because the Northwest Trustee & Management Services’ accounting went back only to the date of death of Margaret, it failed to account for this significant issue. See CP at 28-52.

Northwest Trustee & Management Service (hereinafter “Successor Trustee”) was appointed successor trustee by order of the trial court on March 2, 2012. CP at 4-8. Paragraph F of the March 2 order appointing successor trustee stated, “The independent third party Trustee and Personal Representative should conduct, or hire accountants to conduct, an independent accounting of the Wimberley Family Trust assets from the time of C.W.’s⁷ death to the present.” CP at 6 (emphasis added). The Successor Trustee never completed the ordered accounting going back to the date of C.W.’s death, instead presenting an accounting going back only to the date of Margaret’s death. Significant invalid transfers of Trust assets, which occurred shortly before Margaret’s death, have rendered the Successor Trustee’s accounting incomplete and inaccurate.

This matter is before this Court on appeal from an order of the trial court approving the Successor Trustee’s preliminary accounting and granting other relief. CP at 348-49. While the motion by Northwest Trustee & Management Services was not titled as a motion for summary judgment, the effect of the order was to make final determinations with regard to the legal interpretation of the Wimberley Family Trust (hereinafter the “Trust”) and final distributions of Trust assets. CP at 344-46. After an August 7,

⁷ As discussed above, C.W. Wimberley was Margaret’s husband, who was co-trustor of the Trust with Margaret Wimberley until the date of his death on January 20, 2002.

2013, telephonic hearing before Commissioner Monica Wasson of Division III Court of Appeals, it was determined that the June 4, 2013, order is appealable as a matter of right. Commissioner's Ruling, Cause No. 31757-9-III (August 12, 2013).

V. LEGAL AUTHORITY

A. Standard of Review

The interpretation of will and trust instruments is reviewed de novo. *In re Estate of Curry*, 98 Wn. App. 107, 112-13, 988 P.2d 505 (1999). Washington's courts have treated motions involving petitions for accounting as akin to a motion for summary judgment. *See Tucker v. Brown*, 20 Wn.2d 740, 772-73, 150 P.2d 604 (1944); *Matter of Winslow's Estate*, 30 Wn. App. 575, 578-79, 636 P.2d 505 (1981); *see also In re Estate of Black*, 116 Wn. App. 476, 483, 66 P.3d 670 (2003), *aff'd*, 153 Wn.2d 152 (2004) ("Proceedings for probate of wills are equitable in nature. Review is therefore de novo on the entire record.").

The standard of review for summary judgment orders is also de novo. *Hadley v. Maxwell*, 144 Wn.2d 306, 310, 27 P.3d 600 (2001). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When reviewing an order of summary judgment, the court engages in the same inquiry as the trial court, considering the facts and all

reasonable inferences from the facts in the light most favorable to the nonmoving party. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789 (2002). Factual issues may be decided on summary judgment “when reasonable minds could reach but one conclusion from the evidence presented.” *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 47, 846 P.2d 522 (1993) (quoting *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 353, 779 P.2d 697 (1989)).

Here, although the decision being appealed is titled a Preliminary Accounting and Petition for Instructions, the petition was the equivalent of a motion for summary judgment, and the ruling by the Superior Court was made as a matter of law. CP at 344-46. This matter should, thus, be reviewed under the same standard as a summary judgment ruling.

B. Wes Committed Financial Exploitation of Margaret, a Vulnerable Adult, and Must Be Disinherited from the Trust Under the Slayer and Abuser Statute RCW 11.84 *et. seq.*

The trial court never addressed argument that Wes committed financial exploitation of Margaret, and Wes did not even attempt to respond to this point. *See* CP at 87, 88, 102-04; *see also* CP at 308-09. Wes’ financial exploitation and its effects on the Trust’s assets are directly connected to the accounting and must be addressed.

“No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.” RCW 11.84.020. “Property which would have passed to or for the benefit of the slayer or abuser by devise or legacy from the decedent shall be distributed as if he or she had predeceased the decedent.” RCW 11.84.040. “In the absence of a criminal conviction, a superior court finding by clear, cogent, and convincing evidence that that a person participated in conduct constituting financial exploitation against the decedent is conclusive for purposes of determining whether a person is an abuser under this section.” RCW 11.84.150. “In determining whether a person is an abuser for purposes of this chapter, the court must find by clear, cogent, and convincing evidence that: (a) The decedent was a vulnerable adult at the time the alleged financial exploitation took place; and (b) The conduct constituting financial exploitation was willful action or willful inaction causing injury to the property of the vulnerable adult.” RCW 11.84.160. A “vulnerable adult” is a person “[s]ixty years of age or older who has the functional, mental, or physical inability to care for himself or herself.” RCW 74.34.020.

Here, Wes has admitted to taking \$26,000 from Margaret on December 18, 2009—a time when Margaret was indisputably a vulnerable adult. In answers to interrogatories, Wes admitted to taking Margaret to

the bank and having her write him a check for \$26,000. CP at 211-13 (*Wes Wimberley Interrogatory Answers*). As confirmed by the statements of Mr. Greiner and Ms. Calhoun, *supra*, Margaret was a vulnerable adult susceptible to undue influence at the time of the transaction. CP at 197-98, 200-09. Wes' admission that he directly received the \$26,000, combined with the testimony of Rich Greiner and Kristyan Calhoun, is unrebutted clear, cogent, and convincing evidence that Wes financially exploited Margaret, a vulnerable adult. The question of his disinheritance under RCW 11.84.020 should be remanded for trial.

C. Margaret Had Authority Under the Wimberley Family Trust to Control the Disposition of the Fromherz Road Property.

Although determining a settlor's intent is generally a question of fact, the interpretation of a trust provision is a question of law. *In re Estate of Sherry*, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010). Unambiguous instruments are not interpreted any further:

“Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation; if the intention may be gathered from its language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction.”

Templeton v. Peoples Nat'l. Bank of Wash., 106 Wn.2d 304, 309, 722 P.2d 63 (1986) (quoting 90 C.J.S. Trusts § 161 at 18-19 (1955)). “A trust is

ambiguous if it is susceptible of more than one meaning; ambiguity is a question of law.” *Waits v. Hamlin*, 55 Wn. App. 193, 200, 776 P.2d 1003 (1989).

The following provisions of the Wimberley Family Trust govern the separation and administration of assets after the death of the first trustor, in this case C.W. These provisions gave Margaret absolute discretion to determine which Trust assets, up to one-half of the value of the assets contained in the Trust at the time of C.W.’s death, would remain under her control. CP at 138-39; *see* CP at 133-34; *see also* CP at 127. These provisions gave Margaret authority to retain control of 100 percent of the 386 Fromherz Road property and those assets contained in the “building fund” account. *See* CP at 138-39.

Margaret’s Authority to Divide Trust into Survivor and Decedent’s Trusts

- “Upon the death of either Trustor the Surviving Trustee shall divide and allocate the Trust Estate into two (2) separate shares as described in the following section.” CP at 138 (*Trust*, pg. 28).
- “Survivors Trust A shall consist of the Survivor’s one-half (1/2) interest in the commonly owned property or community property, quasi-community property and all other property included in the Trust Estate as the separate property of the Surviving Trustor.” CP at 138 (*Trust*, pg. 28).
- “Decedent’s Marital Share shall consist of the Decedent’s one-half (1/2) interest in the

commonly owned property or community property of the Trust Estate, one-half (1/2) interest in the quasi-community property and all other property included in the Trust Estate as the Separate Property of the Decedent Trustor.” CP at 138 (*Trust*, pg. 28).

Margaret Has Authority to Select Property Allocated to Survivor and Decedent's Trusts

- “Any property not allocated to the Decedent’s Marital Share, or otherwise allocated by the provisions of this Trust at the death of the first of the Trustors to die, shall be allocated to this Survivor’s Trust A.” CP at 138 (*Trust*, pg. 28).
- “The Surviving Trustee shall have the sole discretion to select the commonly owned, community and quasi-community assets or the proportionate share of any such assets which shall be included in the Decedent’s Trust B and Trust C.” CP at 139 (*Trust*, pg. 29).

Margaret Has Authority to Change the Provisions of the Survivor's Trust

- “Survivor’s Trust A shall remain revocable by the Surviving Trustor during the life of the Surviving Trustor.” CP at 138 (*Trust*, pg. 28).
- “The Surviving Trustor retains the right to change the beneficiaries of Trust A.” CP at 144 (*Trust*, pg. 34).

The language of the Trust is clear, Margaret had authority to determine what specific Trust assets were hers to control and to change the beneficiary designation with regard to those assets. She had full authority to place both the Fromherz Road Property and those assets held in the “building fund” account into the “Survivor’s Trust” and designate specific beneficiaries of

those assets independent of the beneficiaries designated by C.W. in the “Decedent’s Trust.”

D. This Court Must Effectuate Margaret’s Intent, Which Was That Jim Receive the “Building Fund” Account and the Fromherz Road Property, Along with the Personal Property Therein.

“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 rules of law.” *Old Nat. Bank & Trust Co. of Spokane v. Hughes*, 16 Wn.2d 584, 587, 134 P.2d 63 (1943) (internal quotation marks and citation omitted); *see also Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 304, 869 P.2d 404 (1994) (“[T]he trustee’s primary duty is to carry out the settlor’s intent.”). Whenever possible, courts should determine the trustor’s intent from the trust’s language. *Eisenbach v. Schneider*, 140 Wn. App. 641, 651, 166 P.3d 858 (2007); RCW 11.12.230. Courts gather intent from the trust instrument as a whole, giving effect to each part. *In re Estate of Sherry*, 158 Wn. App. 69, 78, 240 P.3d 1182 (2010).

Here, the Trust instrument is unambiguous: It gave broad authority to the trustors and then the surviving trustee/trustor to, *inter alia*, receive, manage, allocate, and sell property. CP at 127. There is simply no ambiguity that requires this Court to turn to look beyond the specific

language. But to the extent it is necessary to delve deeper, the subsequent amendments clarified Margaret's intent. *See* CP at 178-81, 187-89.

While Margaret did not place assets into trust to specifically fund Survivor's and Decedent's sub trusts, it was her clear intent to retain 100 percent control of the 386 Fromherz Road property, including full power to direct the property's distribution. The 2007 Amendment to the Trust makes the following express statement of Margaret's intent regarding the final distribution of assets:

Primary Residence: The Trustor's primary residence located at 386 Fromherz Road, Yakima Wa. And all of the surrounding property, buildings, improvements and fixtures and supporting equipment used on that property **shall be distributed unto James K. Wimberley as compensation time, labor and other resources in improving the property.** This distribution shall not be subject offset against his share the residual trust.

Further, the entire balance of the building fund account held with Yakima Federal Savings and Loan Association **shall be set aside from all of the Trustor's other accounts and investments and be distributed to Jim for the purpose of finishing the ongoing work on the property.** Jim shall use this fund at his sole discretion toward finishing the property and the fund shall not be offset against his share of the residual trust.

CP at 179 (*2007 Amendment*, pg. 2, ¶ D) (bold added).

Margaret reaffirmed her intent in the 2008 amendment:

The Remainder beneficiaries of the trust shall be James K. Wimberley and Carroll Wesley Wimberley. Amendment 07-07 to the trust dated

July 18, 2007 shall control the distribution of the trust upon the passing of Margaret V. Wimberley.

CP at 188 (*2008 Amendment*, pg. 2, ¶ C).

And the last amendment in 2008 made Mr. Greiner the “Trust Protector” and the diviner of Margaret’s intent until her death—his impressions and conclusions cannot be disregarded and should be given great weight. CP at 188 (*2008 Amendment*, pg. 2, ¶ D). Margaret’s desire to leave the 386 Fromherz Property to Jim is further supported by a hand written letter from her to Mr. Greiner dated August 31, 2006. CP at 221. The letter provided instructions to Mr. Greiner and stated that, “386 Fromherz Road property, improvements, and equipage to transfer to Jim (son).” CP at 221. This letter was dated nearly a year before the 2007 Amendment was signed, and, combined with the 2007 and 2008 amendments, shows consistency in Margaret’s intentions over a period of several years. *Compare* CP at 221 (*2006 Letter*) with CP at 178-81 (*2007 Amendment*) and CP at 187-89 (*2008 Amendment*). Margaret reaffirmed her intent to both Mr. Greiner and Ms. Calhoun in various meetings that spanned the course of more than three years. *See* CP at 194-98 (*Declaration of Richard C. Greiner*); CP at 200-09 (*Declaration of Kristyan Calhoun*).

Under settled Washington law, this Court must give effect to Margaret’s stated intent contained in the Trust instrument and its

amendments. *Old Nat. Bank & Trust Co. of Spokane*, 16 Wn.2d at 587. Margaret did not slavishly adhere to the provisions of the Trust documents when she specifically declined to fund a separate “Decedent’s Trust,” perhaps because she misunderstood her rights under the Trust. *See* CP at 178 (2007 Amendment, pg. 1 ¶ A). Nevertheless, this court can and should effectuate her purpose and intent with regard to the changes in beneficiary designations by holding that the 2007 Amendment effectively designated 100 percent of the 386 Fromherz Road property, and the assets in the “building fund” account as her separate Trust assets to be disposed of as she had designated. *See* CP at 179-80. Because Margaret’s share of Trust assets was sufficient to fulfill her intent, this Court should rule that the Successor Trustee must distribute assets in accordance with the 2007 Amendment.

E. Margaret’s Share of Trust Assets Was Sufficient to Fund Her Specific Bequests to Jim as Directed in the 2007 Amendment.

1. By virtue of the 1969 community property agreement, all Trust assets owned by the couple at the time of C.W.’s death passed to Margaret as her separate property.

“The community property agreement statute, RCW 26.16.120, enables husbands and wives to enter into community property agreements concerning the status and disposition of their property, to take effect upon the death of either.” *Estate of Wittman*, 58 Wn.2d 841, 843, 365 P.2d 17 (1961). Community property agreements are not wills and are not governed by the laws relating to wills. *Id.* “They are completely executed when one

of the parties to the recorded contract dies.” *Id.* “Title to the community property, thereupon, vests as the sole and separate property of the survivor.” *Id.* “Unless such a recorded contract is rescinded by the parties, it constitutes a conveyance by the decedent to a surviving spouse.” *Id.* at 843-844. “The property covered by it cannot be devised or bequeathed by will by either spouse while it remains in effect.” *Id.* at 844 (emphasis added).

C.W. and Margaret had a community property agreement executed and recorded in 1969. CP at 108-09. By virtue of that community property agreement, all property owned by C.W. and Margaret at the time of C.W.’s death, which was not already placed in the trust, became the separate property of Margaret. CP at 108 (*Community Property Agreement*, ¶ 1). While C.W. had executed a “pour over” will that left all of his assets to the trust, the community property agreement superseded his will, and any assets owned by C.W. at the time of his death immediately vested in Margaret. *Estate of Wittman*, 58 Wn.2d at 844. When she later placed those assets into the Trust, they remained her separate assets over which she retained authority to designate beneficiaries. *See* CP at 138 (*Trust*, pg. 28) (stating that “any property” not allocated at time of first trustor’s death “shall be allocated to this Survivor’s Trust”).

2. C.W. had authority to direct the disposition of only one half of the assets contained in Trust at the time of his death, and

Margaret had authority to direct distribution of all other assets.

At the time of C.W.'s death, less than half of the couple's total assets had been placed into the Trust. Contained in **Appendix A** and **Appendix B** is a list of assets owned by Margaret, C.W., and the Wimberley Family Trust at the time of C.W.'s death. At the time of C.W.'s death, the Trust held assets of \$500,729.16, **Appendix A**; and Margaret and C.W. jointly held non-trust assets of \$588,306.04, **Appendix B**.

The portion of Trust assets over which C.W. had authority to designate the distribution became fixed at \$250,346.58, or one-half of the then-existing Trust estate, which totaled \$500,729.16 at the time of his death. *See Appendix A*. While Margaret's share of the Trust estate was revocable and would fluctuate throughout the remainder of her life, C.W.'s share became irrevocable and fixed at the time of his death. *See CP* at 138. The portion of the Trust estate to be distributed pursuant to C.W.'s beneficiary designations is therefore the same now as it was when he died, \$250,346.58. Only this portion of Trust assets remained irrevocable at the time Margaret executed the 2007 Amendment.

By virtue of the terms of the Trust and combined with the legal effect of the Community Property Agreement as described *supra*, Margaret had complete discretion and control over 50 percent of the assets contained in

the Trust at the time of C.W.'s death, as well as those assets placed into the Trust by Margaret as her separate property after C.W.'s death. Margaret also had authority to designate those Trust assets that would form her half of the Trust estate at the time of C.W.'s death. CP at 139. Margaret could then designate the Trust beneficiaries over that portion of the Trust estate that exceeded C.W.'s interest, which would be held in a constructive "Survivor's Trust." See CP at 144.

The accounting of the successor trustee, Northwest Trustee & Management Services, seems to indicate that there were total Trust assets of \$944,500.02 at the time of Margaret's death. CP at 51. After reducing that amount by the share that became irrevocable at the time of C.W.'s death, \$250,346.58, Margaret had authority to designate the distribution of assets valued up to \$694,153.44. Attached hereto as **Appendix D** is a flow chart depicting the share of Assets over which Margaret and C.W. each retained control, beginning on the date of death of C.W., January 20, 2002, and ending at Margaret's death on August 2, 2010.

The share of Trust assets controlled by Margaret at her date of death is far in excess of the value of the specific bequests to Jim as described in the 2007 Amendment, which total only \$396,739.87. See *infra* Part V.F. (addressing the "building fund" account valuation). In fact, even if the Court were to have determined that Margaret only owned 50 percent of the

total Trust assets at her date of death, which would have been clear error, she still would have had sufficient assets to effectuate the specific gifts contained in the 2007 Amendment. This court can and must effectuate Margaret's intent to make the specific bequests to Jim described in the 2007 Amendment without altering the disposition of those Trust assets which became irrevocable at the time of C.W.'s death.

F. Margaret Lacked Authority to Transfer Funds from the "Building Fund" Account in December 2009, and These Transfers Should Be Credited Back to the "Building Fund" Account for Purposes of Calculating Final Trust Distributions.

"Any trustee may resign, without judicial proceedings, by a writing signed by the trustee and filed with the trust records, to be effective upon the trustee's discharge as provided in RCW 11.98.041." RCW 11.98.029. Upon the resignation of a trustee, "A successor trustee of a trust shall succeed to all the powers, duties and discretionary authority of the original trustee." RCW 11.98.060.

With the 2008 amendment to the Wimberley Family Trust, Margaret made the Trust irrevocable, and removed herself as trustee in favor of Jim.

The 2008 amendment states:

A. Changing character of the trust to an IRREVOCABLE TRUST:

From the date of this Amendment forward, the trust shall hereafter become irrevocable and no further changes to the trust, or the identity of the trustee, or the distributive provisions shall be permitted.

B. Changing identity of Trustee

Given the change of character of the trust to an irrevocable trust, Margaret V. Wimberley shall no longer be the trustee of the trust.

The Trustee of the Trust shall be James K. Wimberley. Only the Trust protector, established below, shall have the ability to appoint a successor to James, should he be unwilling or unable to serve. James may not be removed as trustee except for a finding by the trust protector that he has violated a fiduciary duty owed to Margaret V. Wimberley.

CP at 187 (*April 3, 2008, Trust Amendment*, pg. 1, ¶¶ A-B).

According to the drafting attorney, Mr. Greiner, Margaret implemented these changes because she was concerned about her own deteriorating ability to resist the overreaching of her son Wes. *See* CP at 195 (*Declaration of Rich Greiner*, ¶ 11). Her intent in removing herself as trustee was to protect the Trust assets from her own actions that might result from the undue influence of Wes. *See* CP at 221.

Despite her best efforts, Margaret was unable to fully prevent Wes' overreaching and undue influence. Twice in December 2009, Wes Wimberley took Margaret to Yakima Federal Savings and Loan to withdraw Trust assets. CP at 211-13. Wes Wimberley's actions in this regard are undisputed, and admitted to by Wes in sworn interrogatory answers. CP at 211-13 (*Wes Wimberley Interrogatory Answers*). On December 18, 2009, Wes took Margaret to the bank where she removed \$26,000 and transferred

it to Wes. CP at 212. On December 31, 2009, Wes again took Margaret to the bank where she removed \$280,000 and deposited it into a non-trust account at Umpqua bank. CP at 212. Under Wes's direction, Margaret removed a total of \$306,000 from the Trust in under two weeks. Margaret could not, alone, protect herself and the Trust from Wes' overreaching and undue influence. However, she provided the trial court with all the tools it needed to do for her what she could not do for herself.

Margaret lacked authority to transfer Trust assets out of the "building fund" account in December of 2009 for two reasons. First, Margaret had removed herself as trustee. CP at 187 (*2008 Amendment*, Pg. 1, ¶ B). Only a trustee has authority to administer and access assets of the trust. RCW 11.98.070. On April 3, 2008, Margaret resigned as Surviving Trustee, and no longer had any authority to transfer, gift, or alter the disposition of Trust assets. Second, the Trust was irrevocable, thus prohibiting her, or anyone else, from altering the final disposition of Trust assets. CP at 187 (*2008 Amendment*, Pg. 1, ¶ A). Margaret took these steps with the specific intention of preventing the type of financial overreaching by Wes that resulted in the removal of \$306,000 in assets from the "building fund" account. *See* CP at 221. The December 2009 transfers were invalid and, pursuant to the terms of the Trust, must be credited back to the "building fund" account.

G. The Specific Bequest to Jim from the “Building Fund” Account Should Be Valued at \$96,739.87.

The value of the specific bequest of the “building fund” account to Jim should be determined as of the date that the distributive provisions of the Trust became irrevocable.⁸ On April 3, 2008, the “building fund” account contained \$96,739.87 in assets. **Appendix C.** It was Margaret’s intent that, on April 3, 2008, the distributive provisions described in the Trust, including the specific bequests to Jim contained in the 2007 amendment, become irrevocable. CP at 187 (“From the date of this Amendment forward, the trust shall hereafter become irrevocable and no further changes to the trust . . . or the distributive provisions shall be permitted.”); CP at 188 (“Amendment 07-07 to the trust dated July 18, 2007, shall control the distribution of the trust upon the passing of Margaret V. Wimberley.”).

The court must interpret the Trust provisions and the amendments in such a way as to give effect to Margaret’s intent. *Old Nat. Bank & Trust Co. of Spokane*, 16 Wn.2d at 587. This Court should hold that Jim is entitled to receive a specific bequest of \$96,739.87 before making equal divisions of the remaining Trust assets to Jim and Wes.

⁸ We concede that subsequent additions to the “building fund” were made and then those additions and the underlying funds were subsequently withdrawn by Wes.

H. The Debt Described in Jim's 1994 Divorce Decree and Alleged to Be Owed by Jim to the Estate Is Not an Enforceable Debt.

The alleged debt owed by Jim to C.W. and Margaret cannot be collected by the Successor Trustee. The only record of the alleged debt is contained in the "Exhibit E" to the November 23, 1994, Decree of Divorce between Jim and Pamela Wimberley. CP at 77. There is no promissory note, and no other written evidence of the debt. Even if recovery of this debt could be considered an action upon a contract in writing under RCW 4.16.040, the action was required to have been commenced before November 23, 2000. There has been no attempt to pursue this alleged debt for almost 19 years, and the statute of limitations has long since passed and the doctrine of Laches would preclude any other attempt to enforce a purported agreement. The Successor Trustee should be instructed to disregard this alleged debt.

I. The Remaining Disputes Regarding Distribution of Trust Assets Should Be Remanded for Trial with Instructions from This Court on the Legal Principles to Be Applied to the Remaining Questions of Fact.

1. Wes is obligated to repay the Trust \$42,025.52 pursuant to a debt owed under the October 6, 2006, Promissory Note.

As co-signer with his son, Seth Wimberley, on an October 6, 2006, promissory note to Margaret for \$37,802.52, Wes's distributive share of the Trust should be reduced by the amount still owing on the note. A true and correct copy of the October 6, 2006, promissory note is in the possession of

the Successor Trustee. CP at 277-78. Under that note, Wes agreed to repay \$37,802.52, beginning November 1, 2006, with the full amount due by March 2010. CP at 277-78. Interest was to accrue at three percent a year. The Trust received total payments in the amount of \$2,650. CP at 280-90. For ease of calculations, the Successor Trustee should apply those payments to the principal amount of the loan as of the date of execution, October 2006, and apply interest at three percent a year after that:

Original Loan Amount:	\$37,802.52
Less Payments Received:	(\$2,650.00)
Total Principal Due:	\$35,152.52
<u>3-percent simple interest for 7 years and 2 months:</u>	<u>\$7,557.79</u>
Total Due On Loan:	\$42,719.31

Thus, Wes owes the Trust \$42,719.31 to repay this valid debt, and it must be included in the Trust's assets.

2. Wes agreed to pay back additional loans from Margaret in the amount of \$29,600, which loans have not been repaid and should be offset from his distributive share of the Trust.

Dating back to 2005, Wes and his family members received additional loans in the amount of \$29,600. CP at 281. The loans to Wes and his family members are evidenced by checks and bank statements. CP at 281-90. The Successor Trustee is in possession of the documents and accountings showing the amount of the loans, the payments received, and the outstanding balance owed. CP at 280-90. Because there is a factual dispute with regard to the precise amount of these loans, a determination

regarding Wes's outstanding liability for these loans should be remanded for trial.

3. Jim should receive the personal property of the estate pursuant to Margaret's intent as expressed in the 2007 Amendment.

The parties dispute the proper disposition of personal property owned by the Trust. The 2007 Amendment provides that Jim shall receive the 386 Fromherz Road property along with "buildings, improvements and fixtures and supporting equipment used on that property." CP at 179 (*2007 Amendment*). The issue should be remanded to the trial court with instructions to determine which items of personal property belong to Jim either as gifts or as "buildings, improvements and fixtures and supporting equipment used on that property." *See* CP at 179 (*2007 Amendment*).

4. Fees and Expenses of Trustees and Attorneys.

Jim should not be required to pay the fees of the Successor Trustee. The issues under dispute are a result of Wes's admitted actions directing Margaret to transfer Trust assets in 2009, as well as Wes' failure to acknowledge Jim's legal right to receive the 386 Fromherz Road property and the "building fund" account as specific bequests prior to equal distribution of the remaining assets. It has been Wes' actions, not Jim's actions, that have complicated the administration and distribution of this Trust and Wes should be responsible for payment of the fees and costs of

the Successor Trustee under RCW 11.96A.150. The issue of the amount of these fees should be remanded to the Superior Court for a factual determination.

Jim incurred fees acting as trustee and is entitled to receive compensation for his work. Additionally, the Successor Trustee's accounting applies various Trust expenses to Jim. CP at 300-06. The Successor Trustee is in possession of an itemized list of responses to its accounting, explaining why the questioned expenses should be applied to the trust, and not to Jim individually. CP at 300-06. This issue should be remanded to the Superior Court with instructions to calculate the total of these expenses which should be reimbursed to Jim Wimberley.

VI. CONCLUSION

The June 4, 2013, Order of the Superior Court made numerous errors of law, the most important of which was to permit the Successor Trustee to start the forensic accounting at the date of Margaret's death, and not the date that she resigned as Successor Trustee or earlier. By choosing her date of death as the start date, an incomplete and erroneous picture of the administration of the Trust resulted. This led directly to the erroneous requirement that Jim Wimberley repay the estate \$254,437.91. Margaret had no legal authority to remove \$306,000 of Trust assets from the Yakima Federal Savings "building fund" account, and she was unduly influenced by

Wes to do so. Even if only this one obvious error were reversed, it would substantially alter the ultimate distribution of Trust assets.

Additionally, significant errors in the interpretation of the Trust document and the 2007 and 2008 Amendments resulted in the Superior Court failing to effect the intent of Margaret Wimberley. At the time of his death, C.W. controlled \$250,346.58 in Trust assets, and his irrevocable Trust controlled exactly that same amount when Margaret died. Margaret controlled all Trust assets which exceeded that amount, and she had discretion under the Trust to choose which specific assets she wished to control. She had sufficient assets and authority to give specific gifts of both the Fromherz Road Property and the assets contained in the “building fund” account to Jim Wimberley as specific bequests. This would have been true even if Margaret only controlled 50 percent of the total Trust assets at the time of her death.

There were significant errors made at the Superior Court level. Jim Wimberley respectfully requests that this Court remand this matter to the Superior Court to direct that the Successor Trustee recalculate the distribution of Trust assets based on the following:

- 1) That the Successor Trustee account for the invalid removal of \$306,000 in Trust assets from the “building fund” account;
- 2) That the Successor Trustee effectuate the intent of Margaret Wimberley by transferring to Jim Wimberley his 100-percent

interest in the Fromherz Road property and the personal property thereon;

- 3) That the Successor Trustee effectuate the intent of Margaret Wimberley by treating the assets from the “building fund” account as a specific bequest to Jim;
- 4) That the award of damages, including payment of rent, trustee fees, attorney fees, and the \$254,437.91 at 12-percent interest against Jim be reversed;
- 5) That after the Successor Trustee completes a final accounting, any potential “overpayment” of Jim, which may be found to have occurred, be offset against the assets contained in the Trust to which he is otherwise entitled to receive at the final distribution;
- 6) That the Successor Trustee be directed not to attempt to enforce the alleged 1994 loan from Margaret and C.W. to Jim; and
- 7) That all other matters, including final distribution of personal property, repayment of loans by Wes and his family, and the issue of disinheritance of Wes Wimberley under the slayer and abuser statute be remanded for trial.

Margaret took all the steps she could to safeguard her assets, but those actions were not sufficient to stop Wes. Thus, only this Court is now in a position to do for Margaret what she could not do alone: Safeguard and give effect to her intent.

Respectfully submitted this 13 day of December, 2013.

HELSELL FETTERMAN LLP

By 
Kameron L. Kirkevold, WSBA No. 40829
Mathew V. Pierce, WSBA No. 42197
Attorneys for James Wimberley

CERTIFICATE OF SERVICE

I, Michelle 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 the Estate of Margaret Wimberley, I did on the date listed below, (1) cause to be filed with this Court the foregoing document; and (2) to be delivered via email to Cam McGillivray, Northwest Trustee & Management Services, PO Box 18969, Spokane, WA 99228; and via Email and US mail to Linda Sellers, Sara Watkins, Halverson Northwest Law Group P. C., 405 E. Lincoln Ave, Yakima, WA 98901.

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: December 13 2013



Michelle N. Wimmer

Appendix A

The following Trust financial account figures are based on contemporaneous bank statements. The values placed on other assets are derived from the value of the asset at whatever time such assets was eventually sold.

Trust Assets on 01/20/2002

Trust Financial Accounts 01/20/02

U.S. Bank Account No. 0713 (account closed Dec. 15, 2009): <i>See CP at 223, January 2002 statement</i>	\$2,995.69
Yakima Federal Savings And Loan Account No. 5734 (“building fund”): <i>See CP at 225, February 2002 statement</i>	\$544.92
Evergreen Bank No. 2087 (Evergreen later changed name to Umpqua): <i>See CP at 227, February 2002 statement</i>	\$4901.12
Salomon Smith Barney Account No. 1734: <i>See CP at 230, December 31, 2001 statement</i>	\$192,287.43

Total Financial Assets In Trust 1/20/2002: \$200,729.16

Trust Real Property 01/20/02

386 Fromherz Road, Yakima, parcel No. 181433-12017 <i>See CP at 232, Deed Showing purchase and transfer of this property</i>	\$300,000 ¹
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TOTAL ASSETS IN TRUST 01/20/2002 \$500,729.16

¹ The value of the property as of Margaret’s date of death is used because a tax assessor’s value for 2002 is not readily available, and assuming that the property increased in value between 2002 and 2010, the use of the 2010 value provides C.W.’s portion of the trust with the greatest possible value for his one half interest in the property.

Appendix B

The following Trust financial account figures are based on contemporaneous bank statements. The values placed on other assets are derived from the value of the asset at whatever time such assets was eventually sold.

Non Trust Assets on 01/20/2002

Non-Trust Financial Accounts, 01/20/2002

N/A \$0

Non Trust Real Property 01/20/02

906 S. 19th Ave., Yakima, Parcel No. 181326-14015 \$113,400

See CP at 234-36, Excise Tax Affidavit and Deed transferring this property. This property was the residence of Margaret and C.W. and the physical property never became a Trust asset. Margaret acquired a 100% interest in this property by virtue of the 1969 community property agreement. She sold this property as her separate property for \$113,400 on 11/19/04.

1209 N. 16th Ave., Yakima, Parcel No. 181313-22402 \$390,000

See CP at 238-45, Deeds transferring this property, and showing the transfer of the parcels after division. This property is C.W. and Margaret's ½ interest in business property co-owned with C.W.'s business partner, Hambleton. It was a non-trust asset at the date of C.W.'s death, and was transferred into trust as separate property of Margaret on 05/15/2002. The property was then subdivided and, one parcel (No.181313-22407) sold as a trust asset in Nov. 13, 2004. The Trust's share of the sale proceeds from that sale was \$175,000. Parcel No. 181313-22408, which is currently owned by the trust and valued at \$215,000, is a subdivision of the original property.

Other Non-Trust Assets, 01/20/2002

Hambelton-Wimberley Business Closed and Liquidated 2008 \$84,906.04

C.W. and Margaret owned a 50% interest in Hambleton Wimberley DBA Energy Equipment & Mfg. This was a non-trust asset. On November 21, 2008, the business was dissolved, and Margaret's share of the business assets was \$84,906.04. This money was deposited into the Trust account at Yakima Federal Savings and Loan, which transaction can be seen on the November 2008. See CP at 247, November 28, 2008 bank statement.

TOTAL NON-TRUST ASSETS 01/20/02 \$588,306.04

Assets Obtained After 01/20/02

Asbestos Claim Proceeds

\$126,576.79

These funds were obtained as settlement proceeds received for the death of C.W. from mesothelioma. The total proceeds received were \$379,730.39, but Margaret only kept 1/3 of the proceeds, giving 1/3 each to Jim and Wes during her lifetime. See CP at 249-75, copies of correspondence and checks related to distribution of the Asbestos funds.

Appendix C

Your Account

Yakima Federal Savings AND LOAN ASSOCIATION

OFFICES

YAKIMA DOWNTOWN - 118 E YAKIMA AVE - P.O. BOX 1526 (98907) - 509-248-2634
STADIUM - 3810 TIETON DRIVE (98902) - 509-966-5042
ORCHARD PARK - 7105 TIETON DRIVE (98908) - 509-965-8080
PASCO - 3604 W. COURT - P.O. BOX 3019 (99303) 509-547-7374
RICHLAND - 1007 JADWIN - P.O. BOX 1010 (99352) - 509-943-3144
KENNEWICK - 3350 CLEARWATER - P.O. BOX 6805 (99326) - 509-783-1474
KENNEWICK - GAGE - 8908 W. GAGE BLVD. (98336) - 509-735-6696
PROSSER - 601 MARKET ST - P.O. BOX 151 (98350) 509-788-2388
SUNNYSIDE - 801 E. EDISON - P.O. BOX 420 (98944) 509-837-4555
ELLENSBURG - 201 E. 5TH AVENUE - P.O. BOX 579 (98926) 509-925-5338

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386 FROMHERZ RD
YAKIMA WA 98908-9096



643-21

SUMMARY OF YOUR ACTIVITY
STATEMENT DATE APR 30 08
STATEMENT NUMBER 708001351
BEGINNING BALANCE 96344.20
DEPOSIT AMOUNT + 0.00
WITHDRAWAL AMOUNT - 0.00
SERVICE CHARGE - 0.00
INTEREST PAID + 221.99
ENDING BALANCE = 96566.19

PREFERRED 07-08001351 BALANCE SUMMARY
ACTIVITY BEGINNING APR 01 08 WITHDRAWALS DEPOSITS \$ 96344.20
APR 30 INTEREST PAID 4/01 THROUGH 4/30 221.99 APR 30 \$ 96566.19

2.84% ANNUAL PERCENTAGE YIELD EARNED IS BASED ON \$ 221.99 INTEREST EARNED FOR 30 DAYS
INTEREST PAID THIS YEAR: \$ 931.95

INTEREST RATE AS OF:
APR 01 02.90 APR 02 02.80

Appendix D

The following chart depicts the share of assets over which Margaret and C.W. each have control beginning on the date of death of C.W., January 20, 2002, and ending at Margaret's death:

