

RECEIVED

MAR 13 2017

WASHINGTON STATE
SUPREME COURT

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 94128-9

(Court of Appeals No. 74320-1-I)

GARY P. WAY & KRISTIN KIRCHNER,

Appellants,

vs.

MARJORY E. WAY,

Respondent.

ANSWER OF RESPONDENT

Submitted By:
LORNA S. CORRIGAN
Lorna@NewtonKight.com
(WSBA #13101)
NEWTON ♦ KIGHT L.L.P.
Attorneys for Respondent,
MARJORY WAY
1820 - 32nd Street
P.O. Box 79
Everett, Washington 98206
(425) 259-5106

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
APPENDICES	iii
I. <u>RESTATEMENT OF ISSUES PRESENTED FOR REVIEW</u>	1
II. <u>RESTATEMENT OF THE CASE</u>	3
III. <u>ARGUMENT WHY REVIEW SHOULD BE DENIED</u> . . .	8
IV. <u>REQUEST FOR ATTORNEYS' FEES</u>	10
V. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Cases

Christian v. Tohmeh, 191 Wn. App. 709, 366 P.3d 16 (2015) 9

Court Rules and Statutes

ER 802 2

ER 803(a)(3) 2

RAP 13.4(b) 11

RAP 13.4(b)(4) 9

RAP 18.A (j) 10, 11

RCW 11.96A.150(1) 2, 7, 10, 11

APPENDICES

<u>APP No.</u>	<u>Description</u>	<u>Page</u>
1	ER 802	A-1
2	ER 803(a)(3)	A-2
3	RAP 13.4(b)(4)	A-3
4	RAP 18.1(j)	A-4
5	RCW 11.96A.150(1)	A-5

I. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Prior to decedent Peter Way's death, he and his wife, Marjory Way, entered into a Living Trust. The Trust provides that the estate of the first spouse to die would be divided into a Trust A and a Trust B. In multiple paragraphs, the Trust makes express provisions for a life estate in Trust A in the surviving spouse. For example, the Trust states in Paragraph 7 that "[u]pon the death of the deceased spouse, the surviving spouse shall become the Life Beneficiary of Trust A." Paragraph 8 of the Living Trust names Gary Way and Kristin Kirchner, 50% each, as the "Final Beneficiaries" of Peter's Trust A. It further states that "[u]pon the death of the Life Beneficiary, the Trustee shall distribute . . . Trust A to the . . . Final Beneficiaries provided in this Paragraph 8." Elsewhere, in Paragraph 6, the Living Trust provides that upon Peter's death his portion of the trust estate was to "be distributed in accordance with the terms and to the beneficiaries named in Schedule E, attached. . . ." Schedule E provides that Peter's Estate is to be distributed to the following Specific Beneficiaries upon the following terms:

SPECIFIC BEQUESTS

In the event that Marjory . . . survives Peter . . . then she shall inherit the . . . condominium . . . and the . . . Toyota Highlander.

Gary Peter Way	son	50% of the remainder . . .
Kristin Kirchner	daughter-in-law	50% of the remainder . . .

Do the references to "remainder[s]" in Schedule E merely affirm the future interests of Gary and Kristin as the "Final Beneficiaries" named in Paragraph 8 of the Living Trust, who would take following the death of the life beneficiary, rather than create immediate bequests of all of Peter's estate, other than

the condominium and Toyota Highlander, to Gary and Kristin?

- B. Is the interpretation of the term "remainder" in Schedule E that Gary and Kristin will take from Peter's Trust estate only following the death of Marjory the only reasonable interpretation of that schedule because it is the only interpretation that reconciles all of the Trust language?
- C. Is the Living Trust unambiguous given the fact that only one reasonable interpretation flows from the Trust language, such that extrinsic evidence of the Trustor's intent is inadmissible?
- D. The Living Trust was drafted by an attorney whom Peter and Marjory Way consulted for estate planning work after Peter learned that he had lung cancer. After the attorney met with Peter and Marjory, the attorney met with his legal assistant, Kathleen Madsen. Ms. Madsen took notes of her meeting with the attorney. She testified, however, that she had not been present at the attorney's meeting with the Ways, and that she had no personal knowledge of the intent of Peter Way in executing the Living Trust. If the Trust is ambiguous, such that extrinsic evidence is admissible for purposes of proving the trustor's intent, are the notes of the legal assistant excepted from the hearsay prohibition of ER 802 by ER 803(a)(3) when offered to prove Peter's intent in executing the Living Trust, where the out-of-court declarant is the drafting attorney rather than Peter?
- E. Did Gary and Kristin abandon any error in the trial court's dismissal of their claims of breach of contract, fraud and specific performance where they failed to argue such error in their opening brief in the Court of Appeals?
- F. Did Gary and Kristin abandon any objection to the trial court's award of attorneys' fees to Marjory where they failed to present argument that the trial court abused its discretion under RCW 11.96A.150 in making the award from the Trust?

II. RESTATEMENT OF THE CASE

Husband and wife, Peter and Marjory Way, sought estate planning services from an attorney after Peter was diagnosed with lung cancer. CP 417, l. 20. The attorney drafted a joint, or "marital", trust for them (the "Living Trust", or the "Trust"), CP 1579, which they executed. *Id.* at ll. 21-23.

The Living Trust provided, upon the death of the first spouse, for the creation of a Trust A and a Trust B. Trust A consisted of the deceased spouse's separate property and his or her share of the shared marital property. Trust B consisted of the separate property of the surviving spouse and his or her portion of the shared marital property. CP 1573-74, ¶ 7.

Upon Peter's death, Marjory became the trustee of Trusts A and B. CP 1418, ll. 5-7. Some time thereafter, Marjory filed a TEDRA petition seeking clarification whether certain language in the Living Trust preserved a life estate in her as the surviving spouse, or gave Peter's son, Gary, and daughter-in-law, Kristin, the right to the immediate distribution of all of Peter's estate other than a condominium and car specifically bequeathed in the Trust to Marjory. CP 1564.

Gary and Kristin argued in response to the Petition that they were entitled to all of the estate other than those specific bequests to Marjory. CP 1552, ll. 8-15. They did so based on the inclusion in Schedule E to the Trust of references under the Caption "Specific Bequests", not only to specific bequests of the condo and car to Marjory, but also to 50% "remainder[s]" in both Gary and Kristin. CP 1553, ll. 3-7.

The drafting attorney was deposed in this case. He testified at that deposition that in drafting the Way Living Trust he used a form that he obtained from legalForms.ilrg.com, Maximillian Ventures, LLC. CP 260, ll. 13-22; deposition Exhibit 6, CP 429. He identified the form as an "AB Trust form . . . copyright 06-08." CP 449.

The form created a life estate in the surviving spouse, *see* deposition Ex. 6, CP 456, at ¶ 7(ii), and provided for the naming of "Final Beneficiaries" who would receive their distributions on the death of the surviving spouse. *Id.* at ¶ 8, CP 457. At the same time it reserved in the trustor a power, through the use of schedules to be attached to and incorporated in the trust, to make bequests from Trust property. *Id.* at ¶ 6, CP 455. The form also provided that there would be no distributions until the death of both spouses. *Id.* at ¶ 6. The

drafting attorney testified that the latter language was included in the Way Trust. CP 267, ll. 3-6. Presumably the attorney did not employ that language because in addition to the life estate created by the Trust in the surviving spouse, *see* ¶ 7(ii), CP 1573, Schedule E to the Trust set out specific bequests, effective immediately upon the death of Peter Way, to Marjory of the condominium and of a Toyota vehicle to Marjory. CP 1585.

The drafting attorney was, in his deposition, however, shown a second form of "Marital AB Trust", copyright 2006-2010, available from Maximillian Ventures, LLC. He testified that he did not recognize the form. CP 337, ll. 1-11. CP 465 and deposition Ex. 9, CP 465. He conceded, however, that the language of the trust he drafted for the Ways more closely resembled the form contained in Exhibit 9 to his deposition than the language contained in deposition Exhibit 6, the trust form he asserted that he had used in drafting the Way Trust. CP 326, ll. 17-25; 327-327; and 329, ll. 1-5. The Exhibit 9 form, like the Way Trust drafted by the attorney, for example, did not contain the language found in the Exhibit 6 form to the effect that there would be no distributions until the death of both spouses. In fact the Way Trust

as drafted made distributions in the form of specific bequests of the condo and car to Marjory immediately upon Peter's death. *See* Paragraph 6 of Way Trust, CP 1573, and Schedule E thereto. CP 1585. While the attorney did not specifically recall drafting the schedules for the Way Living Trust, CP 263, ll. 10-12, he testified that it was his practice to create the schedules from scratch. *Id.*, ll. 2-9.

The Exhibit 9 form, which is most similar to the Way Trust, was accompanied by instructions as to how to complete that form. CP 468-72. Those instructions indicated that the form allowed the trustor to name "Specific Beneficiaries" in the "appropriate Schedule" to the trust, who would receive "specific items of property" upon the trustor's death. *Id.* at CP 470, ¶ 5. They also provided for the naming by each trustor of "Final Beneficiaries" who would be the persons entitled to receive all of the Trust property not designated to go to a "Specific Beneficiary". *Id.*

On the cross-motions for summary judgment brought before the trial court, Marjory argued that the reference to "remainder[s]" to Gary and Kristin in Schedule E was an affirmation by Peter of Gary and Kristin's status as "Final Beneficiaries" who would take the remainder

of the Trust after Marjory's death. CP 1573, ll. 15-18. Gary and Kristin argued that Peter intended that Marjory receive only the condo and the car rather than a life estate. CP 1330, ll. 11-33.

The trial court granted Marjory's motion for summary judgment. CP 198-201. It ruled that Peter intended that Marjory receive the specific bequests of the condo and car, and a life estate in Peter's Trust A. CP 199-200, ll. 21-25 and 1-6. Gary and Kristin would take under the Trust, but only as the remainder beneficiaries of Trust A, following Marjory's death. CP 200, ll. 7-9. The trial court also dismissed Gary and Kristin's claims for breach of contract, fraud and specific performance, and awarded Marjory her attorneys' fees and costs from Trust A, pursuant to RCW 11.96A.150. *Id.*, ll. 16-18; *see also* App. 5. The Court of Appeals, in an unpublished opinion, affirmed the trial court. *See* Appendix A to Corrected Petition for Review. It held in part that Gary and Kirsten's additional claims had not been briefed and had therefore been abandoned. The Court also awarded Marjory her attorneys' fees on appeal pursuant to RCW 11.96A.150, the same statute as had been relied upon by the trial court. *Id.*

III. ARGUMENT WHY REVIEW SHOULD BE DENIED

A petition for review will be accepted by the Supreme Court only if one or more of the considerations found in RAP 13.4(b), *see* App. 3, are identified. Gary and Kristin have asserted, in support of their petition, only the presence of "an issue of substantial public interest that should be determined by the Supreme Court." *Id.* They by implication argue that the same issues of trust interpretation that were presented in this case will arise again because the trust form employed remains available to attorneys and other persons on the internet. Petition for Review at 19. No issue of substantial public interest exists here, however, where the disputed issue arose solely out of modifications to a trust form made by the attorney hired by Peter and Marjory Way to perform estate planning services, CP 886-887, ll. 25 and 1-23, and where the procedural rulings on the abandonment of claims and the attorneys' fee award are governed by settled law.

The issue that resulted in the filing of the TEDRA action in this case was whether the reference to "remainder[s]" in Gary and Kristin in Schedule E to the Way Living Trust was intended by the trustors to cause the immediate transfer of all of Peter's estate (other than the

condominium and the car), to them upon Peter's death, notwithstanding the express provisions elsewhere in the Trust for a life estate in Peter's surviving spouse. That issue was created not by the boilerplate provisions of a legal form available on the internet, but rather by the individualized drafting decisions of a single attorney. There is no basis for concern that the drafting decisions that led to this litigation, would, even if the trust forms were to be employed by other attorneys or lay persons in the future, be repeated. Those drafting decisions did not create an issue of "substantial public interest". RAP 13.4(b)(4). *See* App. 3.

Nor did the decision of Court of Appeals to decline review of the trial court's dismissal of Gary and Kristin's claims for breach of contract, fraud and specific performance do so. It is well-settled that an appellate court has the discretion to deny review of an issue not argued in a party's brief. Christian v. Tomeh, 191 Wn. App. 709, 727-28, 366 P.3d (2015). Gary and Kristin have shown no abuse in the exercise of that discretion by the Court of Appeals, and that exercise did not create an issue of substantial interest to the public. Nor did they show any abuse of discretion in the trial court's award of attorneys' fees

under RCW 11.96A.150. *See* App. 5. The Petition for Review should be denied.

IV. REQUEST FOR ATTORNEYS' FEES

RCW 11.96A.150 provides for an award of attorney's fees in a TEDRA action, in the discretion of the court, from any party, including the estate, to any party.

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150(1) (amended 2007). Marjory Way received an award of her attorneys' fees both at the trial court and before the Court of Appeals. Pursuant to RAP 18.1(j), *see* App. 4, she should receive a further award from the Trust for her attorneys' fees in answering this Petition.

V. CONCLUSION

Petitioners Gary Way and Kristin Kirchner have failed to demonstrate the existence here of any issue of substantial public interest, the only consideration under RAP 13.4(b) upon which they relied in their petition. Their petition should therefore be denied, and Respondent, Marjory Way, should have an award of her attorneys' fees and costs in answering the petition, pursuant to RAP 18.1(j) and RCW 11.96A.150(1).

Respectfully submitted this 10th of March, 2017.

NEWTON ♦ KIGHT L.L.P.

By: 
LORNA S. CORRIGAN
WSBA #13101
Attorney for Respondent
MARJORY WAY
1820 32nd Street
P. O. Box 79, Everett, WA 98206
(425) 259-5106
Fax: (425) 339-4145
Lorna@NewtonKight.com

APPENDIX 1

ER 802

HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

APPENDIX 1

A-1

ER 802

APPENDIX 2

ER 803(a)(3)

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

APPENDIX 2
A-2

ER 803(a)(3)

APPENDIX 3

RAP 13.4(b)(4)

DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

...

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

...

**APPENDIX 3
A-3**

RAP 13.4(b)

APPENDIX 4

RAP 18.1(j)

ATTORNEY FEES AND EXPENSES

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

APPENDIX 4

A-4

RAP 18.1(j)

APPENDIX 5

RCW 11.96A.150(1)

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

APPENDIX 5

A-5

RCW 11.96A.150(1)