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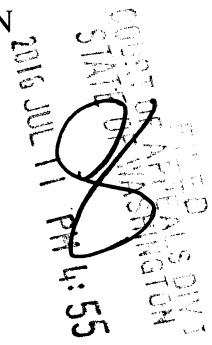
No. 74320-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I



GARY PETER WAY and KRISTIN KIRCHNER,

Appellants,

v.

MARJORY E. WAY, TRUSTEE OF THE PETER J. & MARJORY E. WAY LIVING TRUST,

Respondent.

Appeal from the Superior Court of Washington for Snohomish County
(Cause No. 15-2-04284-8)

REPLY BRIEF OF APPELLANTS

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1. **Peter intended "remainder" to Gary and Kristin in Schedule E to mean the remainder of his estate upon his death, not a reiteration of a remainder of a Trust A to Gary and Kristin after a life estate for Marjory.**

Peter's intent when he executed his Will and the Way Living Trust is paramount.

It is not contested by the parties that Peter intended upon his death that his separate property condominium and Toyota automobile would be distributed to Marjory, pursuant to Paragraph 6 and Schedule E. Marjory, in Respondent's brief argues in favor of an interpretation of the meaning and intent of the word "remainder" in Schedule E, which Gary and Kristin dispute.

Marjory argues Peter intended the word "remainder" to Gary and Kristin in Schedule E to "reiterate" that upon Peter's death the remainder of his estate would be created and transferred to a Trust A, with Marjory as trustee and life beneficiary and upon her death the remainder of the Trust A would be distributed to Gary and Kristin as final beneficiaries, pursuant to Paragraphs 7 and 8.

If Marjory's interpretation of "remainder" in Schedule E is correct, she was entitled to create and fund Trust A upon Peter's death and enjoy a life estate in the remainder of Peter's estate, which she has done and continues to do since Peter's death on June 4, 2012.

Gary and Kristin argue Peter intended by positive, direct, unambiguous and mandatory terms in Paragraph 6 and Schedule E that upon his death the remainder of his estate would be distributed to Gary and Kristin as specific beneficiaries, absolutely, free of any trust. If that mandatory distribution had been made by Marjory, as trustee of the Living Trust, there would have been no portion of Peter's estate remaining to create or fund a Trust A or serve as a life estate for Marjory.

Marjory breached her fiduciary duty and committed fraud and continues to do so by failing and refusing to distribute the remainder of Peter's estate to Gary and Kristin upon Peter's death.

The arguments raised by Marjory in Respondent's Brief are not persuasive, but require the Court to determine what Peter intended by the distribution of "50% of remainder" in Schedule E. That question can be answered by an interpretation of "remainder" from the terms of the Living Trust as a whole, from the surrounding circumstances and by correctly applying accepted rules of construction.

a. Peter's intent regarding the meaning of "remainder" in Schedule E is paramount.

Marjory relies on the Black's Law Dictionary definition of "remainder" as "[a] future interest arising in a third person ...who is

intended to take after the natural termination of the preceding estate" Resp. Brief, pp. 13-14.

Words used in a will are understood in their ordinary sense if there is nothing to indicate a contrary intent. In re Estate of Levas, 33 Wn.2d 530, 536, 206 P.2d 482, 486 (1949).

Peter intended the common meaning of remainder, which is "the part that is left after the other parts are gone, used, or taken away." Cambridge Academic Content Dictionary, http://dictionary.cambridge.org/us/dictionary/english/remainder (last visited June 20, 2016).

In re Estate of Soesbe involved a dispute over the remainder of a testamentary trust between the heirs of the deceased testator's spouse and the testator's heirs under the laws of intestacy. Each group claimed superior rights of inheritance to the remainder of the estate. The Soesbe Court rejected both claims and awarded the remainder to the beneficiaries named in the residuary provisions of the testator's will.

> Both arguments overlook the primary rule that the construction of a will, including testamentary intent, is a question of fact to be decided upon the relevant evidence and not by technical rules of law. Burtman v. Butman, 97 N. H. 254, 85 A. (2d) 892. The will expresses a plain testamentary intention that the balance falls within the residuary provisions of paragraph No. 6 of the will.

In re Estate of Soesbe, 58 Wn.2d 634, 636, 364 P.2d 507 (1961) (emphasis added).

In reaching its decision, the Soesbe Court quoted with favor the following language of the supreme court of New Hampshire in Hayward v. Spaulding, 75 N. H. 92, 71 Atl. 219:

> ". . .'Upon the rule of testamentary interpretation established in this state, it is immaterial whether the doctrine of remainders is correctly or incorrectly applied. . . . Whatever that doctrine may be and however it may be applied, it does not set aside the supreme rule that the interpretation of a will is the ascertainment of the testator's intention. If it upholds the intention disclosed by the terms of the will in this case, it is useless; if it does not uphold it, it is equally useless, as it cannot break the will.'"

In re Estate of Soesbe, 58 Wn.2d at 636.

Peter clearly intended "remainder" in Schedule E to mean the remainder of his estate after the distribution of the condo and car to Marjory.

The definition of remainder in Black's Law Dictionary is useless because it does not uphold and cannot break Peter's intent as expressed in the positive, direct, unambiguous terms of his Will and Living Trust. The intention that is positive and direct controls, not that which is merely negative or inferential. In re Estate of Douglas, 65 Wn.2d 495, 499, 398 P.2d 7, 10 (1965). "Remainder" in Schedule E cannot reasonably be inferred as merely a reiteration that Gary and Kristin are Final

Beneficiaries of the remainder of a Trust A, pursuant to Paragraph 8. CP 1573-1575, 1585.

b. Peter intended "remainder" in Article 3.1 of his Will to mean the same thing as in Schedule E of the Living Trust: the remainder of his estate upon his death.

According to the unambiguous dispositive provisions in Article 3.1 of Peter's Will, if the Living Trust had been revoked or declared invalid for any reason, Peter intended that his condo and car would be distributed to Marjory and the "remainder" of his estate distributed to Gary and Kristin, 50-50. CP 1559. The Will does not provide a life estate for Marjory in the event the Living Trust is invalid. Peter intended the same dispositive provisions in Schedule E as he did in his Will, assuming the Living Trust was never revoked or declared invalid, which it never was.

Marjory, in Respondent's brief, does not contest Appellants' argument that the Living Trust and Will are integrated and that Peter's intent must be gathered from the four corners of both documents and, if inconsistent, the Will controls. In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985). Peter used the word "remainder" in both documents to mean the same thing.

> [W]here the same words occur in different parts of a will and relate to the same subject matter, it will be presumed that they are used in the same sense wherever found in the will, unless the context discloses a contrary or different intention.

In re Estate of Lidston, 32 Wn.2d 408, 415-16, 202 P.2d 259, 263-64 (1949). "Remainder" is used in the same context in the Will as it is in the Living Trust. Both refer to Peter's estate upon his death, after the distribution of Peter's condo and car to Marjory.

c. The meaning of "remainder" in Schedule E is unambiguous, but if there is room for construction, Gary's interpretation should be adopted because Gary would have inherited Peter's estate if he had died intestate.

Normally, the surviving spouse has rights of inheritance of the predeceased spouse's estate under Washington's intestacy laws. RCW 11.04.015. However, Marjory and Peter waived those rights when they entered into the prenuptial agreement, in which they expressly waived any rights of inheritance. CP 899.

Gary, on the other hand, is Peter's natural son and only issue. Due to the prenuptial agreement, had Peter died without a will, Gary would have inherited Peter's entire estate under Washington's intestacy laws. RCW 11.04.015.

The court in In re Estate of Levas, stated the following rule of construction.:

> [W]here there is room for construction of a will that meaning will be adopted which favors those who would inherit under the intestate laws.

In re Estate of Levas, 33 Wn.2d 530, 536, 206 P.2d 482, 486 (1949).

Peter and Marjory waived their rights to inherit from each other. Gary and Kristin argue there is no room for Marjory's construction of "remainder" in Schedule E, but if the Court believes there is, Gary and Kristin's interpretation should be adopted.

d. Peter's estate upon his death is the last antecedent of "remainder" in Schedule E.

The "last antecedent" is a rule of construction applied to the interpretation of statutes and wills which states that "referential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent."[1] The court in In re Estate of Seaton, 4 Wn. App. 380, 382, 481 P.2d 567, 568 (1971) applied the "last antecedent" rule to the interpretation of a will.

Paragraph 6, which describes Peter's trust estate, is referred to in the first sentence of Schedule E and, therefore, is the last antecedent of "50% of remainder" used in Schedule E.

[1] "Antecedent" is defined in the Cambridge Academic Content Dictionary as "something existing or happening before, esp. [sic] as the cause of an event or situation." http://dictionary.cambridge.org/us/dictionary/english/antecedent (last visited June 20, 2016).

e. Under the ejusdem generis rule of construction "remainder" in Schedule E refers to Peter's estate upon his death.

Ejusdem generis is another rule of construction, which courts have applied to determine the testator's intent when there is ambiguity in the language of a will. In re Estate of Patton, 6 Wn. App. 464, 468, 494 P.2d 238, 240 (1972).

Under the doctrine of ejusdem generis, a general description of things which is in the same context as a specific enumeration of certain items will be limited to refer only to things of the same kind enumerated. In re Estate of Patton, 6 Wn. App. at 469.

Applying ejusdem generis to the meaning of "remainder" in Schedule E, the bequest to Marjory of the condominium and car is a specific enumeration of items contained within Peter's trust estate at the time of his death, as set forth in Paragraph 6 and referred to in the first sentence of Schedule E. The bequest of the condominium and car does not refer to Trust A, since Peter undeniably intended the condominium and car to be distributed to Marjory upon his death, not transferred to Trust A.

Since the general description of "remainder" as used in the bequest to Gary and Kristin in Schedule E is in the same context as the bequest of the condo and car to Marjory, "remainder" in Schedule E also refers to Peter's trust estate upon his death.

f. "Remainder" in Schedule E specifically identifies the property, the terms and the beneficiaries to whom the remainder is to be distributed.

Marjory argues that Peter's bequests of the "remainder" to Gary and Kristin in Schedule E is not specific enough to be specific bequests, so Peter must not have intended Gary and Kristin to receive the remainder of his estate as a specific bequest upon his death and, instead, Peter must have intended "remainder" to "reiterate" the remainder of Trust A upon Marjory's death.

However, the bequest of the "remainder" is listed under the heading "Specific Bequests" in Schedule E, so Peter must have considered it to be a specific bequest that would be distributed upon his death pursuant to Paragraph 6, not upon Marjory's death.

Peter's trust estate is described with specificity in Paragraph 6, Husband's Beneficiaries, as consisting of Peter's "share of the property listed in Schedule A, as well as any separate property listed in Schedule C." CP 1573, 1581, 1583. Therefore, upon Peter's death "remainder" in Schedule E can be specifically identified as consisting of one-half of the Chase bank account listed in Schedule A and everything listed in Schedule C, except the condo and car.

Furthermore, Mr. Zingarelli, who prepared the Schedules to the Living Trust, testified that the bequests to Marjory, Gary and Kristin in Schedule E are specific bequests. CP 362-363.

g. Based on the surrounding circumstances, Peter did not intend to create a Trust A upon his death.

It is appropriate for a court to consider surrounding circumstances in order to determine a testator's intent when he executed his will. Anderson v. Anderson, 80 Wn.2d 496, 499, 495 P.2d 1037, 1039 (1972).

Gary and Kristin, in Appellants' opening brief at pages 5 thru 12, describe circumstances in Peter's life that pertain to his intent regarding the distribution of his estate.

Peter was 71 years old when he married Marjory and she was 65. CP 1546. They both had children or step-children from previous marriages. Id.

Their prenuptial agreement, recites they each have relatives who are the natural objects of their beneficence. CP 897-903. They declare they each have separate property, which is to remain their separate property "to enable each to dispose of his or her assets as he or she wishes at death." Id. Each party expressly waives their rights to inherit from the estate of the other upon their deaths. CP 899.

Marjory filed for divorce six years after she married Peter, to which Peter filed a Joinder. CP 819-821. The divorce petition was still pending at the time of Peter's death on June 4, 2012. CP 823.

On July 7, 2015, Marjory filed a declaration in which she claimed the reason she filed the petition for divorce was to obtain a "Medicaid divorce," supposedly to protect Peter's assets against her own possible future medical expenses, but she and Peter intended to continue living happily together. CP 950-955, 826, 1417. She claimed she and Peter did not go forward with the divorce after Peter was diagnosed with lung cancer in November 2011. CP 1417.

On October 15, 2015, Marjory filed a declaration correcting her declaration of July 17, 2015. CP 1129-1131. Marjory admitted she lied when she called it a "Medicaid divorce." She claimed she only did so because she was too embarrassed to admit she filed for divorce because she and Peter had both abused alcohol and were physically abusive toward each other. She claimed, nonetheless, that neither she nor Peter had any desire to follow through with the divorce and that they overcame their abuse problems and were able to restore their "happy marriage." Id.

However, Marjory lied in her declaration correcting declaration, too. Aplnts' Brief, pp. 10-11.

The truth is, Marjory and Peter signed a Decree of Dissolution and Findings of Fact and Conclusions of Law on December 9, 2011. CP 867-882. Marjory testified that when she signed the Decree of Dissolution she intended to go forward with the divorce. CP 864. She could not deny it, since she and Peter signed the Decree of Dissolution.

Marjory states in her July 17, 2015 declaration that after Peter was diagnosed with lung cancer, she and Peter met with William Zingarelli in "the late fall/early winter of 2011." CP 1417. Therefore, they met with Mr. Zingarelli for assistance with their estate planning around the same time they signed the divorce decree on December 9, 2012. CP 844-861.

The foregoing facts and circumstances support Gary and Kristin's argument that Peter intended to leave the remainder of his estate to Gary and Kristin upon his death, not a life estate for Marjory.

h. Marjory's Schedule D leaves no remainder of her estate for Trust A upon her death to serve as a life estate for Peter, if Marjory had died before Peter.

Marjory calls it "absurd" that she and Peter would sign the Living Trust containing extensive provisions for a Trust A if Peter did not intend to leave any remainder of his estate with which to fund it upon his death.

However, pursuant to Paragraph 6 and Schedule D, Marjory bequeaths her entire trust estate to her daughters, 50-50, to be distributed

to them upon her death, not transferred to a Trust A. CP 1573, 1584. This is not surprising, given the fact she and Peter had been married a relatively short period of time, she had daughters from a prior marriage, she and Peter had a signed prenuptial agreement, which confirmed each waived their rights to inherit from the other and they signed the divorce decree less than three months earlier. CP 897-903.

Marjory's "absurd" argument ignores the fact there are provisions for the creation of Trust A regardless of which spouse dies first. Yet, they each signed it, knowing at the time that neither of them would be leaving a remainder for a Trust A upon their death.

2. There are reasons Marjory and Peter signed the Living Trust, even though neither of them wanted to leave a life estate for the other one.

There were several reasons Marjory and Peter entered into the Living Trust.

Under normal circumstances, property held in a revocable inter vivos trust during the lifetime of the settlor is not subject to judicial conservatorship proceedings in the event of the settlor's incapacity, since title to the property is placed in the name of the trustee and trust. Loring, A Trustee's Handbook § 2.1.1, p. 52 (C.E. Rounds ed. 2014). Other advantages of a living trust are avoidance of probate, privacy, cost savings, efficiency and flexibility. Id.

Paragraph 6 of the Way Living Trust gives Marjory and Peter the ability, through their respective Schedules D and E, to leave as much or as little of their trust estate to whomever they want. They did not have to leave any remainder for a Trust A. In fact, neither of them did.

Peter and Marjory were elderly and both had health issues when they signed the Living Trust. Peter was terminally ill. CP 1417. Marjory had a cardiac disease. CP 1130. Obviously, they were both concerned about becoming incapacitated and needing special care.

The provisions of the Living Trust provide for the possibility that either spouse could become incapacitated. Paragraph 4, Death or Incapacitation of Trustee, provides that either spouse will serve as sole trustee in the event of the other's incapacitation. CP 1571-1572. Furthermore, under Paragraph 3(D), at all times during his or her lifetime, each spouse reserves the right to all income, profits and control of his or her separate property described in their applicable Schedules B or C, which include during any period of incapacitation. CP 1571.

Paragraph 3B allows them to amend the terms of the Living Trust at any time during both their lives. By leaving the provisions for Trust A in the Living Trust, if either of them changed their minds in the future and decided to leave a life estate for the other, all they would have had to do was agree to amend their Schedules D or E, to distribute less than their

entire estate to specific beneficiaries. In that event, with the provisions for Trust A still in the Living Trust, any remainder in their estate that was not to be distributed to a specific beneficiary, would automatically be transferred to Trust A, without the necessity of changing or adding any of the terms of the Living Trust, other than amending their Schedules D or E.

Not leaving a life estate for each other did not render the Living Trust meaningless. Paragraph 18, Severability and Survival, anticipates the possibility that some provisions of the Living Trust may become inoperative. CP 1578. In that event the remaining provisions "shall be effective and fully operative." Id. Giving their entire respective trust estates to specific beneficiaries pursuant to Paragraph 6 and Schedules D and E, simply makes the provisions pertaining to a Trust A inoperative upon their death.

Peter and Marjory did not amend their respective Schedules D and E because neither of them changed their minds about not leaving a life estate for each other.

3. There are material issues of fact in support of Appellants' counterclaims for breach of fiduciary.

Marjory argues in Respondent's Brief that the only authority Gary and Kristin offer in support of their counterclaim for breach of fiduciary duty is Restatement Third, Trusts, Sec. 89, Comment e that a "trustee has a

duty within a reasonable time to distribute the trust property to the persons who are entitled to it." Rspndnt's Brief, p. 40.

In fact, Washington's law of trusts is to the same effect as Restatement Third, Trusts, Section 89. RCW 11.98.145(2) provides as follows:

> Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.

RCW 11.98.145(2).

Of course, Paragraph 6 of the Living Trust mandates the distributions in Schedule E be made upon Peter's death.

It was clearly Marjory's fiduciary duty to distribute the remainder of Peter's trust estate upon Peter's death to Gary and Kristin, pursuant to Paragraph 6 and Schedule E, which she failed to do.

a. Gary and Kristin's counterclaim was filed timely.

Without citing any authority, Marjory suggests that the statute of limitations has run out on Gary and Kristin's breach of trust claim. She argues Gary and Kristin "neglect[ed] to raise their interpretation of the Trust language as soon as they received a copy of the Trust from Marjory." Rspndnt's Brief, p. 40.

However, Gary and Kristin filed their counterclaim on June 25, 2015, within the three year statute of limitations for breach of trust. CP 551. RCW 11.96A.070.

The three year statute of limitations under Subsection (1)(a) of RCW 11.96A.070 was not tolled because Marjory never sent a report to Gary or Kristin. She did not send a copy of the Living Trust to Gary or Kristin until after July 1, 2012. CP 509. She did not provide Gary or Kristin with a copy of Peter's Will or file Peter's Will with any court until after she filed the petition in this case on June 3, 2015. CP 1556-1561.

The tolling provisions of Subsection (1)(c)(i) of RCW 11.96A.070 do not apply because Marjory is not deceased. CP 509.

The tolling provisions of Subsection (1)(c)(iii) of RCW 11.96A.070 do not apply because the trust assets have not been distributed, so the Living Trust has not been terminated. Gillespie v. Seattle-First Nat'l Bank, 70 Wn. App. 150, 165, 855 P.2d 680, 688 (1993).

Even if the statute of limitations started to run on the date of Peter's death on June 4, 2012, which Gary and Kristin contend it did not, Marjory filed her petition in this case on June 3, 2015, within three years of Peter's death. The filing of Marjory's petition tolled the statute of limitations on Gary and Kristin's counterclaim. J. R. Simplot Co. v. Vogt, 93 Wn.2d 122, 126, 605 P.2d 1267, 1269 (1980).

4. Appellants assigned error to the dismissal of their counterclaims and included argument in their opening brief showing the assignment of error is well taken.

Appellants' opening brief contains argument in support of their assignment of error for the dismissal of their counterclaims for breach of fiduciary duty, breach of contract, fraud and specific performance. Aplnts' Brief, p. 5; CP 502. Appellants argued in support of their claims, as follows:

> Since Peter's death on June 4, 2012, Marjory has wrongfully and in breach of her fiduciary duties, been paying herself a life estate in the entire remainder of Peter's estate, as purported of trustee of "Trust A," knowing all the while from the unambiguous terms of the Will and [T]rust, that Peter did not intend to fund "Trust A" upon his death or give Marjory a life estate. CP 1562-1585.

Appellants' Brief, p. 23.

Gary and Kristin's counterclaims depend on how the Court construes the Living Trust. If Gary and Kristin's interpretation of the Living Trust is correct, then Marjory breached her fiduciary duty and committed constructive fraud for her own benefit and Gary and Kristin are entitled to specific performance to require Marjory to distribute the remainder of Peter's estate to them. Gary and Kristin argued in their opening brief that if the Court determines Marjory breached her fiduciary

duty to distribute the remainder of Peter's estate to them, then their counterclaims should be reinstated. Aplnts' Brief, p. 23.

Appellants did not cite authority in their opening brief in support of their fraud claim. However, a court can consider an assignment of error if it is apparent without further research that the assignment of error presented is well taken. De Heer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962).

The court in Green v. McAllister, 103 Wn. App. 452, 14 P.3d 795, 804 (2000) stated that it amounts to constructive fraud for a trustee to commit a breach of trust for his own benefit, which is what Marjory did:

> Constructive Fraud: Conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud is constructive fraud. Dexter Horton Bldg. Co. v. King County, 10 Wn.2d 186, 191, 116 P.2d 507 (1941). Breach of a legal or equitable duty, irrespective of moral guilt, is "fraudulent because of its tendency to deceive others or violate confidence." Black's Law Dictionary 314 (6th Ed. 1990). This court has defined constructive fraud as failure to perform an obligation, not by an honest mistake, but by some "interested or sinister motive."

Green v. McAllister, 103 Wn. App. at 467-68.

Gary and Kristin's amended counterclaim and their response to Marjory's motion for summary judgment are part of the record on appeal. These pleadings set forth additional facts and argument in support of Gary and Kristin's counterclaims for fraud and breach of fiduciary duty. CP 948-962, 813-947, 1437-1474.

If the Court concludes Appellants have failed to adequately brief the assignment of error regarding dismissal of Appellants' counterclaims, Appellants respectfully request the Court allow them to submit a brief in further support, pursuant to RAP 12.1.

5. The award of attorney fees to Marjory was an abuse of discretion because it was based on the untenable grounds that Marjory's interpretation was correct.

Appellants agree with Marjory when she argues in Respondent's brief that the award of fees and costs to her by the Trial Court should be affirmed "unless the grant of summary judgment is reversed on appeal." Rspndnt's Brief, p. 45.

A trial court abuses its discretion when its exercise of discretion is based upon untenable grounds. Baird v. Larson, 59 Wn. App. 715, 721, 801 P.2d 247, 250 (1990). This is true if the trial court bases its award of attorney fees on untenable grounds. Green v. McAllister, 103 Wn. App. 452, 469, 14 P.3d 795, 804 (2000).

The Trial Court awarded attorney fees to Marjory because she was the prevailing party. CP 89. She prevailed because the Trial Court agreed with her that Peter intended to leave Marjory a life estate and it adopted her interpretation of the Living Trust. However, that determination is based on untenable grounds. The award of attorney fees to Marjory is an

abuse of discretion because it is based on the same untenable grounds that the Trial Court was correct when it ruled that Marjory prevailed.

Gary and Kristin agree with Marjory. If the grant of summary judgment in favor of Marjory is reversed, the award of attorney fees to her should be reversed as well. Rspndnt's Brief, p. 45.

6. Conclusion

Peter intended Gary and Kristin to receive the remainder of his trust estate upon his death. The provisions of the Living Trust as a whole, including Schedule E and Paragraph 6, unambiguously express that intent.

If Peter intended that Marjory to receive a life estate in the remainder of his trust estate and the remainder distributed to Gary and Kristin upon Marjory's death, as Marjory contends, Peter could have done so simply and easily by not making any bequest to Gary and Kristin in Schedule E. In that event, the undistributed remainder of Peter's estate would have automatically been transferred to Trust A upon Peter's death, pursuant to Paragraph 6, Remainder of Trust Estate and Paragraph 7, Contents of Trust A, where it would have served as a life estate for Marjory and, upon her death, the remainder of Trust A would have been distributed to Gary and Kristin as final beneficiaries, pursuant to Paragraph 8.

However, Schedule E is not silent. It makes specific bequest of the remainder to Gary and Kristin.

Contrary to Marjory's argument, Peter did not intend "remainder" in Schedule E to "reiterate" that he intended that Gary and Kristin would only receive the remainder of a Trust A after a live estate for Marjory. The words Peter used in Schedule E simply do not support such an interpretation.

RCW 11.98.11 provides that "[a] trust is created only if: ... the trustor indicates an intention to create the trust."

Peter knew how to bequeath his estate in trust. He did it in his Will by leaving his estate to the Living Trust, assuming the Living Trust was valid:

> "I give all of my property and estate to the Trustee under trust dated February 29, 2012, to be distributed in accordance with the terms thereof."

CP 1559.

If Peter had intended by the language in Schedule E of the remainder to Gary and Kristin as a "reiteration" that he intended his trust estate be transferred to Trust A upon his death, he could have done so simply with language such as "remainder to Marjory, in trust as trustee of Trust A, to be distributed in accordance with the terms of this Declaration of Trust."

Marjory, as purported trustee of "Trust A," has breached her fiduciary duty and committed constructive fraud by wrongfully and continuously helping herself to a life estate since Peter's death over four years ago.

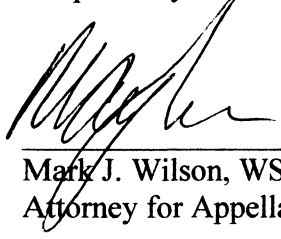
Marjory concealed her breach of trust and fraud by not informing Gary or Kristin of Peter's Will or filing it with a proper court until after she filed the petition in this case. CP 1500, 1418. Gary and Kristin believe Marjory concealed the Will because it clearly shows Peter's intent to leave them the remainder of his estate upon his death. Schedule E makes the same dispositive provisions as the Will does. Marjory has failed and refused to follow both of them.

Appellants respectfully request the decision of the Trial Court dismissing Appellants' counterclaims and denying Appellants' motion for summary judgment be reversed. Appellants also request the Trial Court's award of attorney fees to Marjory be reversed.

Appellantsr request an award of attorney fees and costs on appeal.

Dated: July 11, 2016

Respectfully submitted,



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