No. 94128-9

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 74320-1-I

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

GARY PETER WAY and KRISTIN KIRCHNER,

Petitioners,

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)

PETITION FOR REVIEW (CORRECTED)

Mark J. Wilson, WSBA #16675
2331 46th Avenue SW
Seattle, WA 98116
(206) 567-9826
mjwilson@mjwilsonlawyer.com
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. IDENTITY OF PETITIONERS

Petitioners Gary Peter Way and Kristin Kirchner were respondents in the trial court and appellants in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioners seek review of Division One's unpublished opinion, attached as Appendix A. The Court of Appeals denied petitioners' motion for reconsideration and motion to publish. The order on the motion for reconsideration and to motion to publish is attached as Appendix B to this petition.

III. ISSUES PRESENTED FOR REVIEW

1. Was it error for the Court of Appeals to determine that the terms of the trust require all of the trust estate of the first deceased spouse be transferred to Trust A upon his or her death?[1] (Opinion, pp. 5-6 and 8).

2. Was it error for the Court of Appeals to disregard the terms of the trust contained in Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A, which provide that Trust A does not contain any portion of the first deceased spouse's share of the trust estate that is distributed pursuant to Paragraph 6 to specific beneficiaries upon his or her death? (Opinion, pp. 5-6).

3. Did the Court of Appeals incorrectly conclude that the gift of the remainder to Gary and Kristin in Schedule E was not a "specific bequest?" (Opinion, pp. 8-9).

4. Was it error for the Court of Appeals to refuse to consider, as having been abandoned by Gary and Kristin, the argument that Marjory did not intend to fund Trust A if she were the first deceased spouse, despite provisions pertaining to Trust A contained in the terms of the trust? (Opinion, pp. 11-12).

[1] A copy of the trust is attached as Appendix C.

5. Was it error for the Court of Appeals to have refused to consider, as having been abandoned by Gary and Kristin, arguments that under the "last antecedent" and *ejusdem generis* rules of construction, "remainder" in Schedule E refers to Peter's trust estate upon his death? (Opinion, pp. 11-12).

6. Was it error for the Court of Appeals to deem Gary and Kristin's counterclaims for fraud, breach of contract, specific performance and attorney fees as having been abandoned? (Opinion, pp. 11 and 16).

7. Was it error for the Court of Appeals to uphold the Trial Court's award of attorney fees to Marjory on grounds Gary and Kristin made no showing of abuse of discretion by the Trial Court? (Opinion, p. 16).

8. Does the decision by the Court of Appeals raise issues of significant public interest?

IV. STATEMENT OF THE CASE

1. Surrounding circumstances

Peter met Marjory a short time after his wife of 31 years, Carol Way (formerly Kirchner), died in June 2005. CP 1416-1417. Peter was 71 years old at the time and Marjory was 65 years old. They each had children from former marriages. CP 1546. Gary was Peter's son from his first marriage to Kathleen. Peter also had a step-son, Greg Kirchner, who was Carol's son from a former marriage. CP 1507.

Marjory had two daughters, Karen Martin and Tracey Cummings. CP 1584.

Peter and Marjory married on September 24, 2006, after entering into a prenuptial agreement. CP 1547, 895-903, 858-861.

The prenuptial agreement recites that each party "has relatives who are the natural objects of [his]/[her] beneficence" and that each party's separate property is to remain their separate property "to enable each to dispose of his or her assets as he or she wishes at death." CP 897.

Marjory filed a petition for divorce from Peter on August 16, 2011, to which Peter filed a Joinder. CP 949, 817, 821, 1439, 1511. The divorce petition was still pending at the time Peter and Marjory signed the declaration of trust on February 29, 2012 and still pending at the time of Peter's death on June 4, 2012. CP 949, 823.

Peter and Marjory signed a Decree of Dissolution and Findings of Fact and Conclusions of Law on December 9, 2011, which were never filed with the divorce court, but in which they confirmed their prenuptial agreement. CP 867-874, 875-882, 902, 903.

Under Schedule E of the trust, Peter gives Marjory his separate property condominium and Toyota automobile upon his death. After Peter died and before filing the TEDRA Petition in this case, Marjory sold the condominium and received proceeds of $482,419.93. CP 1012.

Attorney William Zingarelli prepared the will and trust using a form he obtained on the Internet as a template.[2] CP 263. He used the form tust10 or 20 times previously. CP 451, 261. Mr. Zingarelli drafted the Schedules himself, but could not recall drafting the Schedules used in the Way Trust. CP 263.

Mark Wilson, legal counsel for Gary and Kristin, was able to go on the Internet, purchase and download the same form from the same website that Mr. Zingarelli used. CP 468-500. The terms of the trust Mr. Wilson purchased are the same as the Way trust, the only difference being the template trust form contains blanks for information the user is to fill, such as the name of the trust, names of the settlors, trustees and beneficiaries and the property, terms and beneficiaries to be listed on Schedules A thru E. CP 475-494.

[2] A copy of Peter's Will is attached as Appendix D.

The trust is essentially a fill-in-the-blanks, do-it-yourself form, intended to be used by lay persons and the general public. CP 470-474.

2. Direction and terms of the trust.

One of the objectives of the trust is to safeguard the settlor's property rights and testamentary powers over their individual shares of the trust estate. That was also one of the objectives of the prenuptial agreement.

The following are some of the pertinent terms and the direction of the Way trust.

According to Paragraph 2, the settlors transfer, set aside and "hold separately any and all of their interest" in the property attached in schedules A, B and C" and "[t]hat property described as separate property shall remain separate property and that property described as shared property shall remain shared property in the same manner as it was shared before being placed in the Trust."

Paragraph 3 protects the interests of each settlor in their shares of the estate property during both their livess:

> **3. Reserved Powers of the Settlors**. At all times while both Settlors are alive, Settlors shall retain the following powers:
>
> . . .
>
> **D. Trust Estate**. Both Settlors reserve the shared right to all income, profits and control of the Trust Estate property described in Schedule A.
>
> . . .
>
> (i) At all times during her lifetime MARJORY E. WAY reserves the right to all income, profits and control of the Trust Estate property described as her separate property in Schedule B.
>
> (ii) At all times during his lifetime PETER J. WAY reserves the right to all income, profits and control of the Trust Estate property described as his separate property in Schedule C.

Paragraph 6 delineates each settlor's testamentary rights over their share of the trust property and Paragraph 6, Remainder of Trust Estate, describes and limits the property to be transferred to Trust A, as follows:

> **6. Trust Beneficiaries.**
>
> **Wife's Beneficiaries.** Upon the death of MARJORY E. WAY, her portion of the Trust Estate, to include her share of the property listed in Schedule A, as well as any separate property listed in Schedule B shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule D, attached.
>
> **Husband's Beneficiaries.** Upon the death of PETER J. WAY, his portion of the Trust Estate, to include his share of the property listed in Schedule A, as well as any separate property listed in Schedule C, shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule E, attached.
>
> **Remainder of Trust Estate.** Upon the death of one spouse, any remaining property of the deceased spouse, including one half of the shared property in Schedule A and any separate property in the appropriate Schedule B or C, in the Trust Estate, which was not distributed to the aforementioned Beneficiaries, including remaining property which was not distributed as above due to the prior death of the Beneficiary, shall be transferred and administered as part of Trust A, as herein provided.

(Emphasis added).

The words "upon the death" and "shall be distributed" indicate the distributions are to be made to specific beneficiaries upon the death of the settlor and are mandatory and nondiscretionary upon the trustee.

Paragraph 6, above, encompasses the settlor's entire trust estate and indicates he or she has absolute testamentary power over it. Use of the word "any" indicates there is no limit on the portion of his or her share of the estate each settlor may bequeath to specific beneficiaries upon his or her death, pursuant to the applicable Schedules D or E. Either settlor may bequeath his or her entire share to specific beneficiaries if they wish, which is exactly what Peter and Marjory

each chose to do, as indicated in their respective Schedules D (Marjory) and E (Peter), as follows:

SCHEDULE D
[Marjory]

. . .

Pursuant to Paragraph 6 of the Declaration of Trust, dated February 29, 2012, the Trust Estate property of MARJORY E. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

Karin Martin Ferndale, WA	Daughter	50% per stirpes
Tracey Cummings Carnation, WA	Daughter	50%; if she predeceases, then to Karin Martin, per stirpes.

(Emphasis added).

SCHEDULE E
[Peter]

. . .

Pursuant to Paragraph 6 of the Declaration of Trust, dated February 29, 2012, the Trust Estate property of PETER J. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

SPECIFIC BEQUESTS:

In the event Marjory Way survives Peter Way then she shall inherit the real property condominium, Parcel number. 00699800111300 and the vehicle, VIN STEEW41A092030311. 2009 Toyota Highlander

Gary Peter Way	son	50% of remainder; if he predeceases, then 50% to his wife, Elena Way, if they were were still married at the time of his death
Kristin Kirchner	daughter-in-law	50% of remainder. If she predeceases, then 50% to her then living children in equal shares.

(Emphasis added).

Pursuant to Paragraph 6, Remainder of Trust Estate, above, upon the death of one spouse, "any remaining property of the deceased spouse, which was not distributed" to the beneficiaries designated by the deceased spouse in the preceding Paragraph 6, Wife's Beneficiaries or Husband's Beneficiaries, shall be transferred and administered as part of Trust A, as herein provided." (Emphasis added). According to Marjory and Peter's respective Schedules D and E, they each bequeathed their entire shares to their own children from their prior marriages.

Paragraph 7 describes the creation and funding of Trust A upon the death of the first deceased spouse and provides that the contents of Trust A does not include any portion of the Trust Estate given to a specific Beneficiary under the terms of Paragraph 6, set forth above, which is consistent Paragraph 6, Remainder of Trust Estate, which places similar limits on the property to be transferred to Trust A. Paragraph 7 provides in pertinent part, as follows:

> 7. **Creation of Trust A and Trust B.** Upon the death of the first spouse, the surviving spouse, as Trustee, shall divide the entirety of the Trust Estate of [the trust] into two separate trusts, Trust A and Trust B, and shall continue to serve as Trustee for both Trusts...
>
> . . .
>
> ***Contents of Trust A.*** All of the property of [the trust] owned by the deceased spouse, to include one half of the value of shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, shall be transferred to Trust A. This includes any earned and accumulated income or appreciation in value attributable to his/her ownership interest in the aforementioned property, but does ***not*** include any portion of the Trust Estate given to a specific Beneficiary under the terms of Paragraph 6...
>
> . . .
>
> ***(ii) Life Beneficiary of Trust A.*** Upon the death of the deceased spouse and the creation of Trust A, the surviving spouse shall become the Life Beneficiary of Trust A....

(Emphasis added) (The underlined portion of Contents of Trust A, above, is omitted from the Opinion, p. 6).

According to the terms of Paragraph 6, Remainder of Trust A, Schedules D and E and the second sentence of Contents of Trust A in Paragraph 7, whichever settlor was the first deceased spouse, neither Marjory or Peter intended to leave any remainder of their share of the trust estate to be transferred to Trust A, since they each bequeathed their entire trust estates to their respective children as specific beneficiaries, to be distributed to them upon their death.

Paragraph 8, Administration of Trust A, is only created, funded and operative if there is any remaining portion of the first deceased spouse's trust estate to administer after the mandatory, nondiscretionary distributions have been made to specific beneficiaries pursuant to Paragraph 6 and the applicable Schedule D or E.

If Marjory, as the surviving spouse and trustee of the trust, had distributed Peter's trust estate upon his death, as she was required to do, according to Paragraph 6 and Schedule E, there would not have been any portion of Peter's trust estate remaining to transfer to Trust A.

Marjory's daughters are named as specific beneficiaries in her Schedule D and final beneficiaries under Paragraph 8, but Marjory bequeath her entire trust estate to them under Schedule D to receive her entire trust upon her death, so Paragraph 8 will not be operative. Upon Marjory's death, they will receive Marjory's bequests of her entire estate as Specific Beneficiaries under Schedule D and will not receive anything as Final Beneficiaries of the remainder of Trust A under Paragraph 8 because there will not be anything left after they receive their bequests under Schedule D.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals did not give due regard to the direction of the trust and the true intent and meaning of Peter.

The Court of Appeals interpreted the trust as requiring that all of Peter's share of the trust estate was to be transferred to Trust A upon his death.

This interpretation is incorrect because the Court of Appeals disregards Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A, which provides in clear, unambiguous terms, that any portion of the deceased spouse's estate distributed to specific beneficiaries pursuant to Paragraph 6 are not to be included in Trust A. (See, above at pp. 5 and 7)

The decisions of this Court and those of the Court of Appeals of this state have consistently held that a court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent. (Opinion, p. 3, citing In re Estate of Bernard, 182 Wn. App. 692, 697 n.1, 332 P.3d 480, 483 (2014); and see, Carney v. Johnson, 70 Wn.2d 193, 197, 422 P.2d 486 (1967); In re Estate of Douglas, 65 Wn.2d 495, 499, 398 P.2d 7 (1965); and In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319, 1323 (1972). That intent is determined from the instrument as a whole, and its specific provisions must be construed in light of the entire document. (Opinion, p. 3; and see, In re Estate of Magee, 75 Wn.2d 826, 829, 454 P.2d 402 (1969); In re Estate of Shaw, 69 Wn.2d 238, 241, 417 P.2d 942 (1966); In re Estate of Johnson, 46 Wn.2d 308, 312, 280 P.2d 1034 (1955); In re Estate of Riemcke, 80 Wn.2d at 728.

RCW 11.12.230, also requires courts to have due regard to the direction of the will and true intent and meaning of the testator in all matters brought before them.

However, the Court of Appeals did not have due regard to the provisions in Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A. These provisions are critically important to a correct interpretation of the trust, but they are not considered and are inexplicably omitted from the passages from the trust quoted in the opinion.

Disregard by the Court of Appeals of the omitted provisions in Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A is only explanation

for the erroneous conclusion that ***all*** of Peter's trust estate was to be transferred to Trust A upon Peter's death: :

The opinion states that adopting Gary and Kristin's interpretation of Schedule E would render Paragraphs 7 and 8 meaningless. (Opinion, p. 9) However, the opposite is true. By adopting Marjory's interpretation, as the Court of Appeals has done, renders the bequests Marjory and Peter make in Schedules D and E meaningless and contrary to the intent of both settlors at the time they signed the trust.

The opinion deprives Peter of his right to dispose of his property by will, which is a valuable right this Court has long recognized and is a right protected by statute. In re Estate of Price, 75 Wn.2d 884, 886, 454 P.2d 411, 412 (1969); citing In re Meagher's Estate, 60 Wn.2d 691, 375 P.2d 148 (1962); and In re Gordon's Estate, 52 Wn.2d 470, 326 P.2d 340 (1958).

The Court's opinion conflicts with this Court's precedent by disregarding the trust as a whole and not giving effect to all its provisions. For these reasons the Court should review the opinion.

2. The Court of Appeals decided in error to refuse to consider Gary and Kristin's argument that Marjory did not intend to fund Trust A if she were the first deceased spouse.

The Court of Appeals refused to consider Gary and Kristin's argument that Marjory, like Peter, did not intend to fund Trust A or leave a life estate for the other, despite the existence of provisions in the trust pertaining to Trust A. (Opinion, pp. 11-12). The grounds the opinion gives for this refusal is its determination that Gary and Kristin abandoned them by not raising them in their Opening Brief.

Gary and Kristin did raise this argument in their Opening Brief. (Appellants' Opening Brf., p. 22). Marjory argued in her Respondent's Brief that such an argument was absurd, given

the extensive provisions pertaining to Trust A. (Respondent's Brf., p. 9). Gary and Kristin replied in their Reply Brief that their interpretation of Marjory's Schedule D was not absurd, given the terms of the trust as a whole and the respective Schedules D and E and given the surrounding circumstances at the time Peter and Marjory signed the trust. (Appellants' Reply Brief, pp. 10-13). Clearly, Gary and Kristin did not abandon this argument.

Marjory clearly intends in her Schedule D to leave her entire trust estate to her daughters, Karin and Tracey upon her death. There is no doubt from the terms , even if she were the first deceased spouse. There is also no doubt, given the terms of Schedule D that she did not intend to transfer any portion to Trust A or leave a life estate for Peter if she became the first deceased spouse, despite the provisions for the creation of Trust A.

This Court should accept review so that it can give due regard to the direction of Peter's trust, which is their right, pursuant to RCW 11.12.230.

3. The Court of Appeals misinterpreted the meaning and intent of "remainder" to Gary and Kristin in Schedule E.

The Court of Appeals erroneously concluded that the gift of the "remainder" to Gary and Kristin in Schedule E refers to the remainder of Trust A, following a life estate in Marjory. (Opinion, pp. 5-8). However, this conclusion was based on the Court's disregard of the terms of Paragraphs 6 and 7, which define and limit the contents of Trust A, as discussed above.

Based on the Court's erroneous conclusion that the trust required all of Peter's share of the trust estate be transferred to Trust A upon Peter's death, to serve as a life estate for Marjory, the Court then concluded, erroneously, that "remainder" in Trust A must mean the remainder of Trust A upon Marjory's death.

The Court relied on the Black's Law Dictionary definition of "remainder" in further support of its conclusion that "remainder" in Schedule E means the remainder of Trust A following Marjory's life estate:

> We turn, then, to the word "remainder," a primary focal point of the parties' arguments. In determining the meaning of the word, we look to Black's Law Dictionary. It defines remainder as:
>
> > "A ***future*** interest arising in a third person — that is, someone other than the estate's creator, its initial holder, or the heirs of either — who is intended to take ***after*** the natural termination of the preceding estate."
>
> The most natural reading of this word, given the context, is that Peter's intent was to provide to Gary and Kristin 50 percent of his property in the ***future,*** after the expiration of Marjory's life estate ("the preceding estate"). This reading is most consistent with the fact that the other provisions of the trust that we discussed previously expressly provide for such a life estate for Marjory. That life estate in Trust A is funded by all of Peter's property at the time of his death.

(Opinion, pp. 7-9) (emphasis in the original).

The Court of Appeals reads Black's definition too narrowly. Black's definition of "remainder" actually supports Gary and Kristin's interpretation of "remainder" as used in Schedule E to mean the remainder of Peter's estate upon Peter's death. (Black's Law Dictionary 1482 (10th ed. 2014)). Peter is the "estate creator," since he created the trust estate, which gave rise to a "future interest" in Gary and Kristin. The "natural termination" of the "preceding estate" was Peter's death.

The Court of Appeals rejects that Gary and Kristin's interpretation of "remainder" because the Court determined that the remainder of Peter's estate upon Peter's death is not a "future interest." (Opinion, pp. 7-8 and 10-11).

However, according to Black's Law Dictionary, Gary and Kristin have a "future interest" in the remainder of Peter's estate upon Peter's death. "Future interest" is defined in Black's as "a

property interest in which the privilege of possession or of other enjoyment is future and not present." (Black's Law Dictionary 934 (10th ed. 2014)). Prior to Peter's death, Gary and Kristin's possession and enjoyment of the remainder of Peter's estate was in the future, assuming Peter did not change the gift to them in Schedule E during his lifetime. Therefore, prior to Peter's death, Gary and Kristin had an "estate in expectancy," which Black's defines as a"future interest." (Black's Law Dictionary 667, 934 (10th ed. 2014)).

Therefore, Gary and Kristin's interpretation of "remainder," as used in Schedule E, as meaning the remainder of Peter's trust estate upon Peter's death, is correct and consistent with the Black's Law Dictionary definition.

To interpret "remainder" in the context of Schedule E to mean the remainder of a life estate warps its meaning, contrary to the proper interpretation of trusts by the courts, as expressed in Anderson.

This Court has often referred to the following principles in construing a will:

> The court, in construing a will, is faced with the situation as it existed when the will was drawn, and must consider all the surrounding circumstances, the objects sought to be obtained, and endeavor to determine what was in the testator's mind when he made the bequests, and the court must not make a new will for him, or warp his language in order to obtain a result which the court might feel to be just. In re Estate of Price, 75 Wn.2d 884, 454 P.2d 411 (1969). Words used in a will are understood in their ordinary sense if there is nothing to indicate a contrary intent. In re Levas' Estate, 33 Wn.2d 530, 206 P.2d 482 (1949).

Anderson v. Anderson, 80 Wn.2d 496, 499-500, 495 P.2d 1037, 1039 (1972).

Marjory's Schedule D does not use the word "remainder."

Comparing Peter's Schedule E to Marjory's Schedule D, it is obvious why Peter used the word remainder in his and Marjory did not in hers. Peter bequeathed his condominium and automobile to her, which left a remainder of his trust estate, all of which he wanted to bequeath to his children, so he called the remainder by its name. Marjory bequeathed her entire trust

estate to her daughters, which left no remainder, so she did not use the word remainder in her Schedule D.

4. The remainder to Gary and Kristin in Schedule E are specific bequests to be distributed to them upon Peter's death.

The Court of Appeals incorrectly concluded that the gift of the remainder to Gary and Kristin in Schedule E was not a "specific bequest." (Opinion, pp. 8-9). The reason the Court applied is that a bequest is a gift of property by a person upon death. Id. Then, based on the Court's erroneous determination that all of Peter's property must be transferred to Trust A, it concluded, erroneously, that the gift of the remainder in Schedule E could not mean a bequest to Gary and Kristin because everything had to be transferred into Trust A and they would receive the remainder of Trust A after the termination of Marjory's life estate in Trust A. One erroneous conclusion led to another.

If were not for the fact that the Court of Appeals had disregarded the terms of Remainder of Trust A, and the second sentence of Contents of Trust A it would probably have interpreted the gift of the remainder in Schedule E as a specific bequest:

First, it is listed in Schedule E, which are intended to be distributed upon Peter's death, pursuant to Paragraph 6.

Second, it is listed under the heading "Specific Bequests" as is the bequest of the condominium and automobile to Marjory.

Third, it refers to Peter's share of the trust estate, which is listed in Schedules A and C with specificity.

5. Under the "last antecedent" and *ejusdem generis* rules of construction, "remainder" in Schedule E refers to Peter's trust estate upon his death, which the Court of Appeals refused to consider in error.

It was error for the Court of Appeals to refuse to consider as being abandoned by Gary and Kristin their arguments that under the "last antecedent" and *ejusdem generis* rules of construction, "remainder" in Schedule E refers to Peter's trust estate upon his death , not the remainder of Trust A upon Marjory's death. (Opinion, pp. 11-12).

However, Gary and Kristin made these arguments in their Reply Brief (Appellants' Reply Brf., pp. 7-8) in reply to the argument in Respondent's Brief that "remainder" in Schedule E refers to the remainder of Trust A following the death of Marjory. (Respondent's Brf., p. 12). Therefore, these arguments were not abandoned.

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."[3] 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.

Therefore, "remainder" in Schedule E does not refer to the remainder of Trust A after the termination of Marjory's life estate.

Ejusdem generis is a 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).

[3] "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).

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, leads one to the conclusion that 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 condominium and car to Marjory, "remainder" in Schedule E also refers to Peter's trust estate upon his death.

6. It was error for the Court of Appeals to rule that Gary and Kristin abandoned their counterclaims for breach of fiduciary duty, fraud, breach of contract and specific performance.

The Court of Appeals ruled that Gary and Kristin abandoned their counterclaims for breach of contract, fraud and specific performance on grounds they did not argue these claims in their Opening brief. (Opinion, p. 16). This is not correct.

First of all, Gary and Kristin assigned error in their opening brief to the Trial Court's dismissal of their counterclaims. (Opinion, p. 16; Appellants' Brief, p. 3).

Secondly, they made factual arguments in Appellants' Opening Brief that support their claims for breach of fiduciary duty, breach of contract and constructive fraud, 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).

Marjory argued in Respondent's Brief that Gary and Kristin had waived the issue as to dismissal of their counterclaims for breach of contract, fraud and specific performance for not arguing and citing to authority in support of them in their Opening Brief. (Respondent's Brief, p. 42). Gary and Kristin replied to this argument in their Reply Brief, as follows:

> 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 then requested in their Reply Brief that if the Court of Appeals concluded they had failed to adequately brief the counterclaims that the Court grant them permission to submit a brief in further support of the assignment of error regarding dismissal of their counterclaims, pursuant to RAP 12.1. (Appellants' Reply Brf., 20). However, the Court subsequently issued its opinion in which it deemed the counterclaims abandoned without ruling otherwise on Appellants' request. (Opinion, p. 16).

This Court may refuse to review a claim of error that was not in the Court of Appeals. Fisher v. Allstate Ins. Co., 136 Wash. 2d 240, 961 P.2d 350 (1998); State v. Clark, 124 Wash. 2d 90, 875 P.2d 613 (1994). The general principle does not, however, prohibit the Supreme Court from considering an issue raised for the first time in the petition for review or answer. This Court retains the discretion to consider such an issue when necessary to decide the case on the merits. State v. L.J.M., 129 Wash. 2d 386, 918 P.2d 898 (1996).

Gary and Kristin request that this Court grant review and consider the counterclaims and whether they should be reinstated.

7. It was error for the Court of Appeals to uphold the Trial Court's award of attorney fees to Marjory on grounds Gary and Kristin made no showing of abuse of discretion by the Trial Court.

The Trial Court's award of attorney fees to Marjory should be reversed if Gary and Kristin prevail on appeal and it is decided that the Trial Court's interpretation of the trust is wrong.

On December 10, 2015, when the Trial Court ruled on Marjory's motion for attorney fees, Judge Wynne indicated that his award of attorneys' fees should be reversed by the Court of Appeals if it is determined that his interpretation of the trust is wrong:

> If I'm wrong in terms of my interpretation of the trust, then the award of attorney's fees is also erroneous and would be reversed by the court of appeals. So I expect the whole thing to be taken up by the court of appeals as one issue. There appears to be no issue as to the amount of the attorney's fees. The attorney's fees appear to the Court to be reasonable given the extent and nature of the litigation.

(Verbatim Report of Proceedings, 12/10/2010, p. 10) (Emphasis added).

Marjory appears to agree with Judge Wynne. Respondent's Brief indicates that the award of fees and costs should be affirmed "unless the grant of summary judgment is reversed on appeal." (Respondent'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).

Appellants should not be held to the stricter burden proving abuse of discretion for reversal of Judge Wynne's award of attorney fees. Prevailing prevailing on the issue of interpretation of the trust, should be deemed sufficient, since that was the indication from Judge Wynne, who made the award in the first place.

8. The decision in this case raises issues of significant public interest.

This Court should accept review because the decision in this case raises issues of significant public interest.

The same form of trust has been available to purchase and download off the Internet from at least from February 29, 2012, when the Way trust was signed, to October 9, 2015 when Mr. Wilson downloaded it from the Internet. CP 468. Nothing has been changed during that time.

Mr. Zingarelli estimates he has used the same form of trust 10 or 20 times. CP 261, 451.

The interpretation of this trust by this Court will impact many lay and professional members of the public whose lives may be profoundly affected it, such as lawyers, settlors, trustees, beneficiaries and family members. Certainly the lives of the parties in this case have been affected.

CONCLUSION

This Court should grant review, reverse the Court of Appeals, enter a ruling that Gary and Kristin are entitled to immediate distribution to them of Peter's estate and order that Marjory

make that distribution immediately and remand for resolution of Gary and Kristin's counterclaims for breach of fiduciary duty, breach of contract, fraud and specific performance.

Dated: February 11, 2017

Respectfully submitted,

Mark J. Wilson, WSBA No. 16675
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Mark J. Wilson, certify that on _____, I caused a copy of this Petition for Review (Corrected); and an unsigned copy of this Certificate of Service to be served by e-mail pursuant to mutual agreement of counsel for the parties on the following persons at the following email addresses:

Lorna S. Corrigan
Lorna@NewtonKight.com
Newton Kight L.L.P.
P.O. Box 79
Everett, WA 98206

Beth A. McDaniel
beth@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Kimberly Staraitis
kstaraitis@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Dated: _____,at Seattle, Washington.

_____
Mark J. Wilson, WSBA No. 16675
Attorney for Petitioner

APPENDIX A

TO CORRECTED PETITION FOR REVIEW

Court of Appeals Opinion with cover letter

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

November 28, 2016

Lorna Sue Corrigan
Attorney at Law
PO Box 79
Everett, WA 98206-0079
lorna@newtonkight.com

Mark Jeffrey Wilson
Attorney at Law
2331 46th Ave SW
Seattle, WA 98116-2416
mjwilson@mjwilsonlawyer.com

Beth A. McDaniel
Law Offices of Beth A McDaniel, PLLC
272 Hardie Ave SW
Renton, WA 98057-5925
beth@bethmcdaniel.com

CASE #: 74320-1-I
Gary P. Way & Kristin Kirchner, Appellants v. Marjory E. Way, Respondent

Snohomish County, Cause No. 15-2-04284-8

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

> "We affirm the Order Granting Petitioner's Cross-Cross Motion for Summary Judgement. We also award Marjory reasonable attorneys fees, subject to her compliance with RAP 18.1 (d)."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of $200 is required.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Honorable Thomas J. Wynne

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In Re: THE PETER J. AND MARJORY E. WAY LIVING TRUST. GARY PETER WAY and KRISTIN KIRCHNER, Appellants, v. MARJORY E. WAY, trustee of the Peter J. and Marjory E. Way living trust, Respondent.	No. 74320-1-I DIVISION ONE UNPUBLISHED FILED: November 28, 2016

Cox, J. — Gary Way and Kristin Kirchner appeal the trial court's order granting summary judgment to Marjory Way in this Trust and Estate Dispute Resolution Act (TEDRA) proceeding. Gary and Kristin fail to show there are any genuine issues of material fact over interpretation of the Peter J. and Marjory E. Way Living Trust.[1] Marjory is entitled to judgment as a matter of law. We affirm.

[1] We adopt the naming conventions of the parties.

Peter and Marjory Way married in September 2006. Peter made his last will and testament on February 29, 2012. On that same date, Peter and Marjory established the trust that is the subject of this litigation. Peter passed away in June 2012.

In June 2015, Marjory commenced this proceeding to obtain a determination of rights under the terms of the trust. Gary and Kristin opposed her petition and counterclaimed. Gary is Peter's son from Peter's prior marriage to Carol Way. Kristin married Greg, Carol's son from a prior marriage. Greg predeceased Kristin.

Gary and Kristin moved for partial summary judgment. Marjory made a cross motion for summary judgment. The trial court granted Marjory's cross motion and dismissed all counterclaims. The court also awarded her fees.

Gary and Kristin appeal.

SETTLOR'S INTENT

Gary and Kristin argue that Peter did not intend for the trust to create a life estate in his property for Marjory. They claim she was only to inherit the condominium and a 2009 Toyota that she and Peter shared. They contend they were each to receive 50 percent of all of Peter's other property. We disagree.

Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] "A genuine issue of material fact exists if 'reasonable minds could differ on the

[2] Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014); CR 56(c).

facts controlling the outcome of the litigation.'"[3] We consider "all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party."[4] We review de novo a trial court's grant of summary judgment.[5]

A court's paramount duty in construing a trust is to give effect to the settlor's intent.[6] That intent is determined from the instrument as a whole, and its specific provisions must be construed in light of the entire document.[7] If the language of the instrument is unambiguous, courts ascertain the settlor's intent from the language of the instrument itself without extrinsic evidence.[8] A trust's terms are not ambiguous unless the language is susceptible to more than one reasonable interpretation.[9] If extrinsic evidence is considered to resolve an ambiguity regarding the settlor's intent, it may not be considered to import an intention into the instrument that is not expressed therein.[10]

---

[3] Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)), review denied, 181 Wn.2d 1023 (2014).

[4] Scrivener, 181 Wn.2d at 444.

[5] Id.

[6] In re Estate of Bernard, 182 Wn. App. 692, 697, 332 P.3d 480, review denied, 181 Wn.2d 1027 (2014); see also RCW 11.12.230.

[7] In re Estate of Bernard, 182 Wn. App. at 704; see also Templeton v. Peoples Nat'l Bank of Wash., 106 Wn.2d 304, 309, 722 P.2d 63 (1986).

[8] In re Guardianship of Jensen, 187 Wn. App. 325, 331, 350 P.3d 654 (2015).

[9] In re Wash. Builders Benefit Trust, 173 Wn. App. 34, 75, 293 P.3d 1206 (2013).

[10] See In re Estate of Curry, 98 Wn. App. 107, 113, 988 P.2d 505 (1999)

Our courts attempt to give effect to every part of an instrument and must make a reasonable effort to reconcile seemingly inconsistent provisions.[11] The principles of construction applicable to wills also apply to trusts.[12]

The interpretation of a trust provision is a question of law that we review de novo.[13]

We start with consideration of paragraph 2 of the trust. That paragraph creates the trust estate. The estate is comprised of all property of Peter and Marjory, property which is described in three schedules: Schedules A, B, and C.

Schedule A describes their community property. Schedule B describes Marjory's separate property. Schedule C describes Peter's separate property.

We next consider paragraph 6 of the trust, Trust Beneficiaries. It provides:

> **Husband's Beneficiaries.** Upon the death of PETER J. WAY, his portion of the Trust Estate, to include his share of the property listed in Schedule A, as well as any separate property listed in Schedule C, shall be distributed in accordance with the terms and to the Beneficiaries named in ***Schedule E***, attached.
> . . . .[14]

SCHEDULE E, to which the above provision refers, provides:

> Pursuant to Paragraph 6 of the Declaration of Trust . . . the Trust Estate property of PETER J. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

---

[11] See In re Estate of Sherry, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010); In re Estate of Wright, 147 Wn. App. 674, 684-85, 196 P.3d 1075 (2008).

[12] First Interstate Bank of Wash. v. Lindberg, 49 Wn. App. 788, 797-98, 746 P.2d 333 (1987).

[13] Wash. Builders Benefit Trust, 173 Wn. App. at 75.

[14] Clerk's Papers at 1573 (emphasis added).

SPECIFIC BEQUESTS:

In the event Marjory Way survives Peter Way then she shall inherit the real property condominium, Parcel . . . and the vehicle..., 2009 Toyota Highlander.

Gary Peter Way	son	50% of ***remainder***, if he pre-deceases, then 50% to his wife . . . if they were still married at the time of his death.
Kristin Kirchner	daughter-in-law	50% of ***remainder***. If she predeceases, then 50% to her then living children in equal shares.[15]

Gary and Kristin contend this provision can only reasonably be interpreted to mean that the "remainder" of Peter's property (less the condominium and Toyota) is theirs "outright, free of trust, as their sole and separate property." To support this argument, they rely on the fact that the Specific Bequests provision in Schedule E "does not indicate" that their gifts of the remainder were in trust or that they were to be transferred into Trust A. We reject this untenable argument.

We consider paragraph 7 of the trust, which makes further provisions regarding the trust estate. It states:

> **Creation of Trust A and Trust B.** Upon the death of the first spouse [Peter], the surviving spouse [Marjory], as Trustee, shall divide the entirety of the Trust Estate . . . into two separate trusts, Trust A and Trust B, and shall continue to serve as Trustee for both Trusts.
>
> . . . .[16]

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[15] Id. at 1585 (emphasis added).

[16] Id. at 1573.

The plain words of this provision direct the trustee to divide the "entirety of the" trust estate into Trust A and Trust B upon Peter's death. This provision makes clear that ***all*** of the trust estate created by paragraph 2 of the trust is to be divided into the two trusts upon Peter's death.

This paragraph 7 further states:

> ***Contents of Trust A.*** All of the property of The Peter J. & Marjory E. Way Living Trust owned by the deceased spouse [Peter], to include one half of the value of shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, shall be transferred to Trust A.
>
> . . . .[17]

The plain words of this provision specify how Trust A is funded. Specifically, one-half of the community property plus all of Peter's separate property fund Trust A. This is his entire ownership interest in the trust estate.

The further provisions of paragraph 7 to consider are the following:

> (ii) ***Life Beneficiary of Trust A.*** Upon the death of the deceased spouse [Peter] and the creation of Trust A, the surviving spouse [Marjory] shall become the ***Life Beneficiary of Trust A.*** The surviving spouse's [Marjory's] life estate interest in Trust A, entitles the surviving spouse [Marjory] receives [sic] all interest or other income from the trust property, to use the property, and to spend the trust property in any amount for his or her health, education, support and maintenance, in his or her accustomed manner of living.
>
> . . . .[18]

There can be no reasonable dispute that these provisions direct that Marjory, the surviving spouse of Peter, is the lifetime beneficiary of Trust A. Likewise, there can be no reasonable dispute that she is to receive all income

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[17] Id.

[18] Id. at 1573-74 (emphasis added).

from the trust property and may spend the trust property for her health, education, support, and maintenance, as she pleases.

Our conclusions are buttressed by further provisions of the trust. For example, Paragraph 8, Administration of Trust A, provides as follows:

> ***Final Beneficiaries***
>
> . . . .
>
> If PETER J. WAY is the first deceased spouse, then the ***Final Beneficiaries*** of Trust A shall be:
> 50% to GARY PETER WAY, per capita
> 50% to KRISTIN KIRCHNER, per stirpes
>
> . . .
>
> ***Death of Life Beneficiary***. Upon the death of the Life Beneficiary, the Trustee shall distribute the property of Trust A to the appropriate Final Beneficiaries provided in this Paragraph 8.[19]

Reading these provisions together, we conclude that Peter intended to draw distinctions between the Life Beneficiary and Final Beneficiaries. Marjory is the former and Gary and Kristin are the latter. The plain words of the trust make clear that Marjory is entitled to the full benefit of the property in Trust A during her lifetime. Only after her passage are Gary and Kristin entitled to whatever may be left over in Trust A, as Final Beneficiaries.

Both parties argue that the trust is unambiguous. But they reach different conclusions about how to read the trust. This dispute is principally based on their conflicting interpretations of the word "remainder" in Schedule E.

We turn, then, to the word "remainder," a primary focal point of the parties' arguments. In determining the meaning of the word, we look to Black's Law Dictionary. It defines remainder as:

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[19] Id. at 1574-75.

> A ***future*** interest arising in a third person — that is, someone other than the estate's creator, its initial holder, or the heirs of either — who is intended to take ***after*** the natural termination of the preceding estate.[20]

The most natural reading of this word, given the context, is that Peter's intent was to provide to Gary and Kristin 50 percent of his property in the ***future***, after the expiration of Marjory's life estate ("the preceding estate"). This reading is most consistent with the fact that the other provisions of the trust that we discussed previously expressly provide for such a life estate for Marjory. That life estate in Trust A is funded by all of Peter's property at the time of his death. To read the word "remainder" otherwise, as Gary and Kristin argue, would write out of the trust the provisions of paragraphs 2, 7, and 8 of the trust. That would be inconsistent with the principle that we should consider all the words of this testamentary document, giving effect to all provisions, if possible.

Our conclusion about the correct reading of the word "remainder" is buttressed by our interpretation of the words "Specific Bequests" in paragraph 6 of the trust. These words address the disposition of the condominium and vehicle that Schedule E identifies as going to Marjory on Peter's death. Turning again to Black's Law Dictionary, the word "bequest" is defined as:

> The money or other property that a person arranges to give to someone or an organization ***upon death***.[21]

Had Peter intended that, on his death, his property would go 50 percent each to Gary and Kristin, he would have used some variation of the word "bequest" to evidence that intent. But he used that word to describe part of the

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[20] BLACK'S LAW DICTIONARY 1482 (10th ed. 2014) (emphasis added).

[21] BLACK'S LAW DICTIONARY 189 (10th ed. 2014) (emphasis added).

property to go to Marjory. That use is consistent with the provisions of paragraphs 7 and 8 that give her a life estate in Trust A.

However, in using the word "remainder," a word with a different meaning, to describe what Gary and Kristin would receive, it appears that Peter intended that they not immediately receive any of his property on his death. Rather, they are to receive whatever of Peter's property remains after Marjory's life estate in Trust A. Only this view of Peter's choice of words is consistent with the provisions of paragraphs 7 and 8 that we discussed earlier in this opinion.

In sum, adopting Gary's and Kristin's interpretation would render paragraphs 7 and 8 of the trust meaningless, violating a basic rule of construction applicable to such testamentary documents. Moreover, there is only one reasonable reading of the trust, making it unambiguous.

Gary and Kristin argue that the will and trust must be considered together and that these documents unambiguously provide that Marjory should only inherit the condominium and a 2009 Toyota. They further argue that Marjory's interpretation of the trust creates an inconsistency between the will and trust. Thus, they argue that the will controls and unambiguously provides that Marjory is only to inherit the condominium and 2009 Toyota. But these arguments rely on an inapplicable provision in Peter's will.

The property distribution paragraph in Peter's will states:

> **Trust.** I give all of my property and estate to the Trustee under [the] trust . . . to be distributed in accordance with the terms thereof. ***In the event the said trust shall have been revoked or declared invalid for any reason***, then I direct my Personal Representative to give all of my property and estate as follows:

> Condominium . . . to my wife, Marjory E. Way, together with the [2009 Toyota], to Marjory E. Way.
>
> The rest, residue and remainder of my estate I give, devise and bequeath 50% to my son, Gary Peter Way . . . and 50% to Kirstin Kirchner . . . .[22]

Gary and Kristin erroneously rely on the property distribution required in the event that the trust is revoked or invalidated to argue that Peter intended to provide Marjory with only the condominium and 2009 Toyota. But that provision is inapplicable here because the trust has not been either revoked or invalidated. Further, the first sentence of this paragraph explicitly states that Peter's property is to be distributed in accordance with the trust terms, which unambiguously provides Gary and Kristin with 50 percent of Peter's property in the future, after the expiration of Marjory's life estate. Thus, Gary's and Kristin's reliance on this paragraph in Peter's will is misplaced.

Gary and Kristin also argue that Peter intended the common meaning of "remainder" in the living trust as defined in the Cambridge Academic Content Dictionary. Under that definition, remainder is "the part that is left after the other parts are gone, used, or taken away."[23] But that definition differs from the Black's Law Dictionary definition stating that a remainder is "[a] ***future*** interest arising in a third person—that is, someone other than the estate's creator, its initial holder,

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[22] Clerk's Papers at 1559 (emphasis added).

[23] CAMBRIDGE ACADEMIC CONTENT DICTIONARY, http://dictionary.cambridge.org/us/dictionary/english/remainder (last visited November 9, 2016).

or the heirs of either—who is intended to take after the natural termination of the preceding estate."[24]

The first definition does not convincingly compare with the second definition. This is particularly true when considering the word in context with the other provisions of the living trust. For the reasons already discussed, we rely on the second definition.

Gary and Kristin also request that we reinstate their breach of fiduciary duty counterclaim against Marjory if we determine that she owed them a fiduciary duty to distribute immediately to them the remainder of Peter's estate. We decline to do so for the reasons stated above.

To further support their interpretation of the living trust, Gary and Kristin make the following arguments in their reply brief that they did not make in their opening brief.

First, Gary and Kristin argue that this court should adopt their interpretation of the living trust because Gary would have inherited Peter's entire estate if Peter died without a will. Second, they argue that Marjory waived her right to inherit from Peter's estate by entering into the prenuptial agreement. Third, they argue that the last antecedent and the ejusdem generis rules of construction support their interpretation of the living trust. Lastly, Gary and Kristin argue that Peter and Marjory did not have to leave any remainder for Trust A, and did not do so, even though the living trust contains provisions for Trust A's creation. To support this argument, they rely on other provisions in the living

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[24] BLACK'S LAW DICTIONARY 1482 (10th ed. 2014) (emphasis added).

trust essentially to argue that the creation of Trust A was optional. We do not consider these arguments as Gary and Kristin failed to comply with RAP 10.3(c).[25]

EXTRINSIC EVIDENCE

Gary and Kristin rely on extrinsic evidence to support their interpretation of the living trust. Because the trust is unambiguous, extrinsic evidence cannot vary its terms. Moreover, certain extrinsic evidence is inadmissible hearsay.

Hearsay

Gary and Kristin argue that the trial court improperly rejected certain notes by a legal assistant as inadmissible hearsay. We hold that the court properly rejected this evidence.

ER 803(a)(3) indicates which evidence is not excluded by the hearsay rule, even though the declarant is available as a witness, such as:

> 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.

Gary and Kristin argue that the notes of a legal assistant to the attorney who drafted Peter's will fall within this hearsay rule exception.[26] They are mistaken.

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[25] See also State v. Hudson, 124 Wn.2d 107, 120, 874 P.2d 160 (1994).

[26] Brief of Appellants at 19-20.

The drafting attorney's legal assistant, Kathleen Matzen, made shorthand notes during her meeting with the drafting attorney, which followed the attorney's meeting with Peter. Matzen testified that she drafted the living trust according to the attorney's instructions. Matzen did not attend the meeting with the Ways and had no personal knowledge of Peter's or Marjory's meeting with the drafting attorney. Matzen also stated that she did not "know personally what [Peter's or Marjory's] intents were."

Gary and Kristin first argue that the notes contain hearsay statements by Peter to "[the drafting attorney] and Matzen" regarding the terms of Peter's will. This assertion is factually incorrect. The record shows that Matzen was never present when Peter made any statements about his will, much less the trust that is before us. Thus, there is no showing in this record that the relevant "declarant," Peter, made any statements in Matzen's notes.

We note that for purposes of the rule, the relevant "declarant" is Peter, not the drafting attorney.[27] Here, Gary and Kristin attempt to use the drafting attorney's statements, not Peter's statements, to fill the gap. This is a misapplication of the rule.

Gary and Kristin also argue that the drafting attorney's statements of his "intent to draft or have Matzen draft at his direction" Peter's will and the living trust also fall within the rule. This is plainly wrong. The drafting attorney's state

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[27] See Hong v. Children's Mem'l Hosp., 993 F.2d 1257, 1265 (7th Cir. 1993) (stating that the state of mind exception to Federal evidence rule against the admission of hearsay does not authorize receipt of a statement by one person as proof of another's state of mind).

of mind is not at issue. Peter's is. In short, this exception to the exclusion of hearsay does not apply.

In any event, the trial court properly excluded Matzen's notes on the basis that they exhibited an attempt to show an intent contrary to the unambiguous provisions of the trust. As previously stated, extrinsic evidence may not be considered to import an intention into the instrument that is not expressed therein.[28]

Other Extrinsic Evidence

Gary and Kristin argue that the "surrounding circumstances" indicate that Peter did not intend to create Trust A upon his death. We disagree.

Gary and Kristin rely on Peter's and Marjory's prenuptial agreement to support this argument. But this document fails to resolve any ambiguity as to Peter's intent in the living trust.

Gary and Kristin specifically argue that the living trust served the same purpose as the prenuptial agreement—to protect "their testamentary wishes and powers." The prenuptial agreement designates Peter's and Marjory's separate property to "enable each to dispose of his or her assets as he or she wishes at death."

But Peter and Marjory executed the living trust six years after executing the prenuptial agreement. Due to this gap in time, the prenuptial agreement fails to show Peter's intent in the living trust. Additionally, as previously discussed, extrinsic evidence may not be considered to import an intention into the

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[28] See Curry, 98 Wn. App. at 113.

instrument that is not expressed.[29] If the prenuptial agreement showed an intention that is not expressed in the living trust, it cannot be considered in resolving any ambiguity as to Peter's intent in the living trust. Accordingly, this argument is unpersuasive.

Gary and Kristin also rely on Peter's and Marjory's unfiled petition for dissolution of marriage, the dissolution decree, and the accompanying findings of fact and conclusions of law, to support their argument. These documents do not support this argument for the same reason.

Gary and Kristin first state that the petition was still pending when Peter and Marjory signed the living trust. But they also state that Peter and Marjory decided to execute the living trust rather than going forward with the dissolution of marriage. Marjory testified that she and Peter decided not to go forward with the dissolution between the time they signed the dissolution documents and the time they signed the living trust. Marjory also testified in her declaration that she and Peter restored their "happy marriage."

In sum, the record shows, and Gary and Kristin do not dispute, that Peter and Marjory did not pursue the dissolution of their marriage. Rather, they executed the living trust months later. Thus, the dissolution documents fail to show Peter's intent in the living trust. Additionally, if the dissolution documents showed an intention that is not expressed in the trust, they cannot be considered in resolving any ambiguity as to Peter's intent in the living trust.

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[29] Id.

COUNTERCLAIMS & ABANDONED CLAIMS

Gary and Kristin assign error to the trial court's order dismissing their counterclaims against Marjory for breach of contract, fraud, and specific performance. They failed to provide argument for these claims in their opening brief. We deem them abandoned.[30]

ATTORNEY FEES

At Trial

Gary and Kristin request that this court reverse the award of attorney fees to Marjory if this court reverses the trial court's decision. Because there is no showing that the trial court abused its discretion in awarding fees, we decline to reverse Marjory's attorney fees award.

On Appeal

Both parties seek attorney fees on appeal under RCW 11.96A.150. We award reasonable attorney fees to Marjory.

RCW 11.96A.150 provides this court with broad discretion to award attorney fees in a trust dispute.[31] In relevant part, the statute provides:

> [A]ny court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party; . . . (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.

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[30] Podbielancik v. LPP Mortg. Ltd., 191 Wn. App. 662, 668, 362 P.3d 1287 (2015).

[31] Wash. Builders Benefit Trust, 173 Wn. App. at 84.

Here, Marjory requests reasonable attorney fees against the principal of the living trust. This litigation benefited the trust because it clarified Peter's intent and the parties' rights. We award Marjory reasonable attorney fees, subject to her compliance with RAP 18.1(d).

We affirm the Order Granting Petitioner's Cross-Motion for Summary Judgment. We also award Marjory reasonable attorney fees, subject to her compliance with RAP 18.1(d).

COX, J.

WE CONCUR:

Mann, J.

Schindler, J.

APPENDIX B

TO CORRECTED PETITION FOR REVIEW

Order Denying Motion for Reconsideration and Motion to Publish

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-

January 11, 2017

Lorna Sue Corrigan
Attorney at Law
PO Box 79
Everett, WA 98206-0079
lorna@newtonkight.com

Mark Jeffrey Wilson
Attorney at Law
2331 46th Ave SW
Seattle, WA 98116-2416
mjwilson@mjwilsonlawyer.com

Beth A. McDaniel
Law Offices of Beth A McDaniel, PLLC
272 Hardie Ave SW
Renton, WA 98057-5925
beth@bethmcdaniel.com

CASE #: 74320-1-I
Gary P. Way & Kristin Kirchner, Appellants v. Marjory E. Way, Respondent

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration and Motion to Publish entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

ssd

Enclosure

c: The Reporter of Decisions.

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

In Re: THE PETER J. AND MARJORY E. WAY LIVING TRUST. GARY PETER WAY and KRISTIN KIRCHNER, Appellants, v. MARJORY E. WAY, trustee of the Peter J. and Marjory E. Way living trust, Respondent.	No. 74320-1-I ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION TO PUBLISH

Appellants, Gary Way and Kristin Kirchner, have moved for reconsideration and publication of the opinion filed in this case on November 28, 2016. The court having considered the motions has determined that the motion for reconsideration and motion to publish should be denied. The court hereby

ORDERS that the motion for reconsideration and motion to publish are denied.

Dated this 11th day of January 2017.

For the Court:

Cox, J.

Judge

APPENDIX C

TO CORRECTED PETITION FOR REVIEW

Declaration of Trust

The Peter J. & Marjory E. Way Living Trust

CP 1570-1585

552581180

COPY

DECLARATION OF TRUST

THE PETER J. & MARJORY E. WAY LIVING TRUST

Date: February 29, 2012

This Declaration of Trust is made and executed this 29th day of February, 2012, by PETER J. WAY and MARJORY E. WAY as the Settlors, and shall establish a revocable living trust in accordance with all of the terms and purposes herein detailed.

1. **Name of Trust.** The trust shall be called and known as The PETER J. & MARJORY E. WAY LIVING TRUST (hereinafter referred to as "the Trust").

2. **Trust Estate.** Settlors warrant and declare that they have transferred, set aside and hold separately any and all of their interest in the property described in the attached Schedules A, B, and C (hereinafter referred to as "the Trust Estate") in The Peter J. & Marjory E. Way Living Trust. Settlors agree to execute any and all additional instruments necessary to vest full title of all the aforementioned property in the Trustees in their capacity as Trustees of the Trust.

   The Trustees shall use and manage the Trust Estate for the benefit of the Trust Beneficiaries, as herein described, and shall administer the Trust Estate in accordance with the terms and purposes herein stated.

   Settlors may, from time to time, add additional and after-acquired property to the Trust Estate by executing such documents as are required to vest title in the Trustees and by amending Schedule A, B or C to reflect the addition of such property, and such property shall be fully incorporated into this Trust.

   While both Settlors are alive, the property contained in the Trust Estate shall retain its original character. That property described as separate property shall remain separate property and that property described as shared property shall remain shared property in the same manner as it was shared before being placed in the Trust.

   While both Settlors are alive, property described in Schedule A retains its character as the shared property of both Settlors. Property described in Schedule B retains its character as the separate property of MARJORY E. WAY. Property described in Schedule C retains its character as the separate property of PETER J. WAY. In the event of revocation of the Trust, property shall be distributed between the Settlors and ownership shall continue in accordance with the above provision as if this Trust had never been created.

3. **Reserved Powers of the Settlors.** ***At all times while <u>both</u> Settlors are alive,*** Settlors shall retain the following powers:

   A. <u>Superior Interest</u>. At all times during their lifetimes, Settlors' interest in the Trust Estate shall remain superior to the interest of any and all beneficiaries.

   B. <u>Amendment</u>. Settlors reserve the right to amend or modify the Trust by adding or removing beneficiaries, adding or removing Trustees or Successor Trustees, or amending any other Trust provision only by a written agreement signed by both parties, but there will be no need to notify any beneficiary.

   C. <u>Revocation</u>. Either Settlor reserves the right to revoke this Trust in its entirety by delivering a written notice of revocation to the other Settlor, without need to notify any beneficiary.

   D. <u>Trust Estate</u>. Both Settlors reserve the shared right to all income, profits and control of the Trust Estate property described in Schedule A.

      (i) At all times during her lifetime MARJORY E. WAY reserves the right to all income, profits and control of the Trust Estate property described as her separate property in Schedule B.

      (ii) At all times during his lifetime PETER J. WAY reserves the right to all income, profits and control of the Trust Estate property described as his separate property in Schedule C.

   E. <u>Homestead</u>. In the event that Settlors' primary residence is transferred to the Trust, Settlors retain all rights and eligibility for state homestead tax exemption that they would be entitled to had the property not been placed in trust. Settlors shall have the right to occupy, rent free, the residence for life.

4. **Appointment of Trustees.** Settlors appoint PETER J. WAY and MARJORY E. WAY as Trustees for The Peter J. & Marjory E. Way Living Trust and that those Trustees shall also serve as Trustee for any additional trusts or Child's Trusts herein created. Either Trustee has the equal right to act for and represent the Trust in any transaction.

   <u>Death or Incapacitation of Trustee</u>. Upon the death or physician certified incapacitation of MARJORY E. WAY, then PETER J. WAY shall serve as sole Trustee of any and all trusts created by this Declaration of Trust. Upon the death or

physician certified incapacitation of PETER J. WAY, then MARJORY E. WAY shall serve as sole Trustee of any and all trusts created by this Declaration of Trust.

Successor Trustees. Upon the death or incapacitation of the surviving spouse/Trustee, or in the event that both spouses become simultaneously incapacitated, as certified by a physician, then TRACEY CUMMINGS shall become Successor Trustee of The Peter J. & Marjory E. Way Living Trust. If this named Successor Trustee in unable or unwilling to serve or predeceases the Initial Trustee, then KARIN MARTIN shall serve as Successor Trustee.

5. **Trustee Rights.** During the administration of the Trust, the Trustee shall have the following rights. For purposes of this Declaration of Trust, the term "Trustee" shall refer to the acting Trustee or Trustees, whether the Initial Trustee or a Successor Trustee.

   A. Trust Purposes. Trustee shall administer and manage the Trust in a good faith manner for the benefit of Settlors and Beneficiaries and in accordance with the terms and purposes described in this Declaration of Trust.

   B. Trustee Resignation. Any acting Trustee may resign at any time by providing written notice to the person specified to serve as next Trustee, as provided in the foregoing or following section.

   C. Appointment of Successor Trustees. In the event all Trustees herein named are unwilling or unable to serve as Trustee, the acting Trustee may appoint an additional Successor Trustee by executing a signed and notarized appointment.

   D. Trustee Compensation. No Trustee shall be entitled to any compensation for serving in the capacity of Trustee, except that Trustee shall be entitled to reasonable compensation, as determined by Trustee, in the event that he/she serves as Trustee of any Child's Trust herein created or in the event that Trustee serves during either or both Settlor's incapacitation.

   E. Trustee Liability. Trustee shall not be liable for any discretionary act associated with the administration and management of the Trust, so long as Trustee is acting in good faith.

   F. Waiver of Bond and Accounting. No bond shall be required of any Trustee, nor shall any Trustee be required to deliver accountings or reports.

6. **Trust Beneficiaries.**

Wife's Beneficiaries. Upon the death of MARJORY E. WAY, her portion of the Trust Estate, to include her share of the property listed in Schedule A, as well as any separate property listed in Schedule B shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule D, attached.

Husband's Beneficiaries. Upon the death of PETER J. WAY, his portion of the Trust Estate, to include his share of the property listed in Schedule A, as well as any separate property listed in Schedule C, shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule E, attached.

Remainder of Trust Estate. Upon the death of one spouse, any remaining property of the deceased spouse, including one half of the shared property in Schedule A and any separate property in the appropriate Schedule B or C, in the Trust Estate, which was not distributed to the aforementioned Beneficiaries, including remaining property which was not distributed as above due to the prior death of the Beneficiary, shall be transferred and administered as part of Trust A, as herein provided.

7. **Creation of Trust A and Trust B.** Upon the death of the first spouse, the surviving spouse, as Trustee, shall divide the entirety of the Trust Estate of The Peter J. & Marjory E. Way Living Trust into two separate trusts, Trust A and Trust B, and shall continue to serve as Trustee for both Trusts. Determination of adequate documentation and records for the division of the Trust and creation of Trust A and Trust B shall be at the discretion of the Trustee.

Contents of Trust A. All of the property of The Peter J. & Marjory E. Way Living Trust owned by the deceased spouse, to include one half of the value of shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, shall be transferred to Trust A. This includes any earned and accumulated income or appreciation in value attributable to his/her ownership interest in the aforementioned property, but does *not* include any portion of the Trust Estate given to a specific Beneficiary under the terms of Paragraph 6 of this Declaration of Trust. No formality shall be required to transfer the aforementioned property into Trust A

(i) Irrevocability of Trust A. Trust A becomes irrevocable upon the death of the deceased spouse.

(ii) Life Beneficiary of Trust A. Upon the death of the deceased spouse and the creation of Trust A, the surviving spouse shall become the Life Beneficiary of Trust A. The surviving spouse's life estate interest in Trust A, entitles the surviving spouse receives all interest or other income from the trust property, to

use the property, and to spend the trust property in any amount for his or her health, education, support and maintenance, in his or her accustomed manner of living

Contents of Trust B. All of the property of The Peter J. & Marjory E. Way Living Trust owned by the surviving spouse, to include one half of the value of the shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, and any property given to the surviving spouse in accordance with Paragraph 6 shall be distributed to Trust B. This includes any earned and accumulated income or appreciation in value attributable to his/her ownership interest in the aforementioned property. No formality shall be required to transfer the aforementioned property into Trust B.

(i) *Revocability of Trust B*. Trust B remains revocable until the death of the surviving spouse. Surviving spouse retains the right to revoke or amend Trust B throughout his/her lifetime.

(ii) *Rights Retained in Trust B*. The surviving spouse retains the right to all income, profits and control of the property in Trust B.

8. **Administration of Trust A.**

Final Beneficiaries.

If MARJORY E. WAY is the first deceased spouse, then the Final Beneficiaries of Trust A shall be:

TRACEY CUMMINGS, per capita
KARIN MARTIN, per stirpes

If MARJORY E. WAY is the first deceased spouse, then the alternate Final Beneficiaries of Trust A shall be:

the then living children of Karin Martin

If PETER J. WAY is the first deceased spouse, then the Final Beneficiaries of Trust A shall be:

50% to GARY PETER WAY, per capita
50% to KRISTIN KIRCHNER, per stirpes

If PETER J. WAY is the first deceased spouse, then the alternate Final Beneficiaries of Trust A shall be:

50% to the children of Kristin Kirchner
50% to the wife of Gary Peter Way, if married.

Trustee Maintenance. The Trustee of Trust A shall spend for the benefit or pay to the surviving spouse all net income earned from the principal of Trust A on a quarterly basis, or with greater frequency, if necessary. The Trustee shall also spend for the benefit of or pay to the surviving spouse any amounts from the principal of Trust A which are necessary for the surviving spouse's health, support and maintenance according to his or her accustomed manner of living. Trustee shall be entitled to reasonable compensation from Trust A assets for his/her duties administering Trust A. No accounting shall be required of Trustee of Trust A, unless otherwise required by law, except that the Trustee shall be required to file federal income taxes on behalf of Trust A and the Final Beneficiaries shall be provided with copies of annual federal income tax returns.

Death of the Life Beneficiary. Upon the death of the Life Beneficiary, the Trustee shall distribute the property of Trust A to the appropriate Final Beneficiaries provided in this Paragraph 8.

9. **Administration of Trust B.** Upon the death of the first deceased spouse, Trust B shall become the surviving spouse's trust and shall remain revocable.

Distribution of Trust B Property. Trust B becomes irrevocable upon the death of the surviving spouse. The Trustee of Trust B shall distribute the property of Trust B, first in accordance with any specific gifts described under Paragraph 6 of this Declaration of Trust. All remaining Trust B property shall be distributed to the appropriate Final Beneficiaries named in Paragraph 8.

10. **Children as Beneficiaries.** [***choose one of the following three options:***]

No Beneficiary of the Trust is a minor or young adult at the time of the execution of this Declaration of Trust.

11. **Simultaneous Death.** In the event that both Settlors die simultaneously or under such circumstances as would render it doubtful which Settlor died first, then it shall be conclusively presumed, for the purposes of this Trust, that both Settlors died simultaneously and at the same moment. Neither spouse shall be deemed the

surviving spouse, and the Trustee shall distribute the Trust Estate according to Paragraph 6 and Paragraph 8 of this Declaration of Trust.

12. **Settlors' Debts and Taxes.**

Wife's Liabilities. Any and all debts of MARJORY E. WAY at the time of her death and all death taxes of the wife shall be promptly paid by the Trustee from the following property of the Trust Estate:

*[list account/accounts]

If the above referenced property is insufficient in value to satisfy liabilities at the time of her death, then the Trustee shall determine, at his/her discretion, from which property of the wife's portion of Trust property the debts shall be paid, subject to any IRS regulation controlling the property in Trust A.

Husband's Liabilities. Any and all debts of PETER J. WAY at the time of his death and all death taxes of the husband shall be promptly paid by the Trustee from the following property of the Trust Estate:

* [list account/accounts]

If the above referenced property is insufficient in value to satisfy liabilities at the time of his death, then the Trustee shall determine, at his/her discretion, from which property of the husband's portion of the Trust property the debts shall be paid, subject to any IRS regulation controlling the property in Trust A.

13. **Incapacity.**

Simultaneous Incapacity of Both Settlors. In the event that both Settlors of The Peter J. & Marjory E. Way Living Trust should become physician certified as incapacitated, physically or mentally, at the same time, then the Successor Trustee shall continue the administration and management of The Peter J. & Marjory E. Way Living Trust. The Trustee shall use, distribute and pay from the Trust Estate for the benefit of the Settlors, as he/she sees fit in their best interest, both from income from the Trust Estate as well as principal from the Trust Estate, as needed. This shall continue until either or both Settlors are certified no longer incapacitated by a competent physician.

Incapacity of Surviving Spouse. In the event that the surviving spouse should become physician certified as incapacitated after the death of the first spouse, then the Successor Trustee shall continue the administration and management of Trust B. The Trustee shall use, distribute and pay from the property of Trust B for the benefit of the surviving spouse, as he/she sees fit in the surviving spouse's best interest, both from income from Trust B property, as well as principal from Trust B property, as needed. This shall continue until either or both Settlors are certified no longer incapacitated by a competent physician. The Successor Trustee shall also manage Trust A, and any Child's Trust herein created, according to the provisions of this Declaration of Trust until the surviving spouse is no longer incapacitated or until the surviving spouse's death.

Amendment During Incapacity. In the event that one spouse is incapacitated and the other spouse is not incapacitated, the spouse who is not incapacitated shall have the authority to amend this AB Trust without the consent of the incapacitated spouse only in response to any change Congress may make to the Estate Tax laws. In the event that both spouses are simultaneously incapacitated and Congress makes changes to the Estate Tax law, the Successor Trustee may amend this Declaration of Trust to the extent necessary to best take advantage of changes to the Estate Tax laws.

14. **Trustee Powers.** The Trustee, in his management and administration of the Trust, shall have any and all powers allowed or conferred upon a Trustee under the laws of the State of Washington, specifically, but not limited to the following

the power to manage the Trust Estate, including real estate, as if Trustee were absolute owner;

the power to sell, encumber, borrow against the Trust Estate, including any real estate therein, by any method allowable by law;

the power to invest, sell or grant options for the sale of the Trust Estate in property of any kind whatsoever;

the power to receive additional property and add it to the Trust Estate as herein created;

the power to make and diversify investments, including determining whether any or all of the Trust Estate should produce income;

the power to deposit funds from the Trust Estate in bank accounts or other accounts, whether they be interest-bearing or non-interest-bearing accounts and whether the institution be FDIC insured or not;

the power to establish relationships with financial institutions involving safe deposit boxes, wire transfer and other transaction;

the power to employ competent professionals for advice and services regarding the management of the Trust Estate;

the power to commence or defend legal actions regarding the Settlor or the Trust;

the power to conduct and continue any business matter of the Settlor; and

the power to perform all acts necessary to administer any Child's Trust which may be created by this Declaration of Trust.

15. **Changing the Situs of Administration.** The Trustee may, at any time, remove all or any part of the property or the situs of administration from one jurisdiction to another. The Trustee may elect, by filing an instrument with the trust records, that the trust shall thereafter be construed, regulated, and governed as to administration by the laws of the new jurisdiction. The Trustee may take action under this paragraph for any purpose that the Trustee deems appropriate, including the minimization of any taxes in respect of the trust or any beneficiary of such trust. If necessary, the beneficiaries entitled to receive distributions of net income under the trust may, by majority consent, appoint a corporate fiduciary in the new situs. If a beneficiary is a minor or is incapacitated, the parent or legal representative of the beneficiary may act on behalf of the beneficiary.

16. **Amendment.** Any subsequently executed amendment to this Declaration of Trust made and signed by both the Settlors shall be deemed fully incorporated in this Declaration of Trust.

17. **Duplicate Originals.** This Declaration of Trust may be executed in any number of counterparts, each of which shall be deemed an original. Any person may rely upon a copy of this Declaration of Trust, provided that it is certified under oath by the Trustee as a true copy, to the same effect as if it were an original.

18. **Severability and Survival.** If any part of this Declaration of Trust is declared invalid, illegal, or inoperative for any reason, it is the intent that the remaining parts shall be effective and fully operative, and that any Court so interpreting this Declaration of Trust and any provision in it construe in favor of survival.

19. **Governing Law.** This Declaration of Trust and The Peter J. & Marjory E. Way Living Trust herein created shall be governed, construed and interpreted by, through and under the Laws of the State of Washington.

SETTLORS' CERTIFICATION OF DECLARATION OF TRUST

We, PETER J. WAY and MARJORY E. WAY, as Settlors, certify that this Declaration of Trust correctly states the manner in which and the terms and conditions upon which the Trust Estate is to be held, administered, managed and disposed of by our named Trustee(s). We have read and understand this Declaration of Trust and confirm that it reflects our wishes.

PETER J. WAY, Settlor

MARJORY E. WAY, Settlor

TRUSTEES' DECLARATION OF ACCEPTANCE OF TRUSTEE RESPONSIBILITY

We, PETER J. WAY and MARJORY E. WAY, as Trustees, certify that we have read the terms and conditions upon which the Trust Estate is to be held, administered, managed and disposed. We have read and understand this Declaration of Trust and confirm that we accept the responsibilities as Trustee that it confers and promise to act in accordance with its requirements.

PETER J. WAY, Trustee

MARJORY E. WAY, Trustee

STATEMENT OF WITNESSES

The foregoing instrument, consisting of 13 pages, including this page, was signed in our presence by PETER J. WAY and MARJORY E. WAY. We, at the request and in the presence of the Settlors and in the presence of each other, have subscribed our names

below as witnesses to this revocable Living Trust. We declare that we are of sound mind and of the proper age to witness a revocable trust, that to the best of our knowledge the Settlors are of the age of majority, or are otherwise legally competent to make a revocable trust, and appear of sound mind and under no undue influence or constraint. Under penalty of perjury, we declare these statements are true and correct on this 29th day of February, 2012 at Stanwood, Washington.

Witness Signature — William Zingarelli
Witness Printed Name

Witness Signature — Kathleen A. Matzen
Witness Printed Name

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

STATE OF WASHINGTON)
COUNTY OF SNOHOMISH)

On February 29, 2012 before me, STACEY MAIN,
NOTARY PUBLIC, personally appeared PETER J. WAY and MARJORY E. WAY, who proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the persons, or the entity upon behalf of which the persons acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Washington that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature (Seal)
NOTARY PUBLIC, State of Washington
My Commission Expires: 01-23-2016

SCHEDULE A
of
The Peter J. & Marjory E. Way Living Trust

Marital/Shared Property

Settlors place in Trust all their interest in the following property :

Chase Bank, checking Account (This account also includes incoming electronic deposits)

SCHEDULE B
of
The Peter J. & Marjory E. Way Living Trust

Wife's Separate Property

Settlor places in Trust all her interest in the following property :

Vehicles:

2004 Pontiac Vibe, VIN 5Y2SL62804Z467703

Investments:

Prologis Computershare Trust Company
NEA Valubuilder TSA Mutual fund

Jewelry

Bank Accounts:

Umpqua Bank CD
Washington Federal checking

Income:

U.S. Social Security
U.K. Social Security
Washington State Retirement

Liabilities:

(list)

SCHEDULE C
of
The Peter J. & Marjory E. Way Living Trust

Husband's Separate Property

Settlor places in Trust all his interest in the following property :

Real Property:

Unit 113, Building 1 of View Point, a Condominium, according to Declaration thereof recorded under Snohomish County Recording No. 8002060102 and any amendments thereto; said Unit is located on Survey Map and Plans filed in Volume 41 of Condominiums, at Pages 152 through 162, in Snohomish County, Washington.

Parcel No. 00699800111300

Vehicles: 2009 Toyota Highlander JTEEW41A092030311

Retirement (IRAs, 401Ks, etc.)
- Boeing Voluntary Investment Plan
  - 401K Stable Value Fund

Investments:
- Vanguard Investments
  - Individual Account (Non-IRA)
  - Traditional IRA
  - Traditional IRA Brokerage Account
  - Roth IRA
- Fidelity Investments
  - Variable Annuity

Bank Accounts:
- Boeing Employees Credit Union
  - Savings Account
  - Variable IRA Savings Account
  - 2 year Traditional IRA CD
  - 3 year Traditional IRA CD
  - 4 year non-IRA CD
- Umpqua Bank
  - Traditional IRA CD
- Bank of Washington
  - Traditional IRA CD

Income:

- U.S. Social Security
- U.K. Social Security
- Boeing Retirement
- Delta D&S Trust
- Delta Retirement Trust
- Delta/John Hancock Annuities

SCHEDULE D
of
The Peter J. & Marjory E. Way Living Trust

Pursuant to Paragraph 6 of the Declaration of Trust, dated Feb 29 2012, the Trust Estate property of MARJORY E. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

Karin Martin Ferndale, WA	Daughter	50% per stirpes
Tracey Cummings Carnation, WA	Daughter	50%; if she predeceases, then to Karin Martin, per stirpes.

SCHEDULE E
of
The Peter J. & Marjory E. Way Living Trust

Pursuant to Paragraph 6 of the Declaration of Trust, dated February 29, 2012 the Trust Estate property of PETER J. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

SPECIFIC BEQUESTS:

In the event Marjory Way survives Peter Way then she shall inherit the real property condominium, Parcel number . 00699800111300 and the vehicle, VIN JTEEW41A092030311 . 2009 Toyota Highlander

Gary Peter Way	son	50% of remainder; if he predeceases, then 50% to his wife, Elena Way, if they were still married at the time of his death
Kristin Kirchner	daughter-in-law	50% of remainder. If she predeceases, then 50% to her then living children in equal shares.

APPENDIX D

TO CORRECTED PETITION FOR REVIEW

LAST WILL AND TESTAMENT OF PETER J. WAY

CP 1558-1561

COPY

LAST WILL AND TESTAMENT

OF

PETER J. WAY

I, PETER J. WAY, of Mukilteo, Washington declare this to be my WILL and revoke all former Wills, Codicils and Trusts.

ARTICLE I
Family; Guardian

1.1 Family. I am married to MARJORY E. WAY. I have one child, GARY PETER WAY, an adult, and a former step-daughter-in-law, KRISTIN KIRCHNER.

No other children have been born to or adopted by me.

ARTICLE II
Personal Representative

2.1 Designation. I appoint my spouse, MARJORY E. WAY as my Personal Representative to administer my Will. If she at any time declines, fails, or becomes unable to act as Personal Representative, I appoint my step-daughter, TRACEY CUMMINGS. If she at any time declines, fails, or becomes unable to act as Personal Representative, I appoint my step-daughter, KARIN MARTIN as Personal Representative.

2.2 Bond Waiver; Powers. No bond shall be required of my Personal Representative in any jurisdiction for any purpose. My Personal Representative shall have unrestricted non-intervention powers to settle my estate in the manner set forth in this WILL, and shall have full power, authority, and discretion to do all that my Personal Representative deems necessary or in the best interests of the practical

 Initials: _____

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

Peter's Will orig in safe depos. Box

administration of my estate, including all powers and authority vested in a Trustee under the provisions of the Washington Trust Act of 1985 as amended which I incorporate by reference herein.

2.3 Taxes from Residue. I direct that all estate, inheritance, and other taxes imposed by reason of my death, and interest or penalties on those taxes, shall be paid by my Personal Representative out of the residue of my estate. This direction shall apply to all such taxes attributable to all property of my estate even though some property may not pass under my WILL or is not part of the residue of my estate.

ARTICLE III
Disposition of Property

3.1 **TRUST**. I give all of my property and estate to the Trustee under trust dated February 25, 2012, to be distributed in accordance with the terms thereof. In the event the said trust shall have been revoked or declared invalid for any reason, then I direct my Personal Representative to give all of my property and estate as follows:

Condominium, Unit 113, Building 1 of View Point, Parcel No. 00699800111300, to my wife, MARJORY E. WAY, together with the vehicle, VIN #JTEEW41A092030311, to MARJORY E. WAY.

The rest, residue and remainder of my estate I give, devise and bequeath 50% to my son, Gary Peter Way. If he predeceases, then to his wife, Elena Way if they were still married at the time of his death and 50% to KRISTIN KIRCHNER, per stirpes.

ARTICLE IV

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

Memorandum

I may leave in the same envelope with my WILL a written memorandum disposing of certain items of tangible personal property. I request that my Personal Representative effect distribution in accordance with the same as though it were set forth in full in this WILL.

I have initialed for identification purposes all pages of this WILL and have executed the entire instrument by signing this page on Feb 29th 2012 at Stanwood, Washington.

PETER J. WAY, Testator

This is to certify that on this 29 day of February, 2012, in Stanwood, Snohomish County, Washington, the foregoing instrument was, in our presence, published and declared by PETER J. WAY, the Testator herein named, to be his Last Will and testament. The Testator signed the same in our presence and, at the Testator's request, and in the presence of each other, we signed our names hereto as attesting witnesses.

Print Name: William Zingarelli
Residing at: Stanwood WA

Print Name: Kathleen A. Mahler
Residing at: Mount Vernon WA

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

DECLARATION OF SUBSCRIBING WITNESSES

THE UNDERSIGNED WITNESSES to the Last Will and Testament of PETER J. WAY, under penalty of perjury pursuant to the laws of the State of Washington, hereby declare as follows:

I am over the age of 18 years, and am fully competent to be a witness in this matter.

The foregoing last Will and Testament of PETER J. WAY was executed by him on the 29th day of February, 2012 at Stanwood, Snohomish County, Washington.

Immediately prior to the execution, PETER J. WAY declared the document to be his Last Will and Testament and requested the witnesses to subscribe their names to it. The Testator signed the document in the presence of all of the witnesses, and the witnesses attested the execution by all subscribing their names in the presence of the Testator and of each other.

The Testator appeared to be of sound and disposing mind and acted freely without duress or undue influence. Each of the witnesses is competent and appears competent to the other, and is of legal age.

SIGNED this 29 day of February, 2012.

Print Name: William Zingarelli
Residing at Stanwood, WA

Print Name: Kathleen A. Matson
Residing at Mount Vernon, WA

WILLIAM M. ZINGARELLI, P.S.
9733 271st St. N.W., PO Box 356
Stanwood, WA 98292
(360) 629-2424

EXHIBIT 2

To Wilson Declaration in Support of Motion to File Corrected Petition for Review

Petition for Review as Served on Opposing Counsel on February 10, 2017

Mark Wilson

From: Mark J. Wilson
Sent: Friday, February 10, 2017 4:30 PM
To: 'Lorna S. Corrigan (Lorna@NewtonKight.com)'; 'hillary@bethmcdaniel.com'
Subject: Petition for review
Attachments: Petition for Review UNSIGNED.pdf

Please see attached Petition for Review

Mark J. Wilson
Attorney at Law
2331 46th Ave SW
Tel: (206) 567-9826
Cell: (206) 261-8182
Fax: (206) 567-9827
Email: mjwilson@mjwilsonlawyer.com

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 74320-1-I

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

GARY PETER WAY and KRISTIN KIRCHNER,

Petitioners,

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)

PETITION FOR REVIEW

Mark J. Wilson, WSBA #16675
2331 46th Avenue SW
Seattle, WA 98116
(206) 567-9826
mjwilson@mjwilsonlawyer.com
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. IDENTITY OF PETITIONERS

Petitioners Gary Peter Way and Kristin Kirchner were respondents in the trial court and appellants in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioners seek review of Division One's unpublished opinion, attached as Appendix A. The Court of Appeals denied petitioners' motion for reconsideration and motion to publish. The order on the motion for reconsideration and to motion to publish is attached as Appendix B to this petition.

III. ISSUES PRESENTED FOR REVIEW

1. Was it error for the Court of Appeals to determine that the terms of the trust require all of the trust estate of the first deceased spouse be transferred to Trust A upon his or her death?[1] (Opinion, pp. 5-6 and 8).

2. Was it error for the Court of Appeals to disregard the terms of the trust contained in Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A, which provide that Trust A does not contain any portion of the first deceased spouse's share of the trust estate that is distributed pursuant to Paragraph 6 to specific beneficiaries upon his or her death? (Opinion, pp. 5-6).

3. Did the Court of Appeals incorrectly conclude that the gift of the remainder to Gary and Kristin in Schedule E was not a "specific bequest?" (Opinion, pp. 8-9).

4. Was it error for the Court of Appeals to refuse to consider, as having been abandoned by Gary and Kristin, the argument that Marjory did not intend to fund Trust A if she were the first deceased spouse, despite provisions pertaining to Trust A contained in the terms of the trust? (Opinion, pp. 11-12).

[1] A copy of the trust is attached as Appendix C.

5. Was it error for the Court of Appeals to have refused to consider, as having been abandoned by Gary and Kristin, arguments that under the "last antecedent" and *ejusdem generis* rules of construction, "remainder" in Schedule E refers to Peter's trust estate upon his death? (Opinion, pp. 11-12).

6. Was it error for the Court of Appeals to deem Gary and Kristin's counterclaims for fraud, breach of contract, specific performance and attorney fees as having been abandoned? (Opinion, pp. 11 and 16).

7. Was it error for the Court of Appeals to uphold the Trial Court's award of attorney fees to Marjory on grounds Gary and Kristin made no showing of abuse of discretion by the Trial Court? (Opinion, p. 16).

8. Does the decision by the Court of Appeals raise issues of significant public interest?

IV. STATEMENT OF THE CASE

1. Surrounding circumstances

Peter met Marjory a short time after his wife of 31 years, Carol Way (formerly Kirchner), died in June 2005. CP 1416-1417. Peter was 71 years old at the time and Marjory was 65 years old. They each had children from former marriages. CP 1546. Gary was Peter's son from his first marriage to Kathleen. Peter also had a step-son, Greg Kirchner, who was Carol's son from a former marriage. CP 1507.

Marjory had two daughters, Karen Martin and Tracey Cummings. CP 1584.

Peter and Marjory married on September 24, 2006, after entering into a prenuptial agreement. CP 1547, 895-903, 858-861.

The prenuptial agreement recites that each party "has relatives who are the natural objects of [his]/[her] beneficence" and that each party's separate property is to remain their separate property "to enable each to dispose of his or her assets as he or she wishes at death." CP 897.

Marjory filed a petition for divorce from Peter on August 16, 2011, to which Peter filed a Joinder. CP 949, 817, 821, 1439, 1511. The divorce petition was still pending at the time Peter and Marjory signed the declaration of trust on February 29, 2012 and still pending at the time of Peter's death on June 4, 2012. CP 949, 823.

Peter and Marjory signed a Decree of Dissolution and Findings of Fact and Conclusions of Law on December 9, 2011, which were never filed with the divorce court, but in which they confirmed their prenuptial agreement. CP 867-874, 875-882, 902, 903.

Under Schedule E of the trust, Peter gives Marjory his separate property condominium and Toyota automobile upon his death. After Peter died and before filing the TEDRA Petition in this case, Marjory sold the condominium and received proceeds of $482,419.93. CP 1012.

Attorney William Zingarelli prepared the will and trust using a form he obtained on the Internet as a template.[2] CP 263. He used the form tust10 or 20 times previously. CP 451, 261. Mr. Zingarelli drafted the Schedules himself, but could not recall drafting the Schedules used in the Way Trust. CP 263.

Mark Wilson, legal counsel for Gary and Kristin, was able to go on the Internet, purchase and download the same form from the same website that Mr. Zingarelli used. CP 468-500. The terms of the trust Mr. Wilson purchased are the same as the Way trust, the only difference being the template trust form contains blanks for information the user is to fill, such as the name of the trust, names of the settlors, trustees and beneficiaries and the property, terms and beneficiaries to be listed on Schedules A thru E. CP 475-494.

[2] A copy of Peter's Will is attached as Appendix D.

The trust is essentially a fill-in-the-blanks, do-it-yourself form, intended to be used by lay persons and the general public. CP 470-474.

2. Direction and terms of the trust.

One of the objectives of the trust is to safeguard the settlor's property rights and testamentary powers over their individual shares of the trust estate. That was also one of the objectives of the prenuptial agreement.

The following are some of the pertinent terms and the direction of the Way trust.

According to Paragraph 2, the settlors transfer, set aside and "hold separately any and all of their interest" in the property attached in schedules A, B and C" and "[t]hat property described as separate property shall remain separate property and that property described as shared property shall remain shared property in the same manner as it was shared before being placed in the Trust."

Paragraph 3 protects the interests of each settlor in their shares of the estate property during both their livess:

> **3. <u>Reserved Powers of the Settlors</u>**. At all times while both Settlors are alive, Settlors shall retain the following powers:
>
> . . .
>
> **D. <u>Trust Estate</u>**. Both Settlors reserve the shared right to all income, profits and control of the Trust Estate property described in Schedule A.
>
> . . .
>
> (i) At all times during her lifetime MARJORY E. WAY reserves the right to all income, profits and control of the Trust Estate property described as her separate property in Schedule B.
>
> (ii) At all times during his lifetime PETER J. WAY reserves the right to all income, profits and control of the Trust Estate property described as his separate property in Schedule C.

Paragraph 6 delineates each settlor's testamentary rights over their share of the trust property and Paragraph 6, Remainder of Trust Estate, describes and limits the property to be transferred to Trust A, as follows:

> **6. Trust Beneficiaries.**
>
> > **Wife's Beneficiaries.** Upon the death of MARJORY E. WAY, her portion of the Trust Estate, to include her share of the property listed in Schedule A, as well as any separate property listed in Schedule B shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule D, attached.
> >
> > **Husband's Beneficiaries.** Upon the death of PETER J. WAY, his portion of the Trust Estate, to include his share of the property listed in Schedule A, as well as any separate property listed in Schedule C, shall be distributed in accordance with the terms and to the Beneficiaries named in Schedule E, attached.
> >
> > **Remainder of Trust Estate.** Upon the death of one spouse, any remaining property of the deceased spouse, including one half of the shared property in Schedule A and any separate property in the appropriate Schedule B or C, in the Trust Estate, which was not distributed to the aforementioned Beneficiaries, including remaining property which was not distributed as above due to the prior death of the Beneficiary, shall be transferred and administered as part of Trust A, as herein provided.

(Emphasis added).

The words "upon the death" and "shall be distributed" indicate the distributions are to be made to specific beneficiaries upon the death of the settlor and are mandatory and nondiscretionary upon the trustee.

Paragraph 6, above, encompasses the settlor's entire trust estate and indicates he or she has absolute testamentary power over it. Use of the word "any" indicates there is no limit on the portion of his or her share of the estate each settlor may bequeath to specific beneficiaries upon his or her death, pursuant to the applicable Schedules D or E. Either settlor may bequeath his or her entire share to specific beneficiaries if they wish, which is exactly what Peter and Marjory

each chose to do, as indicated in their respective Schedules D (Marjory) and E (Peter), as follows:

SCHEDULE D
[Marjory]

. . .

Pursuant to Paragraph 6 of the Declaration of Trust, dated February 29, 2012, the Trust Estate property of MARJORY E. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

Karin Martin Ferndale, WA	Daughter	50% per stirpes
Tracey Cummings Carnation, WA	Daughter	50%; if she predeceases, then to Karin Martin, per stirpes.

(Emphasis added).

SCHEDULE E
[Peter]

. . .

Pursuant to Paragraph 6 of the Declaration of Trust, dated February 29, 2012, the Trust Estate property of PETER J. WAY shall be distributed to the following Specific Beneficiaries upon the following terms:

SPECIFIC BEQUESTS:

In the event Marjory Way survives Peter Way then she shall inherit the real property condominium, Parcel number. 00699800111300 and the vehicle, VIN STEEW41A092030311. 2009 Toyota Highlander

Gary Peter Way	son	50% of remainder; if he predeceases, then 50% to his wife, Elena Way, if they were were still married at the time of his death
Kristin Kirchner	daughter-in-law	50% of remainder. If she predeceases, then 50% to her then living children in equal shares.

(Emphasis added).

Pursuant to Paragraph 6, Remainder of Trust Estate, above, upon the death of one spouse, "any remaining property of the deceased spouse, which was not distributed" to the beneficiaries designated by the deceased spouse in the preceding Paragraph 6, Wife's Beneficiaries or Husband's Beneficiaries, shall be transferred and administered as part of Trust A, as herein provided." (Emphasis added). According to Marjory and Peter's respective Schedules D and E, they each bequeathed their entire shares to their own children from their prior marriages.

Paragraph 7 describes the creation and funding of Trust A upon the death of the first deceased spouse and provides that the contents of Trust A does not include any portion of the Trust Estate given to a specific Beneficiary under the terms of Paragraph 6, set forth above, which is consistent Paragraph 6, Remainder of Trust Estate, which places similar limits on the property to be transferred to Trust A. Paragraph 7 provides in pertinent part, as follows:

> 7. **Creation of Trust A and Trust B.** Upon the death of the first spouse, the surviving spouse, as Trustee, shall divide the entirety of the Trust Estate of [the trust] into two separate trusts, Trust A and Trust B, and shall continue to serve as Trustee for both Trusts...
>
> . . .
>
> ***Contents of Trust A.*** All of the property of [the trust] owned by the deceased spouse, to include one half of the value of shared Property in Schedule A, as well as any separate property described in Schedule B or C, as applicable, shall be transferred to Trust A. This includes any earned and accumulated income or appreciation in value attributable to his/her ownership interest in the aforementioned property, but does ***not*** include any portion of the Trust Estate given to a specific Beneficiary under the terms of Paragraph 6...
>
> . . .
>
> ***(ii) Life Beneficiary of Trust A.*** Upon the death of the deceased spouse and the creation of Trust A, the surviving spouse shall become the Life Beneficiary of Trust A....

(Emphasis added) (The underlined portion of Contents of Trust A, above, is omitted from the Opinion, p. 6).

According to the terms of Paragraph 6, Remainder of Trust A, Schedules D and E and the second sentence of Contents of Trust A in Paragraph 7, whichever settlor was the first deceased spouse, neither Marjory or Peter intended to leave any remainder of their share of the trust estate to be transferred to Trust A, since they each bequeathed their entire trust estates to their respective children as specific beneficiaries, to be distributed to them upon their death.

Paragraph 8, Administration of Trust A, is only created, funded and operative if there is any remaining portion of the first deceased spouse's trust estate to administer after the mandatory, nondiscretionary distributions have been made to specific beneficiaries pursuant to Paragraph 6 and the applicable Schedule D or E.

If Marjory, as the surviving spouse and trustee of the trust, had distributed Peter's trust estate upon his death, as she was required to do, according to Paragraph 6 and Schedule E, there would not have been any portion of Peter's trust estate remaining to transfer to Trust A.

Marjory's daughters are named as specific beneficiaries in her Schedule D and final beneficiaries under Paragraph 8, but Marjory bequeath her entire trust estate to them under Schedule D to receive her entire trust upon her death, so Paragraph 8 will not be operative. Upon Marjory's death, they will receive Marjory's bequests of her entire estate as Specific Beneficiaries under Schedule D and will not receive anything as Final Beneficiaries of the remainder of Trust A under Paragraph 8 because there will not be anything left after they receive their bequests under Schedule D.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals did not give due regard to the direction of the trust and the true intent and meaning of Peter.

The Court of Appeals interpreted the trust as requiring that all of Peter's share of the trust estate was to be transferred to Trust A upon his death.

This interpretation is incorrect because the Court of Appeals disregards Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A, which provides in clear, unambiguous terms, that any portion of the deceased spouse's estate distributed to specific beneficiaries pursuant to Paragraph 6 are not to be included in Trust A. (See, above at pp. 5 and 7)

The decisions of this Court and those of the Court of Appeals of this state have consistently held that a court's paramount duty in construing a testamentary instrument is to give effect to the maker's intent. (Opinion, p. 3, citing In re Estate of Bernard, 182 Wn. App. 692, 697 n.1, 332 P.3d 480, 483 (2014); and see, Carney v. Johnson, 70 Wn.2d 193, 197, 422 P.2d 486 (1967); In re Estate of Douglas, 65 Wn.2d 495, 499, 398 P.2d 7 (1965); and In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319, 1323 (1972). That intent is determined from the instrument as a whole, and its specific provisions must be construed in light of the entire document. (Opinion, p. 3; and see, In re Estate of Magee, 75 Wn.2d 826, 829, 454 P.2d 402 (1969); In re Estate of Shaw, 69 Wn.2d 238, 241, 417 P.2d 942 (1966); In re Estate of Johnson, 46 Wn.2d 308, 312, 280 P.2d 1034 (1955); In re Estate of Riemcke, 80 Wn.2d at 728.

RCW 11.12.230, also requires courts to have due regard to the direction of the will and true intent and meaning of the testator in all matters brought before them.

However, the Court of Appeals did not have due regard to the provisions in Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A. These provisions are critically important to a correct interpretation of the trust, but they are not considered and are inexplicably omitted from the passages from the trust quoted in the opinion.

Disregard by the Court of Appeals of the omitted provisions in Paragraph 6, Remainder of Trust Estate and the second sentence of Paragraph 7, Contents of Trust A is only explanation

for the erroneous conclusion that ***all*** of Peter's trust estate was to be transferred to Trust A upon Peter's death: :

The opinion states that adopting Gary and Kristin's interpretation of Schedule E would render Paragraphs 7 and 8 meaningless. (Opinion, p. 9) However, the opposite is true. By adopting Marjory's interpretation, as the Court of Appeals has done, renders the bequests Marjory and Peter make in Schedules D and E meaningless and contrary to the intent of both settlors at the time they signed the trust.

The opinion deprives Peter of his right to dispose of his property by will, which is a valuable right this Court has long recognized and is a right protected by statute. In re Estate of Price, 75 Wn.2d 884, 886, 454 P.2d 411, 412 (1969); citing In re Meagher's Estate, 60 Wn.2d 691, 375 P.2d 148 (1962); and In re Gordon's Estate, 52 Wn.2d 470, 326 P.2d 340 (1958).

The Court's opinion conflicts with this Court's precedent by disregarding the trust as a whole and not giving effect to all its provisions. For these reasons the Court should review the opinion.

2. The Court of Appeals decided in error to refuse to consider Gary and Kristin's argument that Marjory did not intend to fund Trust A if she were the first deceased spouse.

The Court of Appeals refused to consider Gary and Kristin's argument that Marjory, like Peter, did not intend to fund Trust A or leave a life estate for the other, despite the existence of provisions in the trust pertaining to Trust A. (Opinion, pp. 11-12). The grounds the opinion gives for this refusal is its determination that Gary and Kristin abandoned them by not raising them in their Opening Brief.

Gary and Kristin did raise this argument in their Opening Brief. (Appellants' Opening Brf., p. 22). Marjory argued in her Respondent's Brief that such an argument was absurd, given

the extensive provisions pertaining to Trust A. (Respondent's Brf., p. 9). Gary and Kristin replied in their Reply Brief that their interpretation of Marjory's Schedule D was not absurd, given the terms of the trust as a whole and the respective Schedules D and E and given the surrounding circumstances at the time Peter and Marjory signed the trust. (Appellants' Reply Brief, pp. 10-13). Clearly, Gary and Kristin did not abandon this argument.

Marjory clearly intends in her Schedule D to leave her entire trust estate to her daughters, Karin and Tracey upon her death. There is no doubt from the terms , even if she were the first deceased spouse. There is also no doubt, given the terms of Schedule D that she did not intend to transfer any portion to Trust A or leave a life estate for Peter if she became the first deceased spouse, despite the provisions for the creation of Trust A.

This Court should accept review so that it can give due regard to the direction of Peter's trust, which is their right, pursuant to RCW 11.12.230.

3. The Court of Appeals misinterpreted the meaning and intent of "remainder" to Gary and Kristin in Schedule E.

The Court of Appeals erroneously concluded that the gift of the "remainder" to Gary and Kristin in Schedule E refers to the remainder of Trust A, following a life estate in Marjory. (Opinion, pp. 5-8). However, this conclusion was based on the Court's disregard of the terms of Paragraphs 6 and 7, which define and limit the contents of Trust A, as discussed above.

Based on the Court's erroneous conclusion that the trust required all of Peter's share of the trust estate be transferred to Trust A upon Peter's death, to serve as a life estate for Marjory, the Court then concluded, erroneously, that "remainder" in Trust A must mean the remainder of Trust A upon Marjory's death.

The Court relied on the Black's Law Dictionary definition of "remainder" in further support of its conclusion that "remainder" in Schedule E means the remainder of Trust A following Marjory's life estate:

> We turn, then, to the word "remainder," a primary focal point of the parties' arguments. In determining the meaning of the word, we look to Black's Law Dictionary. It defines remainder as:
>
> > "A ***future*** interest arising in a third person — that is, someone other than the estate's creator, its initial holder, or the heirs of either — who is intended to take ***after*** the natural termination of the preceding estate."
>
> The most natural reading of this word, given the context, is that Peter's intent was to provide to Gary and Kristin 50 percent of his property in the f***uture,*** after the expiration of Marjory's life estate ("the preceding estate"). This reading is most consistent with the fact that the other provisions of the trust that we discussed previously expressly provide for such a life estate for Marjory. That life estate in Trust A is funded by all of Peter's property at the time of his death.

(Opinion, pp. 7-9) (emphasis in the original).

The Court of Appeals reads Black's definition too narrowly. Black's definition of "remainder" actually supports Gary and Kristin's interpretation of "remainder" as used in Schedule E to mean the remainder of Peter's estate upon Peter's death. (Black's Law Dictionary 1482 (10th ed. 2014)). Peter is the "estate creator," since he created the trust estate, which gave rise to a "future interest" in Gary and Kristin. The "natural termination" of the "preceding estate" was Peter's death.

The Court of Appeals rejects that Gary and Kristin's interpretation of "remainder" because the Court determined that the remainder of Peter's estate upon Peter's death is not a "future interest." (Opinion, pp. 7-8 and 10-11).

However, according to Black's Law Dictionary, Gary and Kristin have a "future interest" in the remainder of Peter's estate upon Peter's death. "Future interest" is defined in Black's as "a

property interest in which the privilege of possession or of other enjoyment is future and not present." (Black's Law Dictionary 934 (10th ed. 2014)). Prior to Peter's death, Gary and Kristin's possession and enjoyment of the remainder of Peter's estate was in the future, assuming Peter did not change the gift to them in Schedule E during his lifetime. Therefore, prior to Peter's death, Gary and Kristin had an "estate in expectancy," which Black's defines as a"future interest." (Black's Law Dictionary 667, 934 (10th ed. 2014)).

Therefore, Gary and Kristin's interpretation of "remainder," as used in Schedule E, as meaning the remainder of Peter's trust estate upon Peter's death, is correct and consistent with the Black's Law Dictionary definition.

To interpret "remainder" in the context of Schedule E to mean the remainder of a life estate warps its meaning, contrary to the proper interpretation of trusts by the courts, as expressed in Anderson.

This Court has often referred to the following principles in construing a will:

> The court, in construing a will, is faced with the situation as it existed when the will was drawn, and must consider all the surrounding circumstances, the objects sought to be obtained, and endeavor to determine what was in the testator's mind when he made the bequests, and the court must not make a new will for him, or warp his language in order to obtain a result which the court might feel to be just. In re Estate of Price, 75 Wn.2d 884, 454 P.2d 411 (1969). Words used in a will are understood in their ordinary sense if there is nothing to indicate a contrary intent. In re Levas' Estate, 33 Wn.2d 530, 206 P.2d 482 (1949).

Anderson v. Anderson, 80 Wn.2d 496, 499-500, 495 P.2d 1037, 1039 (1972).

Marjory's Schedule D does not use the word "remainder."

Comparing Peter's Schedule E to Marjory's Schedule D, it is obvious why Peter used the word remainder in his and Marjory did not in hers. Peter bequeathed his condominium and automobile to her, which left a remainder of his trust estate, all of which he wanted to bequeath to his children, so he called the remainder by its name. Marjory bequeathed her entire trust

estate to her daughters, which left no remainder, so she did not use the word remainder in her Schedule D.

4. The remainder to Gary and Kristin in Schedule E are specific bequests to be distributed to them upon Peter's death.

The Court of Appeals incorrectly concluded that the gift of the remainder to Gary and Kristin in Schedule E was not a "specific bequest." (Opinion, pp. 8-9). The reason the Court applied is that a bequest is a gift of property by a person upon death. Id. Then, based on the Court's erroneous determination that all of Peter's property must be transferred to Trust A, it concluded, erroneously, that the gift of the remainder in Schedule E could not mean a bequest to Gary and Kristin because everything had to be transferred into Trust A and they would receive the remainder of Trust A after the termination of Marjory's life estate in Trust A. One erroneous conclusion led to another.

If were not for the fact that the Court of Appeals had disregarded the terms of Remainder of Trust A, and the second sentence of Contents of Trust A it would probably have interpreted the gift of the remainder in Schedule E as a specific bequest:

First, it is listed in Schedule E, which are intended to be distributed upon Peter's death, pursuant to Paragraph 6.

Second, it is listed under the heading "Specific Bequests" as is the bequest of the condominium and automobile to Marjory.

Third, it refers to Peter's share of the trust estate, which is listed in Schedules A and C with specificity.

5. Under the "last antecedent" and *ejusdem generis* rules of construction, "remainder" in Schedule E refers to Peter's trust estate upon his death, which the Court of Appeals refused to consider in error.

It was error for the Court of Appeals to refuse to consider as being abandoned by Gary and Kristin their arguments that under the "last antecedent" and *ejusdem generis* rules of construction, "remainder" in Schedule E refers to Peter's trust estate upon his death , not the remainder of Trust A upon Marjory's death. (Opinion, pp. 11-12).

However, Gary and Kristin made these arguments in their Reply Brief (Appellants' Reply Brf., pp. 7-8) in reply to the argument in Respondent's Brief that "remainder" in Schedule E refers to the remainder of Trust A following the death of Marjory. (Respondent's Brf., p. 12). Therefore, these arguments were not abandoned.

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."[3] 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.

Therefore, "remainder" in Schedule E does not refer to the remainder of Trust A after the termination of Marjory's life estate.

Ejusdem generis is a 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).

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[3] "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).

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, leads one to the conclusion that 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 condominium and car to Marjory, "remainder" in Schedule E also refers to Peter's trust estate upon his death.

6. It was error for the Court of Appeals to rule that Gary and Kristin abandoned their counterclaims for breach of fiduciary duty, fraud, breach of contract and specific performance.

The Court of Appeals ruled that Gary and Kristin abandoned their counterclaims for breach of contract, fraud and specific performance on grounds they did not argue these claims in their Opening brief. (Opinion, p. 16). This is not correct.

First of all, Gary and Kristin assigned error in their opening brief to the Trial Court's dismissal of their counterclaims. (Opinion, p. 16; Appellants' Brief, p. 3).

Secondly, they made factual arguments in Appellants' Opening Brief that support their claims for breach of fiduciary duty, breach of contract and constructive fraud, 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).

Marjory argued in Respondent's Brief that Gary and Kristin had waived the issue as to dismissal of their counterclaims for breach of contract, fraud and specific performance for not arguing and citing to authority in support of them in their Opening Brief. (Respondent's Brief, p. 42). Gary and Kristin replied to this argument in their Reply Brief, as follows:

> 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 then requested in their Reply Brief that if the Court of Appeals concluded they had failed to adequately brief the counterclaims that the Court grant them permission to submit a brief in further support of the assignment of error regarding dismissal of their counterclaims, pursuant to RAP 12.1. (Appellants' Reply Brf., 20). However, the Court subsequently issued its opinion in which it deemed the counterclaims abandoned without ruling otherwise on Appellants' request. (Opinion, p. 16).

This Court may refuse to review a claim of error that was not in the Court of Appeals. Fisher v. Allstate Ins. Co., 136 Wash. 2d 240, 961 P.2d 350 (1998); State v. Clark, 124 Wash. 2d 90, 875 P.2d 613 (1994). The general principle does not, however, prohibit the Supreme Court from considering an issue raised for the first time in the petition for review or answer. This Court retains the discretion to consider such an issue when necessary to decide the case on the merits. State v. L.J.M., 129 Wash. 2d 386, 918 P.2d 898 (1996).

Gary and Kristin request that this Court grant review and consider the counterclaims and whether they should be reinstated.

7. It was error for the Court of Appeals to uphold the Trial Court's award of attorney fees to Marjory on grounds Gary and Kristin made no showing of abuse of discretion by the Trial Court.

The Trial Court's award of attorney fees to Marjory should be reversed if Gary and Kristin prevail on appeal and it is decided that the Trial Court's interpretation of the trust is wrong.

On December 10, 2015, when the Trial Court ruled on Marjory's motion for attorney fees, Judge Wynne indicated that his award of attorneys' fees should be reversed by the Court of Appeals if it is determined that his interpretation of the trust is wrong:

> If I'm wrong in terms of my interpretation of the trust, then the award of attorney's fees is also erroneous and would be reversed by the court of appeals. So I expect the whole thing to be taken up by the court of appeals as one issue. There appears to be no issue as to the amount of the attorney's fees. The attorney's fees appear to the Court to be reasonable given the extent and nature of the litigation.

(Verbatim Report of Proceedings, 12/10/2010, p. 10) (Emphasis added).

Marjory appears to agree with Judge Wynne. Respondent's Brief indicates that the award of fees and costs should be affirmed "unless the grant of summary judgment is reversed on appeal." (Respondent'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).

Appellants should not be held to the stricter burden proving abuse of discretion for reversal of Judge Wynne's award of attorney fees. Prevailing prevailing on the issue of interpretation of the trust, should be deemed sufficient, since that was the indication from Judge Wynne, who made the award in the first place.

8. The decision in this case raises issues of significant public interest.

This Court should accept review because the decision in this case raises issues of significant public interest.

The same form of trust has been available to purchase and download off the Internet from at least from February 29, 2012, when the Way trust was signed, to October 9, 2015 when Mr. Wilson downloaded it from the Internet. CP 468. Nothing has been changed during that time.

Mr. Zingarelli estimates he has used the same form of trust 10 or 20 times. CP 261, 451.

The interpretation of this trust by this Court will impact many lay and professional members of the public whose lives may be profoundly affected it, such as lawyers, settlors, trustees, beneficiaries and family members. Certainly the lives of the parties in this case have been affected.

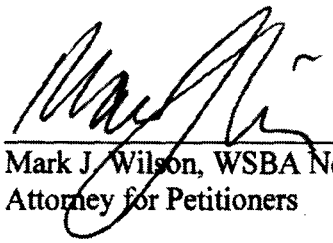
CONCLUSION

This Court should grant review, reverse the Court of Appeals, enter a ruling that Gary and Kristin are entitled to immediate distribution to them of Peter's estate and order that Marjory

make that distribution immediately and remand for resolution of Gary and Kristin's counterclaims for breach of fiduciary duty, breach of contract, fraud and specific performance.

Dated: February 10, 2017

Respectfully submitted,



Mark J. Wilson, WSBA No. 16675
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, Mark J. Wilson, certify that on February 10, 2017, I caused a copy of this Petition for Review; and an unsigned copy of this Certificate of Service to be served by e-mail pursuant to mutual agreement of counsel for the parties on the following persons at the following e-mail addresses:

Beth A. McDaniel
beth@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Hillary D. Mace
Hillary@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Kimberly Staraitis
kstaraitis@bethmcdaniel.com
272 Hardie Ave. SW
Renton, WA 98057

Dated: Febuary 10, 2016 at Seattle, Washington.

Mark J. Wilson, WSBA No. 16675
Attorney for Petitioner