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STATE OF WASHINGTON
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SUPREME COURT NO. 98268-6

NO. 79261-0-I

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

Frederick A. Graham,

Petitioner,

v.

Bank of America, N.A.,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In two successive cases, Petitioner Frederick Graham appealed trial court decisions against him, and has now twice petitioned this Court for discretionary review, because he was dissatisfied with annual Trust distributions of $661,974. Under the terms of the Trust, Petitioner is only entitled to annual distributions of Trust income (i.e., income generated from the Trust's principal), which total about $200,000 per year. The Trust also permits the Trustee, in its discretion, to make distributions from the Trust's principal. In response to Petitioner's requests, Bank of America (the Trustee) offered to increase Petitioner's annual Trust distribution from $200,000 to $661,974, which is the greatest amount the Trustee believed could reasonably be made within the discretionary distribution standards set forth in the Trust. But Petitioner insisted on no less than $760,000. CP 18.

The Trustee determined that increasing the annual Trust distribution beyond $661,974 (i.e., the most the Trustee concluded could be distributed) would require Petitioner and the Trustee to enter into a TEDRA agreement under RCW 11.96A.220 to alter the terms of the Trust. Yet for a TEDRA agreement to bind all parties, every party with an interest in the Trust must be a party to the agreement or must otherwise be represented. RCW 11.96A.220 ("If all parties agree to a resolution of any such matter, then the agreement shall be evidenced by a written agreement signed by all parties.

Subject to the provisions of RCW 11.96A.240 [a special representative may petition the court for approval of the agreement], the written agreement shall be binding and conclusive on all persons interested in the estate or trust.”). Petitioner is not the only party with an interest in the Trust—upon Petitioner’s death, his interest in Trust assets will pass to another party (i.e., the remainder beneficiary).[1]

In some circumstances, the remainder beneficiary may be “virtually represented” by another party to a TEDRA agreement. RCW 11.96A.220. However, the remainder beneficiary may not be virtually represented by any party whose interest is in conflict with the remainder beneficiary’s interest. RCW 11.96A.120(7), (9). In the event of such a conflict of interest, a special representative or a guardian ad litem (“GAL”) may be appointed to represent the remainder beneficiary.[2] RCW 11.96A.030(5)(g); .160 (appointment of a GAL); .250 (appointment of a special representative).

Petitioner does not want a special representative or GAL to advocate

[1] As is explained *infra* at page 5, the remainder beneficiary is Petitioner’s appointee or, if he appoints no one, his estate. The remainder beneficiary is also unascertained: their exact identity is not presently known.

[2] Where there are competing interests in the context of TEDRA litigation, the reminder beneficiary is represented by a GAL. RCW 11.96A.030(5)(g). In the context of nonjudicial TEDRA agreements where there are competing interests, the remainder beneficiary is represented by a special representative. RCW 11.96A.250.

for the interests of the remainder beneficiary. Instead, Petitioner wishes to virtually represent the remainder beneficiary and to bind that party (or parties) to any TEDRA agreement. CP 18. Yet the Trustee has identified a conflict of interest between Petitioner and the remainder beneficiary. This conflict is that the more Petitioner receives from the Trust as distributions of principal, the less will be available for the remainder beneficiary. The trial court and Court of Appeals both agree with the Trustee that there is a conflict of interest between Petitioner and the reminder beneficiary.

Petitioner now asks this Court to declare that he has "full ownership" over the Trust estate, including the portion of the Trust that will pass to the remainder beneficiary. With such a declaration, Petitioner would then purport to virtually represent the remainder beneficiary, allowing him to alter the terms of the Trust. His goal in so doing would be to compel the Trustee to make larger annual distributions to Petitioner than are currently permitted by the Trust, leaving less for the remainder beneficiary. A declaration that Petitioner "owns" the remainder interest in the Trust would defeat the purpose of the trust and undo the protections intended and established by his mother, the trustor. It would also be unsupported by Washington trust law. Moreover, contrary to the complaints in the Petition, the decision of the Court of Appeals takes nothing way from Petitioner. Petitioner retains all powers assigned to him.

II. STATEMENT OF THE CASE

A. Petitioner's mother established a spendthrift trust, granting a *partial* interest in Trust property, entitling him to the Trust's *income*, and giving him the ability to identify the party who will receive the remaining Trust assets upon his death.

Petitioner Frederick Graham's mother established a trust for the benefit of her husband for his life with the remainder interest passing to her two sons. CP 41 (Last Will and Testament of Felecia A. Graham) at Art. IV.B. Petitioner's father relinquished his lifetime interest in the trust, resulting in the trust being divided into two subtrusts, one for the benefit of Petitioner and one for his brother. *In re Marital Tr. B Created Under the Last Will & Testament of Felecia A. Graham Dated Oct. 26, 1988,* 196 Wn. App. 1072, 2016 WL 6952619 at *1 (Nov. 28, 2016) (unpublished) ("*Marital Trust B I*"), *review denied*, 188 Wn.2d 1004 (2017). Petitioner became the sole lifetime beneficiary of one of the subtrusts (the "Trust") and Respondent became the Trustee of the Trust. *Id.*

Under the terms of the Trust, the Trustee must annually pay Trust income to Petitioner for Petitioner's lifetime:

> The income of this Trust [ ] shall be payable from the date of my death to the beneficiaries entitled thereto[.]

CP 37 at Art. IV.A.4. The Trustee is also authorized to make discretionary distributions of Trust principal. CP 38 at Art. IV.A.5 (directing the Trustee to consider Petitioner's "other resources and income" before exercising its

discretion to distribute any part of Trust principal to Petitioner).

Petitioner is entitled to the Trust's annual income, (CP 37 at Art. IV.A.4), which traditionally has amounted to $200,000/year, *Marital Trust B I*, at *1. But the Trust's spendthrift clause gives Petitioner only a partial interest in Trust property, which is less than legal ownership, in order to protect those assets from his creditors:

> No disposition, charge or encumbrance of either the income or principal of the trust estates, or any part thereof by any beneficiary under these trusts by way of anticipation shall be of any validity or legal effect, or be in any wise regarded by the Trustee, and neither the income nor principal of the trust estates, nor any part thereof, shall in anyway be liable to any claim of any creditor of any beneficiary.

CP 43 at Art. IV.C.2.

The Trust also instructs that Trust assets pass to another party upon Petitioner's death—i.e., the Trust document creates a remainder interest[3] (a.k.a. a "remainder beneficiary"). CP 42 at Art. IV.B.5.a. Under the Trust, the remainder beneficiary is identified in one of two ways, (1) Petitioner can name the remainder beneficiary, or (2) if Petitioner does not so name, Petitioner's estate becomes the remainder beneficiary:

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[3] A "remainder interest" is defined as "[t]he property that passes to a beneficiary after the expiration of an intervening income interest. For example, if a grantor places real estate in trust with income to A for life and remainder to B upon A's death, then B has a remainder interest." *Remainder Interest*, BLACK'S LAW DICTIONARY (11th ed. 2019).

> [U]pon the death of [Petitioner], his share of the net assets of the trust estate shall be distributed as he shall appoint or provide by his will or, in the absence of such appointment or provision, to his estate.

CP 42 at Art. IV.B.5.a. The Trust gives Petitioner the ability to sign a will that identifies who will receive the remainder interest at his death but, as a testamentary power of appointment, that Trust provision does not take effect until Petitioner's death. CP 42 at Art. IV.B.5.a.

The Trust's income provision (CP 37 at Art. IV.A.4), spendthrift provision (CP 43 at Art. IV.C.2), and remainder interest/appointment provision (CP 42 at Art. IV.B.5.a), all work together so that (a) Petitioner will receive an annual distribution of Trust income while he is alive; (b) Petitioner's limited interest in the Trust is protected from creditor's claims during his lifetime; and (c) the assets remaining in the Trust at Petitioner's death pass to the reminder beneficiary at that time (whether that remainder beneficiary is his estate or an appointee selected by Petitioner).

These provisions create two vested interests in the Trust: (1) Petitioner's lifetime interest, and (2) the remainder beneficiary who will receive Petitioner's interest upon his death. These two interests are the focus of the 2019 opinion, discussed below. *In re Marital Tr. B Created Under the Last Will & Testament of Felecia A. Graham Dated Oct. 26, 1998*, 11 Wn. App. 2d 608, 455 P.3d 187 (2019) ("*Marital Trust B II*").

B. The trial and appellate court agreed with the Trustee that the remainder beneficiary possesses a legally cognizable interest in the Trust and that Petitioner does not own the Trust's assets.

Preceding Petitioner's Petition for Review is a 2014 TEDRA petition, a 2016 appeal, a 2017 petition for review to this Court (which this Court denied), a second TEDRA petition in 2018, and a second appeal in 2019. *See Marital Trust B I*, 196 Wn. App. 1072, 2016 WL 6952619; *Marital Trust B II*, 11 Wn. App. 2d 608, 455 P.3d 187. All petitions and appeals involved a dispute about whether Petitioner's interest in the Trust and the remainder interest in the Trust are distinct from each other and, if so, who has the right to represent the remainder interest in a matter involving the principal of the Trust. At every level, the trial court and Court of Appeals have agreed with the Trustee.

The 2019 appellate opinion affirming the trial court's order is the subject of this Petition. The question before the Court of Appeals was whether Petitioner "owns the remainder interest in the trust assets and can bind that interest without it being separately represented." *Marital Trust B II*, 11 Wn. App. 2d at 609, ¶ 1.[4] The Court of Appeals concluded that

[4] The trial court concluded that "[a] separate remainder interest exists in the Trust . . . [and Petitioner] may not virtually represent that interest in TEDRA litigation or Non Judicial Binding Agreement, which could negatively impact the remainder interest." CP 90. The Court of Appeals affirmed. *Marital Tr. B II*, 11 Wn. App. 2d at 609, ¶ 1.

Petitioner does not own Trust property, that the remainder beneficiary does "have a legally recognized interest, and a special representative may separately represent such interest." *Id.* at 614-15, ¶¶ 16, 20.[5]

The Court of Appeals rejected Petitioner's argument "that he effectively owns the property held by the trust because he controls the distribution of the remainder." *Id.* at 612, ¶ 11. The Court of Appeals explained that when a trust instrument gives "a life interest in property to a beneficiary" with "the remainder [going] to that beneficiary's estate or appointees," the trust "creates a separate future interest for the" remainder beneficiary. *Id.* at 613, ¶ 14. "When this occurs, legal title to the remainder never vests in the beneficiary." *Id.* (emphasis added).

Regarding Petitioner's power of appointment, the Court of Appeals explained that the fact that Petitioner can decide who, after his death, will receive his interest in the Trust does not mean that Petitioner owns that Trust property—"the [T]rust does not give the future interest to [Petitioner] while alive. It allows him, while alive, only to identify other persons to receive it." *Id.* at 613, ¶ 15. In other words, the power of appointment is not equal

[5] A "special representative" is appointed when negotiating a TEDRA agreement under RCW 11.96A.220 (*see* RCW 11.96A.250) whereas a "guardian ad litem" ("GAL") is appointed in a TEDRA action (*see* RCW 11.96A.160). Both represent minors, incapacitated people, those who are unborn or unascertained, or those whose identity or addresses are unknown to the parties. At times the parties have used the terms interchangeably.

to ownership. *Id.* at 613-14, ¶ 16 (Petitioner's mother's "will makes clear that she did not intend for [Petitioner] to have an interest in the remainder or own the trust property"). Nothing, however, in the Court of Appeals' decision limits or otherwise affects Petitioner's power to determine the identity of (i.e., to appoint) the remainder beneficiary (and certainly does not "effectively invalidate[] all general powers of appointment," Pet. at 4). Petitioner retains his power of appointment which he may choose to exercise or not to exercise, in which case the remainder defaults to his estate.

The Court of Appeals also held there was a conflict of interest between Petitioner and the remainder beneficiary <u>if</u> "[Petitioner] attempts to exhaust the trust's funds" therefore, "[Petitioner] cannot represent this interest." *Id.* at 615, ¶ 19. Lastly, the Court of Appeals awarded the Trustee its attorneys' fees because Petitioner's lawsuit "does not benefit . . . the trust, and [Petitioner] does not prevail." *Id.* at 615, ¶ 22.

III. ARGUMENT

This Court only accepts review if a petition implicates one of the four criteria enumerated in RAP 13.4(b). Petitioner primarily asserts that his Petition "involves an issue of substantial public interest." RAP 13.4(b)(4); Pet. at 3-5. Far from involving an issue of substantial public interest, the decision was uncontroversial and based on well-settled law.

This matter is a private dispute between a Trustee and a beneficiary,

and its outcome is determined by the terms of a specific Trust—it does not concern an issue of public interest, let alone "an issue of substantial public interest." RAP 13.4(b)(4) (emphasis added). A lower court's decision may involve "an issue of substantial public interest" if the decision "has the potential to affect a number of proceedings in the lower courts" and "if review will avoid unnecessary litigation and confusion on a common issue." *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413, 414, ¶ 2 (2016). Petitioner has not identified any similar proceedings in lower courts that share a common issue with the Petition. *Cf. State v. Watson*, 155 Wn.2d 574, 577, ¶ 7, 122 P.3d 903 (2005) ("This case presents a prime example of an issue of substantial public interest" because "[t]he Court of Appeals holding . . . also has the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where [drug offender sentencing alternative] was or is at issue."). This is a purely private dispute and Petitioner has not carried his burden, as the petitioning party, to demonstrate the existence of an issue of substantial public interest. This Court should deny review.

A. Honoring the intent of the testator and the terms of the Trust, the Court of Appeals preserved Petitioner's power of appointment, stating that Petitioner "can decide who receives the remainder interest."

Nothing in the Court of Appeals' decision undermines Petitioner's power of appointment. The opposite is true—the Court of Appeals stated that, without limitation, "[Petitioner] can decide who receives the remainder

interest." *Marital Tr. B II*, 11 Wn. App. 2d at 613, ¶ 15 (emphasis added). Notably, Petitioner provides no citation to any part of the Court of Appeals' decision which would limit his power of appointment. Pet. at 11-14. The decision below contains no such limitation.

Petitioner confuses his power of appointment with the role of a GAL. Petitioner incorrectly argues that involvement of a GAL subverts his power of appointment because the GAL would need to "consent . . . to [Petitioner's] exercise of his testamentary general power of appointment." Pet. at 13. Petitioner is mistaken.

First, nothing in the Court of Appeals' opinion states that a GAL must be involved if/when Petitioner exercises his testamentary power of appointment. Second, the power of appointment is not the same as the power to choose <u>whether</u> any assets remain in the Trust at Petitioner's death and it is not the same as the power to decide <u>who</u> receives the assets <u>now</u>, during Petitioner's lifetime. Third, <u>selecting</u> a remainder beneficiary is not the same as <u>representing</u> the interests of the remainder beneficiary. Fourth, whether a GAL or special representative must be involved is controlled by statute, not by the Court of Appeals' decision. *See infra* at Section III.C., starting on page 14. The opinion does not change Washington law regarding general powers of appointment.

The Court of Appeals' decision leaves Petitioner's testamentary general power of appointment unaltered and unmodified.

B. The spendthrift clause establishes that Petitioner owns neither the assets nor the remainder, despite having the benefit of the assets.

Petitioner's interest in Trust assets is limited—he is entitled to an annual distribution of Trust income. CP 37 at Art. IV.A.4. Also, the Trustee may, in its sole discretion, make distributions of Trust principal <u>if</u> Petitioner's income is insufficient to support him in his "accustomed manner of living." CP 38 at IV.A.5. The nature of Petitioner's partial interest in the Trust is correctly reflected in the Court of Appeals' holding that Petitioner does not "own the trust property" nor does he "have an interest in the [Trust's] remainder." *Marital Tr. B II*, 11 Wn. App. 2d at 613-14, ¶ 16.

The spendthrift nature of the Trust further limits Petitioner's interest in the Trust. Petitioner's mother created a spendthrift trust, thereby giving her son the <u>benefit</u> of Trust assets during his life but not full ownership rights and not the power to control Trust assets during his life:

> No disposition, charge or encumbrance of either the income or principal of the trust estates, or any part thereof by any beneficiary under these trusts by way of anticipation shall be of any validity or legal effect, or be in any wise regarded by the Trustee, and neither the income nor principal of the trust estates, nor any part thereof, shall in anyway be liable to any claim of any creditor of any beneficiary.

CP 43 at Art. IV.C.2. Petitioner's argument ignores this clause.

That the spendthrift clause prevents Petitioner from alienating Trust

property is just one reason that Petitioner does not own the Trust property, including the remainder. *See* RESTATEMENT (THIRD) OF TRUSTS § 58, *Comment a* (2003) ("The term 'spendthrift trust' refers to a trust that restrains voluntary and involuntary alienation of all or any of the beneficiaries' interests."); Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 219 (2011) (explaining that "[p]roperty that we own can be reached by our creditors" but spendthrift clauses prevent creditor's claims brought by creditors of a beneficiary because a spendthrift "trust is fundamentally the settlor's"). The spendthrift clause limits Petitioner's interest in Trust property such that Petitioner does not retain "one or more of the fundamental attributes of ownership (the right to possess, exclude other[s], and to dispose of property)." *Woods View II, LLC v. Kitsap Cty.*, 188 Wn. App. 1, 39, 352 P.3d 807 (2015) (citing *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907 (1990), *cert. denied*, 489 U.S. 911 (1990)); *see also* Helene S. Shapo et al., BOGERT'S LAW OF TRUSTS & TRUSTEES, § 222 at 396 (3d ed. 2007) ("by creating a spendthrift trust [the trustor] is giving the beneficiary only a partial interest").

In addition to the spendthrift clause, the income provision of the Trust clarifies Petitioner's interest in Trust assets. Petitioner is only entitled to annual distributions of trust <u>income</u>. CP 37 at Art. IV.A.4. Distribution

of Trust principal is only allowed if, "in the judgment of the Trustee," the income from the Trust is "insufficient to provide for the proper support in [Petitioner's] accustomed manner of living." CP 38 at Art. IV.A.5.

Petitioner points to no provision of the Trust that gives him ownership of the Trust assets, let alone the remainder interest. No such provision exists. The Court of Appeals correctly held that Petitioner's mother made "clear that she did not intend for [Petitioner] to have an interest in the remainder or own the trust property." *Marital Tr. B II*, 11 Wn. App. 2d at 614, ¶ 16.

C. The Washington State Legislature protects the interests of remainder beneficiaries by prohibiting virtual representation when there is a conflict of interest between the remainder beneficiary and the lifetime beneficiary.

As noted by the Court of Appeals, the Washington State Legislature gave the remainder interest—whether that interest is given to appointees, heirs, or distributees of an estate, or distributees or beneficiaries of a trust—a legally cognizable, protectable interest via passage of the virtual representation sub-section of TEDRA. RCW 11.96A.120 (the "Virtual Representation Statute"); *see Marital Tr. B II*, 11 Wn. App. 2d at 614, ¶ 18 (RCW 11.96A.120 establishes that the remainder beneficiary does "have a cognizable and separate interest in the trust property"). The Virtual Representation Statute expressly protects interests held by remainder

beneficiaries by prohibiting a lifetime beneficiary (e.g., Petitioner) from virtually representing the remainder beneficiary if there is a conflict of interest. RCW 11.96A.120(7), (9). The official comments to RCW 11.96A.120 state that "a 'conflict' exists only if the party who would be the virtual representative has significantly different economic interests in the matter in issue from those of the parties being virtually represented." Comments to TEDRA at § 305 (Jan. 28, 1999) (excerpted at CP 59).

Petitioner denies that a conflict of interest exists between himself and the remainder beneficiary, insists that he can virtually represent the remainder beneficiary, and argues that he owns the Trust assets. Pet. at 17.

Regarding virtual representation, two provisions of RCW 11.96A.120 permit a trust's lifetime beneficiary (here, Petitioner) to virtually represent the remainder beneficiary, but only when there is no conflict of interest between the lifetime and remainder beneficial interests. RCW 11.96A.120(7), which refers to an interest passing from a living person to the distributees of that person's estate, states:

> Where an interest has been given to a living person, and the same interest, or a share in it, is to pass to . . . the heirs, . . . or the distributees of the estate of that living person upon the happening of a future event, that living person may virtually represent the . . . heirs . . . and the distributees of the estate of the person, but only to the extent that there is no conflict of interest between the representative and the person(s) represented with regard to the particular question or dispute.

(emphasis added). Likewise RCW 11.96A.120(9), which specifically refers to powers of appointment, states:

> To the extent there is no conflict of interest between the holder of the power of appointment and the persons represented with respect to the particular question or dispute, the holder of a lifetime or testamentary power of appointment may virtually represent and bind persons who are permissible appointees or takers in default . . . .

(emphases added). In either scenario a conflict disqualifies Petitioner from virtually representing the remainder beneficiary. RCW 11.96A.120(7), (9).

There is a clear conflict of interest between Petitioner and the reminder beneficiary, where Petitioner wishes to change the terms of the Trust to compel distributions of principal to him that exceed those currently permissible under the Trust. This change will necessarily deplete the principal that would otherwise pass to the remainder beneficiary at Petitioner's death. As the Court of Appeals explained, "a conflict of interest arises between [Petitioner] and the [remainder beneficiary] if [Petitioner] attempts to exhaust the trust's funds. [Petitioner] cannot represent this interest." *Marital Tr. B II*, 11 Wn. App. 2d at 615, ¶ 19; *see also* CP 27, 50-65 (Bruce P. Flynn et al., *Nonjudicial Dispute Resolution Agreements in Trusts and Estates – The Washington Experience and a Proposed Act*, 20 ACTEC Journal 138, 141 (1994)) (opining that a conflict exists between a life beneficiary and the remaindermen regarding principal distributions to

the life beneficiary); CP 27, 66-68 (Uniform Trust Code § 302, *Comment*).

Despite the plain language of the Virtual Representation Statute, Petitioner argues that the remainder beneficiary does not have a protectable interest that is capable of being represented under RCW 11.96A.120. Pet. at 16. If, as Petitioner asserts, remainder beneficiaries do not have a legally cognizable interest, then there could never be a conflict of interest between a remainder beneficiary and a lifetime beneficiary. Such an interpretation would render parts of the Virtual Representation Statute meaningless. Petitioner's argument is irreconcilable with the statutorily-recognized interest held by the remainder beneficiary. RCW 11.96A.120(7), (9).

Petitioner also argues that RCW 11.96A.120(7) does not apply because, in default of his power of appointment, the Trust directs that Petitioner's interest will go to his estate and not to the heirs or distributees of his estate. Pet. at 7. Petitioner ignores, however, that an estate is not the end point—assets that go to an estate are administered by the personal representative and distributed to the heirs, beneficiaries, or distributees of the estate. Regardless, the cognizable, protectable interest held by the remainder beneficiary is recognized in both subsections (7) and (9) of RCW 11.96A.120, and both prohibit virtual representation in the face of a conflict.

The Court of Appeals held: Petitioner does not own the Trust property nor does he have an interest in the remainder; the remainder

beneficiary has "a cognizable and separate interest in the trust property"; there is a conflict of interest between Petitioner and the remainder beneficiary if Petitioner "attempts to exhaust the trust's funds," therefore, Petitioner "cannot represent this interest"; and "a special representative may separately represent such interest." *Marital Tr. B II*, 11 Wn. App. 2d at 613-15. The Court of Appeals did not rule that a decedent's estate and his heirs/distributees are the same, nor did the Court of Appeals rule that "the Trust corpus skips the estate and passes directly to the heirs and distributees of the estate." Pet. at 8. Petitioner provides no citation to the Court of Appeals decision to support that characterization because none exists.[6]

The court below correctly held that the remainder beneficiary has a cognizable interest in Trust property (separate from Petitioner's) and that a conflict prevents Petitioner from virtually representing the remainder.

D. Whether or not the remainder beneficiary is ascertainable has no bearing on the validity of the remainder beneficiary's present interest in the Trust.

Petitioner conflates the expectancy interest held by beneficiaries of a will with the cognizable and protectable interests held by remainder

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[6] Petitioner's entire argument regarding State and Federal tax law relies on a mischaracterization of the Court of Appeals holding. Pet. at 8-11. Petitioner repeatedly asserts that the Court of Appeals ruled "that the term 'estate' includes heirs and distributees of the estate." Pet. at 11. The court below issued no such ruling.

beneficiaries whose interests are secured through a trust. Unlike a trust, a will is an ambulatory document and is not effective until the testator dies. *See Hall's Estate*, 159 Wash. 236, 241, 292 P. 401 (1930). As observed in *Marital Trust B II*: "[Petitioner] fails to appreciate the difference between a living person's and a dead person's estate." 11 Wn. App. 2d at 613, ¶ 15.

Petitioner's estate will not exist until his death, making the remainder beneficiary of the Trust currently unascertainable. Yet the fact that the beneficiaries may be unascertainable does not destroy the validity of their interests. RESTATEMENT (THIRD) OF TRUSTS § 44 (2003). For a trust to be valid and to create a remainder interest, "[i]t is not necessary that the intended beneficiary or beneficiaries be known at the time of the creation of the trust," only that they be ascertainable "at the time when a question of the trust's continuance is to be resolved." RESTATEMENT (THIRD) OF TRUSTS § 44, *Comment a*. Here, Petitioner's estate (and more specifically the parties who will receive the assets of the estate—the distributees of the estate) will become ascertainable when he dies. That is all the law requires in order to establish a valid beneficial interest in a trust.

Ignoring the difference between trust and will beneficiaries, Petitioner recites, at length, various principals regarding the expectancy interests held by heirs/beneficiaries to a will. *See* Pet. at 4 (Assignments of Error Nos. 3 and 4); *id*. at 14-16. None of those principals apply to this

dispute, which concerns the interest bestowed by a trust to a lifetime beneficiary (i.e., Petitioner) and the remainder beneficiary.

E. The Court of Appeals did not err in awarding attorneys' fees.

The Court of Appeals appropriately exercised its discretion and awarded reasonable attorneys' fees to the Trustee because Petitioner's lawsuit did "not benefit . . . the trust, and [Petitioner] does not prevail." *Marital Tr. B II*, 11 Wn. App. 2d at 615; RCW 11.96A.150; RAP 18.1(a); *cf. Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324 (1991) (where the services of the attorneys are rendered solely for the benefit of certain parties, attorneys' fees should not be awarded out of the estate, even though the estate is incidentally benefited by having adverse claims decided); *see also Marital Trust B I*, 196 Wn. App. 1072, 2016 WL 6952619 (Trustee did not violate its fiduciary duty in taking the same positions in litigation as here to protect the Trust, even when adverse to Petitioner).

Regardless, Petitioner's argument is moot: the Trustee never submitted a motion or bill for attorneys' fees nor collected fees. The Trustee does not intend to collect fees, despite the Court of Appeals' grant below.

IV. CONCLUSION

Review should be denied because the decision below does not concern any of the enumerated grounds in RAP 13.4(b).

DATED: April 10, 2020.

STOKES LAWRENCE, P.S.

By: /s/ Mathew L. Harrington
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 10th day of April, 2020, I caused a true and correct copy of the foregoing document, "RESPONSE TO PETITION FOR REVIEW," to be delivered via the Appellate Court Web Portal to:

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Dated this 10th day of April, 2020, at Seattle, Washington.

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