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No. 68109-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of:

EDDIE KANYER,

Deceased,

MARY ELLEN KANYER,

Respondent,

v.

KEVIN KANYER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT

SMITH GOODFRIEND, P.S.

MOEN LAW OFFICES, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Valerie A. Villacin
WSBA No. 34515

By: Bruce R. Moen
WSBA No. 6640

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

600 University St., Suite 3312
Seattle, WA 98101
(206) 441-1156

Attorneys for Respondent

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I. INTRODUCTION

This is an appeal by a son of an order confirming the actions of his mother as trustee and sole beneficiary of two trusts, which hold assets previously owned by his mother and late father as community property. While alive, the mother is the sole beneficiary of all of the assets held in the trusts and is entitled to use the trust income and principal for her support. The mother also retains “full power to sell, dispose of, invest, reinvest, exchange and manage” the property during her lifetime, and “in the exercise of [her] duties [as Trustee] is authorized to do all acts that might legally be done by an individual in absolute ownership and control of property.” Further, the mother has authority to revoke, withdraw, alter, and amend any portion of the agreement as it relates to her half interest in community property owned when her husband died.

While the agreement governing the revocable trusts left to the son a “first right of refusal” to take beach property held in one of the trusts as his share of his inheritance upon the mother’s death, nothing in the trust agreement limits the mother’s ability to manage the assets of the trusts while she is still alive. The trial court properly rejected the son’s argument that he had any vested rights under the plain language of the trust agreement, holding as a

matter of law that the mother could gift her half interest in the beach property to another son, and that she could sell her deceased husband's half interest in the beach property to generate cash for her support, even if her actions effectively eliminated appellant's unvested right of first refusal. (Appendix A) This court should affirm.

II. RESTATEMENT OF ISSUES

1. The Trust Agreement did not require the mother as the Trustee to fund the Family Trust with any specific assets. Instead, it provided the mother with discretion to "satisfy the amount distributable to the Family Trust by allocating property in cash or in kind (including undivided interests), or part in cash and part in kind." Did the trial court err in concluding that the mother had authority to fund the Family Trust with a condo instead of the beach property, but in any event how each trust was funded "did not matter," because "at the end of the day," the mother could sell any asset from either trust to support herself?

2. As sole beneficiary of the Family Trust and Survivor Trust, the mother had the right to use the assets of the trusts for her "health, education, support, and maintenance." Also, as Trustee of the trusts, the mother had "full power to sell, dispose of, invest, reinvest, exchange and manage the assets of the trust estate." Did

the trial court properly conclude that the mother could sell the beach property to generate cash for her support without first proving that the sale was “necessary”?

3. Should this court award attorney fees on appeal to the mother as Trustee for having to defend her actions taken under the unambiguous Trust Agreement giving her broad discretion as Trustee?

III. RESTATEMENT OF FACTS

A. As Part Of Their Estate Plan, Mary Ellen And Eddie Kanyer Created A Living Trust. Upon Eddie’s Death, The Trust Was To Be Divided Into Two Trusts, Of Which Mary Ellen Was Named Trustee And Sole Beneficiary With Full Discretion To Use All Trust Assets For Her Support.

Appellant Mary Ellen Kanyer, now age 85, is the surviving spouse of Eddie Kanyer, who passed away on August 9, 2000. (CP 3, 55) Mary Ellen and Eddie have four sons: their first-born, appellant Kevin Kanyer (DOB 5/30/1955), Jeffrey (DOB 2/28/1957), Robert (DOB 7/06/1961), and Rodney (DOB 3/24/1959), who passed away in 1992 without children. (CP 12, 224)

On April 5, 2000, approximately six months before Eddie died, he and Mary Ellen created a revocable living trust, the terms of which are governed by the “Joint Revocable Living Trust

Agreement of the Kanyer Trust" (the "Trust Agreement"). (CP 4, 11-47) The living trust was part of Mary Ellen and Eddie's estate plan, created to hold their community and separate assets. (CP 224) Mary Ellen and Eddie were the named Grantors and Trustees to the living trust. (CP 12)

The Kanyers' living trust was intended to allow Mary Ellen and Eddie "to retain control over their assets during their lifetimes, while providing for asset management and distribution when the spouses pass away." (CP 289) This type of trust is commonly used to avoid probate and to take advantage of federal estate tax savings opportunities. (CP 289)

The Trust Agreement provides that upon the death of either spouse the trust assets were to be divided and distributed into a Family Trust and a Survivor Trust. (CP 21, ¶ 9.1)¹ The Family Trust was to be funded with "an amount of property" equal to the deceased spouse's one-half interest in any community property, plus any separate property. (CP 21, ¶ 9.2) No specific assets were required to fund the Family Trust. Instead, "property in cash or in

¹ The Trust Agreement contemplated a third trust – the Marital Trust – to be funded if there was a tax advantage. (CP 21, ¶ 9.1) Because there was no tax advantage, the Marital Trust was never funded. (CP 224-25)

kind (including undivided interests), or part in cash and part in kind” equivalent to one-half of the deceased spouse’s community property interest could fund the Family Trust. (CP 22, ¶ 9.2.3)

When Eddie died in August 2000, he had no separate property. Therefore, Mary Ellen chose to fund the Family Trust with the condominium where she and Eddie had resided (the “Alki Condo”), as the equivalent of Eddie’s half interest in the community property. (CP 225) The Alki Condo had a value of \$260,000 when Eddie died. (CP 4) According to Thomas Keller, an estate planning attorney, and Richard Head, a certified public accountant, with whom Mary Ellen consulted, Mary Ellen’s decision to fund the Family Trust with the Alki Condo was appropriate. (CP 290, 293-94) Mr. Keller stated that this funding “allowed the Trustee of the Family Trust to hold title to a single, non-income producing asset with potential for growth appreciation. That would have allowed the asset to grow tax-free for the remaindermen while still providing a home to the surviving spouse.” (CP 290) Mr. Head also noted that at the time Mary Ellen funded the Family Trust, the “condo had greater potential for growth and appreciation partly due to its location in Seattle.” (CP 294)

The remaining assets, including Mary Ellen's half interest in community property and any separate property, were to fund the Survivor Trust. (CP 21, ¶ 9.1.1) Mary Ellen funded the Survivor Trust with the remaining community property – a brokerage account – valued at \$158,408, and a cabin and property located in Indianola, Washington (the "Indianola Beach Property"), with an assessed value of \$273,850. (CP 4, 54, 225) At the time, Mary Ellen believed the Indianola Beach Property was her separate property because she had inherited the property from her mother in 1974,² and since then the property had always been held in her name only. (See CP 6-7, 52) However, Mary Ellen and Eddie had executed a Community Property Agreement in 1965, which provided that any real property then owned or acquired thereafter would be considered community property. (CP 76) On partial summary judgment, the trial court concluded that as a result of the Community Property Agreement, the Indianola Beach Property was converted to Mary Ellen and Eddie's community property (CP 482) – a determination not challenged by Mary Ellen on appeal.

² This property has been in Mary Ellen's family since 1916. (CP 231)

As the surviving spouse, Mary Ellen is the primary beneficiary of the Survivor Trust and is allowed to use the assets of this trust even if her use exhausted the trust itself. (CP 23, ¶ 10.3.1) Mary Ellen is also the sole beneficiary of the Family Trust and has the right to use the assets in that trust for her "health, education, support and maintenance" during her lifetime. (CP 25, ¶ 11.2) Upon Mary Ellen's death, any assets still remaining in the Survivor Trust would become part of the Family Trust. (CP 24, ¶ 10.7) The assets of the Family Trust would then be divided between Mary Ellen and Eddie's then living children. (CP 25, ¶ 11.4)

In addition to being the beneficiary, Mary Ellen is the Trustee of both the Survivor Trust and Family Trust. (CP 12, 46, ¶ 20.1) Mary Ellen has the power to sell, dispose of and manage the trust assets whether in the Survivor Trust or in the Family Trust. (CP 38, ¶ 18.1) The Trust Agreement also gives her power to dispose of real property for cash or credit on any terms she deems appropriate. (CP 39, ¶ 18.3) Mary Ellen has the power to develop or partition any of the real property held in the trusts. (CP 39-40, ¶ 18.3) The Trust Agreement provided that "every action made in good faith by Trustee in the exercise of any power, authority,

judgment or discretion conferred hereunder (including without limitation, disclaimers, releases, or elections with respect to taxes) shall be conclusive and binding upon all persons interested in the assets of any trust established herein." (CP 34, ¶ 16.7)

Mary Ellen also has the right to revoke, withdraw, alter, and amend any provision of the Agreement as it relates to her half-interest in the community property owned by her and Eddie at his death. (CP 13-14, ¶¶ 4.1, 4.3) Mr. Keller, the estate planning attorney who Mary Ellen retained to advise her regarding the Trust Agreement, stated without challenge that "[w]hile Mary Ellen cannot change the Family Trust provisions as it pertains to Eddie's interest, she can change the form and deplete the value of the assets. For example, the identity of individual assets in the trust can increase or decrease by substituting or selling the assets. Additionally, the value of the assets in the trust can change depending upon market values and the beneficiary's rate of consumption." (CP 290)

B. The Trust Agreement Provided The Kanyers' Son, Kevin, With A First Right Of Refusal To Take Beach Property As His Share Of His Inheritance After Both Parents Died. However, While Either Parent Was Still Alive, The Property Remained Available For Their Support.

Less than one month before executing the Trust Agreement, Mary Ellen and Eddie had allowed their oldest son Kevin to reside in the cabin on the Indianola Beach Property as an "interim measure" because he had fallen on hard times, was going through a divorce, and was "essentially homeless." (CP 225, 226) In the Trust Agreement executed approximately a month later, Kevin was granted a "first right of refusal" to receive the Indianola Beach Property as his "fair share" of his inheritance from his parents upon the last of Mary Ellen or Eddie's death:

To our son, Kevin B. Kanyer, we give the right of first refusal to receive our cabin as his fair share. [Legal Description] Such right shall be personal to our son and shall not pass per stirpes.

(CP 25, ¶ 11.4.1)

This first right of refusal did not create any vested interest in the property for Kevin prior to its actual distribution to him upon Mary Ellen's death:

No beneficiary shall have any assignable interest in any trust created hereunder or in the income therefrom. [] No beneficiary shall have any power to sell, assign, transfer, encumber or in any other

manner to anticipate or dispose of his or her interest in the trust or the income produced thereby prior to its actual distribution by the Trustee to the beneficiary...

(CP 32, ¶ 16.1) Instead, while Mary Ellen is alive, she retains the right to use the Indianola Beach Property for her “health, education, support, and maintenance.” (CP 23, 25, ¶¶ 10.2, 11.2) Below, Kevin conceded that Mary Ellen could sell the Indianola Beach Property for her support during her lifetime. (CP 68, 104, 353)

C. After The Cabin On The Beach Property Was Destroyed By Fire, Mary Ellen With The Assistance Of Her Son Jeffrey And His Wife Rebuilt The Cabin, Nearly Tripling The Property’s Value. Mary Ellen Then Sold The Property To Jeffrey To Generate Cash For Her Support.

Kevin had moved onto the Indianola Beach property in March 2000. (CP 226) Although Mary Ellen intended it as only an “interim measure” because Kevin had been going through a difficult divorce and was unemployed, he did not move out until July 20, 2006 when the cabin on the property was completely destroyed by fire. (CP 226)³ Mary Ellen shared a portion of the insurance

³ During the six years that Kevin lived in the cabin, he was not regularly or gainfully employed. (CP 226) Kevin paid no rent to Mary Ellen, and often looked to his mother for financial support. (CP 226) Kevin claimed to have paid the property taxes on the cabin and to have made “improvements” while he lived on the property. (CP 67-68) However, Kevin provided no evidence of these payments, and he worked without permission from Mary Ellen and without the appropriate county permits. (CP 67-68, 225-29) Whether these “improvements” in fact benefited the property was disputed. (CP 225-29)

proceeds with Kevin to cover his lost personal items that were destroyed in the fire, and to provide him with a place to live for a year after the fire. (CP 228, 473)

Mary Ellen decided to rebuild the cabin, assisted by another son Jeffrey. (CP 480) To provide capital for construction, Mary Ellen sold Jeffrey and his wife, Debra, the vacant lot adjacent to the cabin for \$100,000⁴ and used these sales proceeds, along with the remaining insurance proceeds, to fund the construction of a new cabin. (CP 231, 419) Jeffrey and Debra were extensively involved in the construction of the new cabin, contributing resources to allow Mary Ellen to finance the project without incurring any debt. (See CP 230-32, 409-11)

Meanwhile, as construction was proceeding, Mary Ellen amended the Trust Agreement at least four times.⁵ (CP 106-08, 220-22) Mary Ellen initially limited the interest in the beach property that Kevin could take as his inheritance to one-third the value of the entire estate to insure that all three sons received an equal share of the estate left by Mary Ellen. (CP 106) Later, Mary

⁴ It is undisputed that this was a fair value for this lot. (RP 33)

⁵ Only the "Third Amendment" and "Fourth Amendment" were part of the record below. (CP 106-09, 220-22) However, the terms of the "Second Amendment" were described in the "Third Amendment." (CP 106-08)

Ellen eliminated Kevin's first right of refusal, stating: "It is my desire that no single child should receive all of the [Indianola Beach] property [], but instead [her sons] shall share equally in all of my assets." (CP 107) Also acknowledging that Kevin already "received considerable value" from the estate while both she and Eddie were alive, Mary Ellen provided an additional bequest of \$25,000 each to her two other sons. (CP 107) In the "Fourth Amendment" executed in September 2009, Mary Ellen granted a greater interest in the Indianola Beach Property to Jeffrey for his "efforts and expertise" that he contributed towards the cabin construction. (CP 220-21) The Amendment provided Jeffrey and his wife with a 60% interest in the property, with Kevin and Mary Ellen's youngest son, Robert, each receiving a 20% interest. (CP 221)

Shortly after the Fourth Amendment was executed in September 2009, construction was completed. The newly constructed cabin increased the Indianola Beach Property's value from \$275,000 to approximately \$800,000. (CP 231) Mary Ellen viewed Jeffrey and Debra's assistance as "instrumental in not only saving the value of the property, but also increasing its value." (CP 231) But nearly ten years after Eddie died, Mary Ellen's liquid

assets were dwindling. (CP 231) After consulting with counsel, Mary Ellen decided that in addition to the lot that she previously sold to Jeffrey and Debra for \$100,000, she would also sell the newly constructed cabin to Jeffrey and Debra for its appraised value of \$720,000, less 6% in commissions that would otherwise be paid, and less a "gift" to Jeffrey and Debra of 50% of the net value, \$338,400. (CP 231, 237) Although termed a "gift," the adjustment for half the net value was Mary Ellen's "recognition" of Jeffrey and Debra's extraordinary contributions that enhanced the value of the property. (CP 231, 237)

Ultimately, Mary Ellen sold property that was previously worth \$275,000 for cash of \$338,400. (CP 231) As part of this transaction, Jeffrey agreed that Mary Ellen could continue to use the beach property for her enjoyment. (CP 231)

D. The Trial Court Confirmed That Mary Ellen's Actions As Trustee Were Appropriate And Within Her Discretion.

After the construction for the new cabin was complete, Kevin claimed that he owned the new cabin because of his "first right of refusal" in the Trust Agreement. (CP 7, 231) Kevin also claimed that his first right of refusal in the original Trust Agreement gave him a vested interest in the Indianola Beach Property that

prevented Mary Ellen from selling it. (CP 7, 231-32) On December 7, 2010, Mary Ellen filed a petition under the Trust and Estate Dispute Resolution Act, RCW ch. 11.96A, to confirm her actions as Trustee. (CP 3-9) Kevin answered the TEDRA petition seeking a determination that the Indianola Beach Property was community property. (CP 65) Six months after Mary Ellen filed her petition, she asked the court to dismiss the TEDRA action without prejudice. (CP 154) Kevin resisted dismissal, asserting that his "counterclaims remain unresolved." (CP 161) As a result, King County Superior Court Judge Beth M. Andrus ("the trial court") denied Mary Ellen's motion to dismiss. (CP 162-63)

Kevin moved for partial summary judgment for a determination that the Indianola Beach Property was Mary Ellen and Eddie's community property. (CP 167) Mary Ellen moved for summary judgment to confirm her actions as Trustee and dismiss Kevin's claims. (CP 223-24) In his response to Mary Ellen's motion, Kevin demanded a trial to resolve whether Mary Ellen properly funded the trusts when Eddie died, and a determination as to whether Mary Ellen needed to sell the beach property because of her cash position. (CP 342-43)

Judge Andrus agreed with Kevin that the Indianola Beach Property was the community property of Mary Ellen and Eddie as a result of the Community Property Agreement. (CP 482) However, she held that the character of the property had no impact on the actions that Mary Ellen had taken as Trustee. (CP 482-83)

Judge Andrus court noted that under the terms of the Agreement, Mary Ellen could have funded the Survivor Trust with her half community interest in the Indianola Beach Property and left Eddie's half interest in the property in the Family Trust. (CP 483) Mary Ellen also had full authority to gift her interest in the property to Jeffrey instead of Kevin. (CP 483) At the same time, the trial court concluded that Mary Ellen retained "the discretion and thus the power to sell Eddie's half interest to generate cash to support herself. There is nothing in the Trust Agreement prohibiting this sale. As Kevin has to concede, the assets are there for Mary to Ellen to dispose of as she deems appropriate." (CP 483) Judge Andrus concluded that "Mary Ellen had the right to make the decisions she made regarding this property and this Court finds no ambiguity in the Trust Agreement warranting a trial on Kevin's claims." (CP 483)

IV. ARGUMENT

A. The Trial Court Properly Held That Mary Ellen's Actions As Trustee Were Appropriate Under The Unambiguous Terms Of The Trust Agreement.

Judge Andrus properly concluded that the Trust Agreement was not ambiguous, and under its terms Mary Ellen had broad discretion in how she funded the trusts and to sell assets of the trusts for her support and maintenance. (CP 483) "Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation; if the intention may be gathered from its language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction." *Templeton v. Peoples Nat. Bank of Washington*, 106 Wn.2d 304, 309, 722 P.2d 63 (1986). Further, "where discretion is conferred upon a trustee with respect to carrying out the provisions of a trust, the exercise thereof is not subject to control by the court except to prevent an abuse of such discretion." *Templeton*, 106 Wn. 2d at 309.

Kevin's challenge on appeal is two-fold. First, he complains that Mary Ellen was required to fund the Family Trust with the Indianola Beach Property. (App. Br. 1) Second, he complains that

Mary Ellen was prohibited from selling the Indianola Beach Property without first showing need. (App. Br. 1) But the Trust Agreement clearly gave authority to Mary Ellen to take the actions that she took as Trustee of both the Family Trust and Survivor Trust. (See CP 14, 22, 23, 25, 34, 38-39, ¶¶ 4.3, 5.1, 9.2.3, 10.3.1, 11.2, 16.7, 18.1, 18.3, 18.16) Kevin fails to present any basis to warrant a trial against his 85-year old mother for discretionary actions that she has taken as Trustee of the Family Trust and Survivor Trust.

In any event, Kevin never asked for a trial in his answer to Mary Ellen's petition (CP 64-65), and there is no need for a trial as Kevin now demands on appeal. TEDRA expressly envisions that proceedings to resolve disputed issues in probate cases may be decided on a written record, rather than by trial. RCW 11.96A.100(7) ("Testimony of witnesses may be by affidavit.") The statute also provides that a party must demand an evidentiary hearing in a petition or an answer. RCW 11.96A.100(8) ("Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law.").

Even if, as Kevin claims, there are disputed issues of fact, this court has held that a court resolving disputed issues of fact in a TEDRA case need not consider live testimony, but may resolve disputed issues by considering affidavits and other written materials as the trial court did here. **Foster v. Gilliam**, 165 Wn. App. 33, 54-55, ¶¶ 45-49, 268 P.3d 945 (2011) (“It is not necessary that the court hear oral testimony in order to make findings.”), *rev. denied*, 173 Wn.2d 1032 (2012); *See also* RCW 11.96A.170 (right to trial by jury only if “the issues are not sufficiently made up by the written pleadings on file.”)

Mary Ellen’s actions are governed by the terms of the Trust Agreement, which are unambiguous, and the trial court properly dismissed Kevin’s claims against his mother.

B. The Trust Agreement Granted Mary Ellen Broad Discretion As To Which Assets She Could Use To Fund The Family Trust.

The Trust Agreement did not require Mary Ellen to fund the Family Trust with any specific property. Instead, the Trust Agreement stated: “Trustee is authorized to satisfy the amount distributable to the Family Trust by allocating property in cash or in kind (including undivided interests), or part in cash and part in kind.” (CP 22, ¶ 9.2.3) *See also* RCW 11.98.070(15) (trustees have

discretion to “select any part of the trust estate in satisfaction of any partition or distribution, in kind, in money or both; make nonpro rata distributions of property in kind; allocate particular assets or portions of them or undivided interests in them to any one or more of the beneficiaries”).

Kevin’s complaint that Mary Ellen should have funded the Family Trust with the Indianola Beach Property fails to cite to or acknowledge the plain language of the Trust Agreement. (App. Br. 9-10) As Judge Andrus acknowledged, even if the trustors initially intended that the surviving spouse would fund the Family Trust with the Indianola Beach Property, “at the end of the day, it does not matter.” (CP 483) Regardless of whether the Indianola Beach Property was held in the Family Trust or in the Survivor Trust, Mary Ellen is the sole beneficiary of both trusts and is entitled to use the income and principal for her support during her lifetime. (CP 23, 25, ¶¶ 10.2, 11.2)

Kevin erroneously asserts that the trial court concluded that “once the Indianola property is in the Survivor’s Trust, Mary Ellen could do anything.” (App. Br. 12) But that is not what the trial court concluded. Instead, Judge Andrus concluded that Mary Ellen had full authority to revoke the first right of refusal as to her half interest

in the property under the Trust Agreement, which provided that the “Grantor acting alone may exercise the foregoing rights of revocation, withdrawal, alteration and amendment but only and solely as to his or her granted or contributed share of community and separate property.” (See CP 483, *citing* CP 14, ¶ 4.3) Accordingly, Judge Andrus concluded that even if the Trust Agreement originally contemplated that the Indianola Beach Property be placed in the Family Trust, Mary Ellen could alter that provision to place her half interest in the beach property in the Survivor Trust and gift it to Jeffrey. (CP 483) Kevin conceded Mary Ellen’s authority below. (RP 14, 38-39)

The trial court did not ignore that Mary Ellen’s power to revoke or alter the Trust Agreement was limited only to her interest in the property. (App. Br. 8) To the contrary, Judge Andrus acknowledged that regardless of whether Mary Ellen could revoke the first right of refusal as to Eddie’s half interest in the Indianola Beach Property, she could as Trustee and sole beneficiary sell his half interest to generate cash for her “health, education, support, and maintenance.” (See CP 483, *citing* CP 25, ¶ 11.1) Kevin repeatedly conceded this fact below. (CP 68: “I understand that the Indianola property [] may or may not be needed to financially care

for my mother in the future.”; CP 104: “I recognize that my mother may or may not need to sell this property for her health and maintenance needs.”; CP 353: “I have never asserted that the property cannot be sold.”) Consistent with that concession, Kevin never challenged Mary Ellen’s sale of the vacant lot that was part of the Indianola Beach Property to Jeffrey and Debra for \$100,000. (See RP 33) Once Mary Ellen exercised her right to sell the cabin and beach property, Kevin’s first right of refusal as a practical matter ceased to exist.

The trial court was not required to “first determine the value of the entire community estate before it determine[d] whether the substitution” of the Alki Condo for the Indianola Beach Property is appropriate, nor was a trial on this issue necessary, as Kevin argues. (App. Br. 10) Kevin cannot claim any right to a full accounting, because the Trust Agreement specifically provides that the Trustee is only required to provide an accounting to beneficiaries “entitled to *current* distributions of trust income or principal.” (CP 43, ¶ 19.1.1, emphasis added) Under the terms of the Trust Agreement, the Trustee is also “relieved from all of the duties which would otherwise be placed upon Trustee by the act relating to accounting by trustees.” (CP 43, ¶ 19.1.1) In any event,

regardless of Kevin's "red herring" demand for an accounting, nothing in the plain language of the Trust required Mary Ellen to fund the Family Trust with the Indianola Beach Property.

Kevin's argument that he is entitled to a full accounting to show that Mary Ellen "underfunded" the Family Trust is without merit. (App. Br. 10-11) Kevin attacks Mary Ellen's expert testimony that she properly funded the Family Trust with the Alki Condo, arguing that her expert "did not take into consideration other assets available to Mary Ellen." (App. Br. 11) But that is untrue. Mr. Head, a certified public accountant, acknowledged that considering the value of the condo, the beach property, and the community brokerage account⁶, "it is possible that an additional sum of approximately \$88,000 should have been placed into the Family Trust." (CP 293) But he also stated that "the potential underfunding did not prejudice any remaindermen and it remains my opinion that it was appropriate to fund the Family Trust with the condo." (CP 293) This testimony was unchallenged below, and Kevin on appeal still does not claim that the underfunding

⁶ When Mary Ellen initially funded the Family Trust, she believed that the Indianola Beach Property was her separate property and did not include it in her calculation as to Eddie's one-half interest of community property. (See CP 4-7)

prejudiced him, nor can he. Whether Mary Ellen underfunded the Family Trust by only placing the Alki Condo and no additional assets into the trust is not material to Kevin's claim that the Indianola Beach Property, not the Alki Condo, should have funded the Family Trust. **Lamon v. McDonnell Douglas Corp.**, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979). (a "material fact" is a fact upon which the outcome of the litigation depends).

Further, the trial court had considered the undisputed value of the community estate when Eddie died. (CP 48) Except for questioning the value of the Indianola Beach Property, for which he provided no contrary evidence, (See CP 480) Kevin never substantively challenged the accounting presented by Mary Ellen. At most, he claimed that he "cannot agree" to Mary Ellen's statement regarding the value of the trust without "full disclosure of the accounting." (CP 73) But to avoid summary judgment, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value and must set forth specific facts that sufficiently rebut the moving party's contentions." **B.A. Van de Grift, Inc. v. Skagit County**, 59 Wn. App. 545, 550, 800 P.2d 375 (1990).

Because the Trust Agreement provisions are clear and Kevin fails to present any factual issues that are material to his claims, the trial court properly held that Mary Ellen's funding of the Family Trust was appropriate as a matter of law.

C. The Trust Agreement Did Not Require A Showing Of "Need" Before Mary Ellen Could Sell Principal Of The Trust.

Whether Kevin's 85-year old mother "needed" to sell Eddie's half interest in the Indianola Beach Property to generate cash for her support is similarly irrelevant as a matter of law. Nothing in the Trust Agreement requires Mary Ellen to prove she needs to sell property for her "health, education, support, and maintenance." (CP 23, 25, 38, ¶¶ 10.2, 11.2, 18.1) Instead, the Trust Agreement unambiguously grants Mary Ellen "full power to sell, dispose of, invest, reinvest, exchange and manage" the property during her lifetime, and "in the exercise of [her] duties [as Trustee] is authorized to do all acts that might legally be done by an individual in absolute ownership and control of property." (CP 38, 42, ¶¶ 18.1, 18.16)

It is not for the court to question the discretionary acts of Mary Ellen as Trustee. ***Peoples Nat. Bank of Wash. in Seattle v. Jarvis***, 58 Wn.2d 627, 630, 364 P.2d 436, 439 (1961). In ***Jarvis***,

the trustees were given the “power to pay to Ethell Miller Jarvis or to apply for her benefit [] such portions of the principal of the trust estate as it shall seem fitting and proper for her support and maintenance.” 58 Wn.2d at 630. The remaindermen challenged the trustees’ decision to invade principal to pay certain bills for the beneficiary’s “medical, hospital, nursing and housekeeping services,” arguing that “there is no necessity for invading the corpus of the trust assets *at this time*.” 58 Wn.2d at 630 (emphasis in original). The remaindermen argued that there were other alternatives at a “much lesser cost.” 58 Wn.2d at 630. In rejecting their claims, the Court held “defendants would have the court substitute their discretion for that of the trustee. This the court cannot do in the absence of an abuse of discretion, for, where discretion is conferred upon a trustee, the exercise thereof is not subject to control by the court *except to prevent an abuse of such discretion*.” **Jarvis**, 58 Wn.2d at 630 (emphasis in original).

Here, Mary Ellen did not abuse her discretion in selling Eddie’s half interest in the Indianola Beach Property to Jeffrey. Mary Ellen’s decision improved her liquidity, providing her a source of cash since her own cash reserves were “dwindling.” (CP 231) Her only other major asset was her condo, and she properly

determined that it was not appropriate to sell for her support the home where she lives. (CP 239) Further, because she sold the beach property to her son instead of a third party, she was able to retain the additional benefit of the right to continue to use the property. (CP 231) Mary Ellen's actions were within her powers as Trustee and the trial court properly held that she "had the right to make the decisions she made regarding this property and this court finds no ambiguity in the Trust Agreement warranting a trial on Kevin's claim." (CP 483)

No language in the Trust Agreement supports Kevin's argument (made for the first time on appeal) that he "should have been offered the right of first refusal before [the beach property] was sold to his brother." (App. Br. 13) The Trust Agreement granted Kevin a "first right of refusal" to take the Indianola Beach Property as his share of his inheritance once Mary Ellen died but only if the property still remained in the trust at that time. (See CP 25, ¶ 11.4.1) While Mary Ellen is alive, Kevin's interest in the beach property remained only an expectancy and not a vested interest. See ***Marriage of Hurd***, 69 Wn. App. 38, 49, 848 P.2d 185 (1993) ("bequest in a will while the testator is still living is merely an expectancy"), *rev. denied*, 122 Wn.2d 1020, *disapproved on other*

grounds by **Estate of Borghi**, 167 Wn.2d 480, 219 P.3d 932 (2009); **Old Nat. Bank of Washington v. Arneson**, 54 Wn. App. 717, 721, 776 P.2d 145 (1989) (one who holds a first right of refusal “acquires no present right to affect the property, but holds only a general contract right to acquire a later interest should the property owner decide to sell.”), *rev. denied*, 113 Wn.2d 1019.

Kevin’s reliance on **Saunders v. Callaway**, 42 Wn. App. 29, 708 P.2d 652 (1985) to claim that “a right of first refusal for purposes of an inheritance is an enforceable preemptive option,” (App. Br. 13) is misplaced. There, the party had a “first right and option to purchase,” not, as here, a first right of refusal to take certain property as an inheritance. In **Saunders**, the court held that the plaintiff did not have an enforceable “first right and option to purchase” because it was not supported by consideration. 42 Wn. App. at 37. Here, Kevin’s first right of refusal was not a contractual right supported by consideration because it was at most an expectancy that only vested upon Mary Ellen’s death. Mary Ellen was not required to offer Eddie’s half interest in the Indianola Beach Property to Kevin before she sold it to Jeffrey and Debra.

D. This Court Should Award Attorneys' Fees To Mary Ellen For Having To Defend This Appeal.

This court should award Mary Ellen attorneys' fees under TEDRA to compensate the estate for the expenses incurred in defending the trial court's clear and well-reasoned decision. RCW 11.96A.150(1) ("either the trial court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings . . . The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.").

"RCW 11.96A.150 expressly authorizes the Court of Appeals to make an independent decision on the question of fees to any party." *In re Estate of Black*, 116 Wn. App. 476, 492, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). Here, Mary Ellen's actions as Trustee were well within the discretion provided to her under the terms of the Trust Agreement. This appeal was entirely unnecessary because Kevin failed to

present any basis for his claims that a trial is necessary to determine whether his mother's actions as Trustee were warranted. Kevin's decision to pursue this litigation, even after Mary Ellen voluntarily sought to dismiss her petition, has robbed Mary Ellen of the benefits from her decision to sell the Indianola Beach Property. The cash that the trust gained from selling the property is now unnecessarily being used towards this litigation, instead of towards Mary Ellen's support. This court should exercise its discretion and award attorneys' fees to the trustee pursuant to RAP 18.1 and RCW 11.96A.150(1).

V. CONCLUSION

The Trust Agreement is clear. The trial court properly concluded that Mary Ellen's actions as Trustee were within her powers under the Agreement. This court should affirm and award her attorney fees.

DATED this 7th day of September, 2012.

MOEN LAW OFFICES, PS

By:  _____

Bruce R. Moen
WSBA No. 6640

SMITH GOODFRIEND, P.S.

By:  _____

Howard M. Goodfriend
WSBA No. 14355
Valerie A. Villacin
WSBA No. 34515

Attorneys for Respondent Mary Ellen Kanyer

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 7, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Thornton P. Percival Attorney at Law 18478 Angeline Ave NE Suquamish, WA 98392-9791	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Bruce Moen Moen Law Offices, PS 600 University St., Suite 3312 Seattle, WA 98101-4172	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 7th day of September, 2012.



Victoria K. Isaksen

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

In re Estate of EDDIE KANYER,

Deceased,

v.

MARY ELLEN KANYER,

Petitioner,

v.

KEVIN KANYER,

Respondent.

NO. 10-4-06743-1 SEA

ORDER GRANTING CROSS
MOTIONS FOR SUMMARY
JUDGMENT

THIS matter came before the Court on the motion for partial summary judgment of Respondent Kevin Kanyer and the cross motion for summary judgment of Petitioner Mary Ellen Kanyer.

The Court reviewed and considered the following pleadings, in addition to the oral argument of counsel on November 18, 2011:

1. Motion of Kevin Kanyer for Partial Summary Judgment and Memorandum of Law in Support of Motion;

2. Declaration of Kevin Kanyer in Support of Motion for Partial Summary Judgment and all attachments thereto.

3. Petitioner's Motion for Summary Judgment and to Dismiss Claims, verified under oath by Mary Ellen Kanyer, and all attachments thereto;

4. Declaration of Thomas M. Keller;

5. Declaration of Richard B. Head, CPA, CFE, MS-Tax, CAV;

6. Amendment to Mary Ellen Kanyer's Motion for Summary Judgment and to Dismiss Claims;

7. Response of Kevin Kanyer to Mary Ellen Kanyer's Motion for Summary Judgment and Dismissal of Claims;

8. Declaration of Kevin Kanyer in Opposition to Petitioner's Motion for Summary Judgment and attachments thereto;

9. Petitioner's Reply to Kevin Kanyer's Response to Motion for Summary Judgment;

10. Rebuttal Memorandum of Kevin Kanyer to Petitioner's Reply to Summary Judgment motion.

11. The original Petition filed by Mary Ellen Kanyer on December 7, 2010 and all attachments thereto;

12. Kevin Kanyer's Answer to the Petition filed on February 18, 2011 and all attachments thereto;

13. Petitioner's Reply to Kevin Kanyer's Counterclaim filed on February 23, 2011.

FACTUAL BACKGROUND

Petitioner Mary Ellen Kanyer is the surviving spouse of Eddie Kanyer, who passed away on August 9, 2000.¹ Before Eddie passed away, he and his wife created a revocable living trust, the terms of which are contained in a document entitled "Joint Revocable Living

¹ Because all family members share the same last name of Kanyer, the Court will refer to the parties by their first names to ensure clarity. No disrespect is intended.

Trust Agreement of the Kanyer Living Trust” (referred to here as the “Trust Agreement”). The Trust Agreement provided that, upon either spouse’s death, the trust assets were to be divided and distributed into a Family Trust and a Survivor’s Trust. Under Article 9, the survivor, here Mary Ellen, was to put her husband’s interest in any community property and his separate property into the Family Trust. She was to put her interest in any community property and her separate property into the Survivor’s Trust. Under Article X, Mary Ellen was the primary beneficiary of the Survivor’s Trust and was allowed to use the assets of this trust even if her use exhausted the trust itself. Similarly, under Article XI, as long as Mary Ellen is alive, she is the sole beneficiary of the Family Trust and has the right to use the assets for her health, education, support and maintenance. Under Paragraph 18.1, Mary Ellen, as Trustee, has the power to sell, dispose of and manage the trust assets. Paragraph 18.3 gives her the power to dispose of real property for cash or credit on any terms she deems appropriate. She also has the power to develop or partition any of the real property. Paragraph 19.1.7 gives Mary Ellen the power to consolidate or merge the Family and Survivor’s Trusts.

Eddie and Mary Ellen owned two pieces of real estate: a condominium on Alki Avenue (“the Alki condo”), in which Mary Ellen currently resides; and beach property in Indianola, Washington, comprised of what is now two separate lots (“Indianola Beach Property”). Both Mary Ellen and her son, Kevin, the claimant in this matter, agree that the Alki condo was community property at the time of Eddie’s death. The undisputed evidence is that this condo had a value of \$260,000 in 2000.

The current dispute centers around the characterization and disposition of the Indianola Beach Property. Mary Ellen’s mother, Edith S. Fogh, and her aunt, Marjorie Fogh,

purchased it in 1916. The aunt deeded her interest in the Indianola Beach Property to Edith in 1924. Edith gifted the Indianola Beach Property to Mary Ellen in 1974. Kevin has produced a community property agreement signed by Mary Ellen and Eddie in 1965 under the terms of which any real property owned by either spouse or acquired thereafter would be considered community property. Mary Ellen does not dispute that she executed this community property agreement. But she was identified on the title as the sole owner of the Indianola Beach Property and has assumed that the property was her separate property. When the Trust Agreement was created, there was no deed recorded transferring the real estate to the living trust. Nevertheless, the living trust makes specific reference to this piece of real estate in Article XI, entitled "Family Trust." Paragraph 11.4.1 provided in part:

KEVIN KANYER, JEFFREY M. KANYER, and ROBERT S. KANYER. We give the rest and remaining property of the Family Trust to our children as their separate property when they each attain the age of twenty-one (21) or when they complete their second year of college. To our son, KEVIN B. KANYER, we give the right of first refusal to receive our cabin as his fair share. ...

According to the tax assessment attached to the petition, the Indianola Beach Property was valued at \$273,850 in 2000, the year of Eddie's death. The land had a value of \$227,000 and the small cabin was valued at \$46,850. That is the only evidence before this Court as to its value. Although Kevin disputes this valuation, he has provided the Court with no evidence to controvert this valuation.

Kevin resided in the cabin until it burned down in 2006. At that point, Mary Ellen decided to rebuild on the property and her son Jeffrey assisted her in the process. She sold Jeffrey the vacant lot adjacent to the cabin for \$100,000 and then used these sales proceeds, along with insurance proceeds, to fund the construction of a beautiful 2300 square foot home

overlooking Puget Sound on the remaining lot. At the completion of construction, she sold the new house and the lot on which it sits to Jeffrey and his wife, Debra, for its appraised value of \$720,000, less commissions owed and less a gift to Jeffrey and Debra of 50% of the net value, \$338,400. Jeffrey and Debra use the house as a vacation home and Mary Ellen has the ability to enjoy its use as well. Mary Ellen decided to sell the house to Jeffrey and Debra because they had provided her with so much assistance in rebuilding on the property and she needed the cash to support herself. Kevin disputes Mary Ellen's statement that she "needed" the cash.

In addition to the sale of the Indianola Beach Property, Mary Ellen has amended the Trust Agreement on four different occasions the effect of which was to eliminate Kevin's right of first refusal on the cabin upon Mary Ellen's death. At some point, she declared to her children that she had placed the Indianola Beach Property into the Survivor's Trust and the Alki condo into the Family Trust.

KEVIN'S CLAIM

Although Mary Ellen filed the petition, she filed a CR 41 non-suit and sought to dismiss the petition. Although the order of dismissal was signed, Kevin contended that his counter-claim remained pending for resolution. This Court agreed.

Kevin contends that by virtue of the community property agreement signed by Mary Ellen and Eddie in 1965, the Indianola Beach Property was community property and Eddie's ½ interest should have been transferred to the Family Trust upon Eddie's death. He also contends that Mary Ellen had no right under the Trust Agreement to amend the provision giving him a right of first refusal to the cabin. Kevin contends that there are material issues of fact as to whether Mary Ellen had to sell the Indianola Beach Property for her support.

Kevin moved for partial summary judgment seeking a court ruling that the Indianola Beach Property was community property. Mary Ellen filed a cross motion for summary judgment seeking a dismissal of Kevin's counter-claim on the ground that Mary Ellen had the right under the Trust Agreement to put the Indianola Beach Property into the Survivor's Trust and to put the Alki condo into the Family Trust because they were of relatively similar values. She also argues that the characterization of the property as separate or community is no longer relevant because she had the authority under the Trust Agreement to sell any and all assets of the Survivor's Trust and Family Trust if she chose to do so. Given that the Indianola Beach Property is no longer an asset of either trust, she contends, Kevin has no legal right to any part of the property.

Kevin is correct that the Indianola Beach Property was community property. While ordinarily, property received as a gift remains the separate property of the donee spouse, a community property agreement converts all separate property into community property. *Lyon v. Lyon*, 100 Wn.2d 409, 413, 670 P.2d 272 (1983). The law in this state is to accord strong favor to community property agreements over other instruments. *Harris v. Harris*, 60 Wn. App. 389, 804 P.2d 1277 (1991) (citing *Lyon*, 100 Wn.2d 409; *Neeley v. Lockton*, 63 Wn.2d 929, 389 P.2d 909 (1964)). Although Mary Ellen received the Indianola Beach Property as a gift from her mother in 1974, she executed a community property agreement in 1961 in which she agreed that any property she acquired after signing the agreement would be deemed community property. Thus, Kevin's motion for partial motion for summary judgment on this issue is GRANTED.

But Mary Ellen is also correct that the characterization of the Indianola Beach Property as community property does not mean that Kevin is entitled to a right of first refusal

to that property. The parties dispute whether Mary Ellen had the authority to put the Alki condominium into the Family Trust rather than the Indianola Beach Property. At the end of the day, it does not matter. Although Paragraph 11.4.1 shows that Eddie and Mary Ellen intended to put the cabin into the Family Trust, Paragraph 4.3 gives Mary Ellen the authority to modify the Trust Agreement after Eddie's death as to her share of any community property. The effect of this provision is that she has the right to put her interest in the Indianola Beach Property into the Survivor's Trust. Once in the Survivor's Trust, she could gift her half interest to her son Jeffrey—even if Paragraph 11.4.1 remained unchanged. And under Paragraph 11.1, she has the discretion and thus the power to sell Eddie's half interest to generate cash to support herself. There is nothing in the Trust Agreement prohibiting this sale. As Kevin has to concede, the assets are there for Mary Ellen to dispose of as she deems appropriate.

The Court understands Kevin's frustration that his brother now has title to the Indianola Beach Property, but Mary Ellen had the right to make the decisions she made regarding this property and this Court finds no ambiguity in the Trust Agreement warranting a trial on Kevin's claim.

Based on the foregoing, Mary Ellen's cross motion for summary judgment is GRANTED and Kevin's counter-claim is DISMISSED with prejudice.

DATED this 22nd of November, 2011.

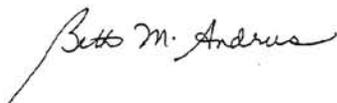
\s\ (E-FILED) _____
Judge Beth M. Andrus
King County Superior Court

King County Superior Court
Judicial Electronic Signature Page

Case Number: 10-4-06743-1
Case Title: IN RE EDDIE KANYER

Document Title: ORDER

Signed by Judge: Beth Andrus
Date: 11/22/2011 9:34:27 AM



Judge Beth Andrus

This document is signed in accordance with the provisions in GR 30.

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