

Original

FILED
COURT OF APPEALS

NOV 13 2013

NO. 34595-1-II

CLERK OF COURT

BY *CMC*

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Estate of:

RAYMOND M. LARSON,

Deceased

BRIEF OF APPELLANTS

EISENHOWER & CARLSON, PLLC

By P. Craig Beetham, WSBA # 20139

Joseph A. Rehberger, WSBA # 35556

Attorneys for Appellants

EISENHOWER & CARLSON, PLLC

1200 Wells Fargo Plaza

1201 Pacific Avenue

Tacoma, Washington 98402

Telephone: (253) 572-4500

TABLE OF CONTENTS

	Page
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. Assignments of Error	1
B. Issues Pertaining to Assignments of Error.....	1
II. <u>STATEMENT OF THE CASE</u>	2
A. Factual History.....	2
B. Procedural History	9
III. <u>SUMMARY OF ARGUMENT</u>	12
IV. <u>ARGUMENT</u>	14
A. Standard of Review.....	14
B. Law Regarding Trust Amendments.....	14
C. The Terms of the Raymond M. and Gene M. Larson Trust Prohibited Raymond Larson’s Unilateral 1991 and 2001 Amendments	16
1. Paragraph 2.1 Reserved the Power of Revocation and Modification Only When Both Co-Trustors Acted in Concert	16
2. Paragraph 2.1 Explicitly Prohibited One Trustor, Acting Alone, from Amending the Raymond M. and Gene M. Larson Trust as to the Other Co-Trustor’s Interest.....	23
3. The “Marital Trust,” Section II, Paragraph B.2.3, Does Not Permit the 2001 Attempted Modification to the Raymond M. and Gene M. Larson Trust	26

a.	The “Marital Trust” is Separate and Distinct from the Raymond M. and Gene M. Larson Trust.....	28
b.	The Trial Court’s Interpretation and Application of Paragraph B.2.3 to Permit Raymond Larson’s 2001 Amendment is Completely Irreconcilable with Paragraph 2.1	33
D.	The 2001 Amendment to the Raymond M. and Gene M. Larson Trust is Invalid Because it Did Not Comply with the Trust’s Modification Requirements	35
1.	Section II, Paragraph B.2.3 Required that any Amendments Made Pursuant Thereto Must be in Writing and Properly Notarized.....	37
2.	Chapter 42.44 RCW Governs the Requirements for Notarial Acts	38
3.	The 2001 Attempted Amendment is Legally Invalid Because it did not Comport with the Raymond M. and Gene M. Larson Trust’s Notary Requirements	39
E.	The Larson Children are Entitled to their Reasonable Expenses, Including Attorneys’ Fees, Incurred in Bringing this Appeal.....	42
V.	<u>CONCLUSION</u>	43

TABLE OF AUTHORITIES

	Page
<u>Cases - Washington</u>	
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i> , 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002).....	34
<i>In re Estate of Button</i> , 79 Wn.2d 849, 852, 490 P.2d 731 (1971).....	15, 34, 36
<i>In re Estate of Larson</i> , 58 Wn.2d 673, 678, 364 P.2d 494 (1961).....	15, 36
<i>In re Estate of Larson</i> , 71 Wn.2d 349, 354, 428 P.2d 558 (1967).....	14
<i>In re Estate of Preston</i> , 59 Wn.2d 11, 15, 365 P.2d 595 (1961).....	15, 36
<i>Jones v. Allstate Ins. Co.</i> , 146 Wn.2d 291, 300, 45 P.3d 1068 (2002).....	14
<i>Niemann v. Vaughn Cmty. Church</i> , 154 Wn.2d 365, 382, 113 P.3d 463 (2005).....	18

Cases – Other Jurisdictions

<i>In re Jesse</i> , 286 F. 305, 306 (9th Cir. 1923)	39
<i>Williams v. Springfield Marine Bank</i> , 475 N.E.2d 1122, 1124-25 (Ill. App. 1985).....	17, 18, 19, 20, 21

Statutes

RCW 11.96A	9, 11, 42
RCW 11.96A.150(1).....	43
RCW 11.96A.150(2).....	43

RCW 26.16.030	24
RCW 42.44	38, 42
RCW 42.44.080	38
RCW 42.44.080(1).....	40
RCW 42.44.080(4).....	40
RCW 42.44.080(7).....	40
RCW 42.44.080(8).....	39
RCW 42.44.080(10).....	40
RCW 42.44.090(1).....	39, 41
RCW 42.44.100	39

Rules

RAP 18.1	42
----------------	----

Other

RESTATEMENT (SECOND) OF TRUSTS § 331(1).....	15
RESTATEMENT (THIRD) OF TRUSTS § 2, cmt. a.....	30, 32
RESTATEMENT (THIRD) OF TRUSTS § 3, cmt. a.....	15
RESTATEMENT (THIRD) OF TRUSTS § 63, cmt. k.....	18, 24
RESTATEMENT (THIRD) OF TRUSTS § 63(1).....	15
RESTATEMENT (THIRD) OF TRUSTS § 66.....	18

I. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred when it denied the Larson Children's motion for partial summary judgment and did not invalidate the 1991 and 2001 unilateral trust amendments due to their noncompliance with the terms of the 1989 Raymond M. and Gene M. Larson Trust.

2. The trial court erred when it denied the Larson Children's second pretrial dispositive motion and did not invalidate the 2001 unilateral trust amendment due to its noncompliance with the 1989 Raymond M. and Gene M. Larson Trust's notarization requirements

B. Issues Pertaining to Assignments of Error.

1. Whether Paragraph 2.1 required all modifications to the Raymond M. and Gene M. Larson Trust, except for those specifically allowed to be undertaken by one settlor acting alone, to be performed by the joint action of both settlors, Raymond and Gene Larson. This issue is reviewed de novo.

2. Whether Paragraph 2.1 additionally prohibited Raymond Larson, acting alone, from making any amendment or modification affecting Gene Larson's interest in the Raymond M. and Gene M. Larson Trust. This issue is reviewed de novo.

3. Whether the trial court erred in finding that the "Marital Trust" provision set forth in Paragraph B.2.3 permitted Raymond Larson to unilaterally modify the beneficiary provisions of the 1989

Raymond M. and Gene M. Larson Trust proper following Gene Larson's death. This issue is reviewed de novo.

4. Whether Raymond Larson's 2001 unilateral trust amendment was properly notarized as required by the Raymond M. and Gene M. Larson Trust. This issue is reviewed de novo.

II. STATEMENT OF THE CASE

A. Factual History.

Raymond and Gene Larson married October 27, 1945 in Seattle, Washington and remained married until Gene Larson passed away in 1994, nearly 50 years. CP at 312-14. Among many other highlights in their lives, Raymond and Gene Larson had two children, Randall Larson and Connie (Larson) Milton. *Id.* In turn, Randall Larson and Connie Larson each had four children of their own, giving Raymond and Gene Larson eight grandchildren: Elizabeth Ann Larson, Casey Raye Milton, Charlotte Gene Larson, Sara Jane Larson, Carey Lynn Milton, Timothy Craig Larson, Colleen Mary Milton, and Daniel Merritt Milton. CP at 314-15; CP at 290-93.

By all accounts, Raymond Larson was a successful business man in Pierce County. CP at 313. Gene Larson was a stay-at-home mother, providing services to the Larson family unit that were invaluable to their marriage as well as volunteering in the community and in her children's various school related activities. *Id.*

During their marriage and on November 1, 1989, Raymond and Gene Larson jointly created a "living trust" which they named the

“Raymond M. and Gene M. Larson Trust.” CP at 269-96. At the time the Raymond M. and Gene M. Larson Trust was settled, Raymond and Gene Larson had been married for approximately 43 years. CP at 312-14.

The plain language of the Raymond M. and Gene M. Larson Trust establishes its principle purposes:

The purposes of this Trust are [1] to provide for the Trustors’ care and welfare during each of their lifetimes, to provide for the management of Trustors’ property in the event of the incapacity of either of them and [2] to ensure an orderly and economical transition of the Trustors’ assets after their deaths to the distributees and beneficiaries identified in Schedule B, attached hereto, and made a part of this Agreement by this reference.

CP at 272 (¶ 3.1 of the Raymond M. and Gene M. Larson Trust) (emphasis added).

Also on November 1, 1989, Raymond and Gene Larson jointly executed Schedule B to the Raymond M. and Gene M. Larson Trust. CP at 288-96. In Schedule B, specifically Paragraph B.3.3, Raymond and Gene Larson identified their “distributees and beneficiaries” as: Randall Larson, Connie (Larson) Milton, and Raymond and Gene’s eight grandchildren: Elizabeth, Casey, Charlotte, Sara, Carey, Timothy, Colleen, and Daniel. CP at 292-93. Raymond and Gene Larson each signed this formulation of Schedule B signifying their collective intent that their children and grandchildren be the lone distributees and beneficiaries. CP at 295-96. In short, the Raymond M. and Gene M. Larson Trust was designed and intended to provide for the security of the surviving spouse,

and to continue after the Trustors' deaths with trust income allotted to Randall Larson and for "each grandchild's education" as well as for the "welfare and health of any of Trustors' children or grandchildren." CP at 291-92 (¶ B.3.3). Both Raymond and Gene Larson signed this original Trust document. *See* CP at 269-96.

The Raymond M. and Gene M. Larson Trust appointed Raymond Larson the Trustee and, upon his death or incapacity, set forth that Raymond and Gene Larson's son Randall Larson would serve as co-trustee along with Puget Sound National Bank, predecessor in interest to KeyBank National Association. CP at 281.

Contemplating the need to make later revisions to their jointly settled Trust, Raymond and Gene Larson reserved therein the power of revocation and modification. CP at 271-72 (¶ 2.1). However, they reserved such power only to the "Trustors," *plural*. CP at 271 (¶ 2.1). Further, with regard to any later amendments, they explicitly agreed that

nothing in this Trust and its Schedules shall be construed to give either Trustor the right, acting alone, to amend or revoke this Trust as to the other Trustor's interest or to utilize the assets in such a way that would be inconsistent with the ownership interests of the other Trustor . . .

CP at 272.

Thereafter, following the settling of the Trust, it is evident that Raymond and Gene Larson actively funded the Raymond M. and Gene M. Larson Trust with real property and investment accounts, all maintained in the name of the "Raymond M. and Gene M. Larson Trust." *See, e.g.*, CP at 129, 160-72. In addition, both Raymond Larson and Gene Larson's

respective Last Wills bequeathed the entirety of their respective estates, save for personal effects, to the Raymond M. and Gene M. Larson Trust to be distributed according to the dictates and provisions thereof. CP at 309-11, 322-25. In fact, of note, Gene Larson executed her Last Will contemporaneously with settling the Trust. CP at 322-25. Thus, the Raymond M. and Gene M. Larson Trust was the principal testamentary instrument of both Raymond and Gene Larson.

Within the text of the Raymond M. and Gene M. Larson Trust, Raymond and Gene Larson established a second “catch-all” trust apparently intended to capture any remaining separate or marital assets that were not previously transferred to the Raymond M. and Gene M. Larson Trust. *See* CP at 289-90. They labeled this trust, the “Marital Trust.”¹ *Id.* The “Marital Trust” is contained within Paragraph B.2.3 of the Raymond M. and Gene M. Larson Trust. *Id.* Of relevance here, as it is the source of dispute below, the “Marital Trust” provision has its own modification provision that narrowly permits the surviving spouse to make “amendment[s] to *this Paragraph B.2.3*” regarding the disposition of assets contained within this separate “Marital Trust.” CP at 290 (emphasis added).

On September 23, 1991, on his own accord, Raymond Larson unilaterally attempted to amend the Raymond M. and Gene M. Larson

¹ The “Marital Trust” consisted of a separate and distinct trust which was intended to capture and provide for the distribution of the assets of Raymond and Gene Larson which were never transferred to or placed in the Raymond M. and Gene M. Larson Trust. *See infra* 28-31.

Trust proper. CP at 298. While Gene Larson was still living, there is no indication that she participated in or even knew of this attempted amendment. *Id.* There is no dispute regarding the fact that she did not participate in its execution nor sign the purported amendment. CP at 298. Of relevance here, Raymond Larson attempted to amend the Raymond M. and Gene M. Larson Trust's principal distribution provision, *see* CP at 291-92 (¶ B.3.3), to remove the allocation of 40 percent of the Trust's net income originally payable to their son Randall. CP at 298. In its stead, the amendment continued to provide the above-referenced educational benefit for Raymond and Gene Larson's eight grandchildren, and then, after the last of the eight grandchildren reached age 25, 60 percent of the Raymond M. and Gene M. Larson Trust was to be allocated in equal shares to the eight grandchildren and 40 percent was to remain in trust for the medical needs of Randall and Connie, and upon their deaths, any remaining principal allocated in equal shares to the grandchildren.² CP at 291-92. *Significantly, Randall and Connie's mother, Gene Larson, did not sign or otherwise acknowledge this amendment. Id.* In fact, there is no indication that Gene Larson had any awareness of this attempted amendment or that she consented to the same. *Id.* Her signature is noticeably absent. *Id.*

² In addition, in the 1991 amendment, Raymond Larson removed the provision setting forth his and Gene Larson's son Randall Larson as the co-successor trustee and provided for Puget Sound Bank to serve as the sole successor trustee.

Three years later, on October 10, 1994, Gene Larson died. CP at 313.

On March 23, 1995, Raymond Larson again attempted to amend the Raymond M. and Gene M. Larson Trust. CP at 300. This time, Raymond Larson intended to grant himself, as trustee, the power to invest the trust corpus in equity securities.³ *Id.*

Shortly after Gene Larson died, Raymond remarried, marrying RoseAnne Von Volkli. CP at 83. Almost immediately after he married RoseAnne Von Volkli, Raymond Larson executed a Last Will, leaving his personal effects to his new wife RoseAnne (Von Volkli) Larson and the remainder of his estate to the Raymond M. and Gene M. Larson Trust. “RAYMOND M. AND GENE M. LARSON TRUST created under a Trust Agreement dated the 1st day of November, 1989” to be distributed according to the dictates therein and “any amendments made to said Trust Agreement subsequent to the date of said Trust.” CP at 309-11.

On October 2, 2001, seven years following the death of his wife Gene Larson, Raymond Larson attempted to amend the Raymond M. and Gene M. Larson Trust a third and final time. CP at 302-07. First, Raymond Larson attempted to amend Paragraph 6.1 of the Raymond M. and Gene M Larson Trust so as to make his new wife, RoseAnne (Von Volkli) Larson, the successor co-trustee. CP at 281, 302. Raymond

³ The Larson Children submit that this amendment, unlike the other two, is consistent with the intent of Raymond and Gene Larson as Co-Trustors and is specifically *permitted* by the language of the 1989 Raymond M. and Gene M. Larson Trust. *See infra* at 19 n.7.

Larson executed this amendment despite the Trust's explicit dictates that any such appointed successor trustee be limited "to the Trustors' [Raymond and Gene Larson's] children or grandchildren." CP at 281.

Second, Raymond Larson again attempted to significantly alter the Raymond M. and Gene M. Larson Trust's distribution provisions, as set forth in Schedule B, Section III, Paragraph B.3.3. CP at 290-92, 303. In this amendment, Raymond Larson, on his own accord, deleted several paragraphs in their entirety and created a new Paragraph B.3.2 to provide RoseAnne (Von Volkli) Larson with quarterly income disbursements from the Raymond M. and Gene M. Trust. *Id.* The effect of this amendment was to completely divest Raymond and Gene Larson's two children and eight grandchildren from any benefit from the Trust, providing instead that upon RoseAnne (Von Volkli) Larson's death, the remainder of the corpus of the Raymond M. and Gene M. Larson Trust should be distributed in equal shares to two charitable entities. *Id.* As Gene Larson was deceased at this time, it is self-evident that she was wholly unaware of this amendment. *Id.* In fact, Respondent conceded the obvious below that "Mr. Larson could not seek the agreement of Gene Larson, the Co-Trustor, in making the 2001 amendments since she was deceased." CP at 331. There is no indication that she consented to the same and her signature does not appear on the amendment. CP at 302-07. In sum, Gene Larson took no action in furtherance of her surviving husband's act of divesting her two children and eight grandchildren. *Id.*

On January 16, 2004, Raymond Larson died. CP at 314.

B. Procedural History.

On February 10, 2004, Raymond Larson's Last Will was admitted to probate. CP at 4-6. Thereafter, RoseAnne (Von Volkli) Larson brought a motion that seeking court approval for her appointment as successor trustee of Raymond Larson's trust estate including his business assets, *see* CP at 7, which the court granted. CP at 48-49. On June 29, 2004, the Larson Children filed a Petition for Judicial Proceedings pursuant to Washington's Trust and Estate Dispute Resolution Act, chapter 11.96A RCW ("TEDRA"). CP at 83-89. In this TEDRA petition, the Larson Children claimed that they and their children were the rightful beneficiaries under the Raymond M. and Gene M. Larson Trust. *Id.* Specifically, they asserted that Raymond Larson's attempts in 1991 and again in 2001 to, acting alone, amend the Raymond M. and Gene M. Larson Trust were invalid. *Id.* at 87.

RoseAnne (Von Volkli) Larson answered the Larson Children's TEDRA petition, and at the same time brought in the Trust and Living Wills Center as a third-party defendant. CP at 92-96. The Trust and Living Wills Center prepared the 2001 amendment to the Raymond M. and Gene M. Larson Trust and provided a guaranty that the amendment was "legal and valid in the State of Washington." CP at 303-04. On January 19, 2006, the Honorable Bryan Chushcoff of the Pierce County Superior Court ("trial court"), granted the Trust and Living Wills Center's

motion for summary judgment and dismissed all claims against the third-party defendant. CP at 317-18.⁴

Thereafter, addressing the legal issues between the parties, the Larson Children brought a motion for summary judgment requesting the trial court find, as a matter of law, that Raymond Larson's 1991 and 2001 amendments were invalid. CP at 241-61. Quite simply, this motion involved the proper construction of the Raymond M. and Gene M. Larson Trust. *Id.* The Larson Children asserted that the Raymond M. and Gene M. Larson Trust, specifically Paragraph 2.1, permitted amendments *only* by the *joint* action of both spousal Trustors, and permitted modifications only in accord with the specific dictates of the Trust. *Id.* at 249-56. Specifically, the Larson Children pointed out that the Raymond M. and Gene M. Larson Trust explicitly denied “either Trustor the right, *acting alone*, to amend or revoke this Trust as to the other Trustor's interest or to utilize the assets in such a way that would be inconsistent with the ownership interest of the other Trustor.” CP at 250 (quoting CP at 272). In response, RoseAnne (Von Volkli) Larson asserted that the “Marital Trust” provisions, found in Paragraph B.2.3 of the Raymond M. and Gene M. Larson Trust permitted the survivor Trustor to modify the distribution provisions, not only of the “Marital Trust” created therein, but also of the Raymond M. and Gene M. Larson Trust proper. CP 327-37.

⁴ No party has appealed this ruling of the trial court.

On February 17, 2006, the trial court denied the Larson Children's motion for partial summary judgment. CP at 422-25. Among other things, the trial court held that:

As a matter of law, Section II of Schedule B expressly permits the surviving Trustor (Raymond Larson) to make notarized amendments to the beneficiaries of the Trust, and the 2001 amendments made by Raymond Larson are legally valid.

CP at 424. The trial court's order makes no reference to Paragraph 2.1's joint action requirement nor its explicit prohibition on one trustor making any amendment inconsistent with the interests of the other. CP at 422-25.

The trial court did agree that RoseAnne (Von Volkli) Larson could not be named as the successor-Trustee of the Raymond M. and Gene M. Larson Trust.⁵ *Id.* at 424.

In sum, at the Larson Children's first motion for partial summary judgment, the trial court essentially held that the "Marital Trust," Schedule B, Section II, Paragraph B.2.3 permitted Raymond Larson's unilateral 2001 amendment to the Raymond M. and Gene M. Larson Trust. CP at 422-25. As such, because of the drastic and wholesale modifications present in the 2001 amendment, including its complete divestment of all of Raymond and Gene Larson's children and

⁵ Inexplicably, the trial court also held that the "Larson children lacked standing to request this relief" concerning RoseAnne (Von Volkli) Larson's improper appointment. CP at 424. This language was likely proposed by counsel in an attempt to permit RoseAnne (Von Volkli) Larson to continue to act as trustee despite the Trust's explicit prohibition. In any event, the trial court erred in agreeing to this language as there is no doubt the Larson Children had such standing. *See generally* ch. 11.96A RCW.

grandchildren, the trial court did not directly address the validity of the earlier 1991 amendment. *See generally id.*

Thereafter the Larson Children brought a second motion for summary judgment, asking the trial court to declare the 2001 amendment invalid as a matter of law because, *even if* Schedule B, Section II, Paragraph B.2.3 permitted amendments to the Raymond M. and Gene M. Larson Trust's beneficiary provisions, Raymond Larson's attempt in 2001 to do just that did not comply with that paragraph's own notary requirements. CP 440-46. Specifically, the Larson Children pointed out that Paragraph B.2.3 requires any amendments thereto be “written and notarized.” CP at 442 (quoting CP at 290), and that Raymond Larson's 2001 amendment was not properly notarized. CP 440-46, 302-07. Nevertheless, on March 10, 2006, the trial court denied this motion. CP at 460-61.

Having disposed of all the legal issues below, on March 20, 2006, the parties entered into a Stipulation and Judgment terminating the trial court action. CP at 464-82. Thereafter, the Larson Children timely appealed to the Court of Appeals. CP at 483-503.

III. SUMMARY OF ARGUMENT

This appeal involves the proper construction of a living trust agreement created by Raymond and Gene Larson, husband and wife. Before and after Gene Larson's death, Raymond Larson made two attempts to amend the beneficiary provisions of their joint trust instrument, both without the consent, knowledge, or joinder of his wife

and co-settlor. These attempted unilateral amendments, first in 1991 and again in 2001, violated the explicit provisions and plain language of the Raymond M. and Gene M. Larson Trust as Raymond Larson, acting alone and without Gene Larson's joinder, was prohibited from making such amendments.

Specifically, Paragraph 2.1 of the Raymond M. and Gene M. Larson Trust, while preserving the power of revocation and modification, did so only to Trustors, plural - requiring any modifications, unless specifically otherwise allowed, to be accomplished by the joint action of both trustors. Secondly, Paragraph 2.1 additionally set forth an absolute prohibition on any unilateral amendments affecting the other co-trustor's interest, establishing that:

nothing in this Trust and its Schedules shall be construed to give either Trustor the right, acting alone, to amend or revoke this Trust as to the other Trustor's interest or to utilize the assets in such a way that would be inconsistent with the ownership interests of the other Trustor

CP at 272 (¶ 2.1). Raymond Larson's attempts to amend the Raymond M. and Gene M. Larson Trust in 1991 and 2001 violated this provision.

Thirdly, the "Marital Trust" established in Paragraph B.2.3, and the provisions for amendments thereto, have no impact or relevance to the distributive provisions or separate corpus of the Raymond M. and Gene M. Larson Trust proper. Simply put, the "Marital Trust" creates a wholly separate trust to capture property and assets not already funded into the Raymond M. and Gene M. Larson Trust. Nevertheless, the trial court held that the allowance for amendments to the "Marital Trust" permitted

wholesale amendment to the Raymond M. and Gene M. Larson Trust. This interpretation is erroneous and is inconsistent with the other 25 pages of the Raymond M. and Gene M. Larson Trust. In fact, it is wholly irreconcilable with Paragraph 2.1's strict prohibition on this very type of amendment.

Finally, even if the Court of Appeals were to affirm the trial court's conclusion regarding the applicability of Paragraph B.2.3, Raymond Larson's 2001 amendment is invalid because it was not properly notarized as required by that very paragraph.

Based on the above arguments, the Larson Children assert the trial court erred in declining to invalidate the 1991 and 2001 amendments, which eviscerated all of Gene Larson's ownership interest in the Trust she co-settled and completely divested her two children and eight grandchildren of the beneficial interest she preserved for them.

IV. ARGUMENT

A. Standard of Review.

The standard of review as to all assignments of error and issues raised in this appeal is de novo. When reviewing summary judgment orders, the appellate court engages in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Further, as the Washington State Supreme Court has noted, the interpretation of a writing is a question of law for the court. *See, e.g., In re Estate of Larson*, 71 Wn.2d 349, 354, 428 P.2d 558 (1967).

In this case, at summary judgment, all parties and the trial court agreed that there were no genuine issues of material fact and that the trial court was faced with pure issues of law. *See* CP at 249, 326, 424, 441, 447. The critical issue before the trial court, and now before this Court on appeal, is the construction of the 1989 Raymond M. and Gene M. Larson Trust and the application of applicable trust law principles thereto. As such, the Court of Appeals engages in a de novo review of all appealed issues.

B. Law Regarding Trust Amendments.

When interpreting written trust agreements, courts look first to the settlors’⁶ intent as manifested in the language of the trust instrument. *Cf. In re Estate of Preston*, 59 Wn.2d 11, 15, 365 P.2d 595 (1961); *In re Estate of Larson*, 58 Wn.2d 673, 678, 364 P.2d 494 (1961). The trust agreement itself governs whether and to what extent the settlors to a trust can modify its terms or revoke it in its entirety. *In re Estate of Button*, 79 Wn.2d 849, 852, 490 P.2d 731 (1971). As the Washington State Supreme Court explained in *In re Estate of Button*, “[w]here the trust instrument specifies the method [for revocation or modification] *only* that method can be used.” *Id.* (emphasis added). Generally, thus, “[t]he settlor has power to modify the trust *if and to the extent* that by the terms of the trust he reserved such a power.” RESTATEMENT (SECOND) OF TRUSTS § 331(1) (emphasis added); *see also* RESTATEMENT (THIRD) OF TRUSTS § 63(1).

⁶ The descriptive terms “trustors” and “settlors” are synonyms and legally interchangeable. *See* RESTATEMENT (THIRD) OF TRUSTS § 3, cmt. a.

C. The Terms of the Raymond M. and Gene M. Larson Trust Prohibited Raymond Larson's Unilateral 1991 and 2001 Amendments.

The Raymond M. and Gene M. Larson Trust contains specific provisions governing modification thereof. Paragraph 2.1 begins on the very first page of the Trust Agreement and describes and controls when one Co-Trustor may act alone in modifying or revoking the jointly settled Raymond M. and Gene M. Larson Trust. Specifically, first, Paragraph 2.1 reserved the power of modification only to both Trustors acting jointly during their joint lifetime. Second, Paragraph 2.1 goes on to establish an absolute prohibition on one Co-Trustor making any amendment that would be inconsistent with the other's interest in the Trust. As Raymond Larson's 1991 and 2001 unilateral amendments violated these provisions, the trial court erred in refusing to declare them null and void.

1. Paragraph 2.1 Reserved the Power of Revocation and Modification Only When Both Co-Trustors Acted in Concert.

Article II, Paragraph 2.1 of the Raymond M. and Gene M. Larson Trust reserved the right of modification, but only to the Co-Trustors acting in concert. In other words, in settling this Trust to control the disposition of their joint and respective estates, while Raymond and Gene Larson did reserve the power to "revoke or modify" the Trust, they did so *only* to the extent they acted *jointly* in revoking or modifying its provisions. Specifically, Article II, Paragraph 2.1 of the Raymond M. and Gene M.

Larson Trust states, “*Trustors* reserve . . . the right[] [t]o revoke or modify this Trust or withdraw any part of the Trust assets at any time.” CP at 271 (emphasis added.) Notably, such reservation was reserved to “*Trustors*,” *plural*. *Id.* (emphasis added).

Courts interpreting language similar to that found herein have determined that the joint action of both settlors is required to effectuate any amendment or modification to the trust instrument. One particularly analogous case is that of *Williams v. Springfield Marine Bank*, 475 N.E.2d 1122, 1124-25 (Ill. App. 1985). The court in *Williams* construed a provision materially *identical* to the revocation and modification term in Paragraph 2.1 here. *Id.* at 1124. In that case, like here, the court was faced with a trust co-settled by a husband and wife. *Id.* at 1123-24. In the applicable amendment reservation clause, the co-settlors established that: “The Settlor[s] hereby specifically reserve the right to add to, amend, alter or cancel the Trust herein created.” *Id.* at 1124. Accordingly, the court held that “[w]here the power to modify a trust has been reserved to the joint settlors of the trust, both must join in executing an instrument to effectuate a change.” *Id.* at 1124. The *Williams* court found significant the fact that the trust agreement expressly reserved the right of reservation to the “Settlors,” with the court specifically noting its plural form. *Williams*, 475 N.E.2d at 1125 (also noting that “the settlors in this case created a joint trust, which implies that any change would also be jointly made”). Additionally, the *Williams* court recognized as instructive the fact

that “when the settlors intended the survivor settlor to have a power exercisable alone, they expressly provided for it.” *Id.*

In sum, the *Williams* court establishes, based on authority from numerous jurisdictions, that when construing reservation language such as that found here, co-settlor spouses must act *jointly* to effectuate a modification, and that upon the death of a co-settlor spouse, the surviving co-settlor has *no* power to revoke or amend the trust’s terms. *See, e.g., Williams*, 475 N.E.2d at 1125 (citing cases and specifically noting that “[c]ourts from other jurisdictions have consistently held clauses similar [to the ones cited therein] create only a joint power which cannot be exercised by the surviving settlor”). This case is virtually indistinguishable from the facts presented herein.

In the context of co-settled spousal trusts, the *Restatements* support the analysis and interpretation performed by the *Williams* court. Specifically, when the trust corpus consists of the community property of spouses, the *Restatement* commentary states that “[i]n the absence of a contrary provision in the terms of the trust, the trust may be amended *only by the joint action of both spouses during their joint lifetime.*” RESTATEMENT (THIRD) OF TRUSTS § 63, cmt. k. (emphasis added). This is a clear statement of the law in this case.⁷

⁷ Significantly, just this past year, the Washington State Supreme Court, in its most recent case dealing with a dispute over trust application and distribution, adopted the *Restatement (Third) of Trusts* as the controlling law of the case and applied it to the application of the disputed trust. *See Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 382, 113 P.3d 463 (2005) (adopting RESTATEMENT (THIRD) OF TRUSTS § 66). Similarly

Applying the *Williams* and *Restatement* principles to the plain language of the Raymond M. and Gene M. Larson Trust it is apparent that, based on the language agreed to by both Raymond and Gene Larson as spousal co-settlors, Raymond Larson lacked authority, both prior to and following his wife Gene Larson's death, to unilaterally modify or amend the terms set forth in the 1989 Trust Agreement (except as explicitly permitted).

First, Raymond and Gene Larson, husband and wife, co-settled the Raymond M. and Gene M. Larson Trust to control the distribution of select portions of their separate and community property. In doing so, by reserving the power of modification to "Trustors," plural, they permitted all amendments only by their joint action during their joint lifetime. This did not occur.

Second, like in *Williams* and consistent with its interpretation, Raymond and Gene Larson carefully set forth and contemplated when one of them, acting alone, should have the power to revoke or modify the terms of the Raymond M. and Gene M. Larson Trust. For example, in the same reservation paragraph they drafted a specific "exception," allowing the surviving trustor the right to amend Article IV of the Trust, *and only Article IV*, as that surviving Trustor deemed appropriate and necessary.⁸

here, the *Restatement (Third) of Trusts* directly addresses the applicable law and prevents Raymond Larson's unilateral attempted amendments.

⁸ Thus the 1995 amendment, *see* CP at 300, executed five months following Gene Larson's death, unlike the other two unilateral attempted amendments, is a type of modification permitted by Paragraph 2.1 of the original 1989 Raymond M. and Gene M.

CP at 272. Of note, this “exception” has absolutely no application to Raymond Larson’s 1991 and 2001 attempted modifications. Notably, Article IV relates *only* to the powers and duties of the trustee, not the disbursement or beneficiary provisions of the Trust that were in Schedule B, Paragraphs B.3.2 and B.3.3. CP at 272, 273-81. They labeled it an “exception” in recognition of the general rule that amendments required the joint action of both spouses. *Id.*

Similarly, at other times within the text of the Raymond M. and Gene M. Larson Trust when the Co-Trustors granted one person the right to make amendments, they did so explicitly. *See, e.g.*, CP at 281 (Paragraph 6.1 established that “Survivor Trustor shall have the right acting alone, in his or her sole discretion” to remove or add a successor Trustee so long as comports with requirements therein). Like in *Williams*, this further demonstrates that the Co-Trustors carefully contemplated and set forth when one Trustor could take action, “acting alone.”

The insertion of these exceptions make clear the limited types of powers that the settlors, especially Gene Larson, intended to permit the surviving Trustor the authority to exercise – ministerial amendments, not substantive distribution or beneficiary amendments. As such, the plain language of the Trust Agreement reserved the power of modification to Raymond *and* Gene acting jointly.

Larson Trust. CP at 271-72 (¶ 2.1). Thus the Larson Children did not challenge the validity of this amendment and do not challenge it here.

In sum, the fact that Raymond *and* Gene Larson jointly created this Trust and reserved the power of modification and revocation to the plural “Trustors” signifies that any modifications must also be jointly made. *Cf. Williams*, 475 N.E.2d at 1124-25. If Raymond and Gene Larson intended the contrary, the Trust document would have been drafted to permit either Trustor the authority, acting alone, to revoke or modify the Trust with respect to changes in the designations of beneficiaries and distributees that Raymond and Gene Larson agreed to – it did not. In fact, when Raymond and Gene *did* intend for a Trustor to have rights in their individual capacity, the Raymond M. and Gene M. Larson Trust set forth those rights explicitly. Yet, when it came to modifying the terms of the Raymond M. and Gene M. Larson Trust, it clearly expressed that the Trustors reserved such a right *only* when acting jointly and with the active concert of both Trustors, Raymond and Gene Larson. CP at 271.

Examining the amendments at issue in this dispute, neither the 1991 unilateral amendment nor the 2001 unilateral amendment was the type of amendment permitted to be undertaken by one co-settlor acting alone. Rather, both amendments significantly altered the distribution allocations intended by the Raymond M. and Gene M. Larson Trust, entered into jointly by Raymond and Gene Larson. First, in the attempted 1991 amendment, while Gene Larson was still alive, Raymond Larson acted alone in removing Randall Larson as the designated Co-Successor Trustee and further divesting him of his beneficial interest in the trust corpus. CP at 298. Second, in 2001 Raymond Larson’s attempted

amendments significantly modified Paragraph B.3.3's designation of designees and beneficiaries to the Raymond M. and Gene M. Larson Trust by divesting the couple's only children and eight grandchildren of *all* beneficial interest, in favor of his new wife, RoseAnne (Von Volkli) Larson and two charitable entities.⁹ CP at 302-07. In crafting these purported amendments, Raymond Larson unilaterally and inappropriately attempted to amend the Raymond M. and Gene M. Larson Trust to defeat its original founding purpose and did so without the mandated joinder of his spouse, the Trust's co-settlor.¹⁰

In sum, as both the 1991 and the 2001 amendments themselves reflect, Gene Larson was not a part of these decisions, did not consent to them, and did not join in the amendments' execution. CP at 298, 302-07. Accordingly, based on Paragraph 2.1's limited and narrow reservation of the power of amendment, it is evident that Raymond Larson's 1991 and 2001 unilateral amendments are legally invalid in their entirety and, as such, the trial court erred in denying the Larson Children's motion for partial summary judgment regarding the same.

⁹ Neither RoseAnne (Von Volkli) Larson nor either of the charitable entities were even referenced in the original Trust document. *See generally* CP at 269-96.

¹⁰ The 2001 amendment additionally appointed RoseAnne (Von Volkli Larson) as the successor trustee. However, the plain language of the Trust document explicitly and unambiguously prohibited Raymond Larson's attempted appointment of RoseAnne (Von Volkli) Larson as the surviving Trustee of the Raymond M. and Gene M. Larson Trust. CP at 281. Paragraph 6.1 prohibited the designation of a trustee other than the "Trustors' children or grandchildren or a corporate Trustee authorized by law." *Id.* .

2. Paragraph 2.1 Explicitly Prohibited One Trustor, Acting Alone, From Amending the Raymond M. and Gene M. Larson Trust as to the Other Co-Trustor's Interest.

In addition to the "joint capacity" requirement set forth above, the Raymond M. and Gene M. Larson Trust additionally contains an absolute prohibition on one spouse from acting alone in performing any act or executing any amendment which is inconsistent with their spousal Co-Trustor's joint interest in the Raymond M. and Gene M. Larson Trust.

After establishing the joint right of revocation and amendment, Paragraph 2.1 then goes on to further enforce when exactly one of the spousal trustors may not *act alone* in modifying the terms of the Raymond M. and Gene M. Larson Trust, providing, in pertinent part:

However, *nothing in this Trust and its Schedules* shall be construed to give either Trustor the right, *acting alone*, to amend or revoke this Trust as to the other Trustor's interest or to utilize the assets in such a way that would be inconsistent with the ownership interests of the other Trustor; and if either Trustor has ceased to act as Trustee, the powers, duties and liabilities of any acting Trustee shall not be materially changed without the written consent of such Trustee.

CP at 272 (emphasis added). This paragraph could not be any more clear - one spousal trustor may not act alone in amending or revoking their jointly settled Trust to the extent such amendment has any effect on the other Co-Trustor's interest. This paragraph, as an introductory paragraph to the entire Trust, also clearly establishes the standard of proper construction of *any other* provision within the Trust Agreement or its corresponding

schedules - declaring that “*nothing* in this Trust and its Schedules shall be construed” to the contrary of this rule. *Id.* (emphasis added).

Relevant here, this prohibition is not limited in time or scope and applies regardless of whether the non-joining co-settlor spouse is alive or deceased. In fact, the paragraph immediately following this prohibition, when read in context, further elucidates that this prohibition survives the death of the non-joining spouse. *Id.* The following paragraph reads:

An exception to the above provisions shall be that the survivor Trustor, in his or her sole and absolute discretion, shall have the right to amend all or any part of ARTICLE IV of this Trust in any manner that survivor Trustor feels appropriate and necessary to carry out the terms, conditions and requirements of this Trust.

CP at 272 (emphasis added). This provision, by permitting a narrow exception for the *surviving* Trustor to make amendments regarding the powers and duties of the trustee, makes clear that the preceding prohibition applies, except for this lone “exception to the above provisions,” to attempted amendments by a surviving Trustor.¹¹ *Id.*

Turning to the facts of this case, and applying Paragraph 2.1’s absolute prohibition, neither Raymond Larson nor Gene Larson had the

¹¹ Even in the absence of such absolute prohibition, the *Restatements* support the position that such unilateral amendments, affecting a co-settlor’s interest, are invalid and void as a matter of law. See RESTATEMENT (THIRD) OF TRUSTS § 63, cmt. k; see also generally, RCW 26.16.030. The *Restatement* authors comment that “[i]f a revocable trust has more than one settlor, unless the terms of the trust provide otherwise,” each settlor ordinarily may revoke or amend the trust *only* with regard to that portion of the trust property “attributable to the settlor’s contribution.” *Id.*, cmt. k. (emphasis added); see also *id.*, cmt. k., ill. 4. Here Gene Larson’s separate estate and one half-share of all community property which was transferred into the Raymond M. and Gene M. Larson Trust would certainly be attributable to her. Cf. RCW 26.16.030.

right, acting alone, to make *any amendment* to the Trust that would be “inconsistent with” the other’s intent or interest therein. CP at 272. Here, it is readily apparent that Raymond Larson’s attempted amendments could not have been any more “inconsistent with the ownership interests” of Gene Larson. *See* CP at 298, 302-07.

First, it is obvious that Raymond Larson “acted alone” in executing these unilateral amendments. *Id.* Gene Larson was not a part of these decisions, did not consent to them, and did not join in the amendments’ execution. *Id.* In fact with regards to the 2001 amendment, Respondent has conceded the obvious that “Mr. Larson could not seek the agreement of Gene Larson, the Co-Trustor, in making the 2001 amendments since she was deceased.” CP at 331. However, as is evident from the language of Paragraph 2.1, Gene Larson’s passing did not cease the operation of that Trust’s prohibition. In sum, it is clear, and there is no dispute, that Raymond Larson acted alone in making the 1991 and 2001 amendments.

Second, it is apparent from the text of Raymond Larson’s 1991 and 2001 unilateral amendments that these amendments had a real and adverse effect on Gene Larson’s interest in the Raymond M. and Gene M. Larson Trust. Gene Larson’s own stated purpose in settling the Trust was to provide for her children and grandchildren. CP at 272, 291-93. Yet, Raymond Larson’s 2001 amendment, and the trial court’s order enforcing it, *completely divested* Gene Larson’s children and grandchildren of all their beneficial interest in her separate and community estate. Raymond Larson’s 2001 amendment completely disregarded Gene Larson’s interest.

As such, the plain language of the Trust document, as set forth in Paragraph 2.1, prohibited Raymond Larson's 1991 and 2001 unilateral attempts to redirect the disbursement of trust assets. CP at 271.

In sum, Paragraph 2.1 establishes an unambiguous and absolute prohibition on one co-settlor, acting alone, from making any amendment that is inconsistent with the other co-settlor's interest. Raymond Larson did just that in 1991 and again in 2001. Accordingly, both these amendments should be declared invalid and void and the trial court's order denying partial summary on this issue should be reversed.

3. The "Marital Trust," Section II, Paragraph B.2.3, Does Not Permit the 2001 Attempted Modification to the Raymond M. and Gene M. Larson Trust.

Despite Paragraph 2.1's "joint capacity" requirement and the above discussed absolute prohibition on unilateral amendments, in the end, the trial court relied on Schedule B, Section II, Paragraph B.2.3, and its establishment and discussion of the "Marital Trust" in finding that Raymond Larson's unilateral 2001 amendment was valid. The trial court misconstrued the intent and effect of the "Marital Trust" as it exists within the context of the Raymond M. and Gene M. Larson Trust proper. In short, the "Marital Trust," and the related provision permitting a redirection of *its* corpus by will or amendment, has *no* application in this context and does not relate to the corpus of the Raymond M. and Gene M. Larson Trust. On the contrary, the "Marital Trust" simply addresses the control and disbursement of the assets of the Co-Trustors upon their death,

specifically assets that were not previously transferred to and thus controlled by the Raymond M. and Gene M. Larson Trust. *See* CP at 289-90 (¶¶ B.2.1 – B.2.3).

The “Marital Trust” provides, in relevant part:

B.2.2 Upon the first of Trustors’ deaths, all interest in any and all personal effects, household furniture and furnishings, personal vehicles, pleasure boats, and similar articles of personal use Trustor may have at the time of his or her death, together with any insurance thereon, are to vest in the survivor Trustor if he or she survives for a period of ninety days, unless the deceased has provided otherwise in his or her last will.

B.2.3 Upon the first of the Trustors’ deaths, all assets of Trustors, regardless of their nature or location shall continue in trust for the benefit of the survivor Trustor and shall be called the “Marital Trust”. Trustee is to administer **this** Trust as follows:

(a) During the life of the survivor Trustor:

- (1) To pay him or her, or for his or her benefit, the net income in convenient installments, but no less frequently than annually; and,
- (2) in addition thereto, to pay him or her, of for his or her benefit, any amount of principal which Trustee may from time to time deem advisable to provide for the maintenance, care and support of the survivor Trustor as long as he or she lives; or which the survivor Trustor may request.

(b) Upon the death of the survivor Trustor:

- (1) Trustee shall distribute the then principal of this Marital Trust and any undistributed income thereof to or for such person, persons, or organizations as the surviving Trustor has specified in his or her last will or in a written and notarized amendment to this Paragraph B.2.3 and,
- (2) in Default of any such appointment, the same shall be distributed as provided in Section III of this Trust Agreement.

CP at 289-90 (emphasis added). Simply stated, the “Marital Trust” provides for a disbursement of the surviving Trustor’s assets *that have not already been transferred* to the Raymond M. and Gene M. Larson Trust. It does not purport to have *any* effect on the disbursement of the corpus of the Raymond M. and Gene M. Larson Trust. At its core, the “Marital Trust” is a default pour over trust intended to catch all the assets not previously transferred to the Raymond M. and Gene M. Larson Trust or alternatively bequeathed or disposed of.

**a. The “Marital Trust” is Separate and
Distinct from the Raymond M. and Gene M. Larson
Trust.**

Any implication that Section II, Paragraph B.2.3 permits modification of the distribution or beneficiary provisions of the Raymond M. and Gene M. Larson Trust is incorrect. The “Marital Trust” contained within Section II of the Raymond M. and Gene M. Larson Trust establishes a separate trust which is intended to capture all assets of

Raymond and Gene Larson that, at the time of the first spouse's death, had not already been transferred to the Raymond M. and Gene M. Larson Trust. As is described in more detail below, the "Marital Trust" consisted of various assets including bank accounts and gold and silver bars which were never placed in the Raymond M. and Gene M. Larson Trust and were held by Raymond and Gene Larson outside of any trust until the first spouse's death.¹² Section II then directs how those assets are to be taken care of and how those assets can later be disbursed. This provision is not implicated herein. On the contrary, relevant here, Section III of the *Raymond M. and Gene M. Larson Trust* contains the distribution and beneficiary provisions of the *Raymond M. and Gene M. Larson Trust*. The "Marital Trust" and the "Raymond M. and Gene M. Larson Trust" are separate, and the allowance of modification of the "Marital Trust" does not permit modification of the Raymond M. and Gene M. Larson Trust. They were separately funded, and separate and distinct provisions apply to each.

Significantly, the proviso for modification of beneficiaries of the "Marital Trust," Paragraph B.2.3, deals *only* with the corpus of the "Marital Trust" established upon the death of the first Co-Trustor. Stated more directly, by its unambiguous language, Section II, Paragraph B.2.3 does not permit any modification to the distribution or beneficiary provisions set forth in Section III of the Raymond M. and Gene M. Larson

¹² See *infra* 30-31.

Trust. As is made clear in Paragraph B.2.2, the assets¹³ of the spouse on his or her death form the corpus of the “Marital Trust.” These assets are separate and distinct from the assets owned by the Raymond M. and Gene M. Larson Trust. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 2, cmt. a (well-accepted modern approach is to treat trusts as separate legal “entit[ies]”). Moreover, and of significant note, while Paragraph B.2.3 gives the surviving spouse the authority to direct the disbursements of these “Marital Trust” assets, either by amendment to the Trust or through a Last Will, it provides the surviving spouse with *no* authority to amend Paragraph B.3.3, which governs the administration and distribution of the assets *belonging to* the Raymond M. and Gene M. Larson Trust.

The reason for this distinction makes perfect sense. Since its settlement, Raymond and Gene Larson actively funded the Raymond M. and Gene M. Larson Trust with real property investments, brokerage accounts, and additional valuable assets. *See* CP at 129, 160-72. However, they did not transfer all their assets or personal worth into the Raymond M. and Gene M. Larson Trust. As such, the “Marital Trust” established in Section II was simply intended, in the absence of any alternative designation, to capture these additional and separate assets.

¹³ Not to be confused with the “personal effects” set forth in Paragraph B.2.2. The Larson Children agree that the “personal effects” of Raymond and Gene Larson vested in the surviving spouse pursuant to Section II, Paragraph B.2.2. Yet these “personal effects” are distinct from Raymond or Gene Larson’s individual or community “assets” that were not placed in the Raymond M. and Gene M. Larson Trust.

By means of example, during their joint lifetime Raymond and Gene Larson transferred several of their assets into the Raymond M. and Gene M. Larson Trust. In fact, discovery below revealed that Raymond and Gene Larson transferred title to several parcels of investment property into the Raymond M. and Gene M. Larson Trust by quit claim deed, as well as establishing several brokerage accounts in the name of the Raymond M. and Gene M. Larson Trust. *See, e.g.*, CP at 129, 160-72. These assets became the corpus of the Raymond M. and Gene M. Larson Trust. However, there were certainly valuable assets that were not transferred into the Raymond M. and Gene M. Larson Trust. For example, they maintained non-trust investment and bank accounts and additionally possessed gold ingots and silver bars - valuable assets which were never transferred into the Raymond M. and Gene M. Larson Trust. It is these valuable assets which the “Marital Trust” is intended to capture and to continue in trust for the benefit of the surviving spouse, and which the surviving spouse could then disperse by Last Will or by a written amendment to Paragraph B.2.3.

Accordingly, capturing these additional and separate assets, Paragraph B.2.3(b)(1), the “Marital Trust,” provides that the same continues in trust for the benefit of the surviving spouse, and then upon his or her death, is distributed per “his or her last will or in a written and notarized amendment to this Paragraph B.2.3.” *Id.* (emphasis added). It then provides that if no such designation is made, these additional and separate assets should be “distributed as provided in Section III” of the

Raymond M. and Gene M. Larson Trust. *Id.* (emphasis added). The provision allowing for the distribution of these separate and distinct assets into the Raymond M. and Gene M. Larson Trust reinforces that these are separate assets and separate trusts.

RoseAnne (Von Volkli) Larson's reliance on Paragraph B.2.3's statement that the "Marital Trust" consists of "all assets of Trustors regardless of their nature or location" is misplaced and erroneous. First, her position fails to recognize the accepted principle that the Trust, and thus its assets, form a distinct legal entity. *See* RESTATEMENT (THIRD) OF TRUSTS § 2, cmt. a. Thus, the assets referred to in Paragraph B.2.3 are only those additional and separate assets *that have not already been transferred* to the Raymond M. and Gene M. Larson Trust. The language used with regards to the "Marital Trust" is simply boilerplate language commonly found in wills regarding assets. Of course, here, we are talking about all their *other* assets, *not* the assets which comprise the corpus of the Raymond M. and Gene M. Larson Trust. It is axiomatic that they wouldn't convey by last will the assets and corpus of the Raymond M. and Gene M. Larson Trust. Such a proposed transfer would be nonsensical from a practical standpoint, but also inconsistent with the entire purpose of settling a trust.¹⁴ By last will they intended to disburse only their additional and separate assets - both of them bequeathing the same to the

¹⁴ Stated another way, Raymond and Gene Larson couldn't convey to the Raymond M. and Gene M. Larson Trust that which was already in it.

Raymond M. and Gene M. Larson Trust. This is the same purpose of the “Marital Trust” set forth in Section II.

The “Marital Trust” permitted amendments only to “this Paragraph B.2.3.” Recognizing the crucial distinction between Section II (distribution of “Marital Trust”) and Section III (distribution of “Raymond M. and Gene M. Larson Trust”), any such amendment would effect *only* the disbursement of these additional and separate assets. Remember, here, when Raymond Larson attempted to modify the Raymond M. and Gene M. Larson Trust in 1991 and again in 2001 he amended, not Section II, Paragraph B.2.3, but the distribution and beneficiary provisions of the Raymond M. and Gene M. Larson Trust as set forth in Section III, Paragraph B.3.3. Unlike Paragraph B.2.3, there is no provision in the Trust which permits a modification of Section III, Paragraph B.3.3.

b. The Trial Court’s Interpretation and Application of Paragraph B.2.3 to Permit Raymond Larson’s 2001 Amendment is Completely Irreconcilable with Paragraph 2.1.

The trial court relied on the “Marital Trust” and its amendment provision found in Paragraph B.2.3 to uphold Raymond Larson’s 2001 unilateral amendment. *See* CP at 422-25. However, the trial court completely ignored Paragraph 2.1’s unequivocal and absolute prohibition on just this type of amendment. Paragraph 2.1 provides, in pertinent part:

However, *nothing in this Trust and its Schedules* shall be construed to give either Trustor the right, *acting alone*, to

amend or revoke this Trust as to the other Trustor's interest
or to utilize the assets in such a way that would be
inconsistent with the ownership interests of the other
Trustor . . .

CP at 272 (emphasis added). This Paragraph 2.1 is found on page two of the Raymond M. and Gene M. Larson Trust and speaks directly to the heart of the issue here. *Id.* It clearly establishes that neither Trustor may perform any act or execute any amendment which is inconsistent with the other Trustor's interests. *Id.* Notably, this absolute prohibition applies to both the main text of the Trust *and* its Schedules. *Id.* These provisions must be read in conjunction.¹⁵

Here, the trial court erred in ignoring the explicit dictates of Paragraph 2.1 in construing the effect of the "Marital Trust." *See In re Estate of Button*, 79 Wn.2d at 852. There can be no real debate that in unilaterally executing the 1991 amendment and, more significantly the 2001 amendment, Raymond Larson acted alone in attempting to amend the Raymond M. and Gene M. Larson Trust completely eviscerating Gene Larson's interest therein. CP at 298, 302-07. Throughout her life, Gene Larson never evinced any intent other than that specifically provided for in the primary trust instrument she executed; to provide first for her surviving spouse and then to bequeath her assets and share of all community property to her two children and eight grandchildren. *Id.* at

¹⁵ As with statutes, in interpreting this Trust instrument and specific provisions, it is imperative to examine related provisions in light of the entire document as a whole, to determine the proper interpretation. *Cf. Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002) (legislative intent is derived from the language used in the statute and related statutes).

272. The prohibition in Paragraph 2.1 prohibited Raymond Larson from depriving Gene Larson of this right and her interest in the Raymond M. and Gene M. Larson Trust.

In sum, first, the “Marital Trust” only involves and implicates those assets not previously funded into the Raymond M. and Gene M. Larson Trust. Second, the amendment provisions therein do not permit amendment of the Raymond M. and Gene M. Larson Trust. Finally, regardless of any contrary construction of the “Marital Trust” provision, Paragraph 2.1 controls its construction and absolutely prohibits one spouse acting alone - here, Raymond Larson - from amending the Raymond M. and Gene M. Larson Trust as he did in 2001, eviscerating Gene Larson’s interest therein. Accordingly, the trial court erred in holding that the “Marital Trust” nevertheless permitted Raymond Larson’s 2001 amendment.

D. The 2001 Amendment to the Raymond M. and Gene M. Larson Trust is Invalid Because it Did Not Comply with the Trust’s Modification Requirements.

If the Court of Appeals adopts the Larson Children’s position that the Raymond M. and Gene M. Larson Trust, specifically Paragraph 2.1, prohibited Raymond Larson’s unilateral attempts in 1991 and 2001 to amend the Raymond M. and Gene M. Larson Trust, this issue becomes moot and need not be addressed. However, if the Court of Appeals agrees that the Raymond M. and Gene M. Larson Trust was fully amendable by one spouse, then the Larson Children respectfully submit that Raymond

Larson's 2001 amendment failed to comply with the provision on which the Respondent and the trial court relied for its enforcement. Specifically, Paragraph B.2.3 requires all amendments thereto be written and notarized. The 2001 amendment was not notarized and thus should be declared invalid.

As is set forth above, it is well established that the trust agreement itself governs whether and to what extent the trustors of a trust can modify its terms or revoke it in its entirety after its settlement. *Cf. In re Estate of Preston*, 59 Wn.2d at 15; *see also In re Estate of Larson*, 58 Wn.2d at 678. To the point, in addressing a particular trust instrument's *procedural* requirements for modifications or revocation, Washington courts have held that "[w]here the trust instrument specifies the method [for revocation or modification] *only* that method can be used." *In re Estate of Button*, 79 Wn.2d at 852 (emphasis added) (holding alleged trust modification invalid as trust required modifications be made in writing, signed by the trustor, and delivered to the trustee - and while alleged modification was in writing and signed, the trustor failed to deliver it to the trustee). In sum, if a trust instrument sets forth specific means by which a modification or other act is to be accomplished, those specific means must be used for the act to be valid.

**1. Section II, Paragraph B.2.3 Required that any
Amendments Made Pursuant Thereto Must be in Writing and
Properly Notarized.**

In this case, the trial court ruled on partial summary judgment that Section II, Paragraph B.2.3 of the Raymond M. and Gene M. Larson Trust, by permitting modification to the distribution and beneficiary of the “Marital Trust,” permitted modification of the distribution and beneficiary provisions of the entirety of the Raymond M. and Gene M. Larson Trust. The Larson Children challenge this ruling. However, if the Court of Appeals were to agree, a careful examination of Paragraph B.2.3’s amendment proviso must be examined. The provision relied on by the Estate and the trial court, provides, in pertinent part:

- (b) Upon the death of the survivor Trustor:
 - (1) Trustee shall distribute the then principal of this Marital Trust and any undistributed income thereof to or for such person, persons, or organizations as the surviving Trustor has specified in his or her last will or in a written and **notarized** amendment to this Paragraph B.2.3 . . .

CP at 289-90. Based on this provision, upon which the trial court relied, and in accord with the Washington State Supreme Court decision in *In re Estate of Button*, any amendment to Paragraph B.2.3 affecting the distribution and beneficiary provisions of the Marital Trust must be notarized in order to be valid and enforceable.

**2. Chapter 42.44 RCW Governs the Requirements
for Notarial Acts.**

Chapter 42.44 RCW sets forth specific standards for notary publics and for notarial acts. Specifically, state statute establishes how and in what fashion notarial acts must be performed, providing as follows:

(1) In taking an acknowledgment, a notary public must determine and certify, either from personal knowledge or from satisfactory evidence, that the person appearing before the notary public and making the acknowledgement is the person whose true signature is on the document.

...

(4) In witnessing or attesting a signature, a notary public must determine, either from personal knowledge or from satisfactory evidence, that the signature is that of the person appearing before the notary public and named in the document.

...

(7) In certifying that an event has occurred or an act has been performed, a notary public must determine the occurrence or performance either from personal knowledge or from satisfactory evidence based upon the oath or affirmation of a credible witness personally known to the notary public.

RCW 42.44.080. Additionally, relevant to all of the above alternatives for notarization, the statute explains that

(8) A notary public has satisfactory evidence that a person is the person described in a document if that person: (a) Is personally known to the notary public; (b) is identified upon the oath or affirmation of a credible witness

personally known to the notary public; or (c) is identified on the basis of identification documents.

RCW 42.44.080(8). Secondly, the chapter requires that any “notarial act by a notary public must be evidenced by a certificate signed and dated by a notary public.” RCW 42.44.090(1) (emphasis added); *see also generally* RCW 42.44.100 (providing short forms of acceptable certificates).

Courts have held that where a statute or document requires proper notarization, that notarization must be performed in the manner so required. *See, e.g., In re Jesse*, 286 F. 305, 306 (9th Cir. 1923) (applying Washington law). In *In re Jesse*, the Ninth Circuit held that where the notary’s seal was present but signature was missing and further, where “there was no attempt, apparently, to swear the parties or to authenticate the document by one certificate,” the underlying document was invalid due to such noncompliance. *Id.*

3. The 2001 Attempted Amendment is Legally Invalid Because it did not Comport with the Raymond M. and Gene M. Larson Trust’s Notary Requirements.

Raymond Larson’s 2001 attempted amendment is procedurally infirm and should be declared invalid because, pursuant to Paragraph B.2.3, the Trust instrument requires any amendments be notarized. Simply stated, Raymond Larson’s signature on the 2001 amendment was not notarized. CP at 302-08. There is no notary statement, certificate, nor notary seal accompanying Raymond Larson’s signature.

Addressing first RCW 42.44.080(1) and (4), both provisions require that the notary “must determine . . . , either from personal knowledge or from satisfactory evidence,” either that the person appearing before them is the person making the acknowledgement or that the signature is that of person appearing before the notary. Neither of the notary publics here made any certification or declaration that they determined, either from personal knowledge or satisfactory evidence, that Raymond Larson was the person appearing before them. Rather, they made such a sufficient certification when properly notarizing their co-witness’ signatures, i.e. that they knew or had satisfactory evidence that witness is the person who appeared before them. This does not satisfy RCW 42.44.080(4) and is not the notarial act contemplated and required by the trust instrument.

Secondly, in the alternative, RCW 42.44.080(7) permits a notary to “act[] in certifying that an event had occurred or an act had been performed.” Again, this did not occur. It is true, that as lay witnesses, Angela and William Donovan attested to the fact that Raymond Larson signed the 2001 amendment. However, they did not certify the same as notary publics. Again, on the contrary, they certified as notary publics that their co-witness signed the document as a witness. Again, this does not satisfy RCW 42.44.080(7) and is not the notarial act contemplated and required by the Trust instrument.¹⁶

¹⁶ It is questionable whether the notaries were qualified at all. RCW 42.44.080(10) provides that “a notary public is disqualified from performing a notarial act when the

Here, a careful examination of the 2001 amendment reveals that there was no notarial act concerning Raymond Larson's purported signature or event - the only such certificates related to the execution of the witness statements, an act irrelevant and insufficient to satisfy the specific dictates of the Raymond M. and Gene M. Larson Trust. *See* RCW 42.44.090(1) (setting forth that every "notarial act by a notary public must be evidenced by a certificate signed and dated by the notary public") (emphasis added); *see also* CP at 302-07. Respondent below argued that the notary publics' notarization of witness signatures to satisfy the required notarization of Raymond Larson's purported signature and actions. However, the Raymond M. and Gene M. Larson Trust did not require that amendments pursuant to Section II, Paragraph B.2.3 be in writing and accompanied by notarized witness statements. Rather, it required that the amendment itself, i.e. the surviving Trustor's execution thereof and signature thereon, be properly notarized.

The facts and documents present in this case conclusively demonstrate that Raymond Larson's attempted amendment and signature thereto were not notarized. Rather, in accompaniment with the attempted amendment, there is a separate attached page entitled "Witness Statement." This "Witness Statement" appears to be signed by William Donovan-Tronson and Angela Donovan. These witnesses then signed affidavits and *these* affidavits were then notarized by the other

notary is a signer of the document which is to be notarized." Here, both notaries not only purported to perform some notarial act but they also signed the document as witnesses.

witness/notary. In sum, the witness affidavits are notarized, but Raymond Larson's attempted amendment and signature are not. From a legal standpoint, there can be no question that the notarization of the witnesses' respective signatures is not the same as notarization of Raymond Larson's signature.

In sum, Raymond Larson's signature, the act which divested his children and grandchildren of their beneficial interest under the Raymond M. and Gene M. Larson Trust, was simply witnessed by two notary publics who thereafter signed separate notarized affidavits. Significantly, neither witness declared that Raymond Larson, as the signer, was in fact the person who appeared before them, nor that he acknowledged that he signed the instrument, nor that the same was his free and voluntary act, nor did they affix their notary seal thereto. It is indisputable that the two witnesses to Raymond Larson's signature did not certify his signature in compliance with chapter 42.44 RCW.

E. The Larson Children are Entitled to their Reasonable Expenses, Including Attorneys' Fees, Incurred in Bringing this Appeal.

Pursuant to RAP 18.1, the Larson Children respectfully request this Court award them their reasonable expenses, including attorneys' fees, incurred in bring this appeal. This action was initially brought under TEDRA, chapter 11.96A RCW. *See* CP at 83-89. Relevant here, TEDRA specifically provides for an award of attorneys' fees and expenses on appeal, providing that the

court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

RCW 11.96A.150(1). This section specifically applies to appellate proceedings involving trust disputes. *See* RCW 11.96A.150(2).

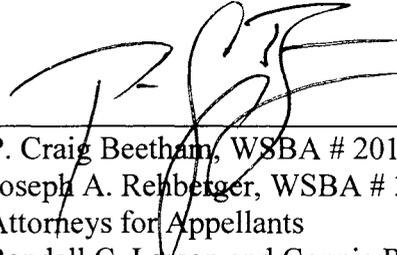
The Larson Children, Randall Larson and Connie Milton, are the only children of Raymond and Gene Larson. CP at 312-16. They have four children each, who were all provided for under the terms of the Raymond M. and Gene M. Larson Trust. CP at 290-93. The Larson Children, on behalf of themselves and their children, have incurred considerable legal expenses in an attempt to preserve and protect the inheritance that their mother and grandmother intended to provide them. RCW 11.96A.150(1) prudently permits such an award be made "from the assets of the . . . trust involved in the proceedings." As the facts and history of this case demonstrate, such an award in this case would be fair and equitable in light of the circumstances of this dispute.

V. CONCLUSION

Based on the forgoing argument and authority, the Larson Children respectfully request this Court reverse the trial court's February 17, 2006 and March 10, 2006 orders denying the Larson Children summary judgment and remand to the trial court for trial on the factual issues concerning the corpus of the Raymond and Gene M. Larson Trust.

RESPECTFULLY SUBMITTED this 7th day of June, 2006.

EISENHOWER & CARLSON, PLLC

By: 

P. Craig Beetham, WSBA # 20139

Joseph A. Rehberger, WSBA # 35556

Attorneys for Appellants

Randall C. Larson and Connie R. Milton

Certificate of Service

I certify that on the 7th day of June, 2006, I deposited with ABC Legal Services, Inc. a true and correct copy of the foregoing Brief of Appellants to be delivered to counsel for the Respondents at the following address:

Ronald E. Thompson
Law Offices of Ronald E. Thompson, PLLC
4411 Pt. Fosdick Drive N.W., Suite 207
Gig Harbor, WA 98335-3189

Deidre M Turnbull
Deidre M. Turnbull
Legal Assistant

FILED
COURT RECORDS
06 JUN -7 PM 3:58
STATE OF WASHINGTON
BY DM
CLERK