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DIVISION II

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NO. 37015-8-II

STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE THE MATTER OF:

The Deed to Camp Kilworth;
The Estate of William W. Kilworth, deceased;
The Estate of Augusta L. Kilworth, deceased;
The Estate of Florence B. Kilworth, deceased;
The William W. Kilworth Trust; and
The Florence B. Kilworth Trust.

APPELLANTS' REPLY BRIEF

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I. Reply to Respondent's "Summary of Argument"

The Respondent contends that the trial court's decision deleting the reversionary interest in the 1934 Deed (hereinafter "the Deed") and allowing the sale of the Kilworth Property (hereinafter "Property") to the Respondent free from reversion is sustainable based upon several legal theories. However, as demonstrated below, none of the Respondent's theories is supported by the record.

The Respondent first contends that the Trust and Estate Dispute Resolution Act ("TEDRA"), Chapter 11.96A RCW, gives the trial court the authority to modify the Deed based upon its "full and ample power and authority to administer and settle" issues, questions or disputes such as the one in the instant case. While it is true that the trial court has full authority to settle numerous types of disputes under TEDRA, the trial court's authority to resolve disputes under TEDRA does not allow it to ignore established and relevant Washington law when ruling on issues brought before the court under TEDRA.

In this case, the court disregarded Washington real property law regarding deed construction and reversionary interests when it modified the Deed by failing to give full effect to the unequivocal intent of the Kilworths to transfer property to the Respondent to use in perpetuity for scouting and to hold in perpetuity without transfer to another entity.

Second, the Respondent argues that the changed circumstances relating to the Property justify modification of the Deed. Significantly, however, the Respondent is unable to cite to any legal theory allowing such a modification of a deed based upon changed circumstances.

Third, the Respondent argues that trial court's decision is sustainable when the Deed is read in its entirety because the Kilworths' primary intent was to support the Boy Scouts with property that could be used for their benefit. The Respondent's contention fails to give full effect to all of the unambiguous words contained in the Deed, which supports an intent that the Respondent hold the property in perpetuity.

Fourth, the Respondent contends that the Deed's modification is sustainable because the Deed created a trust, which enabled the trial court to apply the equitable deviation doctrine to modify the Deed's terms. However, the trial court never entertained the theory that the Deed created a charitable trust and never entered a finding of such. On the contrary, the terms of the Deed reflect an intent by the Kilworths to transfer property subject to condition and reversion as opposed to the creation of a charitable trust. Where there is no charitable trust, application of the doctrine of equitable deviation is improper. *Assuming arguendo*, that the Deed created a charitable trust, the elements of equitable deviation are not met and the trial court's decision is erroneous.

Finally, the Respondent contends that, even if the Deed does not create a charitable trust but reflects a transfer subject to a condition subsequent, the reversionary interest constitutes an unreasonable restraint on alienation, justifying its elimination. The Respondent fails to recognize the Kilworths' right under applicable law to transfer property subject to a reversionary interest where the restraint serves a legitimate charitable purpose.

For the foregoing reasons, and as such reasons are further explained below, the Respondent's arguments fail to support the trial court's decision modifying the terms of the Deed by removing the reversionary interest and also approving the sale of the Property to the City of Federal Way.

II. TEDRA Does Not Allow the Trial Court to Disregard Established Washington Real Property Law, as It Did When It Eliminated the Reversionary Clause in the Deed.

In 1999, the Washington State legislature enacted TEDRA to provide statutory provisions for the resolution of disputes and other matters relating to trusts and estates. *See* RCW 11.96A.010. TEDRA provides a nonjudicial method for the resolution of matters including mediation, arbitration and agreement of the interested parties. RCW 11.96A.010. TEDRA makes clear that parties engaged in nonjudicial resolution shall not engage in any process or enter into any agreement that

violates any statute or common law. RCW 11.96A.210. By way of example, an agreement under TEDRA cannot be in conflict with the intent of the Testator or Testatrix as expressed in a will. 26B Cheryl C. Mitchell and Ferd H. Mitchell, Washington Practice: Probate Law and Practice, § 2.32, pp.52 (2006).

TEDRA also provides for judicial dispute resolution. RCW 11.96A.010. TEDRA vests in the trial court the authority to administer and settle “[a]ll matters concerning the estates and assets of . . . deceased persons, including matters involving nonprobate assets and powers of attorney” and “all trusts and trust matters.” RCW 11.96A.020(1). The term “matter” is defined as “any issue, question or dispute involving . . . [t]he determination of any question arising in the administration of an estate or trust, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to (i) [t]he construction of wills, trusts, community property agreements, and other writings. . .” RCW 11.96A.030(1)(c)(i). TEDRA grants to the trial court the authority to settle certain disputes but does not create or alter substantive law with respect to real property.

In resolving disputes brought under TEDRA, such as the one in this case, the trial court was required to apply relevant Washington law to resolve such disputes. To permit the trial court to decide cases under TEDRA without the mandate of following well established law, grants to court the unbridled authority and discretion to resolve such disputes in any manner in which it desires without restraint and without regard to

established law. Clearly, such would be inconsistent with the language and intent of TEDRA.

While the trial court in this case had the authority under TEDRA to review and resolve the matter before it, in so doing, the trial court did not have the authority to disregard established Washington real property law. The trial court was required to apply the laws relating to the construction of deeds and of reversionary interests in construing the Deed, and determining whether the Respondent's Petition and requested relief should be granted under such established law.

As provided in Appellants' Opening Brief, the trial court ignored the plain and unambiguous language in the Deed setting forth clear and specific conditions relating to the Property, including transfer of the Property, and the reversionary clause granting to the Kilworths (now the Two Trusts) the reversionary rights should the Respondent violate the conditions in the Deed.

Regarding deed interpretation, Washington recognizes that the primary objective of interpreting a deed is to discern the parties' intent. *Niemann v. Vaughn Community Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005) (internal citations omitted). It is well established that courts look to the language of the deed to determine the intent. It is only where the deed is ambiguous, or subject to differing meanings, that the court resorts to extrinsic evidence to determine the intent. *See Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 739, 844 P.2d 1006 (1993). Further, Washington law recognizes reversionary interests and the possibility of

reverter. *See King County v. Hanson Inv. Co.*, 34 Wn.2d 112, 118 (1949); and, *Hodgins v. State*, 9 Wn. App. 486, 494 (1973).

In this case, the Deed expresses the Kilworths' unequivocal donative intent that the Respondent hold the Property in perpetuity without transfer and without use other than for boy scouting and the teaching of that craft. The trial court erroneously looked beyond the plain and unambiguous language of the Deed to establish a different intent, unsupported by the entirety of the Deed's language, to justify its modification. Based upon this incorrect finding as to the Kilworths' "intent," the trial court deleted the reversionary interest thereby ignoring the purpose and validity of the reversion and the Kilworths' clear mandate not to "convey, lease or encumber" the Property or to "allow the same to come into the possession of any other party." (CP 19).

Further, contrary to the Respondent's position, the presence of changed circumstances does not warrant the trial court's modification of the Deed in contravention of its unambiguous language. *See* Brief of Respondent, pp. 18-20. The Respondent contends that the trial court's decision is sustainable based upon the changes in circumstances over the past several decades. The Respondent appears to argue this in two sections of its Brief of Respondent, once in relation to an assertion that the Deed created a charitable trust and once simply as applied to deeds where no trust is created. *See* Brief of Respondent, pp. 18-20; 20-22.

However, as to the latter, and as explained in Appellants' Opening Brief and reiterated below, the doctrine of equitable deviation applies to

cases involving charitable trusts, but not those involving the transfer of property by deed. There is no Washington law allowing a court to modify the terms of a deed because circumstances have changed since the deed's execution. Not surprisingly, the Respondent cites to no such authority. Likewise, TEDRA does not grant the trial court the authority to remove the reversionary clause in the Deed without the support of relevant Washington law.

In sum, the trial court erred when it failed to give effect to the unequivocal and unambiguous language of the Deed expressing the Kilworths' donative intent that the Respondent use the Property for scouting and teaching of scout craft and that the Respondent never convey, lease or encumber Camp Kilworth so that the Respondent could hold the Property in perpetuity. (CP 19). Limiting the donative intent to "support[ing] the Boy Scouts with property that could be used to their benefit" (CP 174) fails to give any effect whatsoever to the Kilworths' clear intent that the Respondent hold the Property in perpetuity.

III. The Deed did Not Create a Charitable Trust and thus, the Trial Court's Application of the Doctrine of Equitable Deviation was Erroneous.

The Respondent also argues that the Deed created a charitable trust and was therefore subject to equitable deviation. *See* Brief of Respondent, pp. 28-32. The Respondent contends that "the trial court based its equitable remedy on the assumption that the Kilworths' conveyance of the

Property had effectively imposed a charitable trust. . .” See Brief of Respondent, p. 19 (emphasis added).¹

a. *The Trial Court Made No Finding that the Deed Created a Charitable Trust.*

The Respondent’s contention that the trial court’s decision was based upon a finding or “assumption” that the Deed created a charitable trust is patently erroneous as neither the trial court’s letter decision nor its Order, Judgment and Decree reflects a finding that the Deed created a charitable trust. (CP 154-165). The trial court’s Order, Judgment and Decree does not reflect any finding that the Deed created a charitable trust. *Id.* The Order, Judgment and Decree recognizes that the Respondent’s Petition requests modification of both the Deed and the Two Trusts. (CP 155). However, the trial court did not modify the Two Trusts but modified the Deed under the doctrine of equitable deviation without finding that the Deed created a charitable trust. Further, at no time during the case did any of the parties, including the Respondent, raise the issue that the Deed created a charitable trust. Quite simply, the issue was not presented to the trial court and the record is devoid of any finding, any evidence or any thought about such a determination.

¹ The Respondent also asserts that the trial court’s decision implicitly recognizes the existence of a charitable trust. See Brief of Respondent, p. 27.

Likewise, the trial court's letter decision recognizes that its determination in the case is whether or not, under equitable deviation, "the Court has the authority to modify the deed." (CP 152-153). The trial court ultimately determined that it was necessary to modify the Deed to "permit deviation to effectuate and further the *trusts*' primary purpose." (CP 153) (emphasis added). The trial court's reference to the "trusts" (containing an apostrophe indicating the plural of trust and recognizing the existence of more than one trust), refers to the Two Trusts, namely, the William W. Kilworth Trust and the Florence B. Kilworth Trust. The trial court's carefully crafted letter decision clearly demonstrates its consideration and determination of the intent of the Two Trusts in applying the equitable deviation doctrine to modify the Deed. The trial court's determination to modify the Deed was based upon a misunderstanding and misapplication of the law of trusts and its application to a deed as opposed to any finding that the Deed created a charitable trust and thus, was subject to equitable deviation.

The Respondent's assertion that the trial court found or assumed that the Deed created a trust is completely unsupported by the record.

b. *The Deed Does Not Create a Charitable Trust.*

i. The Appellate Court Should Not Consider Respondent's Theory That the Deed Created a Charitable Trust.

If the Respondent urges this Court in its Brief or at oral argument to find that the Deed created a charitable trust to justify the Deed's modification, this Court should not consider this theory because the Respondent failed to raise it before the trial court.

It is well established that a theory not presented to the trial court will not be considered on appeal. *Barnes v. Seattle School Dist. No. 1*, 88 Wn.2d 483, 563 P.2d 199 (1977); RAP 2.5(a). In *Barnes*, the trial court held that a school district's non-renewal of administrator contracts coupled with contract offers of a different status providing lower responsibility and pay was unlawful. *Id.* at 488-89. On appeal, the school district argued for the first time that it was financially impossible for them to respect the administrators' contracts. *Id.* at 489. Our State Supreme Court did not consider the issue on appeal because the theory was not presented to the trial court. *Id.*

In this case, the Respondent's failure to raise the theory that the Deed created a charitable trust before the trial court precludes its consideration on appeal.

ii. The Record does not Support a Finding that the Deed created a Charitable Trust.

Even if this Court considers whether the Deed created a charitable trust, the only evidence presented in the record for its review is the Deed, which does not support such a finding.

A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust. Restatement (Second) of Trusts § 351 (1959). While there are no “magic words” that create a charitable trust, it is well established that the settlor of the alleged charitable trust must show an intent to create a trust and not some similar relationship or some other effect such as a gift to a charitable cause with a forfeiture provision such as a reverter. 17 Bogert on Trusts §§ 323, 324, pgs. 372-374 (2nd Ed. 1992) (emphasis added).

In *Hillman v. Roman Cath. Bishop Fall River*, 24 Mass.App.Ct. 241, 508 N.E.2d 118 (1959), the court held that a grantor giving a church a release Deed to property for educational, religious, or recreational use did not create a charitable trust but instead created a fee simple transfer. While the court noted that no special words such as “in trust” were necessary to create a trust, the creation of a charitable trust for specific purposes required a more definite expression of an intention to create a charitable trust. *Id.* at 120.

Further, where there is a definite expression that a transfer for charitable purposes contain a forfeiture or reverter, the instrument transferring the property does not create a trust. As provided in Restatement (Second) of Trusts § 351, cmt. e:

If the owner of property transfers it inter vivos or by will “upon condition” that it be applied for a charitable purpose, a charitable trust is created if the transferor manifested an intention that the transferee should be subject to a duty so to apply it, *rather than that he should be divested of his interest if he should fail so to apply it.*

Id. (emphasis added). See *Connecticut Junior Republic Ass’n v. Town of Litchfield*, 119 Conn. 106, 174 A. 304 (1934)(holding gift to charitable corporation for school as long as grantee continues to use land for that purpose with reverter to grantor if not so used, did not create trust but rather a determinable fee); See also *Moore v. Wells*, 212 Ga. 446, 93 S.E.2d 731 (1956)(holding conveyance by government to school district upon condition and limitation that land be used for school purposes with reverter in case of nonuse creates a defeasible fee with possibility of reverter and not charitable trust); *McDougall v. Palo Alto Unified School Dist.*, 28 Cal.Rptr. 37, 212 Cal.App.2d 422 (1963)(holding conveyance to school district for school purposes with provision for reverter to grantor if school use is discontinued creates a determinable fee and not a trust).

In fact, Respondent acknowledges that a transfer of property subject to a condition leading to the divestment of property if the condition is violated, does not create a trust. Respondent recognizes such in its Brief when it states: “[r]ather than create a trust, an owner of property may transfer it to another on the condition that, if the latter should fail to perform a specified act, the transferee’s interest will be forfeited.” *See* Brief of Respondent, p. 33. Respondent further concedes that “[u]nder Washington law, an estate in fee simple subject to a condition subsequent is created where a deed conveys an estate in fee simple but provides for a forfeiture or reversion upon the happening of some event or condition.” *Id.* (citations omitted). Finally, in discussing a fee simple determinable, the Respondent acknowledges that such is created when there is an estate that “automatically terminates on the happening of a stated event and reverts to the grantor by operation of law.” *Id.* (citations omitted).

Here, the Deed reflects nothing more than the Kilworths’ intent to create a fee simple determinable interest with a reversionary right in the Property. The evidence before the trial court included the plain and unambiguous Deed language expressing specific requirements for the Property and the reversionary clause, which would return the Property to the grantors if a condition was violated. Given such, it is clear, and Respondent recognizes, that the Deed did not create a charitable trust.

Any finding by the trial court or this Court that the Deed created a charitable trust would be erroneous.

IV. The Deed's Reversionary Clause Does Not Constitute an Unreasonable Restraint on Alienation.

The Respondent contends, for the first time in their response brief, that the reversionary clause constitutes an unreasonable restraint on alienation. The Respondent argues that the restraint is unreasonable because it does not effectuate the Kilworths' primary purpose. The Respondent contends that the Kilworths' primary purpose is to promote Scouting and its associated values. *See* Brief of Respondent, p. 35.² The Respondent argues that the restraint is unreasonable because it frustrates the Kilworths' primary purpose and does not allow the Scouts to fully accomplish its mission.

Once again, this Court should not consider Respondent's argument on appeal since the Respondent failed to raise this theory in the trial court. *See Barnes v. Seattle School Dist. No. 1, supra*; RAP 2.5(a).

If this Court considers this argument, as an initial matter, and as stated throughout Appellants' Opening Brief and this Reply, the Kilworths' primary donative intent in transferring the Property to the

² The trial court's Order, Judgment and Decree provides that the primary intent of the Kilworths in conveying Camp Kilworth to the Scout Council was "to support the Boy Scouts with property that could be used to their benefit." (CP 156).

Respondent, as unambiguously expressed in the Deed, was to promote Scouting and the teaching of the craft of Scouting and the Respondent's ownership of the Property in perpetuity. Where that intent, as expressed by the clear language of the conditions, is violated, the Property reverts to the grantor as is permissible under Washington law. *See King County v. Hanson Inv. Co., supra; Hodgins v. State, supra.*

Second, the restraint does not constitute an unreasonable restraint on alienation under the circumstances. Washington follows a reasonableness approach to analyzing restraints on alienation. *Alby v. Banc One Financial*, 156 W.2d 367, 372, 128 P.3d 81 (2006). In determining whether a restraint is reasonable, and therefore valid, courts balance the utility of the purpose served by the restraint against the injurious consequences that are likely to flow from its enforcement. *Id.* at 372-73. Courts look to a variety of factors including the purpose of the restraint. *Id.* at 373.

As recognized in *Alby*, restraints on alienation of land can serve legitimate charitable purposes. The *Alby* court summarized this when stating the following:

Restraints on alienation of land are used for a variety of legitimate purposes; retaining land in families; preserving affordable housing; furthering conservation,

preservation, and *charitable purposes* to which land is devoted.

Id. at 373, fn4 (internal citations omitted)(emphasis added). Moreover, the fact that restraints may negatively impact marketability does not necessarily render them unreasonable. *Id.*

In this case, the restraint on alienation is reasonable because the utility of its purpose outweighs the injurious consequences that will flow from its enforcement.

First, the Kilworths had a legitimate interest in ensuring that the Property would be owned, retained and used, in perpetuity, by the Respondent, a charitable organization which they highly regarded. The Kilworths' decision to use their resources to benefit a charitable organization such as the Boy Scouts in a certain manner by deed transfer including conditions and a reversion addressed their specific intent with regard to that charity. The Deed's conditions of ownership and use, and the reversionary interest that is triggered if the conditions are violated, promotes effective development, improvement and maintenance of the Property so that the Property does not deteriorate or become ineffective for its intended purpose and use. In short, where the Respondent received the Property by charitable gift, to hold in perpetuity, the Respondent should be prompted to use such property diligently and effectively to

promote and better its organization. The Kilworths' gift to the Boy Scouts serves a legitimate interest in ensuring that the Property would be owned, retained and used, in perpetuity, by the Respondent.

The Respondent argues that the fact that the Property was not "bargained for" weighs in its favor in considering whether the restraint is reasonable. Significantly, the Respondent willingly accepted the Property in 1934 with "open eyes" by way of an instrument containing very specific and unambiguous provisions relating to the Property's use, ownership, transfer and reversion. The Respondent could have refused the charitable gift, but it did not. Respondent's argument in this regard is disingenuous.

With regard to the consequences flowing from enforcement of the restraint, the only injurious consequence arising from the restraint which affects the Respondent is the limitation on marketability. The Property, in its current state, remains useful to the Respondent in terms of scouting and promotion the craft of scouting. The fact that there may be "more value" in terms of promoting scouting at other camps through the use of the proceeds of a sale of the Property does not justify elimination of the reversionary interest. There is nothing preventing the Respondent from making improvements to the Property to address the changed circumstances including issues of beach access so that more scouts are able to use the benefits of the 25-acre Property.

Finally, the Respondent argues that upholding the reversionary interest advocates the application of “form over substance” in the resolution of this case. *See* Brief of Respondent, p. 40. However, the substance of the case is most accurately and appropriately determined by looking to the “form” at issue, or the plain and unambiguous language of the Deed. In transferring the Property to Respondent, the Kilworths clearly had in mind a specific intent about the Property including its ownership, transfer and use. This intent is evidenced and expressed in the careful drafting of the Deed’s language and must be interpreted by giving effect to each and every word in the Deed. Being faithful to the “form” in this case satisfies the Kilworths’ “substance”, or intentions.

Balancing the interests of the Two Trusts and the Respondent weighs in favor of a finding that the restraint on alienation is reasonable and enforceable. This is because the Kilworths’ legitimate interest in keeping the Property in the Respondent’s ownership to ensure its ownership and exclusive and perpetual use by this specific charitable organization outweighs Respondents inability to sell the Property, achieve a profit and invest the monies in other Scout camps. If this Court reverses the trial court’s decision and the Respondent keeps the Property, nothing prevents the Respondent from improving it so to make it more available to scouting in the South King County region. The Respondent’s efforts in

this regard would certainly further one aspect of the Kilworths' intent in deeding the Property to the Respondent.

V. **Conclusion**

For the reasons set forth above and in Appellants' Opening Brief, the Appellants, respectfully request that this court reverse the Trial Court's Order, Judgment, and Decree Deleting the Reversionary Right in the 1934 Deed to Camp Kilworth filed on October 23, 2007.

RESPECTFULLY SUBMITTED this 16 day of May, 2008.

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CERTIFICATE OF SERVICE

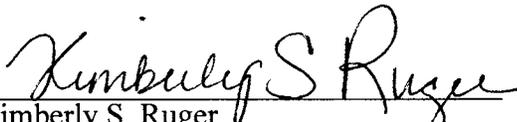
I hereby certify that on the 16th day of May, 2008, I served Respondent with a copy of the foregoing document by depositing a true and correct copy of the foregoing Appellants' Reply Brief, with ABC Legal Messengers to be delivered on May 16, 2008 to the below-listed counsel:

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