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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39463-4

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

JOHN E. COOK, a married man, Respondent

v.

A. DIANE BRATENG, a widow concerning her interest in
realty subject to partition action, and A. DIANE BRATENG,
as Successor Sole Trustee of the Elmer J. Cook Living Trust,
Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

John Cook (hereinafter “Mr. Cook”), the Respondent, sued his sister, A. Diane Brateng (hereinafter “Ms. Brateng”), for partition of a house on a lot they inherited from their uncle, Charles Cook (hereinafter “Uncle Charles”), and for an accounting by Ms. Brateng, who was the trustee of their father’s modest inter vivos trust (cash and receipts from social security and interest totaling only \$70,000 over 2½ years) and a 60 year old 1,232 square foot house in Ilwaco, Washington. Ms. Brateng provided a complete accounting, which the trial court later approved; which accounting Mr. Cook never accepted and therefore sued.

Ms. Brateng cared for her 90 year old father, Elmer Cook, in her home single handedly for the last 27 months of his life, never paying herself for his care or advances made by her own funds for her father. The trust estate would have been depleted long before his death had she paid herself during her father’s lifetime.

Mr. Cook objected to deferral of payment to Ms. Brateng and surprisingly, the trial court held as a matter of law that Ms. Brateng breached her duty to the two remainder beneficiaries (Mr. Cook and herself) by not disclosing two matters: (1) deferral of payment for her services and cash advances; and (2) intention not to sell or encumber the \$90,000 house in Ilwaco, Washington to pay for her services. Their father

built the house in the 1940's and where Ms. Brateng took him at least 32 times during the last 27 months of his life.

The trust agreement drafted for Elmer Cook, the parties father, is extremely detailed in its purpose and procedures which Ms. Brateng followed to the letter, including the exercise of discretionary powers, which are consistent with RCW 11.98.070- Trust Powers.

The Trial Court concluded that Ms. Brateng's failure to disclose deferral of payment to herself and her decision not to sell or encumber her father's house in Ilwaco, Washington: (1) defeated Ms. Brateng's claim for services and cash advanced; (2) defeated Ms. Brateng's claim for attorneys fees, and (3) allowed fees against Ms. Brateng in favor of Mr. Cook. Mr. Cook was aware the Ilwaco house was not sold because on weekends he occupied the adjoining house inherited by the parties from Uncle Charles and subject to the instant partition suit.

Neither the Trust Agreement nor state statute require an annual accounting to a remainder beneficiary during the life of the life beneficiary, nor did Mr. Cook ever request an accounting.

The matter on appeal only concerns questions of law, which are based on the facts as found by the trial court which are not appealed, except Finding of Fact 21, regarding intent of the deceased Trustor, which finding could only be based on the trial courts interpretation of the Trust

Agreement itself, and not trial testimony, of which there was none, and therefore Finding 21 is appealed as not being supported by substantial evidence and as contrary to the express terms of the Trust Agreement.

II. ASSIGNMENTS OF ERROR

ASSIGMENTS OF ERROR

1. The Trial Court erred in entering its Conclusions of Law numbers 34-41 and 46 entered on May 26, 2009. CP 8.
2. The Trial Court erred in entering its Findings of Fact 21 entered on May 26, 2009. CP 8.

ISSUES PERTAINING TO ASSIGMENTS OF ERROR

Deferral of Payment for Service

A. During the life of the Life Beneficiary, does a Trustee have an affirmative duty to disclose to a remainder beneficiary whether payment for Trustee's services is being deferred until the death of the Life Beneficiary, and as such, is that a breach of duty? [CL 35, 37 & 39]

Conclusion of Law #35: The Defendant had a duty to disclose to Plaintiff that she was deferring making any charge against the estate for her services to her father.

Conclusion of Law #37: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she was deferring charges to the estate for her services to the Trust.

Conclusion of Law #39: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she claimed labor costs for caring for Elmer J. Cook.

Duty to Sell/Encumber- Non-Disclosure

B. During the life of the Life Beneficiary, is it a breach of fiduciary duty for a Trustee not to disclose to the remainder beneficiary the Trustee's decision not to encumber or sell the trust property to pay current expenses and the services to the Life Beneficiary? [FF 20 & 21; CL 36 & 38]

Finding of Fact #21: The decision not to encumber the property but later claim pay for services is in direct conflict with Elmer J. Cook's express intent that Plaintiff receive 9/20 of the Trust Estate.

(Note: To make sense of Finding of Fact #21, "but" should be read as "and")

Conclusion of Law #36: The Defendant had a duty to disclose to Plaintiff that she decided not to encumber or sell the trust property in order to pay for services to Elmer J. Cook.

Conclusion of Law #38: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she decided not to encumber or sell trust property to pay for services to Elmer J. Cook.

C. Is Finding of Fact #21 a conclusion of law, reviewed de novo, and does substantial evidence support Finding of Fact #21 that the Trustee's decision not to encumber the Trustor's house and defer payment for services conflict with the Trustor's intent that Mr. Cook receive 9/20th of the Trust Estate, and as such constitutes a breach of duty? [FF 21; CL 36 - 38]

Finding of Fact #21: The decision not to encumber the property but later claim pay for services is in direct conflict with Elmer J. Cook's express intent that Plaintiff receive 9/20 of the Trust Estate.

Conclusion of Law #36: The Defendant had a duty to disclose to Plaintiff that she decided not to encumber or sell the trust property in order to pay for services to Elmer J. Cook.

Conclusion of Law #37: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she was deferring charges to the estate for her services to the Trust.

Conclusion of Law #38: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she decided not to encumber or sell trust property to pay for services to Elmer J. Cook.

Non-Disclosure of Value of Deferred Payment for Services

D. During the life of the Life Beneficiary, does a Trustee have a duty to disclose to a Remainder Beneficiary the value of services provided by the Trustee to the Trust and Life Beneficiary? [FF 13-15; CL 39]

Conclusion of Law #39: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she claimed labor costs for caring for Elmer J. Cook.

Repairs to Trust Property

E. Considering the authority granted by the Trust Agreement and RCW 11.98.070(19) which allow repairs by a Trustee as a right, did the Trustee breach her fiduciary duty by repairing and maintaining trust property so as to justify a \$20,000 charge against the Trustee? [FF 16, 22 & 23; No CL]

Finding of Fact #16: While Elmer J. Cook was alive, but after he was declared incompetent and moved in with the Defendant, the Defendant spent over \$20,000.00 on 1104 Rose Hill for water damage repairs and a kitchen remodel.

Finding of Fact #22: The Court allows the sum of \$59,176.67 expenses and disbursements, already paid from the Trust Estate, less \$10,000.00 to account for the kitchen remodel (that is disallowed) and repair (that is allowed).

*Finding of Fact #23: The cash on hand at the time of Elmer J. Cook's death was \$16,439.62. With kitchen remodel disallow, the cash on hand is \$26,439.62.
(Emphasis Added)*

(Note: Conclusions of Law #42-46 subsume Finding of Facts #22 and 23 which are mixed conclusions of law and findings of fact.)

Award of Attorneys Fees

F. Is it reversible error to award attorneys fees to a Plaintiff where there is no harm shown nor any benefit to the Trust by the lawsuit brought by the Plaintiff solely for the benefit of the Plaintiff and the trial court finds the accounting given to the Plaintiff prior to suit was accurate and complete? [FF 30; No CL]

Finding of Fact #30: Plaintiff is awarded his reasonable attorneys fees and costs in the amount of \$24,425.00.

(Note: This is mixed finding of fact and conclusion of law and is calculated in Conclusion of Law #46, Exhibit C)

G. Is it reversible error to require a Trustee to bear three-quarters of her own attorneys fees in presenting at trial an accounting and defending claims of breach of trust when the accounting presented prior to suit was found to be accurate and complete? [FF 12, 30-31; CL 46 (Ex. C)]

H. Does the law support the mixed finding and conclusions of law that the remainder beneficiary is entitled to an award of attorneys fees and the trustee is entitled only to \$12,358, being ¼ of her fees? [FF 30 & 31; CL 46 (Ex. C)]

Travel Expenses and Labor Costs

I. Do any of the findings and other Conclusions of Law support denial of the Trustee's travel expenses and labor costs for care, attorneys fees and grant of fees to the remainder beneficiary? [FF 30 & 31; CL 40 & 41]

Finding of Fact #30: Plaintiff is awarded his reasonable attorneys fees and costs in the amount of \$24,425.00.

Finding of Fact #31: Defendant is awarded one-half of her reasonable attorneys fees in the amount of \$12,358.17.

Conclusion of Law #40: The Court disallows any travel expenses to and from Ilwaco by Defendant.

Conclusion of Law #41: The Court disallows any labor costs claimed by Defendant for caring for Elmer J. Cook.

Trust Property: Appraisal 8 Years Later

J. Is a Trustee defendant deleterious in not pursuing mediation, arbitration and case setting on a plaintiff's appeal for trial de novo when prior to the plaintiff's suit for accounting the Trustee provided a complete and accurate accounting by which delay the trial court justified applying

appraised value of trust property at the time of trial (April 2008) instead of at the time of death (January 2000)? [FF 17; CL 34]

Conclusion of Law #34: The deleterious conduct of both parties requires the Court, in equity, adopt the 2007 appraisal value of both Uncle Check's and Elmer J. Cook's properties.

Summary of Assignments of Error

1. Duties? Did the Trustee, Diane Brateng, under the Trust Agreement, state statutes and common law, have a duty to do the following during the lifetime of the Trustor, who was the sole life beneficiary of the Trust:

(1) disclose to the Plaintiff, John Cook, a remainder beneficiary, that she was claiming and deferring charges against the estate for her services to their father? [CL 35]¹, and

(2) disclose to the Plaintiff, John Cook, the decision not to encumber or sell trust property to pay for such services [CL 36 & 38]².

2. Breach of Duty? Do the two non-disclosures to John Cook during the life of their father, identified in the preceding Summary of Assignments of Error #1- Duties, constitute the following breaches of duty, as held by the Trial Court:

¹ *Conclusion of Law #35: The Defendant had a duty to disclose to Plaintiff that she was deferring making any charge against the estate for her services to her father.*

² *Conclusion of Law #36: The Defendant had a duty to disclose to Plaintiff that she decided not to encumber or sell the trust property in order to pay for services to Elmer J. Cook.*

Conclusion of Law #38: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she decided not to encumber or sell trust property to pay for services to Elmer J. Cook.

(1) Not disclosing that she was deferring charges to the estate for her services. [CL 37]³;

(2) Not disclosing to John Cook that she decided not to encumber or sell trust property to pay for services to Elmer J. Cook [CL 38]⁴; and

(3) Not disclosing to John Cook that she claimed labor costs for caring for Elmer J. Cook [CL 39]⁵.

3. Breach to Remainder Beneficiary? As a matter of law, did the non-disclosures identified in the Summary of Assignments of Error #2- Breach of Duty, constitute a breach of duty to John Cook or the Trust as the Trial Court variously wrote in its Memorandum Opinion and Conclusions of Law?

4. Payment for Services and Labor? As a matter of law, do the non-disclosures identified in the Summary of Assignments of Error #2- Breach of Duty, support refusal to allow payment for services and labor by the Trustee to the Trustor (Memorandum Opinion: #6, 7, 9, 12, CL 40 & 41, FF 30 & 31, as mixed findings and conclusions)⁶?

³ Conclusion of Law #37: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she was deferring charges to the estate for her services to the Trust.

⁴ Conclusion of Law #38: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she decided not to encumber or sell trust property to pay for services to Elmer J. Cook.

⁵ Conclusion of Law #39: Defendant breached her duty as Trustee of the Elmer J. Cook Revocable Trust by failing to disclose to John Cook that she claimed labor costs for caring for Elmer J. Cook.

⁶ Conclusion of Law #40: The Court disallows any travel expenses to and from Itwaco by Defendant.

5. Disallowance of Claim? Do the non-disclosures identified in the Summary of Assignments of Error #2- Breach of Duty, support, as a matter of law, disallowance of claim for services, expenses and attorneys fees [CL 40-41, 46]⁷ and allowing only \$125/month for bookkeeping services? [FF 25; CL 46]
6. House Repair? Is it error to impose a \$10,000 penalty on the Trustee for “kitchen” repair where the Trustee has full discretion under the Trust Agreement and statutes to repair trust assets?
7. Fractional 9/20th Distribution? Does the deferral of payments for services provided to the Trust and life beneficiary, conflict with a Trustor’s intent that Mr. Cook receive the 9/20th fractional distributions of the trust estate directed by the Trust Agreement? [FF 21; CL 35]⁸

Conclusion of Law #41: The Court disallows any labor costs claimed by Defendant for caring for Elmer J. Cook.

⁷ *Conclusion of Law #40: The Court disallows any travel expenses to and from Ilwaco by Defendant.*

Conclusion of Law #41: The Court disallows any labor costs claimed by Defendant for caring for Elmer J. Cook.

Conclusion of Law #46: “Plaintiff is granted an equitable lien on the Elmer J. Cook property in the amount of \$20,716.83.

⁸ *Finding of Fact #21: The decision not to encumber the property but later claim pay for services is in direct conflict with Elmer J. Cook’s express intent that Plaintiff receive 9/20 of the Trust Estate.*

Conclusion of Law #35: The Defendant had a duty to disclose to Plaintiff that she was deferring making any charge against the estate for her services to her father.

III. STATEMENT OF THE CASE

A. Litigation Procedures

Mr. Cook joined two separate causes of action: (1) accounting of receipts and disbursements of the inter vivos trust created by the parties father for his lifetime care, and (2) partition of real property (small house on one lot) which the parties inherited from their uncle.

Pursuant to the Trust and Estate Dispute Resolution Act (TEDRA), the Trial Court ordered mediation followed by arbitration as provided in RCW 11.96A.310. Both of these processes netted no success and caused all of the parties great added and unavoidable expense. The arbitrator's decision was entered in this matter on October 31, 2006, from which Mr. Cook appealed and filed a request for trial de novo pursuant to RCW 11.96A.310(9)(a). Docket #46. This matter came for trial 15 months after the arbitration award. CP 12.

Ms. Brateng submitted proposed Findings of Fact and a motion for reconsideration of the Trial Court's Memorandum Opinion. CP 16 (Exhibit C). Her request was denied on October 1, 2008. CP 16.

B. Defendant Cared for Elmer Cook from November 1997 through January 2000.

In November of 1995, Elmer J. Cook executed a "Living Trust" naming himself and his daughter, Diane Brateng, as co-trustees. CP 8(#9);

Ex. 1 (Art. 1, Sec. 1, pg. 1-1). After failing health, Elmer Cook was admitted to a nursing home for several months in 1997 at an expense of \$4,200 per month. CP 1, pg. 4. After his condition was stabilized Elmer Cook wished to return to his home in Ilwaco, which he did with the assistance of a caregiver at a cost of \$1,800 per month. CP 1, pg. 4. After Elmer Cook was financially abused by the caregiver and it became apparent that he was no longer able to manage his own affairs, Ms. Brateng became the sole trustee of the Living Trust, responsible for overseeing her father's support, maintenance and his personal day-to-day care. CP 11; Ex. 1 (Art. 12, Sec. 3(b), pg. 12-2); Ex. 26-33, 50 & 51.

Therefore, Ms. Brateng moved their father into her home where she provided care for him from November 1997 until his death in January of 2000 to reduce costs, which included bathing him and dealing with his incontinence. CP 11 & 8 (#16, 34); Ex. 4, 26-33, 50 & 51. Ms. Brateng's husband died on April 4, 1998, midway through her care of her father. CP 1, pg. 1.

C. Trust Income and Principal Only for Elmer Cook.

The Living Trust directed Ms. Brateng to use the income and principal of the trust only for the support of Elmer Cook, the lifetime adult income beneficiary, stated as follows:

My Trustee shall provide as much of the principal and net income of my trust as is necessary or advisable, in its sole discretion, for my health, support, maintenance, and general welfare.

CP 11 & Ex. 1 (Art. 4, Sec. 3(a), pg. 4-3). In conjunction therewith, Ms. Brateng was also vested with the sole discretion to use the principal and income of the trust for payment of any valid obligation of her father, as follows:

My Trustee shall provide as much of the principal and net income of my trust as my Trustee, in its sole and absolute discretion, deems advisable for the payment of any of my valid obligations as confirmed by my Trustee.

CP 11; Ex. 1 (Art. 4, sec. 3(b), pg. 4-3).

Elmer Cook was the sole lifetime adult income beneficiary and John Cook was only a remainder beneficiary. CP 11 & Ex. 1. John Cook never asked for an accounting during his father's life.

D. Support Costs- November 1997 through January 2000.

During the period Ms. Brateng was sole trustee, from November 1997 to January 2000, the Trust's liquid funds were used to pay for Elmer Cook's healthcare and related personal expenses as well as maintenance and repair of his home in Ilwaco. CP 12 (#8); Ex. 26, 27, 34, 39-41, 50 & 51. All of the costs were approved by the trial court, except for half (1/2) of the kitchen repair. CP 12 (#8).

E. Liquid Assets and Social Security Income (\$70,654.28)

The Trust had liquid funds totaling \$43,729.56 as of November 10, 1997, when Ms. Brateng became the sole trustee of the trust. Ex. 26-27, 50 & 52. During the period of November 1997 to January 2000, the Trust had additional income totaling \$23,740.71 in Social Security benefits plus interest income of \$3,184.01, for combined Trust liquid assets totaling \$70,654.28 under the control of Ms. Brateng. Ex. 26. During this same time period Ms. Brateng incurred expenses and made distributions from the Trust totaling \$59,176.97, leaving a balance of \$16,439.62 in liquid funds upon Mr. Cook's death plus the Ilwaco property. CP 6, 8 (#22, 23) & 12 (par. 8). The Ilwaco property was appraised at \$90,000.00 in 2001. Ex. 8.

Ms. Brateng did not furnish an accounting to John Cook prior to their father's death of the above information because the information was never requested and he was not entitled to the information as the Trust states:

My Trustee shall report, at least semiannually, to the beneficiaries then eligible to receive mandatory or discretionary distributions of the net income from the various trusts create in this agreement all of the receipts, disbursements, and distributions occurring during the reporting period along with a complete statement of the trust property. (Emphasis Added)

CP 11; Ex. 1 (Art. 13, sec. 4, pg. 13-1). The accounting of the above information was provided to Mr. Cook the year their father died. Ex. 25,

26 & 34. Which accounting the trial court approved. CP 8 (#12& #22) & 12 (#8).

F. During Elmer Cook's Life – Payments to Trustee Deferred.

Omitted from the expenses outlined in the preceding Section D were any reimbursement for Ms. Brateng's personal cash advances and her personal time devoted both to her services as trustee and as caregiver for her father during the 27 months he resided with her in her home in Kirkland. CP 1 & 12 (#9); Ex. 27-33 & 35. Specifically, Ms. Brateng deferred any reimbursement of her own expenses during this time period because of the uncertainty of how long Elmer Cook would live, and concern regarding how adequate the Trusts funds would be for care for the rest of his life because there was no way to know if the remaining cash, assets and other income would be sufficient to meet his needs as those expenses came due. CP 1; Ex. 35-41. However, Ms. Brateng maintained an itemized accounting of her time and services incurred in furtherance of her duties as trustee which totaled \$61,497.59 (CP 12 (#9); Ex. 35-41), and cash expenses paid of \$48,942.93 (Ex. 41).

The Trial Court denied the Trustee's claims for her 1622 hours of work, except for a mere 200 hours for bookkeeping at a rate of 2/3rds of

which she is paid to teach piano lessons. CP 12 (#7, #9); 8 (#40, #41).

Ms. Brateng is a retired school teacher.

All of the foregoing information was provided to Mr. Cook before the suit was started seeking an accounting, and the same financial information was accounted for in the mediation in 2002, the arbitration in 2006 and at the trial in April 2008. Ex. 25-41. In addition to the above, Ms. Brateng incurred fees and expenses relating to her father's care for which she deferred making any charge against the Trust in consideration of the lack of Trust assets. Ex. 25-41. These include: (a) over 200 hours spent in furtherance of her father's personal care in 1996 and 1997 prior to his being found incompetent in November 1997, (b) over \$4,000 in expenses paid out of pocket by Ms. Brateng for incidental clothing, food and necessities for her father, and in-home care for her father between the period November 15, 1997 and January 1, 2000 (which if valued conservatively at the rate of \$1,500 per month would have totaled in excess of \$38,000). Ex. 25-41. In short, had Ms. Brateng charged the Trust during her father's lifetime for all of her services, fees and expenses incurred, both as trustee and caregiver, the combined total would have exceeded \$100,000 and exhausted the trust liquid assets. Ex. 25-41.

G. The Trust Directs Compensation to the Trustee.

In accordance with the terms of her father's Trust, Ms. Brateng, as trustee, is entitled to charge the Trust for all of her services as trustee and caregiver, as authorized by the following provision of the Living Trust:

My Trustee shall pay itself reasonable compensation for its services as fiduciary as provided in this agreement, and shall reasonable compensate those persons employed by my Trustee, including agents, auditors, accountants and attorneys. [emphasis added]

CP 11; Ex. 1 (Art. 14, Sec. 3(e), pg. 14-4). However, rather than utilizing the Trust assets for her own benefit, Ms. Brateng deferred her own compensation for more than 27 months to insure that there were adequate funds in the Trust to cover her father's personal and healthcare needs. Ex 35-41. No aspect of the Trust requires the compensation of a trustee be paid contemporaneously with providing the services, nor prevents the deferral of payment. CP 11 & 6.

H. Modest Trust Principal at Time of Elmer Cook's Death.

At the time Ms. Brateng became the sole trustee of the Living Trust, Elmer Cook had combined liquid funds totaling \$43,729.56 plus his monthly Social Security payments of \$735.00 per month, and the house in Ilwaco. Ex. 26.

Upon Elmer Cook's death in January 2000, the Trust had remaining liquid funds totaling approximately \$11,500.00 to \$16,439.00

combined with the Ilwaco property (then appraised at approximately \$90,000), for combined Trust assets of \$106,500 (prior to allocation of the fees and expenses owing to Ms. Brateng for her services as trustee and caregiver). Ex. 8. Ms. Brateng retained her father's former legal counsel (Mr. C. Dennis Brislawn, Jr.) to assist with the distribution of the trust assets. Ex. 5. The Trust directed disbursement of a portion of the residual trust assets (after payment of all fees and expenses) upon Mr. Cook's death to the two charities directed by the trust; the Salvation Army (5%) and the Finnish Assembly of God (5%), with the balance to his children. CP 11; Ex. 1 (Art. 9, sec. 1, pg. 9-1).

In addition to the above, the Living Trust made a specific distribution of Mr. Cook's home in Ilwaco to his daughter as follows:

Upon my death, my Trustee shall distribute to A. Diane Brateng the following described real estate AS PART OF, AND NOT IN ADDITION TO, that share of my trust distributed to her, or to her descendants, according to Article Nine of my trust.

CP 11; Ex. 1 (Article 7, Sec. S, pg. 7S-1).

I. Trustee Offered Compromise Fees and Expenses- Rejected.

Because the combined total of Ms. Brateng's fees and expenses would have effectively consumed the remaining trust assets after Elmer Cook's death, Ms. Brateng offered to compromise her claim to facilitate distribution of the trust. Ex. 54. The charitable entities identified above

each agreed to the proposed distribution and executed a settlement and release and were paid their respective distributions from the remaining trust cash. CP 8(#10); Ex. 54, pg.1. However, Mr. Cook rejected the proposed compromised distribution and began a series of correspondence requesting an itemized accounting, questioning the necessity of expenditures to maintain Elmer Cook's home, and challenging the valuation of the real property. Ex. 6.

By letter dated September 18, 2000, Mr. Brislawn responded to Mr. Cook's legal counsel explaining how Ms. Brateng's conduct preserved trust assets. Ex. 54.

Notwithstanding the fact that Ms. Brateng's combined fees and expenses to which she was entitled exceeded the value of the remaining trust assets, Mr. Cook refused the proposed compromise distribution and this action was subsequently commenced by Mr. Cook on October 17, 2001, (CP 4); which was 21 months after their father's death and 12 months after Ms. Brateng's account to Mr. Cook, which the trial court found was complete. CP 8 (#12); 12 (#8). In answer to that Complaint, Ms. Brateng concurred in the request for partition of Uncle Charles' house held as tenants in common. CP 3. However, Ms. Brateng asserts that the remaining assets of her father's Trust (comprising the Ilwaco property) were subject to her claims for fees and expenses incurred in furtherance of

her duties as trustee and caregiver for her father and, thus, properly retained by her as compensation for the same. CP 3.

IV. SUMMARY OF ARGUMENT

Essentially, the Trial Court found: (1) Ms. Brateng, as Co-Trustee, prior to suit, accurately had accounted to Mr. Cook for all receipts and disbursements, and (2) even though Mr. Cook, a remainder beneficiary, never sought an accounting during the Trustor's life, the Court erroneously held that Ms. Brateng, as Trustee, breached her fiduciary duty to Mr. Cook, by (a) not disclosing to him the fact that she did not pay herself for her services during the Trustor's lifetime, and (b) that she had not sold nor borrowed against their father's 60 year old house to pay herself.

That because such non-disclosures were erroneously held to be breaches of fiduciary duty, recovery for her services, money advanced and legal expenses were denied and fees were granted to Mr. Cook, a remainder beneficiary, and she was forced to bare the cost of repairs to trust property she undertook to correct water damage.

V. ARGUMENT

A. Standard of Review.

Findings of fact are reviewed under a substantial evidence standard which is defined as there being a quantum of evidence to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Conclusions of law, on the other hand, are reviewed de novo. Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979).

Interpretation of the Trust Agreement is reviewed de novo. The City of Woodinville v. Northshore United Church of Christ, 139 Wn.App. 639, 651, 162 P.3d 427 (Div. I, 2007).

B. Neither Elmer Cook's Trust Agreement Nor Statute Require an Accounting to John Cook (remainder beneficiary).

1. Accountings were Timely and Complete

No provision of Elmer Cook's Trust requires the trustee (either himself as Trustee or his daughter as Co-Trustee) to give an accounting to a remainder beneficiary during the life of the life beneficiary. CP 11; Ex.1.

The Court will take note in reading the trust agreement that it is unusually detailed and designed to give trustees and the courts

comprehensive guidance in administering the trust, interpreting the obligations of the trustees, and the rights of the life and remainder beneficiaries. CP 11; Ex. 1. There are no headings, captions or text which in any way suggest the right of a remainder beneficiary to receive an accounting during the life of the life beneficiary, nor to suggest the trustee was obligated to provide an accounting. CP 11; Ex. 1.

The Trustees' Accounting Act, first enacted in 1951, and amended in 1984, permits a settlor or "any beneficiary" to petition the superior court, to direct a trustee to file in the court an accounting. RCW 11.106.040 Petition for Statement of Account. Mr. Cook never sought an accounting from Elmer Cook or Ms. Brateng while Elmer Cook was alive, nor did Mr. Cook file a petition under RCW 11.96A.080 as authorized by RCW 11.106.040.

Where no duty to account was created by the trust agreement or by statute, no duty otherwise arose to be breached. In re Estate of Marie Ehlers, 80 Wn.App. 751, 911 P.2d 1017 (Div. III, 1996).

According to In re Estate of Ehlers, 80 Wash.App. 751, 911 P.2d 1017, (Div. III, 1996), "even though trustee provided beneficiary with untimely accounting, trustee did not breach duties, since accounting satisfied statutory requirements and its untimeliness did not cause loss to any beneficiary," referring to RCW 11.106.040- Petition for Statement of

Accounting. In support of the holding that there was no breach of duty, the court in Ehlers stated that, where a trustee is required by statute to make an annual itemized statement of receipts and disbursements of trust principal and income (which Ms. Brateng was not required to make), there is no mention in the statute nor any caselaw that there is a duty on the trustee to disclose the method and timing of charges against the trust estate.

In Ehlers, following several requests for an accounting, and filing a complaint for accounting, the trustee eventually provided an accounting over 16 months after the death of the Trustor, the court found that the accounting satisfied the requirements of RCW 11.106.030- Intermediate and Final Accounts-Contents-Filing, and that the untimeliness did not cause loss to the beneficiaries, and denied the beneficiaries request for attorney's fees, discussed herein more fully below.

Here, within two weeks of Elmer Cook's death Ms. Brateng disclosed to Mr. Cook the balance on their father's bank account and within six (6) months following the death of Elmer Cook, counsel for the Trust provided an accounting of the trust assets and expenditures for the trust beneficiary, Elmer Cook. Ex. 25, 26 & 34. Thereafter, upon request by Mr. Cook for a more detailed accounting, Ms. Brateng immediately provided a complete accounting of all expenditures made from the Trust

account between November 1997 and September 2000, itemizing each expense by check number, date, payee, amount and category or purpose (this accounting was found by the trial court to be accurate and complete). CP 8 (#12 & #22) & 12 (#8); Ex. 25, 26 & 34. Despite receipt of that information, Mr. Cook brought suit for accounting and partition of their deceased uncle's house they held as tenants in common. CP 4 & 2.

2. No Objection of Non-Sale by Mr. Cook

During the last 27 months of Elmer Cook's life, while he resided with Ms. Brateng, he continued to visit the house he built in the 1940's, as seen in the photographs at the Ilwaco house, with Ms. Brateng as his driver. Ex. 23 & 24. At least 32 trips from Kirkland to Ilwaco were made between November 1997 and October 1999, two months before Elmer Cook died. Ex. 29-31. Mr. Cook occupied his uncle Charles' house, which is on the lot adjoining Elmer Cook's house, and Mr. Cook observed his father's visits to his home. Ex. 8-9, 44 & 51. There is no evidence of objection by Mr. Cook of use or visits by Elmer Cook to his Ilwaco house, nor objection to lack of sale of his trust asset which the Trustee maintained. Ex. 36, 39-40. At the same time, Mr. Cook failed to maintain his uncle's house. Ex. 45-48.

According to In Re Parks' Trust (Seattle First National Bank v. Parks et al.), 39 Wn.2d 763, 238 P.2d 1205 (1951), under the Uniform Trustee's Accounting Act RCW 11.106 et. seq., when a trustee fails to perform any of the duties imposed upon him by the act, he may be removed, compensation reduced or forfeited, or other civil penalty inflicted in the discretion of the court. When a trustee of a spendthrift trust fails to file an inventory or yearly intermediate report as required by the Act, but such procedure has never been objected to by the beneficiaries and objections thereto were not included in written objections to the Trustees final accounting and there is no suggestion that the beneficiaries were prejudiced by the absence of intermediate reports, the court did not impose penalty on the trustee for failing to file an inventory or intermediate report.

3. No Harm to Mr. Cook

Even if Ms. Brateng were duty bound by statute or the trust agreement to provide accountings to Mr. Cook, which would have revealed the Ilwaco house had not been sold or encumbered and/or that she was not paying herself from liquid trust assets and therefore that payments to herself were being deferred, such facts would never be the basis for the court to order payment or sale of trust property; and

moreover, deferral of payments for services and no-sale or encumbrance of the Ilwaco house did not then, nor later, harm Mr. Cook. There is no evidence of harm to Mr. Cook of deferral of payments for services or failure to sell an appreciating asset.

According to First Interstate Bank of Washington v. Lindberg, 29 Wn.App. 788, 746 P.2d 333 (1987), a failure of a trustee to provide trust beneficiaries with annual accounting, as required by the trust agreement, was harmless error because beneficiary did not and could not show that receipt by him of annual accountings during the lifetime of the Co-Trustor, who was entitled to the benefit of the trust during her lifetime, would have made any difference. The beneficiary, who received no accountings, had no right to distribution until the Co-Trustor's death, and if the beneficiary would have asserted a claim against the trustee for mismanagement, he would have achieved only modest success.

The conduct of Ms. Brateng, as trustee, in deferring payment to herself is not classic trustee mismanagement. Trustee mismanagement claims which come before the court usually arise because the trustee has claimed and remitted to itself questionable amounts of money over the course of its administration of the trust. Deferral of payments for services to preserve trust principal, a fact found by this court, simply cannot

support a conclusion of law that such deferral was a breach of fiduciary duty.

Considering the root word for fiduciary (*fiducia*, Latin for trust), the conduct of Ms. Brateng was laudable and exemplary, and not a breach of fiduciary duty to a remainder beneficiary who has shown no harm or prejudice.

C. Trustee's Duty to Account – Only Life Beneficiaries are Entitled to Notice

The trustee's duty to provide annual accountings, which would reveal deferral of payment of trust obligations, applies to the income beneficiaries of a trust, and not to remainder beneficiaries. RCW 11.106.020- Trustee's Annual Statement, states as follows:

*The trustee or trustees appointed by any will, deed, or agreement executed shall mail or deliver at least annually to each **adult income trust beneficiary** a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust both principal and income, and upon the request of any such beneficiary shall furnish the beneficiary an itemized statement of all property then held by that trustee, and may also file any such statement in the superior court of the county in which the trustee or one of the trustees resides.*

[Emphasis Added].

The statute specifically states, “each adult income trust beneficiary.” Mr. Cook was not an “income trust beneficiary.” Since Ms.

Brateng was not requiring payment from the trust estate at the time the work was performed, under the statute, Ms. Brateng did not need to provide an accounting of her deferred charges. The statute requires reporting of receipts and disbursements only.

Read as a whole, the trial court's Memorandum Opinion and Conclusions of Law conclude as a matter of law that a trustee has an affirmative duty to notify a remainder beneficiary of the deferral of payment of Trustee charges against an estate (and perhaps the amount of value), which duty the court concludes Ms. Brateng breached, thereby defeating her claim for services, money advanced and attorneys fees defending the suit.

D. Value of Services Provided

From the persistent action taken by Mr. Cook, we can well imagine he would have challenged any payments to Ms. Brateng during the lifetime of their father. Had Ms. Brateng done so, just as now, after their father's death, she is authorized by the trust agreement to pay for services to Elmer Cook (CP 11, Ex. 1 (Art. 12, Sec. 3(b), pg. 12-2)), and she is further empowered by RCW 11.98-Trust, to pay reasonable compensation.

The Trial Court erred in denying payment for services on the erroneous Conclusion of Law of breach of duties (CP 8, #34-41 & 46), the

value of which was \$61,497.59 (CP 12 (#9); Ex. 35-41) and Ms. Brateng's out of pocket uncompensated advances of \$48,942.93, plus attorneys fees in excess of \$60,000.00. CP 8 (#41).

In addition to the powers granted Ms. Brateng by the trust agreement, she was empowered by statute to pay herself as trustee. RCW 11.98.070-Power of Trustee, enumerates thirty-four trustee actions which are authorized, including the power to:

(26) Pay reasonable compensation to the trustee or co-trustees considering all circumstances including the time, effort, skill, and responsibility involved in the performance of services by the trustee;

E. Right to Repair and Maintain Trust Property

Mr. Cook complains that Ms. Brateng, as trustee, spent trust funds to repair water damage to the interior of Elmer Cook's Ilwaco house. The Trial Court agreed, without considering Ms. Brateng's authority under the trust to retain non-income producing assets (CP 11, Ex. 1, Art. 14, sec. 3(o), pg. 14-7), and to repair the same (CP 11, Ex. 1, Art. 14, sec.3(u), pg. 14-10), and as authorized by statute under RCW 11.98.070-Power of Trustee, which enumerates thirty-four trustee actions which are authorized, including the power to:

(19) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing structures, and make any improvements to trust property;

The effect of the courts decision on house repairs was to disallow \$10,000.00 in charges. CP 12 (#8); 8 (#22).

F. Attorneys Fees of Beneficiary– No Harm or Benefit Shown

The Trial Court denied Ms. Brateng, as trustee, most of her attorneys fees incurred in defending a suit for accounting which the trial court found was complete and accurate when given, 15 months before the suit was started, and allowed an award against Ms. Brateng for fees in favor of Mr. Cook. CP 12(#8); 8 (#30 & 31).

A trustee may be required to pay fees and costs only if the superior court or court of appeals finds, pursuant to RCW 11.96A.150, that justice requires it. Ehlers, 80 Wn.App at 764. However, as discussed above on page 22, there are no facts in this case to support the Conclusions of Law awarding attorneys fees to Mr. Cook and denying them to Ms. Brateng.

RCW 11.96A.150(1) states,

“Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.”

The award of attorneys fees is left to the discretion of the court and will not be overturned absent a clear showing of abuse of discretion. *Id.*, citing In re Estate of Niehenke, 117 Wash.2d 631, 647, 818 P.2d 1324 (1991).

Yet, the court in Niehenke goes on to state, “Recent Washington cases suggest that it is inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate; we agree. One authority, 4 W. Bowe & D. Parker, *Page on Wills* § 31.13, at 218 (1961), notes that it has been held that where the services of the attorneys are rendered solely for the benefit of certain parties and are not for the benefit of the estate, attorneys' fees should not be awarded out of the estate, even though the estate is incidentally benefited by having adverse claims decided.” *Id.* at 648.

The Trial Court has ordered the Trust Estate to pay all of Mr. Cook's attorneys fees by a grant to him all of his attorney's fees as a charge against the Trust Estate. CP 12 (#12). The effect of such decision is that Ms. Brateng will be charged with one half of Mr. Cook's attorney's fees by reason of reduction of funds or assets distributable to her. Likewise, the Trial Court has required Ms. Brateng to pay from her own pocket three quarters (3/4) of the attorney's fees at that time she had incurred in defending the accounting suit. This is because of the Trial

Courts decision that the Trust Estate should pay half (1/2) of Ms. Brateng's fees, which reduces the amount distributable to her by half (1/2) of those fees paid plus the other half (1/2) resulting in her paying three-quarters (3/4) of her fees. CP 12 (#12). No statutory or case authority supports such an unjust result.

Here, Mr. Cook has not plead nor proven any manner in which the trust or he personally was harmed by Ms. Brateng deferring payments to herself or by his not knowing the payments were deferred, nor did Mr. Cook present any legal authority to support such a conclusion which the trial court appears to have adopted *sui sponte*. CP 8 (#35-39).

Restated, case authority does not support the trial courts attorneys fees award and denial, nor do the Trust Agreement, RCW 11.98- Trusts, or RCW 11.106 et. seq.- Trustee's Accounting Act.

In TEDRA proceedings, RCW 11.96A.150- Costs- Attorney's Fees- gives a Trial Court and Appeals Court broad discretion to award attorneys fees to any party from any party to the proceedings. However, where the basis of the award and denial of fees, as in this case is untenable, there is reversible abuse of discretion in awarding or denying attorneys fees, Estate of Black, 116 Wn.App. 476, 66 P.3d 670 (Div III, 2003), a will contest between two genuine wills executed by the decedent.

Only where there is a substantial benefit to the trust estate is a challenging party entitled to an award of fees against the trust estate.

In April 2008, Division Two, upheld an award of attorneys fees against a party to a TEDRA proceeding, citing RCW 11.96A.150(a) from any party to a proceeding. Irrevocable Trust of McKean, 144 Wn.App. 333, 345. Furthermore, in an unpublished opinion, Division Three upheld a Trial Courts denial of a request by a trust remainderman for an award of attorneys fees against the trust, where the Trial Court found that the trustee had property apportioned only \$87,084 of a \$882,742 settlement to trust principal, even though the trustee had failed to notify the beneficiaries of the settlement and lawsuit (brought in the name of the trustee only in his individual capacity) in which the trustee personally received \$434,619.50. The failure to notify the remainderman was characterized by the Court as “harmless.” The claim was against Burlington Northern Rail Road for fire damage to farm land owned by separate adjoining parcels by the trustee and the trust. Hennings v. Hennings, 132 Wn.App. 1010, 2006 WL 701946, review denied in 158 Wash.2d 1020, 149 P.3d 378 (2006).

G. The Trust Agreement and Finding of Fact 21 are Reviewed De Novo.

In entering Finding of Fact 21, the Trial Court construed the Trust Agreement to mean that Ms. Brateng’s decision not to encumber the 60

year old house which consisted of the bulk of the trust estate, but later pay for services “is in direct conflict with Elmer J. Cook’s express intent that Plaintiff (Mr. Cook) receive 9/20 of the Trust Estate.” CP 8 (#21). Article Seven, page 7-1 of the Trust Agreement governs distributions of tangible personal property, and Article Nine, page 9-1 of the Trust Agreement governs distributions of “all trust property not previously distributed under the terms of my trust...” Article Nine also identifies the two charities which were to receive under the trust and identifies the 9/20 share which was to be distributed to Mr. Cook. Ex 1.

The property available for distribution to the beneficiaries identified in Article Nine necessarily would be net of trust property and including income the trustee was required to apply “exclusively” for Elmer Cook’s benefit as set forth on pages 4-2 and 4-3 of Article Four, Section 3- Procedural Guidelines For My Disability which states:

During any period of time when I am disabled, my Trustee shall apply the trust property, including its income, exclusively for my benefit and for my valid obligations by observing the following procedural guidelines:

a. Provide for Me

My Trustee shall provide as much of the principal and net income of my trust as is necessary or advisable, in its sole and absolute discretion, for my health, support, maintenance and general welfare.

b. Provide for My Obligations

My Trustee shall provide as much of the principal and net income of my trust as my Trustee, in its sole and absolute discretion, deems advisable for the payment of any of my valid obligations as confirmed by my Trustee.

My Trustee shall provide as much of the principal and net income of my trust as my Trustee deems advisable for the payment of insurance premiums on policies owned by me, either directly or beneficially, or my trust.

Finding of Fact 21, which is about the legal effects of the Trust Agreement, actually is a conclusion of law interpreting the plain meaning of the trust document. Appellate courts review such a conclusion and the unambiguous trust document as an issue of law de novo. In The City of Woodinville v. Northshore United Church of Christ, 139 Wn.App. 639, 651, 162 P.3d 427 (Div. I, 2007), the Appeals Court summarized the goals of contract interpretation and the standard of review when it stated:

The goal of contract interpretation is to determine the parties' mutual intent. Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). In doing so, a court should consider a party's objective manifestations of intent expressed in the contract itself, not the party's unexpressed subjective intentions. BNC Mortgage, Inc. v. Tax Pros, Inc., 111 Wn.App. 238, 249-50, 46 P.3d 812 (2002). Washington courts may consult extrinsic evidence of circumstances under which the contract was made to aid in interpretation, but not to show a party's unilateral intent, to show intent independent of the contract, or to contradict or modify the contract as it was written. Hollis v. Garwall, Inc., 137 Wash.2d 683, 695, 974 P.2d 836 (1999). A court must examine the contract as a whole and not adopt an interpretation that renders a term absurd or meaningless. Spectrum Glass Co. v. Pub. Util. Dist. No. 1 of

Snohomish County, 129 Wn.App. 303, 312, 119 P.3d 854 (2005). *The interpretation of an unambiguous contract is an issue of law that we review de novo.* *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 77 Wn.App. 137, 141, 890 P.2d 1071 (1995).

Here, the trial court made several 'findings of fact' about the legal effect of the Temporary Property Use Agreement that are really conclusions of law because they interpret the plain meaning of the contract. We review those conclusions de novo. *Absher Constr.*, 77 Wn.App. at 142, 890 P.2d 1071.”

Woodinville, 139 Wn.App at 651.

Ms. Brateng submits that no aspect of the Trust Agreement, read on its own or as a whole, supports the trial court’s mixed finding/conclusion that Elmer Cook expected Ms. Brateng to encumber his house by borrowing against it and use the proceeds to pay for services to him, and that failure to borrow and pay constituted a breach of duty as detailed in conclusion of law 36-38.

VI. CONCLUSION

No notice need be given by a trustee to a remainder beneficiary of the deferral of payments for services; or of the decision not to encumber trust property (even if the Trustee could have convinced a bank to lend to a trustee of a 90 year old man against such an asset). Such failure to notify does not constitute a breach of trust.

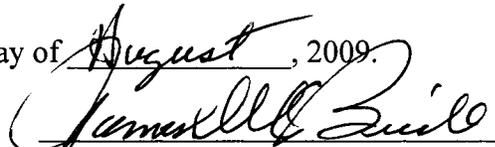
Where there is no breach of duty and where a Trustee’s accounting given prior to suit was held complete, it was error to deny the Trustee’s

claims for cost of care, money advanced, and attorney's fees, and it was error to grant the remainder beneficiary attorney's fees and a \$10,000 set off in favor of the remainder beneficiary for house repairs made within the power granted the Trustee by the Trust Agreement and RCW 11.98.070 Power of Trustee.

Relief Requested

Ms. Brateng requests remand to the trial court to enter findings and judgment consistent with the following: (1) allowance of claim for services of \$61,497.00; (2) allowance of reimbursement for costs advanced of \$48,942.93; (3) charge for attorneys fees now in excess of \$60,000.00 against the portion distributable to Mr. Cook; (4) disallowance of \$10,000 house repair set-off; (5) disallowance of award of fees to Mr. Cook; (6) base the value of Elmer Cook's house at \$90,000.00, and (7) to the extent the share distributable to Mr. Cook is insufficient to cover those fees, Mr. Cook shall be assessed a judgment against his interest in Uncle Charles' house and as a monetary judgment therefor.

Respectfully Submitted this 26 day of August, 2009.


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RCW 11.96A.150

RCW 11.96A.150

Costs — Attorneys' fees.

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

[2007 c 475 § 5; 1999 c 42 § 308.]

Notes:

Severability -- 2007 c 475: See RCW 11.05A.903.

RCW 11.98.070

RCW 11.98.070
Power of trustee.

A trustee, or the trustees jointly, of a trust, in addition to the authority otherwise given by law, have discretionary power to acquire, invest, reinvest, exchange, sell, convey, control, divide, partition, and manage the trust property in accordance with the standards provided by law, and in so doing may:

(1) Receive property from any source as additions to the trust or any fund of the trust to be held and administered under the provisions of the trust;

(2) Sell on credit;

(3) Grant, purchase or exercise options;

(4) Sell or exercise subscriptions to stock or other corporate securities and to exercise conversion rights;

(5) Deposit stock or other corporate securities with any protective or other similar committee;

(6) Assent to corporate sales, leases, and encumbrances;

(7) Vote trust securities in person or by proxy with power of substitution; and enter into voting trusts;

(8) Register and hold any stocks, securities, or other property in the name of a nominee or nominees without mention of the trust relationship, provided the trustee or trustees are liable for any loss occasioned by the acts of any nominee, except that this subsection shall not apply to situations covered by subsection (31) of this section;

(9) Grant leases of trust property, with or without options to purchase or renew, to begin within a reasonable period and for terms within or extending beyond the duration of the trust, for any purpose including exploration for and removal of oil, gas and other minerals; enter into community oil leases, pooling and unitization agreements;

(10) Subdivide, develop, dedicate to public use, make or obtain the vacation of public plats, adjust boundaries, partition real property, and on exchange or partition to adjust differences in valuation by giving or receiving money or money's worth;

(11) Compromise or submit claims to arbitration;

(12) Borrow money, secured or unsecured, from any source, including a corporate trustee's banking department, or from the individual trustee's own funds;

(13) Make loans, either secured or unsecured, at such interest as the trustee may determine to any person, including any beneficiary of a trust, except that no trustee who is a beneficiary of a trust may participate in decisions regarding loans to such beneficiary from the trust, unless the loan is as described in *RCW 83.110.020(2), and then only to the extent of the loan, and also except that if a beneficiary or the grantor of a trust has the power to change a trustee of the trust, the power to loan shall be limited to loans at a reasonable rate of interest and for adequate security;

(14) Determine the hazards to be insured against and maintain insurance for them;

(15) Select any part of the trust estate in satisfaction of any partition or distribution, in kind, in money or both; make nonpro rata distributions of property in kind; allocate particular assets or portions of them or undivided interests in them to any one or more of the beneficiaries without regard to the income tax basis of specific property allocated to any beneficiary and without any obligation to make an equitable adjustment;

(16) Pay any income or principal distributable to or for the use of any beneficiary, whether that beneficiary is under legal disability, to the beneficiary or for the beneficiary's use to the beneficiary's parent, guardian, custodian under the uniform gifts to minors act of any state, person with whom he resides, or third person;

(17) Change the character of or abandon a trust asset or any interest in it;

(18) Mortgage, pledge the assets or the credit of the trust estate, or otherwise encumber trust property, including future income, whether an initial encumbrance or a renewal or extension of it, for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(19) Make ordinary or extraordinary repairs or alterations in buildings or other trust property, demolish any improvements, raze existing structures, and make any improvements to trust property;

(20) Create restrictions, easements, including easements to public use without consideration, and other servitudes;

(21) Manage any business interest, including any farm or ranch interest, regardless of form, received by the trustee from the trustor of the trust, as a result of the death of a person, or by gratuitous transfer from any other transferor, and with respect to the business interest, have the following powers:

(a) To hold, retain, and continue to operate that business interest solely at the risk of the trust, without need to diversify and without liability on the part of the trustee for any resulting losses;

(b) To enlarge or diminish the scope or nature or the activities of any business;

(c) To authorize the participation and contribution by the business to any employee benefit plan, whether or not qualified as being tax deductible, as may be desirable from time to time;

(d) To use the general assets of the trust for the purpose of the business and to invest additional capital in or make loans to such business;

(e) To endorse or guarantee on behalf of the trust any loan made to the business and to secure the loan by the trust's interest in the business or any other property of the trust;

(f) To leave to the discretion of the trustee the manner and degree of the trustee's active participation in the management of the business, and the trustee is authorized to delegate all or any part of the trustee's power to supervise, manage, or operate to such persons as the trustee may select, including any partner, associate, director, officer, or employee of the business; and also including electing or employing directors, officers, or employees of the trustee to take part in the management of the business as directors or officers or otherwise, and to pay that person reasonable compensation for services without regard to the fees payable to the trustee;

(g) To engage, compensate, and discharge or to vote for the engaging, compensating, and discharging of managers, employees, agents, lawyers, accountants, consultants, or other representatives, including anyone who may be a beneficiary of the trust or any trustee;

(h) To cause or agree that surplus be accumulated or that dividends be paid;

(i) To accept as correct financial or other statements rendered by any accountant for any sole proprietorship or by any partnership or corporation as to matters pertaining to the business except upon actual notice to the contrary;

(j) To treat the business as an entity separate from the trust, and in any accounting by the trustee it is sufficient if the trustee reports the earning and condition of the business in a manner conforming to standard business accounting practice;

(k) To exercise with respect to the retention, continuance, or disposition of any such business all the rights and powers that the trustor of the trust would have if alive at the time of the exercise, including all powers as are conferred on the trustee by law or as are necessary to enable the trustee to administer the trust in accordance with the instrument governing the trust, subject to any limitations provided for in the instrument; and

(l) To satisfy contractual and tort liabilities arising out of an unincorporated business, including any partnership, first out of the business and second out of the estate or trust, but in no event may there be a liability of the trustee, except as provided in RCW 11.98.110 (2) and (4), and if the trustee is liable, the trustee is entitled to indemnification from the business and the trust, respectively;

(22) Participate in the establishment of, and thereafter in the operation of, any business or other enterprise according to subsection (21) of this section except that the trustee shall not be relieved of the duty to diversify;

(23) Cause or participate in, directly or indirectly, the formation, reorganization, merger, consolidation, dissolution, or other change in the form of any corporate or other business undertaking where trust property may be affected and retain any property received pursuant to the change;

(24) Limit participation in the management of any partnership and act as a limited or general partner;

(25) Charge profits and losses of any business operation, including farm or ranch operation, to the trust estate as a whole and not to the trustee; make available to or invest in any business or farm operation additional moneys from the trust estate or other sources;

(26) Pay reasonable compensation to the trustee or co-trustees considering all circumstances including the time, effort, skill, and responsibility involved in the performance of services by the trustee;

(27) Employ persons, including lawyers, accountants, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of the trustee's duties or to perform any act, regardless of whether the act is discretionary, and to act without independent investigation upon their recommendations, except that:

(a) A trustee may not delegate all of the trustee's duties and responsibilities;

(b) This power to employ and to delegate duties does not relieve the trustee of liability for such person's discretionary acts, that, if done by the trustee, would result in liability to the trustee;

(c) This power to employ and to delegate duties does not relieve the trustee of the duty to select and retain a person with reasonable care;

(d) The trustee, or a successor trustee, may sue the person to collect any damages suffered by the trust estate even though the trustee might not be personally liable for those damages, subject to the statutes of limitation that would have applied had the claim been one against the trustee who was serving when the act or failure to act occurred;

(28) Appoint an ancillary trustee or agent to facilitate management of assets located in another state or foreign country;

(29) Retain and store such items of tangible personal property as the trustee selects and pay reasonable storage charges thereon from the trust estate;

(30) Issue proxies to any adult beneficiary of a trust for the purpose of voting stock of a corporation acting as the trustee of the trust;

(31) Place all or any part of the securities at any time held by the trustee in the care and custody of any bank, trust company, or member firm of the New York Stock Exchange with no obligation while the securities are so deposited to inspect or verify the same and with no responsibility for any loss or misapplication by the bank, trust company, or firm, so long as the bank, trust company, or firm was selected and retained with reasonable care, and have all stocks and registered securities placed in the name of the bank, trust company, or firm, or in the name of its nominee, and to appoint such bank, trust company, or firm agent as attorney to collect, receive, receipt for, and disburse any income, and generally may perform, but is under no requirement to perform, the duties and services incident to a so-called "custodian" account;

(32) Determine at any time that the corpus of any trust is insufficient to implement the intent of the trust, and upon this determination by the trustee, terminate the trust by distribution of the trust to the current income beneficiary or beneficiaries of the trust or their legal representatives, except that this determination may only be made by the trustee if the trustee is neither the grantor nor the beneficiary of the trust, and if the trust has no charitable beneficiary;

(33) Continue to be a party to any existing voting trust agreement or enter into any new voting trust agreement or renew an existing voting trust agreement with respect to any assets contained in trust; and

(34)(a) Donate a qualified conservation easement, as defined by section 2031(c) of the Internal Revenue Code, on any real property, or consent to the donation of a qualified conservation easement on any real property by a personal representative of an estate of which the trustee is a devisee, to obtain the benefit of the estate tax exclusion allowed under section 2031(c) of the Internal Revenue Code or the deduction allowed under section 2055(f) of the Internal Revenue Code as long as:

(i)(A) The governing instrument authorizes the donation of a qualified conservation easement on the real property; or

(B) Each beneficiary that may be affected by the qualified conservation easement consents to the donation under the provisions of chapter 11.96A RCW; and

(ii) The donation of a qualified conservation easement will not result in the insolvency of the decedent's estate.

(b) The authority granted under this subsection includes the authority to amend a previously donated qualified conservation easement, as defined under section 2031(c)(8)(B) of the Internal Revenue Code, and to amend a previously donated unqualified conservation easement for the purpose of making the easement a qualified conservation easement under section 2031(c)(8)(B).

[2002 c 66 § 1; 1997 c 252 § 75; 1989 c 40 § 7; 1985 c 30 § 50. Prior: 1984 c 149 § 80; 1959 c 124 § 7. Formerly RCW 30.99.070.]

Notes:

*Reviser's note: RCW 83.110.020 was repealed by 2005 c 332 § 15, effective January 1, 2006.

Construction -- 1989 c 40: "(1) The amendments made in this act with respect to the excise tax imposed under section 4980A(d) of the Internal Revenue Code of 1986, as amended, are to be effective as to excise tax imposed by reason of a decedent's death occurring after April 18, 1989.

(2) The amendments made in this act regarding apportionment of the tax with respect to qualified real property, and regarding extensions to pay tax, shall be effective with respect to the tax attributable to deaths occurring after April 18, 1989.

(3) The amendment to RCW 11.98.070(13) shall be effective with respect to loans described in RCW 83.110.020 (2) made or committed to be made after April 18, 1989." [1989 c 40 § 8.]

Severability -- 1989 c 40: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1989 c 40 § 9.]

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

RCW 11.106

Chapter 11.106 RCW Trustees' accounting act

[Chapter Listing](#)

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- [11.106.010](#) Scope of chapter -- Exceptions.
 - [11.106.020](#) Trustee's annual statement.
 - [11.106.030](#) Intermediate and final accounts -- Contents -- Filing.
 - [11.106.040](#) Petition for statement of account.
 - [11.106.050](#) Account filed -- Return day -- Notice.
 - [11.106.060](#) Account filed -- Objections -- Appointment of guardians ad litem -- Representatives.
 - [11.106.070](#) Court to determine accuracy, validity -- Decree.
 - [11.106.080](#) Effect of decree.
 - [11.106.090](#) Appeal from decree.
 - [11.106.100](#) Waiver of accounting by beneficiary.
 - [11.106.110](#) Modification under chapter 11.97 RCW -- How constituted.
-

11.106.010

Scope of chapter — Exceptions.

This chapter does not apply to resulting trusts, constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiaries, investment trusts, voting trusts, insurance trusts prior to the death of the insured, trusts in the nature of mortgages or pledges, trusts created by judgment or decree of a federal court or of the superior court when not sitting in probate, liquidation trusts or trusts for the sole purpose of paying dividends, interest or interest coupons, salaries, wages or pensions; nor does this chapter apply to personal representatives.

[1985 c 30 § 95. Prior: 1984 c 149 § 128; 1955 c 33 § 30.30.010; prior: 1951 c 226 § 10. Formerly RCW 30.30.010.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.106.020

Trustee's annual statement.

The trustee or trustees appointed by any will, deed, or agreement executed shall mail or deliver at least annually to each adult income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust both principal and income, and upon the request of any such beneficiary shall furnish the beneficiary an itemized statement of all property then held by that trustee, and may also file any such statement in the superior court of the county in which the trustee or one of the trustees resides.

[1985 c 30 § 96. Prior: 1984 c 149 § 129; 1955 c 33 § 30.30.020; prior: 1951 c 226 § 2. Formerly RCW 30.30.020.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

Trust provisions may relieve trustee from duty, restriction, or liability imposed by statute: RCW 11.97.010.

11.106.030

Intermediate and final accounts — Contents — Filing.

In addition to the statement required by RCW 11.106.020 any such trustee or trustees whenever it or they so desire, may file in the superior court of the county in which the trustees or one of the trustees resides an intermediate account under oath showing:

- (1) The period covered by the account;
- (2) The total principal with which the trustee is chargeable according to the last preceding account or the inventory if there is no preceding account;
- (3) An itemized statement of all principal funds received and disbursed during such period;
- (4) An itemized statement of all income received and disbursed during such period, unless waived;
- (5) The balance of such principal and income remaining at the close of such period and how invested;
- (6) The names and addresses of all living beneficiaries, including contingent beneficiaries, of the trust, and a statement as to any such beneficiary known to be under legal disability;
- (7) A description of any possible unborn or unascertained beneficiary and his interest in the trust fund.

After the time for termination of the trust has arrived, the trustee or trustees may also file a final account in similar manner.

[1985 c 30 § 97. Prior: 1984 c 149 § 130; 1955 c 33 § 30.30.030; prior: 1951 c 226 § 3. Formerly RCW 30.30.030.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.106.040

Petition for statement of account.

At any time after the later of one year from the inception of the trust or one year after the day on which a report was last filed, any settlor or beneficiary of a trust may file a petition under RCW 11.96A.080 with the superior court in the county where the trustee or one of the trustees resides asking the court to direct the trustee or trustees to file in the court an account. At the hearing on such petition the court may order the trustee to file an account for good cause shown.

[1999 c 42 § 627; 1985 c 30 § 98. Prior: 1984 c 149 § 131; 1955 c 33 § 30.30.040; prior: 1951 c 226 § 4. Formerly RCW 30.30.040.]

Notes:

Part headings and captions not law -- Effective date -- 1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.106.050**Account filed — Return day — Notice.**

When any account has been filed pursuant to RCW 11.106.030 or 11.106.040, the clerk of the court where filed shall fix a return day therefor as provided in RCW 11.96A.100(4) and issue a notice. The notice shall state the time and place for the return date, the name or names of the trustee or trustees who have filed the account, that the account has been filed, that the court is asked to settle the account, and that any objections or exceptions to the account must be filed with the clerk of the court on or before the return date. The notice shall be given as provided for notices under RCW 11.96A.110.

[1999 c 42 § 628; 1985 c 30 § 99. Prior: 1984 c 149 § 132; 1955 c 33 § 30.30.050; prior: 1951 c 226 § 5. Formerly RCW 30.30.050.]

Notes:

Part headings and captions not law -- Effective date -- 1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.106.060**Account filed — Objections — Appointment of guardians ad litem — Representatives.**

Upon or before the return date any beneficiary of the trust may file the beneficiary's written objections or exceptions to the account filed or to any action of the trustee or trustees set forth in the account. The court shall appoint guardians ad litem as provided in RCW 11.96A.160 and the court may allow representatives to be appointed under RCW 11.96A.120 or 11.96A.250 to represent the persons listed in those sections.

[1999 c 42 § 629; 1985 c 30 § 100. Prior: 1984 c 149 § 133; 1977 ex.s. c 80 § 31; 1955 c 33 § 30.30.060; prior: 1951 c 226 § 6. Formerly RCW 30.30.060.]

Notes:

Part headings and captions not law -- Effective date -- 1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

Purpose -- Intent -- Severability -- 1977 ex.s. c 80: See notes following RCW 4.16.190.

11.106.070**Court to determine accuracy, validity — Decree.**

Upon the return date or at some later date fixed by the court if so requested by one or more of the parties, the court without the intervention of a jury and after hearing all the evidence submitted shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth in the account including the purchase, retention, and disposition of any of the property and funds of the trust, and shall render its decree either approving or disapproving the account or any part of it, and surcharging the trustee or trustees for all losses, if any, caused by negligent or wilful breaches of trust.

[1985 c 30 § 101. Prior: 1984 c 149 § 134; 1955 c 33 § 30.30.070; prior: 1951 c 226 § 7. Formerly RCW 30.30.070.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.106.080

Effect of decree.

The decree rendered under RCW 11.106.070 shall be deemed final, conclusive, and binding upon all the parties interested including all incompetent, unborn, and unascertained beneficiaries of the trust subject only to the right of appeal under RCW 11.106.090.

[1985 c 30 § 102. Prior: 1984 c 149 § 135; 1955 c 33 § 30.30.080; prior: 1951 c 226 § 8. Formerly RCW 30.30.080.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.106.090

Appeal from decree.

The decree rendered under RCW 11.106.070 shall be a final order from which any party in interest may appeal as in civil actions to the supreme court or the court of appeals of the state of Washington.

[1985 c 30 § 103. Prior: 1984 c 149 § 136; 1971 c 81 § 80; 1955 c 33 § 30.30.090; prior: 1951 c 226 § 9. Formerly RCW 30.30.090.]

Notes:

Rules of court: Method of appellate review superseded by RAP 2.2(a)(3), 18.22.

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

11.106.100

Waiver of accounting by beneficiary.

Any adult beneficiary entitled to an accounting under either RCW 11.106.020 or 11.106.030 may waive such an accounting by a separate instrument delivered to the trustee.

[1985 c 30 § 104. Prior: 1984 c 149 § 137; 1955 c 33 § 30.30.100; prior: 1951 c 226 § 11. Formerly RCW 30.30.100.]

Notes:

Short title -- Application -- Purpose -- Severability -- 1985 c 30: See RCW 11.02.900 through 11.02.903.

Severability -- Effective dates -- 1984 c 149: See notes following RCW 11.02.005.

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STATE OF WASHINGTON

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

JOHN E. COOK, a married man,
Respondent

vs.

A. DIANE BRATENG, a widow
concerning her interest in realty
subject to partition action, and A.
DIANE BRATENG, as Successor
Sole Trustee of the Elmer J. Cook
Living Trust,

Appellant.

Case No.: 39463-4

DECLARATION OF MAILING

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY C
DEPUTY

I, Raemi M. Lucas, being first duly sworn upon oath, deposes and says that:

I am a citizen of the United States of America, over the age of 21 years and competent to be a witness herein.

On the 27th day of August, 2009, I deposited a copy of the Brief of Appellant in the United States Mail, first class mail, postage prepaid, to the address that follows:

Nelson Law Firm, PLLC
Attn: David A. Nelson
1516 Hudson Street
Longview, WA 98632

Dated this 26th day of August, 2009.

Raemi M. Lucas
Raemi M. Lucas

SUBSCRIBED TO AND SWORN before me this 26th day of August, 2009.

Rachel Julin Leos
Printed Name: RACHEL JULIN LEOS
Notary Public in and for the State of WA
Residing at Kirkland, WA
My Commission Expires 9/9/2011

FILED
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DIVISION II

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STATE OF WASHINGTON
BY Ca
DEPUTY

**COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON**

JOHN E. COOK, a married man,

Case No.: 39463-4

Respondent

vs.

A. DIANE BRATENG, a widow
concerning her interest in realty
subject to partition action, and A.
DIANE BRATENG, as Successor
Sole Trustee of the Elmer J. Cook
Living Trust,

DECLARATION OF MAILING

Appellant.

I, Raemi M. Lucas, being first duly sworn upon oath, deposes and says that:

I am a citizen of the United States of America, over the age of 21 years and competent to be a witness herein.

On the 26th day of August, 2009, I deposited the original and one copy of the Brief of Appellant in the United States Mail, first class mail, postage prepaid, to the address that follows:

Court of Appeals, Division II
950 Broadway, #300 MS TB-06
Tacoma, WA 98402

Dated this 26th day of August, 2009. Raemi M. Lucas
Raemi M. Lucas

SUBSCRIBED TO AND SWORN before me this 26th day of August, 2009.

Rachel Julin Leos
Printed Name: RACHEL JULIN LEOS
Notary Public in and for the State of WA
Residing at Kirkland, WA
My Commission Expires 9/9/2011