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STATE OF WASHINGTON
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86776-3

NO. 65821-2-1

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

JEFFREY MANARY,

Respondent,

v.

EDWIN A. ANDERSON,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 NOV 30 PM 2:44

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jeffrey Manary asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition. Petitioner was plaintiff in the trial court and respondent before the Court of Appeals, Division One.

B. COURT OF APPEALS DECISION

Petitioner requests review of the Court of Appeals' October 31, 2011, decision reversing the trial court's grant of summary judgment to plaintiff Manary and remanding the case with direction to enter summary judgment for appellant Anderson. A copy of the decision is attached as Appendix A. The opinion is published.

C. ISSUES PRESENTED FOR REVIEW

Petitioner requests that the Supreme Court review whether the Court of Appeals erred by:

1. Holding decedent Homer Greene retained a one-half interest in real property independent of the Greene Trust after he had quit claimed all his right, title and interest, including all after-acquired interest to the irrevocable Trust.

2. Holding that a 1999 amendment to the Trust by Homer Greene naming Alice Manary as an additional beneficiary was not relevant to the resolution of the issues before the Court.

3. Holding that Homer Greene's interest in the real property was a "nonprobate asset" pursuant to RCW Chapter 11.

4. Holding that the Greene Trust was revocable after the death of Eileen Greene in direct contradiction to the express terms of the Trust.

5. Holding that there was no evidence that an interest in the real property was held by the Successor Trustee and that Alice Manary, the Trust beneficiary, had no asset in her possession, contrary to the terms of RCW 11.11.050(1) and RCW 11.11.070.

6. Ruling that Respondent Manary was not entitled to summary judgment against Appellant Anderson.

7. Ruling that summary judgment should be entered for Appellant Anderson.

D. STATEMENT OF THE CASE

Factual Background

In December 1995, Homer L. Greene (hereinafter "Mr. Greene" and Eileen M. Greene (hereinafter "Mrs. Greene"), husband and wife, executed a written trust document titled the "Homer L. Greene and Eileen

M. Greene Revocable Living Trust” (hereinafter “the Trust”). *CP 129 - 168*. Mr. and Mrs. Greene conveyed the entirety of their right, title and interest in their residential real property (“the Property”) into the Trust. The conveyance was by a quit claim deed, including all after acquired title, to themselves as Trustees and to all Successor Trustees. *CP 181; 183*. That conveyance of the Property to the Trust was recorded in King County, Washington. *CP 181*.

Mrs. Greene passed away on December 5, 1998. *CP 189*. The Trust provided that “[a]s soon as practicable after the death of the first Trustee to die... the Trustee shall divide the Trust into two (2) separate trusts, which shall be the ‘Survivor’s Trust’ and the ‘Family Trust.’” *CP 137, Sect. 3.02*. “The Trustee shall allocate Decedent’s interest in the community property and Decedent’s separate property held by this Trust... to the Family Trust.” *CP 137, Sect. 3.04*. However, the Trust also provided that “[t]he Trustee need not segregate and may combine the assets of the separate trusts established by this instrument for the purpose of administration.” *CP 150, Sect. 7.10*. Mr. Greene, as Trustee, after consulting with counsel, chose not to establish separate trusts. *CP 125; 201*.

In August 1999, Mr. Greene “amend[ed] said Trust pursuant to the powers reserved to the Trustor under Article II” naming Alice E. Manary

the beneficiary of the trust estate and “in the event that Alice E. Manary should predecease both Trustors, then all the trust estate shall be distributed to Trustor’s nephew, Jeffrey Manary.” *CP 192, Sect. 6.03*. He also amended Section 9.01 to read

At the death, incapacity, or resignation of the survivor of the undersigned, then ALICE E. MANARY shall serve as the First Successor Trustee. Should Alice E. Manary be unable to serve or refuse to serve, then JEFFREY MANARY shall serve as the Second Successor Trustee.

CP 193. Mr. Greene did not amend or modify any of the Trust’s terms regarding the Property. *CP 181; 192 - 194*.

Under the terms of the Trust, “neither Trustee shall have the power to amend, modify or revoke this Trust with respect to the other Trustor’s community property interest or separate property interest.” *CP 131, Sect. 1.06 (c)*. Further, “upon the death or incapacity of either of the Trustors, the Family Trust and Family Disclaimer Trust (if created thereunder), under this Agreement shall become irrevocable.” *CP 132, Sect. 1.06 (d)*. The Property, originally owned by Mr. and Mrs. Greene and transferred into the Trust, was community property and “retain[ed] its character...during the Trustors’ lifetimes.” *CP 131, Sect. 1.04*. The Property was therefore a part of the irrevocable Family Trust. *CP 132, Sect. 1.06 (d)*.

The Property was also subject to specific Trust provisions for its use and administration. *CP 131 – 132 Sect. 1.06; CP 136, Sect. 2.06; CP 150, Sect. 7.06.* In particular,

[a]fter the death of the first Trustor, the Trustee is authorized to retain in any trust or trusts for the personal use of the Surviving Trustor, any property occupied by the Trustors as their principal place of residence at the time of death of the first Trustor to die, for so long as the Survivor may desire to occupy the residential property; during such retention the trustee shall pay...*in the best interests of such trusts and their beneficiaries...* all costs of keeping such property insured, maintained and repaired. *On written request of the Survivor, the Trustee may sell such property and replace it with another property to be retained in the trust in the same manner as the replaced residence property.*

CP 150, Sect. 7.06 (emphasis added).

Although the Trust holding the Property was irrevocable, the Trust did allow for the Property's removal but only following specific instructions. Mr. Greene executed a Warranty Deed to the Property to Anderson for "co-ownership joint occupancy" dated November 5, 2004, which is recorded at 20050224000653 in the records of King County, Washington. *CP 98 - 99.*

Anderson's briefing admits that this deed purported to transfer an "unclear" partial interest in the Property to Anderson. *CP 33, FN 3; CP 98*

- 99. Mr. Greene also executed a Last Will and Testament dated November 5, 2004, in which he bequeathed the Property to Anderson. *CP 101*. Neither the Warranty Deed nor the Will mention or refer to the Trust or refer to Homer Greene as a Trustee. *CP 98 – 99; 101 – 103*. Mr. Greene had no personal right, title or interest in the Property to convey to Anderson in either the Warranty Deed or the Will that was independent of the Trust. *CP 181; 183*. There is also no evidence to suggest that Mr. Greene intended to replace the Property with another property to be used “in the same manner.”

Mr. Greene passed away in January 2007. *CP 105*. His Last Will and Testament dated November 5, 2004 was probated in King County on April 16, 2007 appointing Anderson as the personal representative of his Estate. *CP 107 - 108*.

Anderson took possession of the Property pursuant to the Will. *CP 101*. It is undisputed in both parties’ briefing that Anderson has never served Alice E. Manary, as Successor Trustee, or Jeffrey Manary, as Second Successor Trustee, personally or by certified mail, with notice of Anderson’s claim for legal title to the Property as required by RCW 11.11.050 (1). *CP 204 -205; CP 235 – 236*. Nor has Anderson ever filed a petition for title to the Property pursuant to the requirements of RCW

11.11.070 (2) either as a part of the Probate proceeding or separately. *CP 205; 236 -237.*

Proceedings Below.

Manary filed this action seeking, among other things, quiet title of the Property and ejectment of Anderson *CP 4 - 5.*

Anderson filed a counterclaim asking the court to “quiet title in favor of [Anderson] by affirming the statutory warranty deed” executed by Mr. Greene on November 5, 2004 granting “co-ownership-joint occupancy” in the Property. *CP 18; CP 88.*

Both parties brought motions for partial summary judgment seeking quiet title to the Property. *CP 30 – 39; 109 - 121.* Manary argued that the Trust was entitled to the Property pursuant to uncontested facts that the Property was conveyed by valid quitclaim deed including all after acquired title to the Trust and was never properly removed from the Trust. *CP 109 -121.* Anderson argued that Homer Greene bequeathed the Property to Anderson in his Last Will and that he was therefore entitled to the Property or at least a partial interest in it. *CP 30 - 39.* Neither party alleged any material facts were in dispute; both parties sought judgment as a matter of law. *CP 34, 114.*

The Trial Court found that the bequest of the Property by Homer Greene's Last Will was ineffective because Mr. Greene did not 1) modify the Trust instrument as to the Property; and/or 2) make some reference to the Trust in his Will. *CP 243; RP May 28, 2010 at 11-15*. The Property was not Mr. Greene's to convey and remained Trust property. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case is a matter of first impression for the Court to review the boundaries of RCW Chapter 11.11 as it applies to interests in real property that are established by, and subject to, express terms of a Trust. Review is necessary to clarify the relationship of a deeded and recorded interest in real property and the "nonprobate asset" distribution of property authorized by RCW Chapter 11.11. The decision by the Court of Appeals herein ignores the distinction between a vested title interest in real property and a partial beneficial interest in a Trust which holds title to that real property. The decision herein confuses the roles of Trustor, Trustee and Beneficiary and improperly expands the definition of nonprobate asset beyond the legislative intent.

RAP 13.4(b) provides that a petition for review will be accepted if the decision below, among other things, is in conflict with another decision of the Court of Appeals, or involves an issue of substantial public

interest. *RAP 13.4(2); RAP 13.4(4)*. These criteria are satisfied in this case and review is appropriate.

1. The Ruling Below Conflicts With Other Decisions of the Court of Appeals.

This case does not involve a revision to a revocable living trust. In fact, the Trust herein was irrevocable after the death of Mrs. Greene as to the Property, with the Property being segregated from other Trust assets and subject to specific Trust provisions for its use and administration. *CP 136, Sect. 2.06; CP 150, Sect. 7.06*. The Property's title belonged to the Trust as of December 1995. *CP 181*. At the time of Mr. Greene's Last Will bequest in November 2004, he held no legal title to the Property, and his interest as Trustee to limited to holding and maintaining the property in the best interests of the Trust beneficiaries. *CP 183*.

However, the Court's holding in this case is contrary to its prior decision for the case of In re the Estate of Furst. In the case of In re Estate of Furst, 113 Wn.App. 839, 840-42, 55 P. 3d 664 (2002), Furst created a revocable living trust and a Will. Furst was the trustee and the trust agreement reserved the right to revoke the trust by delivering a written instrument to the trustee. Before he died, Furst executed a second will. The residuary legatee of the second will argued that the second will revoked the Trust. *Id.* The court disagreed, reasoning that although a later

will could have revoked *the Trust*, the one at issue did not because it did not purport to do so and it did not even mention the Trust. *Id.* at 843. This reasoning is relevant to this matter because Mr. Greene failed to mention the Trust or even his role as Trustee in the Last Will bequeathing the Property to Anderson. *CP 98 – 99; 101 - 103.* Since this bequest could not be accomplished without revoking the Trust, the court should determine that this failure to mention the Trust renders the attempted transfer of the Property invalid.

Furst is also relevant to this matter because it discusses what should happen when the Trust itself sets forth how revocation may occur. “Where the trust instrument specifies the method of revocation, only that method can be used.” Furst at 842 (citing In Re Estate of Button, 79 Wash.2d 849, 852, 490 P.2d 731 (1971)). The Trust in this matter sets forth specifically how and when it may be revoked. *CP 131 – 132, Sect. 1.06.* It also give specifics about the conditions for removal of the Property. *CP 150, Sect. 7.06.* This rational is consistent with the pending statutory requirements of RCW Chapter 11.103, discussed later in this Petition.

The Court evades the application of the Furst case in this proceeding by simply concluding that this case did not involve revocation of the Trust by Homer Greene’s last will. However, this ignores the

obvious language of both the Trust and the Will. Mr. Greene had to be attempting to revoke the Trust, or some part thereof, by implication to devise the Property to Mr. Anderson. The Trust provisions expressly prohibited such a transfer, so he could not be acting within the terms of the Trust.

Section 1.06 discusses revocation. *CP 131 - 132*. The Grantors “reserve the right during their joint lifetimes, individually or jointly, to amend, modify or revoke this Trust, in whole or in part, *by a writing or writings signed and acknowledged by them*, to be effective upon delivery to the Trustee.” *CP 131, Sect. 1.06(b) (emphasis added)*. “Upon the death or incapacity of either of the Trustees, the Family Trust... under this Agreement shall become irrevocable... The Survivor’s Trust shall be remain revocable by the Survivor...governed by the rules of this Trust as initially established this day.” *CP 132, Sect. 1.06(d)*. However, “[n]either Trustee shall have the power to amend, modify, or revoke this Trust with respect to the other Trustor’s community property interest or separate property interest.” *CP 131, Sect. 1.06(c)*. Therefore, Mr. Greene did not have the power to revoke or amend the Trust with respect to anything that Mrs. Greene also had an interest in. Any attempts to amend or revoke any part or whole of the Trust also needed to be in a writing delivered to the Trustee. Anderson admits that Mr. Greene did not deliver any such

writing. *CP 229, Lines 4-6.* Exactly this type of writing is what the court required in Furst to find that the decedent intended to revoke the Trust.

Even if Mr. Greene's actions are considered an attempt to amend the Trust by removing the Property, Sections 2.06 and 7.06 govern the removal of the Property from the Trust. *CP 136; 150.* "If the current residence property is a part of the Trust, the Trustors shall have possession and full management of it, and shall have a right to occupy it, rent free." *CP 136 Sect. 2.06.* "Upon the death of the first Trustor, the residence shall be administered in accordance with Sect. 7.06." *Id.* "After the death of the first Trustor, the Trustee is authorized to retain...any property occupied by the Trustors as their principal place of residence..." *CP 150, Sect. 7.06.* "On written request of the Survivor, the Trustee may sell such property and replace it with another property, to be retained in the trust in the same manner as the replaced residence property." *Id.* The terms of the Trust state that after the death of one of the Trustors, the Property is to be retained in the best interest of the beneficiaries and *may* be sold *if replaced* but this must be done by written request. No such written request exists. *CP 229, Lines 4-6.* Further, Mr. Greene's bequest to Anderson was not an attempt to sell the Property and replace it. Therefore, the terms required by the Trust for any transfer of the Property were not met by the Will bequest and title to the Property should remain in the Trust.

The Court should accept review to resolve the contradiction created by the Court of Appeals.

2. The Ruling Below Involves an Issue of Substantial Public Interest.

The decision affects the public interest in maintaining confidence in recorded deeds and the terms of irrevocable Trusts. The specific real property interest at issue in this case is not a “nonprobate asset” as that term is defined in statute. The Legislature specifically excludes from the definition of a nonprobate asset, “[a] deed or conveyance for which possession has been postponed until the death of the owner” from the definition of “nonprobate assets.” *RCW 11.11.010(7)(a)(ii)*. The Property fits squarely within the exclusion. The Property was conveyed by deed to the Trust. *CP 181; 183*. Although the Trust held title, the beneficiary of the Trust could not gain possession until “upon death of the surviving Trustor, the Trustee shall apply and distribute the net income and principal” of the Trust. *CP 192, Sect. 6.03*. Mr. Greene, although not a holder of title to the Property, was its “owner” as defined by *RCW 11.11.010(8)* because he held “beneficial ownership of the nonprobate asset.” “The Trustors shall have possession and full management of [the Property]” used as their residence. *CP 136, Sect. 2.06*. It is not disputed that he had beneficial ownership. *CP 225, Lines 7 - 8*. Therefore, the

Property is not an asset governed by RCW Chapter 11.11 and the chapter has no bearing on the right to transfer. *RCW 11.11.007*.

Even if RCW Chapter 11.11 were applied in this matter, recovery by Appellant Anderson should still be barred for (a) failure to provide notice and (b) failure to petition the court within the appropriate timeframe.

(a) *Failure to provide Notice.*

In addition, the resolution of disputes involving nonprobate assets is a matter of continuing public interest. Anderson, both in his capacity as the personal representative of Mr. Greene's Estate and in his capacity as a testamentary beneficiary, failed to provide notice to Manary or the Trust. *CP 204 -205; CP 235 – 236.*

Written notice... must be served personally or by certified mail, return receipt requested and postage prepaid, on the financial institution or other third party having the nonprobate asset in its possession or control, on the beneficiary, on the testamentary beneficiary, and on the personal representative, and proof of the mailing or service must be made by affidavit and filed under the cause number assigned to the owner's estate.

RCW 11.11.050 (1) (emphasis added).

Alice Manary, firstly as the Successor Trustee who had legal title and control of the Property, and secondly as the beneficiary of the Trust, was

entitled to notice under the statute and the Property upon Mr. Greene's death. *CP 192 - 194*. "Beneficiary" means the person designated to receive a nonprobate asset upon death of the owner by means other than the owner's will." *RCW 11.11.010 (2)*. Manary was therefore entitled to notice under *RCW 11.11.050 (1)*. No such notice was provided. *CP 204 - 205; CP 235 - 236*.

Notice is to be provided by the "personal representative, petitioner for appointment as personal representative, attorney for the personal representative or petitioner, or testamentary beneficiary under the will of the decedent." *RCW 11.11.050 (2)*. Anderson was the personal representative of Mr. Greene's Estate. *CP 107 - 108*. As such, he was obligated to provide notice to Manary that Mr. Greene disposed of the Property in his Last Will. *RCW 11.11.050 (2)*. Although *RCW 11.11.050(3)* relieves the personal representative from liability for failing or refusing to give notice, it does not relieve the testamentary beneficiary from any liability. *RCW 11.11.050(3)*. Anderson, as the "person named under the owner's will to receive a nonprobate asset," was the testamentary beneficiary. *RCW 11.11.010 (10)*. As the testamentary beneficiary, Anderson was required to provide notice to the beneficiary, Manary. *RCW 11.11.050 (1)*.

Anderson had constructive notice of Manary's claim to the Property pursuant to the quitclaim deed properly recorded on December 8, 1995. *CP 181*. "[R]ecording of an instrument is constructive notice... to those parties acquiring interests subsequent to the filing and recording of the instrument." *McVean v. Coe*, 12 Wash.App. 738, 532 P.2d 629 (1975). "An instrument is deemed recorded the minute it is filed for record." *RCW 65.08.070*. The earliest that Anderson could have claimed any interest in the Property was December 5, 2004 with the conveyance of a "co-ownership-joint occupancy" to Anderson. *CP 98*. This is clearly subsequent to the filing of the quitclaim deed to the Trust in 1995. Therefore, Anderson had constructive notice of the pre-recorded deed and was obligated to provide Manary with notice under RCW Chapter 11.11 of his new claim for title in 2007.

(b) *Failure to Petition the Court Within the Appropriate Timeframe.*

The testamentary beneficiary claiming a nonprobate asset must petition the Superior Court for title to that asset "within the earlier of (a) [s]ix months of the date of admission of the will to probate; and (b) one year of the owner's death" or "be forever barred from making such a claim or commencing such an action." *RCW 11.11.070(3)*. Mr. Greene died on January 5, 2007 and his Last Will was admitted to probate on July 16, 2007. *CP 107 - 108*. No petition has ever been filed with the Court. *CP*

205; 236 -237. Anderson is therefore barred from making any such claim to the Property. *RCW 11.11.070 (3)*.

(c) *Legislative Policy Requires Compliance With the Terms of a Revocable Trust.*

In addition, the State legislature has recently adopted a number of revisions and additions to the Washington law of Trusts. Although not effective until January, 2012, they are instructive on the public interest issues in this case. *RCW 11.103.030* provides that unless the term of a trust expressly provide that the trust is revocable, the trustor may not revoke or amend the trust. *RCW 11.103.030(1)*. The statute further requires that, even if a trust is revocable, it may only be revoked or amended by substantial compliance with a method provided in the terms of the trust. *RCW 11.103.030(3)(a)*. The decision of the Court of Appeals is contrary to the public policy of the State as expressed in the statute, and the Court should accept review to resolve the inconsistency.

F. CONCLUSION

For all of the reasons discussed above, this Court should grant review of the Court of Appeals decision terminating review.

DATED this 30 day of November, 2011

Respectfully submitted,

BURKE LAW OFFICES, INC PS

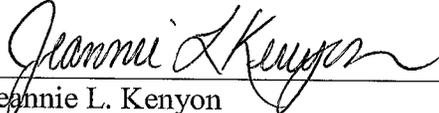
Handwritten signature of Thomas G. Burke in black ink, consisting of stylized initials 'TGB' followed by a horizontal line.

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Attorney for Petitioner Manary

CERTIFICATE OF SERVICE

I certify that I mailed, or caused to be mailed, a copy of the foregoing brief postage prepaid, via US Mail on the ____ day of November, 2011 to the following counsel of record at the following address:

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY MANARY,)	No. 65821-2-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
EDWIN A. ANDERSON,)	PUBLISHED
)	
Appellant.)	FILED: <u>October 31, 2011</u>
)	
)	

Cox, J.—A testator or testatrix may dispose of nonprobate assets by will, provided the disposal complies with the Testamentary Disposition of Nonprobate Assets Act (“Act”).¹ Such a disposition is effective, notwithstanding the rights of any beneficiary designated before the date of the will.²

Here, Homer Greene and Eileen Greene, husband and wife, executed a revocable living trust in 1995. They simultaneously funded the trust by conveying by deed their interests in their residential real property to themselves as trustees under this trust. The trust initially named three beneficiaries.

¹ RCW 11.11.020.

² RCW 11.11.020(1).

Eileen predeceased Homer in 1998.³ In 1999, Homer amended the trust in ways that we describe later in this opinion.

Homer executed his last will and testament on November 5, 2004. It bequeathed Homer's interest in the residential real property to Edwin Anderson.

At issue in this quiet title action is the right to Homer's one-half interest in the residential real property that was a subject of both Homer's will and the Greenes' prior revocable living trust. The trial court granted summary judgment to Jeffrey Manary, the named second successor trustee for the Greenes' 1995 revocable living trust. Because the Act controls, Anderson, to whom Homer bequeathed his interest in the property in his 2004 will, is the rightful owner. We reverse and remand with instructions.⁴

Under the terms of the Greenes' 1995 trust, Homer and Eileen retained possession and full management of the residential real property and had the right to occupy it rent free. Upon the first spouse's death, the surviving spouse was entitled to remain on the property rent free. But the survivor was to create an irrevocable Family Trust for the deceased spouse's community property interest in the couple's property and his or her separate property. The surviving spouse's interest in the community property was to be transferred to a Survivor's Trust where the surviving spouse retained all rights of revocation, amendment, modification, and withdrawal. At the surviving spouse's death, the assets in both

³ For clarity, we adopt the naming convention for the Greenes used by Edwin Anderson, the appellant and personal representative of the estate of Homer.

⁴ We deny Manary's motion to strike certain assignments of error.

the Family Trust and the Survivor's Trust were to pass to the beneficiaries identified in the original 1995 trust.

Eileen predeceased Homer in December 1998, and Homer became the sole trustee. Although the trust stated that he was to place Eileen's interest in their community property and her separate property into the Family Trust, he did not establish that trust. Instead, he left all assets in the original trust.⁵

In August 1999, Homer amended the trust beneficiaries, naming his sister, Alice Manary, the sole beneficiary. There appears to be a dispute between the parties over the effect of this amendment. But those issues are not currently before us, and we express no opinion about them.

At the same time that Homer amended the trust to name his sister as the sole beneficiary, he also named her as the successor trustee and his nephew, Jeffrey Manary, as second successor trustee. There does not appear to be any dispute between the parties as to Jeffrey Manary's status as either second successor trustee or as a proper party in this appeal.⁶

A few years before Homer's death, Anderson moved onto the residential real property and became Homer's caretaker. On November 5, 2004, Homer executed his last will, which bequeathed his interest in this property to Anderson.

⁵ Homer's failure to create the Family Trust and Survivor's Trust are not at issue in this appeal. Because neither was created, the remainder of this opinion only refers to the Greenes' 1995 trust.

⁶ This record indicates that Jeffrey Manary was substituted as plaintiff by prior order of the superior court. Clerk's Papers at 113.

Homer died in January 2007. The court appointed Anderson as the personal representative of his estate.

After Homer's death, Anderson remained on the property. Alice Manary, as successor trustee under the trust, commenced this quiet title action against Anderson, seeking to eject him and to establish her right to the property. Anderson counterclaimed, seeking to quiet title in him. Alice Manary passed away, and Jeffrey Manary succeeded her as the plaintiff.

On cross-motions for summary judgment, each party claimed a right to Homer's interest in the property. Anderson based his claim on the Act. Manary based his claim on the provisions of the 1995 trust. The trial court granted Manary's motion, quieting title in him.

Anderson appeals.

TESTAMENTARY DISPOSITION OF NONPROBATE ASSETS

Anderson argues that the trial court erred, as a matter of law, in granting summary judgment in favor Manary. Anderson asserts that he is entitled to prevail under the Act. We agree.

An order granting summary judgment should be affirmed if no genuine issue of material fact remains and the moving party is entitled to judgment as a matter of law.⁷ Summary judgment orders are reviewed de novo, taking the evidence and all reasonable inferences from it in the light most favorable to the nonmoving party.⁸

⁷ CR 56(c).

⁸ Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

Here, there are no genuine issues of material fact for trial. The main issue is legal: whether the Act applies to Homer's 2004 testamentary disposition of his interest in the residential real property.

The fundamental objective in construing a statute is to ascertain and carry out the legislature's intent.⁹ "Statutory interpretation begins with the statute's plain meaning."¹⁰ The plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole."¹¹

In determining the plain meaning of a statute, the court "must not add words where the legislature has chosen not to include them"¹² If the statute is unambiguous, the court's inquiry is at an end.¹³

RCW 11.11.020(1) provides:

Subject to community property rights, upon the death of an owner ***the owner's interest in any nonprobate asset specifically referred to in the owner's will belongs to the testamentary beneficiary named to receive the nonprobate asset,*** notwithstanding the rights of any beneficiary designated before the date of the will.¹⁴

⁹ Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting Arborwood Idaho, LLC v. City of Kennewick, 151 Wn.2d 359, 367, 89 P.3d 217 (2004)).

¹⁰ Id.

¹¹ State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

¹² Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

¹³ State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

¹⁴ (Emphasis added.)

RCW 11.11.010(8) defines an “owner” as “a person who, during life, has beneficial ownership of the nonprobate asset.” RCW 11.11.010(10) defines a “testamentary beneficiary” as “a person named under the owner’s will to receive a nonprobate asset under this chapter. . . .”

There is no dispute that Homer was an “owner” under the Act. He had beneficial use of the residential real property during his life under the terms of the 1995 trust. Likewise, Homer’s interest in this property is “specifically referred to” in his will by its tax parcel number and street address. It is also undisputed that Anderson is the “testamentary beneficiary” under the Act. Homer’s will specifies that Anderson would receive Homer’s interest in the residential real property.

The main dispute between the parties is whether Homer’s interest in the real property is a nonprobate asset. We hold that it is.

RCW 11.11.010(7)(a) adopts the definition of a “nonprobate asset” in RCW 11.02.005, excluding the exceptions identified in RCW 11.11.010(7)(a). Specifically, RCW 11.02.005(15) defines nonprobate asset and also sets forth a nonexclusive list of examples:

“Nonprobate asset” means those rights and interests of a person having beneficial ownership of an asset that pass on the person’s death under a written instrument or arrangement other than the person’s will. “Nonprobate asset” includes, but is not limited to, a right or interest passing under a joint tenancy with right of survivorship, joint bank account with right of survivorship, payable on death or trust bank account, transfer on death security or security account, deed or conveyance if possession has been postponed until the death of the person, trust of which the person is grantor and that becomes effective or irrevocable only upon the person’s death, community property agreement, individual retirement account or bond, or note or other contract the payment or performance of which is affected by the death of the person. “Nonprobate asset” does not include: A payable-on-death

provision of a life insurance policy, annuity, or other similar contract, or of an employee benefit plan; a right or interest passing by descent and distribution under chapter 11.04 RCW; a right or interest if, before death, the person has irrevocably transferred the right or interest, the person has waived the power to transfer it or, in the case of contractual arrangement, the person has waived the unilateral right to rescind or modify the arrangement; or a right or interest held by the person solely in a fiduciary capacity.^[15]

As we stated above, RCW 11.11.010(7)(a) specifies additional exclusions from the definition of nonprobate asset :

- (i) A right or interest in real property passing under a joint tenancy with right of survivorship;
- (ii) A deed or conveyance for which possession has been postponed until the death of the owner;
- (iii) A right or interest passing under a community property agreement; and
- (iv) An individual retirement account or bond.

The general definition of a nonprobate asset includes “those rights and interests of a person having beneficial ownership of an asset that pass on the person’s death under a written instrument or arrangement other than the person’s will.”¹⁶ Under the express terms of the trust, Homer had a beneficial interest in the residential real property—the asset—during his life. Moreover, the trust also expressly provided that this beneficial interest would pass to the trust’s beneficiaries upon his death. Thus, under the plain words of the statute, Homer’s interest in the real property is a nonprobate asset.

¹⁵ RCW 11.02.005(15) (emphasis added).

¹⁶ Id.

Furthermore, his interest in the property also qualifies as a nonprobate asset because it falls expressly within the nonexclusive list of examples of such assets. Specifically, his interest in the property is an interest passing under a “trust of which the person is grantor and that becomes effective or irrevocable only upon the person’s death. . . .”¹⁷ Homer was one of two grantors under the Greenes’ 1995 revocable trust. Upon his death, the trust became irrevocable as to him. Therefore, his interest in the property is a nonprobate asset.

For these reasons, under the plain language of RCW 11.11.020(1), upon Homer’s death, his interest in the property vested in Anderson as a nonprobate asset.¹⁸ Accordingly, Anderson was entitled to summary judgment on his quiet title claim.

The trial court granted summary judgment for Manary, stating:

7. Neither the Warranty Deed nor the Will mention or refer to the Trust. Neither the Warranty Deed nor the Will mention or refer to Mr. Greene as a Trustee.

8. Mr. Greene’s failure to either modify the Trust as to the Property or to acknowledge the Trust in either the Warranty Deed or his Will purporting to transfer the Property to Defendant Anderson resulted in the Property remaining Trust property. As such, Mr. Greene had no right, title or interest in the Property to convey to Defendant Anderson in either the Warranty Deed or the Will. Both attempted transfers to Defendant Anderson were invalid.^[19]

¹⁷ Id.

¹⁸ RCW 11.11.060 (“[T]he entitlement of the testamentary beneficiary to the nonprobate asset vest[s] immediately upon death of the owner.”).

¹⁹ Clerk’s Papers at 243.

Nothing in the statute requires Homer's will to mention the trust in order for RCW 11.11.020 to be effective. Moreover, there is nothing in the statute that requires a testator or testatrix to acknowledge a previously created trust in the will. The trial court's conclusion to the contrary was incorrect.

Manary primarily argues that Homer's interest in the property is not a nonprobate asset because it falls within one of the Act's four exceptions to the definition. He claims that the Act does not apply here because real estate joint tenancies and future interest deeds are excluded from the definition of a nonprobate asset. But, Homer's interest in the property is not a joint tenancy or a future interest deed, so this is not persuasive.

He also argues that the interest is a "deed or conveyance for which possession has been postponed until the death of the owner" ²⁰ This claim is based on the fact that the Greenes funded the 1995 trust by conveying by deed the residential real property to themselves as trustees. ²¹ We reject this argument because it is directly at odds with the definition of nonprobate asset:

those rights and interests of a person having beneficial ownership of an asset **that pass on the person's death** under a written instrument or arrangement other than the person's will. ^[22]

The fact that the Greenes funded their trust in 1995 and that Homer's interest in the house did not pass until his death does not bar classifying it as a nonprobate asset. The statute's language makes this clear.

²⁰ Brief of Respondent at 9.

²¹ Id.

²² RCW 11.02.005(15)

Next, Manary argues that, even if Homer's interest in the property is a nonprobate asset, Anderson is not entitled to it because he did not properly notify Manary or the trust under RCW 11.11.050(1). This argument is not persuasive.

RCW 11.11.050(1), which is titled "Notice—Affidavit—Form—Limitation on liability for failure to provide notice," states:

Written notice under this chapter must be served personally or by certified mail, return receipt requested and postage prepaid, on the financial institution or ***other third party having the nonprobate asset in its possession or control***, on the beneficiary, on the testamentary beneficiary, and on the personal representative, and proof of the mailing or service must be made by affidavit and filed under the cause number assigned to the owner's estate.^[23]

The statute's plain language only requires notice to third parties having the nonprobate asset in their possession. The interest in the real property was never in Manary's possession. Thus, this statute is inapplicable.

Manary also argues that Anderson failed to timely petition the court for relief within the statutory time limits, as required by RCW 11.11.070(3). We conclude that this statute is also inapplicable.

RCW 11.11.070(3) is titled "Ownership rights as between individuals preserved—Testamentary beneficiary may recover nonprobate asset from beneficiary—Limitation on action to recover" and states:

(1) The protection accorded to financial institutions and other third parties under RCW 11.11.040 has no bearing on the actual rights of ownership to nonprobate assets as between beneficiaries and testamentary beneficiaries, and their heirs, successors, personal representatives, and assigns.

²³ (Emphasis added.)

(2) A testamentary beneficiary entitled to a nonprobate asset otherwise transferred to a beneficiary not so entitled, and a personal representative of the owner's estate on behalf of the testamentary beneficiary, may petition the superior court having jurisdiction over the owner's estate for an order declaring that the testamentary beneficiary is so entitled, the hearing of the petition to be held in accordance with chapter 11.96 RCW.

(3) A testamentary beneficiary claiming a nonprobate asset who has not filed such a petition within the earlier of: (a) Six months from the date of admission of the will to probate; and (b) one year from the date of the owner's death, shall be forever barred from making such a claim or commencing such an action.^[24]

Manary selectively quotes RCW 11.11.070(3). But, when the full statute is examined, it is clear that notice of six months or one year is only required if the nonprobate asset is held by the original beneficiary and the testamentary beneficiary is entitled to it.

As we have already stated earlier in this opinion, there is no evidence that the interest in the real property was held by Manary at any time relevant to this case. Moreover, the will states that Anderson, the testamentary beneficiary, is entitled to the property. Therefore, notice to Manary was not required.

Next, Manary argues that the Act cannot be applied because the will did not mention the 1995 trust and Homer did not revoke the trust in the will. He relies on In re Estate of Furst.²⁵ That case is distinguishable.

There, Furst created a revocable living trust, funded it with the majority of his assets, and simultaneously executed a pour-over will bequeathing the residue

²⁴ (Emphasis added.)

²⁵ 113 Wn. App. 839, 55 P.3d 664 (2002).

of his estate to the trust.²⁶ He later executed a last will, which revoked all prior wills and bequeathed the residue of his estate to two individuals.²⁷ The last will did not mention the trust.²⁸ Furst did not transfer any of his assets out of the trust before his death several months later.²⁹

Upon Furst's death, the trust's successor trustee petitioned the court to declare that the assets in the trust were nonprobate assets to be distributed under the terms of the trust.³⁰ The will's residuary beneficiary objected and sought to have the trust declared revoked and its assets distributed according to the will.³¹ On cross-motions for summary judgment, the trial court granted the residuary beneficiary's motion, deciding that the will revoked the trust.³²

On appeal, this court first addressed whether the last will effectively revoked the trust, converting the trust's assets into probate assets subject to disposition under the will.³³ The court held that the will did not revoke the trust because it did not purport to do so and did not even mention the trust.³⁴ The

²⁶ Id. at 840-41.

²⁷ Id. at 841.

²⁸ Id.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id.

³³ Id. at 842-43.

³⁴ Id. at 843.

court also noted that the Act could not be applied to change the beneficiary of the trust because the provisions of RCW 11.11.020(2) were not followed.³⁵

Manary argues that, as in Furst, Homer's bequest of his interest in the property to Anderson is invalid because the last will neither mentions the trust nor revokes its provisions in accordance with the terms of the trust. But, unlike the Furst case, this case does not involve revocation of the trust by Homer's last will.

Here, Anderson bases his claim on the provisions of the Act, not on common law principles regarding revocation of prior trusts by a last will. Thus, it is irrelevant that this will neither mentions the prior trust nor purports to revoke it. As we have already explained, unlike Furst, there is full compliance with the relevant provisions of the Act here. Because compliance with the Act is all that is required, Furst does not necessitate any different result here.

Manary also argues that Anderson is not entitled to Homer's interest in the property because the property was owned by the trust, and not by Homer.³⁶ But, under the Act's plain language, and as Manary correctly concedes in his brief,³⁷ Homer was an "owner" of his interest in the property and, therefore, could bequeath it to Anderson by specifically identifying it in his will.

Finally, Manary argues that the Act "does not eliminate the need to substantially follow requirements specifically set forth in [the] terms of a will

³⁵ Id. at 843-44; RCW 11.11.020(2) ("A general residuary gift in an owner's will, or a will making general disposition of all of the owner's property, does not entitle the devisees or legatees to receive nonprobate assets of the owner.").

³⁶ Brief of Respondent at 17-18.

³⁷ Id. at 18.

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substitute.”³⁸ In fact, the Act does just that. Compliance with the Act’s express terms permits a testamentary disposition that need not comply with the previous trust’s provisions.³⁹

We reverse the summary judgment order and remand for entry of summary judgment in favor of Anderson.

Cox, J.

WE CONCUR:

Everton, J.

Grosse, J.

³⁸ Id. at 20.

³⁹ RCW 11.11.020(1).