

65821-2

65821-2

NO. 65821-2-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JAN 24 PM 3:19

JEFFREY MANARY,

Respondent,

v.

EDWIN A. ANDERSON,

Appellant.

BRIEF OF RESPONDENT

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

Attorneys for Respondent

Thomas G. Burke, WSBA No. 6577
Chelsy D. Harn, WSBA No. 42457
Burke Law Offices, Inc., P.S.
612 S. 227th Street
Des Moines, WA 98198
(206) 824-5630

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESPONDENT’S STATEMENT OF THE CASE.....2

 A. Statement of the Facts.....2

 B. Procedural History6

 C. Respondent’s Statement of Issue Presented.....7

 Whether title to real property conveyed to an irrevocable Trust by a valid and properly recorded quitclaim deed may later be re-transferred by one of the original Trust settlers to a third party via a later executed Last Will and Testament which makes no mention or reference to the Trust?.....7

II. LAW APPLICABLE TO STANDARD OF REVIEW.....7

 A. Standard of Review for Summary Judgment.....7

 B. Standard of Review for Appeal.....8

III. ARGUMENT.....9

 A. The trial court did not err in ruling Homer Greene’s specific bequest of the Property was ineffective.....9

 1. The Testamentary Disposition of Nonprobate Assets Act defined in RCW Chapter 11.11 does not govern this matter.....9

 2. Even if RCW Chapter 11.11 were applied in this matter, recovery by Anderson should still be barred for (a) failure to provide notice and (b) failure to petition the court within the appropriate timeframe.....10

 (a) Failure to Provide Notice.....10

(b)	Failure to Petition the Court Within the Appropriate Timeframe.....	12
3.	Alternatively, even Anderson did qualify for relief under RCW Chapter 11.11, the Will bequest would still be insufficient to transfer the Property out of the Trust.....	13
4.	The trial court ruling in this matter is not contrary to Testamentary Disposition of Nonprobate Assets Act.....	17
B.	MOTION TO STRIKE ASSIGNMENTS OF ERROR: Appellant Anderson is not entitled to appellate review of the unsupported Assignments of Error he has alleged.....	20
III.	CONCLUSION.....	23

TABLE OF AUTHORITIES

CASES

Edward L. Eyre & Co. v. Hirsch, 36 Wash.2d 439 at 446, 218 P.2d 888 (1950).....23

Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).
.....8

Guile v. Ballard Cmty. Hosp., 70 Wn.App. 18, 21, 851 P.2d 689 (1993).
.....8

In Re Estate of Button, 79 Wash.2d 849, 852, 490 P.2d 731 (1971).
.....15, 20

In re Estate of Furst, 113 Wash.App. 839, 55 P.3d 664 (2002).
.....14, 15, 16, 20

Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, *reconsideration denied* (2002).....7, 8

McVean v. Coe, 12 Wash.App. 738, 532 P.2d 629 (1975).....12

Rice v. Life Insurance Co. of North America, 25 Wash. App. 479 at 482, 609 P.2d 1387 (1980).....20

SEC v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982).....8

Smith v. King, 106 Wn.2d 443, 451-52, 772 P.2d (1986).....21

State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).....21

State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)..... 21, 22, 23

United States v. First National Bank, 652 F.2d 882, 887 (9th Cir. 1981).
.....8

STATUTES

RCW 11.02.005.....8

RCW 11.11.007.....9, 10

RCW 11.11.010.....passim

RCW 11.11.040.....19

RCW 11.11.050.....5, 11, 12

RCW 11.11.070.....6, 13

RCW 65.08.030.....19

RCW 65.08.070.....12

RULES

CR 56(c).....7

RAP 10.3 (a)(4).....21

RAP 10.3 (a)(6).....21

SECONDARY SOURCES

Cynthia J. Artura, *Superwill to the Rescue? How Washington’s Statute Falls Short of Being A Hero in the Field of Trust and Probate Law*, 74 Wash. L. Rev. 799 (1999).....passim

Mark L. Kaufmann, Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1019, note 4, at 1021-22 (1988).....13

I. INTRODUCTION

On appeal before this Honorable Court is a partial summary judgment order quieting title of real property located at 18616 102nd Avenue SE, Renton, King County, Washington (hereinafter “the Property”) to the Homer L. Greene and Eileen M. Greene Revocable Living Trust” (hereinafter “the Trust”). *CP 241 – 247*. The Property was conveyed by quitclaim deed to the Trust in 1995. *CP 181*. It was also conveyed in a Statutory Warranty Deed and Homer L. Greene’s Last Will in 2007 to Edwin A. Anderson (hereinafter “Anderson”). *CP 101*. The parties in this matter are Manary, the Successor Trustee and Anderson, the testamentary beneficiary/personal representative of Homer L. Greene’s Estate. *CP 1 – 2*. The trial court concluded that

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.

CP 243.

II. RESPONDENT'S STATEMENT OF THE CASE

A. Statement of the Facts

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 the Property into the Trust. *CP 181; 183*. The 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 to combine the Trusts' assets. *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 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, there 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 right, title or interest in the Property to convey to Anderson in either the Warranty Deed or the Will. *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.*

B. Procedural History

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.*

The primary issue presented by Anderson is whether or not RCW Chapter 11.11 (also called the Testamentary Disposition of Nonprobate Assets Act and erroneously referred to by Anderson as the "Super Will Statute") applies to Homer Greene's testamentary disposition of the Property, thereby divesting the Trust of legal title.

C. Respondent's Statement of Issue Presented

Whether title to real property conveyed to an irrevocable Trust by a valid and properly recorded quitclaim deed may later be re-transferred by one of the original Trust settlers to a third party via a later executed Last Will and Testament which makes no mention or reference to the Trust?

II. LAW APPLICABLE TO STANDARD OF REVIEW

A. Standard of Review for Summary Judgment

Summary judgment is appropriate if the papers submitted, including admissions, demonstrate that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, *reconsideration denied* (2002). A material issue of fact is one that affects

the outcome of the litigation and requires a trial to resolve the parties' differing versions of the truth." SEC v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982) (quoting United States v. First National Bank, 652 F.2d 882, 887 (9th Cir. 1981)). The facts and inferences from them are viewed "in a light most favorable to the nonmoving party." Jones at 300.

There are two possible ways for a Plaintiff defending counterclaims to move for summary judgment. Guile v. Ballard Cmty. Hosp., 70 Wn.App. 18, 21, 851 P.2d 689 (1993). The defending Plaintiff can set out his or her version of the facts and allege that there is no genuine issue as to the facts as set out. *Id.* A defending Plaintiff can also meet his or her burden by establishing that the nonmoving party lacks sufficient evidence to support its case. *Id.* In the latter case, the moving party must identify those portions of the record and any other evidence that he or she believes demonstrates the genuine absence of material fact. *Id.* at 22.

B. Standard of Review for Appeal

"The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." Folsom v. Burger King, 135 Wash.2d 658, 663, 958 P.2d 301 (1998).

III. ARGUMENT

A. Mr. Greene's specific bequest of the Property was ineffective to remove the Property from the Trust.

1. The Testamentary Disposition of Nonprobate Assets Act defined in RCW Chapter 11.11 does not govern this matter.

Summary judgment was proper because Anderson did not establish the essential elements of his claim to establish that RCW Chapter 11.11 is applicable to the Property.

[T]his chapter is intended to establish ownership rights to nonprobate assets upon the death of the owner, as between beneficiaries and testamentary beneficiaries. This chapter is relevant only as to controversies between these persons, and has no bearing on the right of a person to transfer a nonprobate asset under its terms in the absence of a testamentary provision under this chapter.

RCW 11.11.007.

Crucial to Anderson's claim is that the Property is a "nonprobate asset." 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*.

2. 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.*

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).

Manary, as the beneficiary of the Trust, was entitled to 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)*.

3. Alternatively, even if Anderson did qualify for relief under RCW Chapter 11.11, the Will bequest would still be insufficient to transfer the Property out of the Trust.

RCW Chapter 11.11 is intended to apply only to joint bank accounts with right of survivorship and revocable living trusts. S.B. Rep on S.B. 6181 at 2, 55th Leg., Reg. Sess. (Wash. 1998), also see Cynthia J. Artura, *Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 Wash. L. Rev. 799 at 813 (1999). "The superwill permits a testator to 'change the conditions and provisions of will substitutes through the use of a testamentary instrument.'" *Artura* at 813 (citing Mark L. Kaufmann, Should the Dead Hand Tighten Its Grasp: An Analysis of the Superwill, 1988 U. Ill. L. Rev. 1019, note 4, at 1021-22 (1988)). Therefore, had Mr.

Greene tried to change the beneficiary of the Trust, a will substitute, RCW Chapter 11.11 could arguably have been applied.

However, Mr. Greene's Last Will bequeathed the Property, already owned by the Trust, to Anderson. This is not a revision to a revocable living trust. In fact, the Trust was irrevocable after the death of Mrs. Greene, with the Property being 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. *CP 183*. It is undisputed that Anderson was never made a beneficiary or successor trustee of the Trust. Anderson seeks to go beyond the scope of RCW Chapter 11.11 (applicable to change in beneficiary designations) and apply its provisions to the contents of an irrevocable Trust.

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.* 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.*

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.

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 the Property is to be retained 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 the Property should remain in the Trust.

4. The trial court ruling in this matter is not contrary to RCW Chapter 11.11.

The undisputed facts in this case demonstrate that the Property was never Mr. Greene’s to give away in his personal capacity or his trustee status. *CP 181; 183; 150, Sect. 7.06.* The bequest of the Property in Mr. Greene’s Last Will and by statutory warranty deed in his personal capacity was not sufficient to remove the Property from the Trust. *CP 150, Sect. 7.06* (Only with written request of the Survivor may the Property be removed and even then, only for the purpose of sale and replacement.) Mr. Greene did not personally own the Property. *CP 183.* His interest in the Property was limited to his status as Co-Trustee pursuant to the quitclaim deed executed with his wife, Eileen. *CP 181.* The Property belonged to the Trust and not to Mr. Greene. *CP 181; 183.*

Anderson introduces secondary sources to support his contention that the “Super Will” Statute should apply to the Property. Anderson’s cited article states that a court will uphold the validity of a will *only if* it deals with... “the testator’s property, whether real or personal and whether in whole or in part, *of which he has the power to dispose.*” *Artura* at 801. Mr. Greene did not have power to dispose of the Property in his personal capacity; he only had a right to possess and manage it. *CP 136, Sect. 2.06*. Nor did he as Trustee have the power to give the property as a gift. *CP 150, Sect. 7.06*.

Although the Testamentary Disposition of Nonprobate Assets Act does allow for a person to alter the beneficiary designation of a revocable living trust that is not what Mr. Greene attempted to do with his Last Will. *RCW 11.02.005 (15)* (defining a nonprobate asset to include a “trust of which the person is grantor and that becomes effective or irrevocable only upon the person's death). First, the Trust in this case was not revocable with regard to the Property. *CP 131, Sect. 1.06; CP 136, Sect. 2.06; CP 150, Sect. 7.06*. Second, Mr. Greene did not attempt to change the beneficiary of the Trust itself (which would qualify as a nonprobate asset). He instead tried to remove the Property from the Trust. *CP 101*.

The briefing materials offered by Anderson repeatedly indicate that RCW Chapter 11.11 is to be applied “narrowly” and only to “certain

limited nonprobate assets.” *Artura* at 812; F.B. Prep. On S.B. 6181, at 1, 55th Leg., Reg. Sess. (Wash. 1998) (emphasis added). The Property is one such asset that is excluded from the statute.

The statute does not apply to real estate joint tenancies or to future interest deeds due to the drafter’s concerns regarding real estate title records. The drafters explain that the statute also excludes property interests passing under community property agreements because transfers under community property agreements supersede any disposition by will or will substitute.

Artura at 813.

The Property is precisely the type of real estate that the Legislature was concerned about. The Property was recorded by quitclaim deed in King County records as belonging to the Trust. *CP 181*. This recording provided notice to all, including Anderson, of the Trust’s interest in the property. *RCW 65.08.030*. To allow its transfer by Will would raise real estate title record issues. *Artura* at 813 (citing Comments to Testamentary Dispositions of Nonprobate Assets Provisions §11.11.040 (unpublished) (on file with author)). Therefore, it is clear that granting summary judgment to quiet title in the Property to the Trust would not frustrate the purpose of the Testamentary Disposition of Nonprobate Assets Act and would in fact be consistent with the Legislature’s intent.

Further, the Testamentary Disposition of Nonprobate Assets Act does not eliminate the need to substantially follow requirements specifically set forth in terms of a will substitute. *Artura* at 808. The Washington Court of Appeals stated that “[s]ubstantial compliance with the terms of the policy means that the insured has not only manifested an intent to change beneficiaries, but has done everything which was reasonably possible to make that change.” *Artura* at 808 (quoting Rice v. Life Insurance Co. of North America, 25 Wash. App. 479 at 482, 609 P.2d 1387 (1980)). Furst also makes clear that despite the presence of provisions in Chapter RCW 11.11, “[w]here the trust instrument specifies the method of revocation, only that method can be used.” Furst at 842 (quoting In Re Estate of Button, 79 Wash.2d 849, 852, 490 P.2d 731 (1971)). Here, Mr. Greene did make any attempt to revoke the Trust itself, nor did he substantially comply with the requirements for removal of the Property. *CP 131, Sect. 1.06; CP 136, Sect. 2.06; CP 150, Sect. 7.06*. The Testamentary Disposition of Nonprobate Assets Act would not be frustrated by a court decision to continue to uphold the requirement of substantial compliance.

**B. MOTION TO STRIKE ASSIGNMENTS OF ERROR:
Appellant Anderson is not entitled to appellate review
of the unsupported Assignments of Error he has
alleged.**

RAP 10.3 (a)(4) requires that a separate statement for each error along with the issues pertaining to that error be presented in the Appellant's brief. RAP 10.3 (a)(6) requires that argument and citations with legal authority and references be presented for each issue. A party waives an assignment of error when he fails to support it with argument or authority. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (citing Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986)). See also State v. Dennison, 115 Wn.2d 609, 629, 801 P.2d 193 (1990) (court need not consider arguments not developed in the briefs and for which a party has not cited authority); RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record).

Anderson alleges seven separate assignments of error by the trial court but fails to provide argument or authority for several. Appellant's Brief, pg. 2. In fact, his argument section takes up a new error not previously mentioned at all. Appellant's Brief, pg. 9.

Assignment of Error 1 alleged by Anderson is that the trial court erred in making Finding of Fact 8. Appellant's Brief, pg. 2. Finding of Fact 8 states:

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.

CP 243 at ¶8.

There has been no authority or argument offered by Anderson in his brief that Mr. Greene had any right, title or interest in the Property at any point after its conveyance to the Trust by quitclaim deed including all after acquired title in December 1995. Nor has Anderson offered any authority or argument to show that Mr. Greene acknowledged the Trust in either the Warranty Deed or his Will. There is no basis for his contention that the trial court made any error here. Therefore, this assignment of error has been waived. State v. Thomas at 874.

Assignment of Error 2 alleges that the trial court erred in declaring the testamentary transfer pursuant to Homer Greene's Last Will and Testament null and void. *CP 245 at ¶5*. Appellant's Brief, pg. 2. Again, Anderson provides no argument or authority on this issue. He does not explain why he thinks that it was improper for the trial court to find the testamentary transfer null and void. Therefore, this assignment of error has been waived. State v. Thomas at 874.

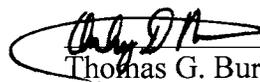
All contentions of error that Anderson makes based on the findings of the trial court should be stricken. "No error can be assigned upon an oral statement or written memorandum of the court, as the final decision in an action at law is the judgment signed, based upon the court's findings of fact and conclusions of law. Edward L. Eyre & Co. v. Hirsch, 36 Wash.2d 439 at 446, 218 P.2d 888 (1950).

III. CONCLUSION

There are three main reasons why quiet title should be awarded to the Trust and not to Anderson. First, Anderson has failed to demonstrate that RCW Chapter 11.11 can be applied to the Property because it is an asset expressly excluded from coverage. Second, Anderson has not satisfied the requirements to obtain title even if he were entitled to it under RCW Chapter 11.11 as he did not give notice or make a petition within the required time frame. Third, the bequest of the Property by Will was insufficient to remove the Property from the Trust. Therefore, the Appellate Court should affirm the trial court's ruling.

Dated this 24th day of January, 2011.

BURKE LAW OFFICES, INC. PS


Thomas G. Burke, WSBA No. 6577
Chelsy D. Harn, WSBA No. 42457

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 27th day of January, 2011 to the following counsel of record at the following address:

John M. Casey
Curran Law Firm
P.O. Box 140
Kent, WA 98035


Jeannie L. Kenyon
Paralegal to Thomas G. Burke and
Chelsy D. Harn