SUPREME COURT OF THE STATE OF WASHINGTON

No. 1037911

(Court of Appeals, Division I, No. 85676-6-I)

IN THE MATTER OF THE TONY VIVOLO RESIDUARY TRUST F/B/O NICHOLAS VIVOLO AND THE ESTATE OF NICHOLAS VIVOLO,

STEVEN VIVOLO, AS PERSONAL REPRESENTATIVE AND BENEFICIARY OF
THE ESTATE OF NICHOLAS VIVOLO
Appellant,

v.

CHRISTOPHER VIVOLO,
Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case is not exceptional, either factually or legally. Its resolution required the Court of Appeals to examine two unambiguous documents—the Last Will and Testament of Nicholas Vivolo and the Tony Vivolo Residuary Trust—to answer two key questions:

(1) Is Nicholas' Will ambiguous?

(2) Does Nicholas' Will manifest his intent to exercise his power of appointment over the Residuary Trust?

The Court of Appeals concluded that "Nicholas' will is not ambiguous and that he did not manifest an intent to exercise his power of appointment as to the Residuary Trust." *Matter of Tony Vivolo Residuary Tr.*, No. 85676-6-I, 2024 WL 5118405, at *9 (Wash. Ct. App. Dec. 16, 2024).

Disagreeing with this conclusion, Steven Vivolo petitions for discretionary review under RAP 13.4(b)(1), (2), and (4). However, the Petition does not qualify for review under any of these provisions as it fails to establish: (i) a conflict between the

Court of Appeals' decision and a Supreme Court decision (RAP 13.4(b)(1)); (ii) a conflict between the Court of Appeals' decision and a published Court of Appeals decision (RAP 13.4(b)(2)); or (iii) an issue of substantial public interest warranting Supreme Court review (RAP 13.4(b)(4)). Therefore, this Court should deny the Petition.

II. STATEMENT OF ISSUES

1. Does the Petition for Review fail to qualify for discretionary review under RAP 13.4(b)(1) because there is no conflict between the Court of Appeals' unpublished decision and any Supreme Court decision? **Answer: Yes - deny review.**

2. Does the Petition for Review fail to qualify for discretionary review under RAP 13.4(b)(2) because there is no conflict between the Court of Appeals' unpublished decision and any published Court of Appeals decision? **Answer: Yes - deny review.**

3. Does Petition for Review fail to qualify for discretionary review under RAP 13.4(b)(4) because it does not

involve an issue of substantial public interest that requires Supreme Court intervention? **Answer: Yes - deny review.**

III. COUNTERSTATEMENT OF THE CASE

Nicholas Vivolo possessed two distinct powers of appointment over shares of two separate trusts:

(1) A general power of appointment over his share of the Tony Vivolo Residuary Trust ("Residuary Trust") (CP 45) created under the Last Will and Testament of Tony Vivolo dated June 22, 1994[1] ("Tony Vivolo's Will") (CP 40-54); and

(2) A general power of appointment over his share of the Non-Exempt Trust (also known as the "Non-Exempt GSTT Trust" or the "Non-GSTT Exempt Trust") (CP

[1] The Residuary Trust was funded with the residue of Tony's estate which primarily consisted of a majority interest in real property on NE 45th Street near University Village which was leased to Safeway (hereafter, the "Safeway Property"). (CP 44, 269, ¶ 7.)

29) created under a 2013 TEDRA Agreement.[2] (CP 132.)

In his Last Will and Testament ("Nicholas' Will" or the "Will"), Nicholas exercised his power of appointment explicitly and exclusively with respect to the Non-Exempt GSTT Trust:

> I give, devise and bequeath the rest, residue and remainder of my estate to my brother, **STEVEN VIVOLO**. . . .This includes, but is not limited to, my power to appoint and my "appointive property" as outlined in the non-exempt GSTT Trust that I am to take free of trust as outlined in that certain TEDRA Agreement. . .

(CP 70) (first emphasis in original; underline emphasis added). Nicholas did not reference or allude to the Residuary Trust, its

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[2] Pursuant to a 2008 merger agreement, the Residuary Trust and two other trusts were merged into a single trust, called "the Vivolo Family Irrevocable Trust. (CP 267-274.) However, disputes arose following the 2008 merger, and litigation ensued. (CP 24.) To resolve the disputes, in 2013, Nicholas and the other beneficiaries of the Vivolo Family Irrevocable Trust entered into a TEDRA Agreement. (CP 23-38.) Among other things, the TEDRA Agreement extracted and reinstated the Residuary Trust "with the same terms as existed before the merger in 2008." (CP 30, ¶ D.6; CP 269.)

power of appointment, to all powers of appointment he possessed, or to all property subject to disposition. (CP 69-70.)

Both the Superior Court and the Court of Appeals concluded: Nicholas' Will was unambiguous, Nicholas manifested the intent to exercise his power of appointment only as to the Non-Exempt GSTT Trust, and Nicholas did not manifest his intent to exercise his power of appointment over the Residuary Trust. (CP 199-200); *Matter of Tony Vivolo Residuary Tr.*, No. 85676-6-I, 2024 WL 5118405, at *9 (Wash. Ct. App. Dec. 16, 2024).

The Court of Appeals also determined that the surrounding circumstances—some of which were evident from the Will itself—further demonstrated Nicholas' intent to not exercise his power of appointment over the Residuary Trust:

> The reference to the TEDRA Agreement establishes that **at the time Nicholas executed his will, he was aware that the TEDRA Agreement reinstated the Residuary Trust** and that the terms were those that existed prior to the 2008 merger, meaning he still had his power of

> appointment as to the Residuary Trust. **Despite knowing this, he elected only to mention the Non-Exempt GSTT Trust.** Had Nicholas intended for his residuary clause to encompass all his powers of appointment, **there would have been no need to expressly identify the Non-Exempt GSTT Trust**.

Matter of Tony Vivolo Residuary Tr., 2024 WL 5118405, at *8 (emphasis added).

Finally, the Court of Appeals concluded that Nicholas' residuary clause does not qualify as a "blanket-exercise clause" that could be construed as exercising all of his powers of appointment. *Id.* at *9. The Will does not contain language that could be characterized as a "blanket-exercise clause" because it does not expressly use the words "any power" or "any property" nor does it dispose of all property subject to Nicholas' disposition:

> [T]he language in Nicholas' will does not provide such a blanket-exercise clause as defined in RCW 11.95A.010(3).

Matter of Tony Vivolo Residuary Tr., 2024 WL 5118405, at *9

As a result, the Court of Appeals affirmed that Nicholas did not exercise his power of appointment over the Residuary Trust.

Steven's Petition for Review followed.

IV. LEGAL ARGUMENT

A. The Petition Fails to Meet RAP 13.4 Standards.

Steven petitions for Supreme Court review pursuant to RAP 13.4(b)(1), (2), and (4). However, his Petition fails to assign error to any portion of the Court of Appeals' decision, nor does he identify grounds for review under RAP 13.4(b). *See* Pet. at 18-22, §§ V.c-d. Supreme Court review cannot be had absent a qualifying basis under RAP 13.4(b). RAP 13.4(c)(7) (requiring a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument").

Furthermore, his petition does not qualify for review under RAP 13.4 or its sub-parts—Steven does not identify any conflict between the Court of Appeals' decision and a decision of the Washington Supreme Court (RAP 13.4(b)(1)), any conflict

between the Court of Appeals' decision and a published Court of Appeals decision (RAP 13.4(b)(2)), or any issue of substantial public interest (RAP 13.4(b)(4)). These failures disqualify Steven's petition from review under RAP 13.4.

B. The Petition Fails to Satisfy RAP 13.4(b)(1) Because There is No Conflict with a Supreme Court Decision.

Steven petitions for Supreme Court review under RAP 13.4(b)(1), which requires a conflict between the Court of Appeals' decision and a decision of the Washington Supreme Court. However, Steven fails to identify such a conflict.

He cites two Supreme Court cases:

- *In re Quick's Est.*, 33 Wn. 2d 568, 206 P.2d 489 (1949) for the general rule that when a specific bequest is found to be invalid, the bequest falls into the residuary estate; but, where a residuary bequest fails, the testator usually dies intestate as to that property. Pet. at 8.
- *Matter of Est. of Bergau*, 103 Wn. 2d 431, 693 P.2d 703 (1985) for the principle that a testator's intent must

be ascertained from the will's language, giving effect to all provisions. Pet. at 10.

Neither case conflicts with the Court of Appeals' decision. The issue in this case is not whether a failed bequest falls into the residuary estate as in *Quick*, but rather whether Nicholas' Will exercised his power of appointment over the Residuary Trust. The Court of Appeals correctly held that Nicholas' Will unambiguously exercised his power of appointment only over the Non-Exempt GSTT Trust, not the Residuary Trust.

Steven's reliance on *Bergau* is similarly misplaced. The Court of Appeals did precisely what *Bergau* instructs—it examined the Will's language as a whole, considered Nicholas' explicit reference to only one trust, and determined that his intent was clear. There is no Supreme Court decision holding that a residuary clause must be interpreted as exercising all possible powers of appointment unless expressly limited.

Because Steven does not identify a Supreme Court case that conflicts with the Court of Appeals' reasoning, only

asserting his own disagreement with that reasoning, his Petition fails under RAP 13.4(b)(1), and review should be denied.

C. The Petition Fails to Satisfy Either RAP 13.4(b)(2) or (4) Because There is No Conflict With a Published Court of Appeals' Decision, Nor Does This Case Involve an Issue of Substantial Public Interest.

Although he does not actually refer to either RAP 13.4(b)(2)or to RAP 13.4(b)(4), - or their standards, Steven appears to invoke those provisions as a basis for granting discretionary review. However, he fails to satisfy the requirements of either rule. The Court of Appeals' decision in this case does not involve an issue substantial public interest, nor does it conflict with a published Court of Appeals decision.

1. The Decision Does Not Present an Issue of Substantial Public Interest Under RAP 13.4(b)(4).

Steven argues that the Court of Appeals' ruling raises an issue of substantial public interest because it affects the interpretation of wills and trust. *See* Pet. at 10-13. However, RAP 13.4(b)(4) applies only when an issue affects a broad segment of the public beyond the parties to the case.

For example, in *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005), the Court found substantial public interest where the Court of Appeals' decision affected sentencing policies in all Pierce County criminal cases. No such widespread impact exists here. This case concerns the specific wording of a single individual's will and how it interacts with a particular trust.

The Court of Appeals' decision is fact-specific and does not announce a new rule of law or alter how Washington courts interpret wills. The ruling simply applies existing statutory and common law principles to determine whether Nicholas exercised his power of appointment over the Residuary Trust. Because the decision does not implicate a broadly significant legal issue, review is not warranted under RAP 13.4(b)(2).

2. The Decision Does Not Conflict with a Published Court of Appeals Decision under RAP 13.4(b)(2).

Steven suggests that the Court of Appeals' ruling narrows *First Interstate Bank of Washington v. Lindberg*, 49 Wn. App.

788, 746 P.2d 333 (1987), which held that a testator need not explicitly mention a power of appointment if their intent to exercise it is clear. Pet at 6, 16–17. However, the Court of Appeals did not narrow or modify *Lindberg*—it merely distinguished *Lindberg* from this case, based on the facts.

In *Lindberg*, the testator's will explicitly referred to "all property subject to my disposition," which included property controlled by a power of appointment. The Court found that such language demonstrated the testator's clear intent to exercise their power of appointment over all property. *Lindberg*, 49 Wn. App. at 795; *accord* RCW 11.95A.010(3) (defining "blanket-exercise clause").

In contrast, Nicholas' Will specifically referenced only one of his powers of appointment—his power of appointment over the Non-Exempt GSTT Trust —and omitted any mention of the Residuary Trust or its property.(CP 70.) The Court of Appeals concluded that this omission demonstrated his intent not to exercise his power of appointment over the Residuary Trust.

See Matter of Tony Vivolo Residuary Tr., No. 85676-6-I, 2024 WL 5118405, at *9 (Wash. Ct. App. Dec. 16, 2024).

Because *Lindberg* involved a general reference to all property subject to disposition, while Nicholas' Will referred to only a single trust, the Court of Appeals properly distinguished the cases rather than creating a conflict. Its decision is based on facts that are unique to this case and does not include any original statutory interpretation analysis that could create an issue of substantial public interest.

Because Steven has not identified a conflicting Court of Appeals decision, review is not warranted under RAP 13.4(b)(2).

D. The Court of Appeals Correctly Applied RCW 11.95A.010(3) and Washington Law.

Steven argues that Nicholas' residuary clause should be interpreted as a "blanket-exercise clause", meaning that it exercised all of his powers of appointment, including over the Residuary Trust. Pet. at 10–13. In determining that Nicholas did not use any "blanket-exercise clause", the Court of Appeals

properly rejected this argument under RCW 11.95A.010(3) and Washington common law. *See Matter of Tony Vivolo Residuary Tr.*, 2024 WL 5118405, at *9; *but see* Pet. at 10-13.

Washington recognizes two categories of exercise clauses: a "specific-exercise clause" and a "blanket-exercise clause." RCW 11.95A.010(3), (16). A specific-exercise clause is "a clause in an instrument which specifically refers to and exercises a particular power of appointment." RCW 11.95A.010(6). A blanket-exercise clause is a "clause in an instrument which exercises a power of appointment *and is not a specific-exercise clause*." RCW 11.95A.010(3) (emphasis added). A blanket-exercise clause includes a clause that:

> (a) Expressly uses the words "any power" in exercising any power of appointment the powerholder has;
>
> (b) Expressly uses the words "any property" in appointing any property over which the powerholder has a power of appointment; or
>
> (c) Disposes of all property subject to disposition by the powerholder.

RCW 11.95A.010(3).

Nicholas' Will clearly does not contain a "blanket-exercise clause":

> I give, devise, and bequeath the rest, residue, and remainder of my estate to my brother **STEVEN VIVOLO** . . . This includes, but is not limited to, my power to appoint and my "appointive property" as outlined in the non-exempt GSTT Trust that I am to take free of trust as outlined in that certain TEDRA Agreement, Page 7, Section 3.b as follows. . .

(CP 70) (first emphasis in original; underline emphasis added).

First, the precise reference to his power of appointment from the "non-exempt GSTT Trust" is a specific-exercise clause (i.e., a clause that "specifically refers to and exercises a particular power of appointment"). So, by definition, the clause cannot be deemed a blanket-exercise clause. RCW 11.95A.010(3) (a "'[b]lanket-exercise clause' means a clause in an instrument which exercises a power of appointment and is not a specific-exercise clause.")

Second the clause does not expressly use the words "any power" or "any property" in exercise the power or appointing property subject to the power of appointment. *Compare* RCW

11.95A.010(3) (use of the words "any power" or "any property" must be express), *with* CP 70 (Nicholas' will).

Third, although Nicholas could have disposed of his interest in the Safeway Property (i.e., the asset held in the Residuary Trust), he did not. Likewise, Nicholas' Will does not dispose of all property subject to his powers of appointment. *Compare* CP 69–70 (Nicholas' Will), *with* RCW 11.95A.010(3)(c) (a blanket-exercise clause includes a clause that "[d]isposes of all property subject to disposition by the powerholder"), *and with Lindberg*, 49 Wn. App. at 795 ("References in the will to the property subject to the power or to the instrument creating it can supply the necessary intent to exercise the power.").

As the Court of Appeals found, "the language of Nicholas' will manifested the intent to exercise his power of appointment only as to the Non-Exempt GSTT Trust. Certainly, Nicholas could have included reference to the Residuary Trust just as he

had the Non-Exempt GSTT Trust." *Matter of Tony Vivolo Residuary Tr.*, 2024 WL 5118405, at *9.

The Court of Appeals correctly concluded that "the language in Nicholas' will does not provide such a blanket-exercise clause as defined in RCW 11.95A.010(3)." *Matter of Tony Vivolo Residuary Tr.*, 2024 WL 5118405, at *9.

E. The Court of Appeals Correctly Determined Nicholas' Residuary Clause Did Not Control the Disposition of the Residuary Trust.

Steven asserts that because Nicholas did not name the takers in default in his Will, he must have intended to exercise his power of appointment over the Residuary Trust. Steven is wrong both as a matter of fact and as a matter of law.

First, the Court of Appeals considered the surrounding circumstances when making its decision. The Court explicitly noted that Nicholas' reference to the TEDRA Agreement "establishes that at the time Nicholas executed his will, he was aware that the TEDRA Agreement reinstated the Residuary Trust and that the terms were those that existed prior to the 2008

merger, meaning he still had his power of appointment as to the Residuary Trust. Despite knowing this, he elected only to mention the Non-Exempt GSTT Trust." *Matter of Tony Vivolo Residuary Tr.*, 2024 WL 5118405, at *8.

Second, a trust is a non-probate asset, which does not typically pass through a testator's residuary clause. *See* RCW 11.11.020. "A testator who bequeaths the rest, residue and remainder of [his] estate [to] testamentary beneficiaries has not changed the beneficiary designations of his nonprobate assets." *Manary v. Anderson*, 176 Wn.2d 342, 346, 292 P.3d 96 (2013) (internal quotation marks omitted). Thus, a residuary clause that does not explicitly reference a power of appointment does not control the disposition of a trust's assets.

Third, the terms of the Residuary Trust govern default beneficiaries. Because Nicholas did not clearly exercise his power of appointment over the Residuary Trust, the Residuary Trust determines the takers in default, not Nicholas' residuary

clause.[3] Even if Nicholas' residuary beneficiary designation were relevant, it does not overcome the unambiguous language of the residuary clause. The Court of Appeals correctly held that because Nicholas did not exercise his power of appointment, the Residuary Trust's default provisions apply, not Nicholas' Will:

> The language that manifests a contrary intent as to Nicholas' exercise of that power is the language in Nicholas' will in which he expressly exercised his power of appointment as to the Non-Exempt GSTT Trust without any mention of the Residuary Trust, the subject property of that Trust, or the instruments that granted him power of appointment as to that trust, whether that be Iona's will or Tony's will.

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[3] Following its finding that Nicholas had not manifested an intent to exercise his power of appointment over the Residuary Trust, the Superior Court ordered that the assets held in the Residuary Trust "f/b/o Nick Vivolo shall pass ***pursuant to the terms of the Tony Vivolo Residuary Trust***," and, therefore, pass to the takers in default identified in the Residuary Trust. CP 199-200 (emphasis added). In other words, pursuant to the Superior Court's order, upon its reinstatement, the terms of the Residuary Trust controlled, not Iona's will. Additionally, in presenting to the Court of Appeals, "[b]oth parties cite[d] to Tony's will as the source of Nicholas' power of appointment." *Matter of Tony Vivolo Residuary Tr.*, 2024 WL 5118405, at *7. Steven cannot now reverse the affirmative factual representation made to the Court of Appeals.

Matter of Tony Vivolo Residuary Tr., 2024 WL 5118405, at *8.

Thus, Steven's argument misunderstands both the facts and Washington law.

F. The Court Should Award Respondent Christopher Vivolo His Reasonable Attorneys' Fees and Costs Incurred in Defending Against the Petition for Review.

RAP 14.2 grants the Court discretion to award reasonable attorneys' fees and costs from any party or from estate or trust assets. The Court should award Respondent his attorneys' fees and costs incurred in responding to the Petition for Review. First, Respondent prevailed both in the trial court and at the Court of Appeals. Second, Steven's Petition for Review lacks merit and fails to even identify any qualifying basis for review under RAP 13.4(b). Respondent should be awarded his reasonable attorneys' fees and costs incurred in having to relitigate these issues a third time. Respondent respectfully requests that this Court award him attorneys' fees and costs from the portion of Nicholas' share of the Residuary Trust to be distributed to Steven.

V. CONCLUSION

The Court of Appeals correctly determined that Nicholas' Will did not exercise his power of appointment over the Residuary Trust. Steven fails to show that the decision conflicts with any Supreme Court decision or published Court of Appeals decision, nor does he identify an issue of substantial public interest.

For these reasons, the Court should deny the Petition for Review for failing to qualify for discretionary review under RAP 13.4(b)(1), (2), or (4) and should award Respondent his reasonable attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 13th day of February 2025.

STOKES LAWRENCE, P.S.

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CERTIFICATE OF COMPLIANCE AND WORD COUNT (RAP 10.4, RAP 18.17)

The text of this brief consists of 3,436 words as counted by the program used to generate the brief.

DATED: February 13, 2025 at Seattle, Washington.

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CERTIFICATE OF FILING AND SERVICE

I certify that on this date, I caused a true and correct copy of the foregoing to be served on the following counsel of record by filing the same with the Washington State Appellate Courts Electronic Filing Portal, which will send a copy to:

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