FILED
SUPREME COURT
STATE OF WASHINGTON
1/14/2025
BY ERIN L. LENNON
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Court of Appeals
Division I
State of Washington
1/14/2025 11:37 AM

Case #: 1037911

SUPREME COURT OF THE STATE OF WASHINGTON
No. _____

(Court of Appeals, Division 1, No. 85676-6-1)

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,

Christopher Vivolo,

Respondent.

PETITION FOR REVIEW

Attorney for Steven Vivolo:
Holly A. Surface
612 South 227th Street
Des Moines, WA 98198

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I. INTRODUCTION AND IDENTITY OF PETITIONER

Steven Vivolo ("Steven")[1] is the brother and sole beneficiary of Nicholas Vivolo, as well as the undisputed appointee of Nicholas' power of appointment with respect to a Non-Exempt GSTT Trust and the appointee of Nicholas' power of appointment with respect to the Tony Vivolo Residuary Trust ("Residuary Trust").

At issue is whether Nicholas exercised his power of appointment with respect to the Residuary Trust. RCW 11.95A.010(3), pertaining to blanket exercise clauses, and RCW 11.95A.200, pertaining to the requirements necessary to exercise powers of appointment, are under review and are matters of first impression and substantial public interest in this matter.

[1] Since many involved individuals share the same last name, first names only are used for simplicity. No disrespect is intended.

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In addition, the Court of Appeals has misapplied well-established Washington Supreme Court authority as well as Washington Court of Appeals opinions in support of the instant opinion; thus, this Court should grant review.

II. COURT OF APPEALS DECISION

Division I filed its opinion on December 16, 2024. *See* Appendix at pp A-1 – A-17. The trial court's decision is reproduced at A-18 – A -22.

III. ISSUE PRESENTED FOR REVIEW

Did the testator, Nicholas Vivolo, intend to exercise his power of appointment with respect to the Tony Vivolo Residuary Trust by use of the language "this includes but is not limited to" when such language could not possibly refer to anything else?

IV. STATEMENT OF THE CASE

The Court of Appeals' opinion is generally correct with respect to its recitation of the facts and procedure. Op. pp 1 – 5.

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However, some necessary facts were omitted or require more emphasis as outlined below.

At the time of his death, Nicholas' estate had a beneficial interest in three trusts: (1) the GSTT-Exempt Trust for the benefit of Nicholas Vivolo, CP 15; (2) the Non-Exempt GSTT Trust for the benefit of Nicholas Vivolo, CP16; and (3) the Vivolo Family (Tony Vivolo) Residuary Trust for the benefit of Nicholas Vivolo. CP 8.

Upon Nicholas' death, the assets in the GSTT-Exempt Trust passed directly to the next generation without becoming a part of Nicholas' taxable estate. Thus, Nicholas' estate held only its beneficial interests in the GSTT Non-Exempt Trust and the Residuary Trust. The estate's interest in each trust was a power of appointment. Each of these trusts was a nonexempt trust with respect to the generation skipping transfer tax, with that tax exemption having been fully utilized in the GSTT Exempt Trust. Furthermore, pursuant to Iona's will, the terms of both

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the Non-Exempt GSTT Trust and the Residuary Trust were identical.

In his will, Nicholas identified his nearest relatives as his brothers, Steven and Vance, noting his brother Ronald was deceased. He did not mention his deceased brothers, Vincent or Joseph, who are the fathers of Christopher and Joe Woody, respectively. CP 68. Neither Christopher nor Joe Woody were mentioned in Nicholas' will.

The result of the trial court's ruling was that significant assets, ¼ of approximately $1,290,377.09, CP 9, pass to Nicholas' brother Vance, who is identified as family in Nicholas' will, but for whom he did not otherwise provide, CP 70. In addition, ¼ of $1,290,377.09, CP 9, passed to each of Christopher and Joe Woody, Nicholas' nephews, who are not mentioned as family in his will, and whose deceased fathers are also not mentioned in Nicholas' will, and for whom he did not otherwise provide. CP 70. Finally, Steven would also receive

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only ¼ of $1,290,377.09, CP 9, when Nicholas' clear intent was to leave Steven everything he had, including both property and authority. CP 70. In the event Steven predeceased, Nicholas did not intend to benefit the individuals benefitted by the order currently on appeal; rather, he left his entire residuary estate to Steven's family. *Id.*

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should address four issues: (1) the Court of Appeals misapplied the effect of the "separate writing" to the will in support of its conclusion that Nicholas did not exercise his power of appointment with respect to the Residuary Trust, contrary to Supreme Court authority related to specific and residuary bequests ; (2) Nicholas did exercise his power of appointment with respect to the Residuary Trust pursuant to RCW 11.95A.010(3) and RCW 11.95A.200, the construction of which is a matter of first impression and substantial public

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interest; (3) the Court of Appeals unnecessarily narrowed the holding of *First Interstate Bank of Wash. v. Lindberg*, 49 Wn. App. 788, 795, 746 P.2d 333 (1987) to apply only to single and straightforward trusts or estates; and (4) the Court of Appeals did not analyze the circumstances surrounding Nicholas' execution of his will, which support the conclusion that Nicholas intended to exercise the power of appointment with respect to the Residuary Trust.

a. The Court of Appeals misapplied the effect of the "separate writing" to the Will.

The Court of Appeals determined that Nicholas' use of the words "this includes, but is not limited to," refers to additional tangible personal property Nicholas may desire to leave Steven, by way of a separate writing to the will, as opposed to exercise of his power of appointment with respect to the Residuary Trust. This conclusion is utterly at odds with well-established Washington precedent and is reviewable under RAP 13.4(b)(1).

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Article IV of Nicholas' will states, "I give all my interest in certain items of tangible personal property to the persons designated in a separate writing, which is signed by me and included in this Will on page 9 that describes those items of property and directs their disposition…" CP 69.

Article V of Nicholas' will provides:

> ***After payment of taxes and liabilities, and other expenses of administration, I give, devise, and bequeath the rest, residue and remainder of my estate to my brother, STEVEN VIVOLO***. If Steven Vivolo predeceases me or we die in a common accident, I give, devise and bequeath the rest, residue and remainder of my estate to Suluama T. Vivolo-Laumea Vivolo and my nieces and nephews, Machael A. Vivolo, Faith C. Vivolo, Anthony M. Vivolo and Kathleen Kay M. Vivolo, equally to share and share alike….

CP 118. Nicholas then left specific instructions pertaining to the power(s)[2] of appointment.

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[2] While it is not necessary to refer to both powers individually… it is done so here for the Court's ease of reference.

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> ***<u>This includes, but is not limited to</u>,*** 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 118. ***<u>Emphasis added.</u>***

Thus, any items of tangible personal property not specifically designated on the separate writing would fall to the residue of the estate. This is consistent with well-established Washington precedent. When a specific bequest is found to be invalid, the bequest falls into the residuary estate; but, where a residuary bequest fails, the testator will usually die intestate as to it. *In re Quick's Est., 33 Wn. 2d 568, 206 P.2d 489 (1949)*. Accordingly, any property that is not specifically bequeathed or devised will fall to the residue of the estate.

The Court of Appeals' reasoning creates an impossible result. "Nicholas allowed himself the ability to later dispose of tangible personal property. Viewed in the context of the entire will, the phrase "not limited to" suggests that he could leave

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additional personal property to Steven beyond his power to appoint and his appointive property…". Op. pp. 15-16.

However, Steven is the recipient of all property, both real and personal, not otherwise bequeathed or devised in the will pursuant to the residuary clause. The separate writing related to tangible personal property could not give Steven additional personal property because he receives it all anyway. The only purpose of the pages of the separate writing would be if Nicholas wanted to leave tangible personal property to someone *other than* Steven. Thus, the phrase, "this includes, but is not limited to" can only refer to additional authority Nicholas desires to leave Steven because Steven will receive all property, including tangible personal property, without the necessity of separate writing.

Nicholas can only give Steven authority with respect to two powers of appointment, the Non-Exempt GSTT Trust, and the Residuary Trust. Nicholas clearly appoints Steven with respect

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to the Non-Exempt GSTT Trust. The only other possible thing that the phrase, “this includes, but is not limited to,” could refer to is appointment with respect to the Residuary Trust.

In Washington, the Testator's intent must, if possible, be ascertained from the language of the will itself, considered in its entirety, with effect given every part thereof. *Matter of Est. of Bergau*, 103 Wn. 2d 431, 693 P.2d 703 (1985). Thus, the Court of Appeals must give effect to the words ‘this includes, but is not limited to,” but must not rely on impossibilities to support its interpretation.

b. The Court of Appeals’ mistaken interpretation of the blanket exercise clause is an issue of statutory construction of first impression and of substantial public interest, meriting this Court’s review pursuant to RAP 13.4(b)(4).

As set forth in RCW 11.95A.010(3):

> (3) "Blanket-exercise clause" means a clause in an instrument which exercises a power of appointment and is not a specific-exercise clause. The term includes a clause that:

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> (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).

The Court of Appeals determined that Nicholas' use of the phrase, "includes, but is not limited to," is not a blanket exercise clause, but instead he referenced only the Non-Exempt GSTT Trust. Op. 16-17. This is a very narrow interpretation of both the statute and the phrase, when each are intended to be interpreted broadly and "not limited".

This Court reviews the meaning of statutes de novo. *State v. Wentz,* 149 Wn.2d 342, 346, 68 P.3d 282 (2003). The purpose of statutory interpretation is to effectuate legislative intent. *State v. Evans,* 177 Wn.2d 186, 192, 298 P.3d 724 (2013). The Court does so by looking at the plain language of the statute, considering the text of the provision and its context

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within the statute, related provisions, and the statutory scheme. *Id.* Here, the phrases "any power" and "any property" should not be construed to be limited to just that language as other phrases, such as "all power" and "all property" and "my power" and "my property" as well as other possibilities, provide the same effect. Indeed, part (c) specifically anticipates other phrases that dispose of all property subject to disposition.

In resolving an issue of statutory construction, courts first look to the plain meaning of the statute. *Matter of Dependency of E.M.*, 197 Wn.2d 492, 499, 484 P.3d 461 (2021). The statute's "plain meaning" is "discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). When the statute's meaning is unambiguous, no further inquiry is needed, and the court must give effect to that plain meaning as an expression of legislative

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intent. *Id.*at 9-10. Courts "resort to the aids of statutory construction" only if the statute is ambiguous. *Id.*at 12.

Here, the unambiguous language of RCW 11.95A.010(3) allows for very broad interpretations of language that disposes of all property subject to disposition by the powerholder. As argued previously, the phrase, "includes, but is not limited to," could not possibly refer to property in addition to the estate residue – which gave all property to Steven. It could only refer to authority in addition to the power of appointment with respect to the Non-Exempt GSTT Trust.

In addition, the TEDRA Agreement reinstated the Residuary Trust to those that existed prior to the merger in 2008. CP 30. That would refer to the terms of Iona's 2005 will, in which she exercised her power of appointment granted to her by Tony as to his Residuary Trust. As expressed in Iona's will, "the Shares from my husband's Residuary Trust described in this Article V shall be administered and distributed in the same

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manner as the Shares of the Non-GSTT Exempt Trust described in Article II, paragraph 3.". Op. p. 13. Thus, Nicholas' specific reference to the Non-Exempt GSTT Trust captures the exact language necessary to exercise the power of appointment with respect to both trusts.

Furthermore, the Court of Appeals did not engage in any analysis of whether it would be necessary to use the word "powers" instead of "power", where "power" is a noncount noun[3] and refers to the same right but is invoked as to multiple instruments. The unambiguous reading of the language results in a finding that Nicholas intended that "my power to appoint" be expressed and exercised, and the property associated with such power to be given to Steven.

Furthermore, "my power to appoint" is separate and distinct from "my appointive property as outlined in the Non-Exempt GSTT Trust…" CP 70. Appointive property in the

[3] 'Water' and Other Noncount Nouns | Merriam-Webster

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Non-Exempt GSTT Trust is distinguished from power to appoint by second use of the word "my" which invokes the last antecedent rule, in which qualifying words and phrases, both grammatically and legally refer to the last antecedent. *In re Seaton's Estate,* 4 Wn.App. 380, 481 P.2d 567 (1971).

In *Seaton*, the will provided that the son "shall have the right to purchase…the one-half interest of my daughter in the farm owned by me… I hereby fix the value of said property at the sum of $22,000." *Id.* The issue was whether $22,000 was intended as the value of the farm or the one-half interest in the farm. Under the last antecedent rule, the $22,000 value was apparently intended to apply to the entire farm, with the one-half interest valued at $11,000. *Id.* Similarly, the antecedent "in the Non-Exempt GSTT Trust" refers only to "my appointive property." This is further amplified by lack of a comma between "my power to appoint and my appointive property….". The Court of Appeals has rewritten Nicholas's will from:

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"this includes but is not limited to, my power to appoint and my appointive property as outlined in the Non-Exempt GSTT Trust"; to

"this includes but is not limited to, my power to appoint and appointive property as outlined in the Non-Exempt GSTT Trust";

The two readings create dramatically different effects. Thus, removing the second "my", reading additional limitations into the language, is an error of law particularly where the Court found the language of the will was unambiguous. *Matter of Est. of Wendl*, 37 Wn. App. 894, 897.

In addition, the Court of Appeals applied an unnecessarily limiting interpretation of *First Interstate Bank of Wash. v. Lindberg*, 49 Wn. App. 788, 795, 746 P.2d 333 (1987), which stands for the proposition that a power of appointment need not be expressly mentioned if the intent to exercise it is otherwise clear. *Id.* The Court of Appeals

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determined that *Lindberg* was distinguishable because the Court in that case was only dealing with a straightforward situation involving power of appointment with respect to a single trust. Op. p. 16.

However, although the case at bar involves the exercise of a power of appointment with respect to two trusts, *Lindberg* is still applicable and the instant Opinion is therefore in conflict. While the crux of the issue is whether Nicholas' exercise of "my power to appoint" applies to a power of appointment with respect to either one or two trusts, the use of the phrase, "includes, but is not limited to" provides the clear intent to exercise the power of appointment with respect to both trusts, because the phrase could not possibly refer to additional property. Thus, this Opinion incorrectly limits the applicability of *Lindberg* to issues involving only one power of appointment.

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c. Nicholas' exercise of the power of appointment with respect to the Residuary Trust is in compliance with RCW 11.95A.200.

> A power of appointment is exercised only:
> (1) If the instrument exercising the power is valid under applicable law;
> (2) If the terms of the instrument exercising the power:
> (a) Manifest the powerholder's intent to exercise the power; and
> (b) Subject to RCW 11.95A.230, satisfy the requirements of exercise, if any, imposed by the donor; and
> (3) To the extent the appointment is a permissible exercise of the power.

In this case, the instrument exercising the power, Nicholas' Last Will and Testament, is valid and has been properly admitted to probate. The terms of the will manifest Nicholas's intent to exercise the power, as discussed above, it would be impossible for the phrase, "includes, but is not limited to," to refer to additional property when Steven receives all property under the residuary clause, and Nicholas may only grant a power of appointment with respect to two trusts. The phrase, "includes, but is not limited to," can only refer to the

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power of appointment with respect to the trust not specifically mentioned.

There are no requirements of exercise imposed by Iona, so a review of RCW 11.95A.230 is not necessary. CP 19. There is no question that the appointment is a permissible exercise of the power. RCW 11.95A.240(1) provides, "[a] powerholder of a general power of appointment that permits appointment to the powerholder of the powerholder's estate may make any appointment, including an appointment in trust or creating a new power of appointment, that the powerholder could make in disposing of the powerholder's own property." *RCW 11.95A.240(1).* In this case, the powerholder, Nicholas, may make any appointment that he could make in disposing of his own property. He has devised the asset to his brother, Steven, a proper exercise of the power of appointment.

d. The Court of Appeals did not analyze the circumstances surrounding the will's execution.

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The Court of Appeals outlined Washington law pertaining to the paramount duty of the court in construing a will, which is to give effect to a testator's intent. *Bergau,* 103 Wn.2d 431,435. This includes consideration including an awareness of the surrounding circumstances when the will was drawn. *In re Estate of Riemcke,* 80 Wn.2d 722, 728, 497 P.2d 1319 (1972). Circumstances to be considered include whether the testator intended a class gift; the fact of whether there is a natural class among the beneficiaries, the relationship of the testator to the objects of his bounty, the subject matter of the gift, and the skill of the draftsman of the will. *See, e.g. In re Estate of Newbert,* 16 Wn.App. 327, 555 P.2d 1189 (1976). *See* Op. pp. 11-12.

Additionally, the court may consider evidence of the testator's relationship to the parties named in the will, his disposition as evidenced by provisions made for them, and the general trend of his benevolence. *Bergau at 436.* The Court of

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Appeals did not, however, analyze the law with the facts of the case in this respect.

The parties to benefit if Nicholas did not exercise the power of appointment (with respect to the Residuary Trust) are given minimal, if any, mention in the will. Neither Christopher, Joe Woody, nor Vance are included among the general trend of Nicholas' benevolence. No disposition of either property or authority is made for them. Furthermore, no mention is made of either Christopher, Joe Woody, or Nicholas's brothers, Vincent or Joseph, who are the fathers of Christopher and Joe Woody, respectively. Nicholas does, however, mention his deceased brother, Ronald. CP 68. The result of the trial court's ruling is that individuals who are not among the deceased's "general trend of benevolence" and are scantly, if at all, mentioned in Nicholas Vivolo's will, receive a substantial inheritance of approximately $322,594.27.[4].

[4] One fourth of $1,290,377.09

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The Court may also properly consider the testimony of Jason Crummer as it relates to the relationship between the testator and the parties named in the will. Such testimony reveals that Steven, along with Steven's wife and children, were the only potential takers under the will, or the exercise of a power of appointment, who had an active role in Nicholas' life.

> Knowing the VIVOLO family for so long and being aware of some family dynamics, NICK's position regarding the distribution of his property came as no surprise to me. NICK had no kids, had never been married. STEVEN and his family were the only family members who were involved in NICK's life and affairs. STEVEN visited him on a regular basis, TERESA (STEVEN's wife) helped him with taxes and financial matters, ANTHONY, FAITH, KATHLEEN, and VANESSA (STEVEN's children) helped with his care and daily needs.

CP 187.

The circumstances surrounding the will's execution, as well as the four corners of the will, support the conclusion that Steven was the only intended beneficiary of Nicholas' will, with respect to both authority and property.

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VI. CONCLUSION

Based on the foregoing, petitioner, Steven Vivolo, respectfully requests that review be granted pursuant to RAP 13.4(b)(1), (2), and (4).

SIGNED AND DATED this 14th day of January 2025, at Des Moines, Washington.

Presented by:

DES MOINES ELDER LAW

"I certify that this pleading contains a word count of 4,134 excluding the parts of the document exempted from word count, consistent with RAP 18.17(b)."

By: ***Holly A. Surface***_____

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the date and place below, I caused a true and correct copy of the document to which this certificate is attached to be served upon all parties and/or their counsel of record in the manner indicated below:

Christopher Vivolo c/o Ann T. Wilson Stokes Lawrence P.S. 1420 5th Ave, Ste 3000 Seattle, WA 98101	☐ Personal Service ☐ U.S. Mail ☐ Certified Mail ☐ Hand Delivered ☒ Court E-Service if Opted ☐ E-Mail: ann.wilson@stokeslaw.com
Partners in Care c/o Kameron L. Kirkevold Helsell Fetterman LLP 1001 4th Ave, Ste 4200 Seattle, WA 98154	☐ Personal Service ☐ U.S. Mail ☐ Certified Mail ☐ Hand Delivered ☒ Court E-Service if Opted ☐ E-Mail: kkirkevold@helsell.com

SIGNED AND DATED this 14th day of January 2025, at Des Moines, Washington.

BY: Scott Ensminger, Paralegal

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APPENDIX

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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of: TONY VIVOLO RESIDUARY TRUST F/B/O NICOLAS VIVOLO and the ESTATE OF NICK VIVOLO	No. 85676-6-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — At issue in this appeal is whether Nicholas Vivolo exercised his power of appointment in his will as to his share of the Tony Vivolo Residuary Trust, that was first created by his father. Based on our de novo review of Nicholas'[1] will, we hold that he did not exercise his power of appointment and affirm.

FACTS

Tony Vivolo and Iona Vivolo were married and had six children: Ronald, Steven, Nicholas, Joseph, Vance, and Vincent. The family also included several grandchildren, including Christopher, the son of Vincent, who predeceased Iona. In 1970 Tony and Iona created the family Irrevocable Trust for the benefit of their children. In Tony's 1994 will, he granted each of his children, except Steven, a power of appointment as to their individual share of Tony's Residuary Trust. Tony expressly disinherited Steven. Two

[1] Because multiple family members share the same surname, for clarity and consistency we refer to all family members by their first names as listed in their parents' wills.

years later, Tony executed a second codicil to his will and no longer excluded Steven. In this codicil, Tony granted Iona a special power of appointment to designate and appoint by her last will the manner in which Tony's Residuary Trust shall be divided and distributed into shares for their surviving children and the lawful surviving descendants of any deceased child of theirs. Though Tony expressed his wishes as to how the shares were to be distributed, he expressly stated those wishes were "not binding" on his wife.

By 2005, Iona was a widow and two of her sons had already passed. In addition to the family trust, and Tony's Residuary Trust, she also had created a GSTT Exempt Trust, and a Non-GSTT Exempt Trust.[2] Iona executed her will, dated July 28, 2005, and granted all of her children, whether living or deceased, a general power of appointment as to the GSTT Non-Exempt Trust. That grant stated:

> (c) *General Power of Appointment:* Each Child shall have the power to appoint in his Will to such appointee or appointees whomsoever, on such terms and in such amounts as he shall determine, all of the remainder of his or her Share of the Non-GSTT Exempt Trust ("the Appointive Property"). To the extent a Child fails to exercise such power, the Appointive Property shall be distributed as otherwise provided in subparagraphs (iii) and (iv) of paragraph 2(b) above. I intend this power of appointment to be a taxable "general power of appointment" as described in IRC Sec. 2041 exercisable in favor of the Child's creditors, his estate, or the creditors of his estate.

Iona also exercised her power of appointment as to Tony's Residuary Trust that Tony had granted her. Her will stated:

> EXERCISE OF LIMITED POWER OF APPOINTMENT
>
> I hereby elect to exercise the power of appointment to designate the shares of the Residuary Trust established under the Will of my husband, Tony Vivolo, that was vested in me pursuant to the Second

[2] Within the context of trusts and asset transfers, GSTT stands for Generation-Skipping Transfer Tax.

> Codicil to the Last Will and Testament of Tony Vivolo, dated March 28, 1996,[3] as follows: The Residuary Trust shall be divided into equal Shares, one Share for each of my Children who survives me and one Share for the issue of a Child who does not survive me, in the same manner as provided in Article II, paragraph 3(a), except that these Shares of the Residuary Trust shall not be adjusted to account for Lifetime Benefits as I have made what I consider to be the appropriate adjustments in paragraph 3(a) of Article II of this Will with respect to the Shares of my own estate. In all other respects, the Shares from my husband's Residuary Trust described in this Article V shall be administered and distributed in the same manner as the Shares of the Non-GSTT Exempt Trust described in Article II, paragraph 3.

Later, while Iona was still alive, all three trusts (the family Irrevocable Trust, Tony's Residuary Trust, and the Non-GSTT Exempt Trust) were merged in 2008 into a Family Irrevocable Trust and converted into six separate trusts. After Iona died, litigation ensued that led to a court-approved TEDRA Agreement that involved all living beneficiaries and representatives of future children of all current beneficiaries.[4] Nicholas, Steven, and Christopher were represented by counsel. The Agreement expressly stated its purpose, which included to "correct the effect of the 2008 merger, which merged trusts with varying and conflicting provisions."[5]

[3] Tony's second codicil to his will is dated March 28, 1996. The second codicil refers to his first codicil dated November 22, 1995. His first codicil is related to Tony's 1994 will.

[4] The Order Approving the TEDRA Agreement was entered after considering objections to the "Amended 'Reform TENDRA Agreement.'" The order approved the TEDRA Agreement attached as "Exhibit A" to the order. The record does not include "Exhibit A." However, both parties cite to the same TEDRA Agreement that is in the record as the court-approved TEDRA Agreement.

[5] The other stated purposes were to: 2) clarify the duties of the Trustee, 3) allow Chris Vivolo, who has very different needs than the other beneficiaries, to enjoy the benefits of trusts that have fewer links to the trusts for the other beneficiaries, 4) allow beneficiaries with greater cash needs to obtain that cash, while providing a method for beneficiaries with fewer cash needs to accumulate funds which may be used to purchase other trust property or diversify, 5) avoid further litigation.

The Agreement states, in relevant parts:

A. Definitions

....

The "Non-Exempt Trusts" are defined as the Vivolo Family Irrevocable Trusts for the benefit of Ron Vivolo, Steve Vivolo, Nick Vivolo, Vance Vivolo, Joseph Vivolo and Chris Vivolo, which are the surviving trusts after the merger of the Vivolo Family Irrevocable Trust, created by Iona Vivolo during her life, the Tony Vivolo Residuary Trust created in his Last Will and Codicils, and the Non-GSTT Exempt Trust created under the Last Will and Testament of Iona Vivolo. Initially these were three single trusts each with six separate shares, and after the 2008 merger the single Vivolo Family Irrevocable Trust, with six shares, was converted to six separate trusts....

3. Provisions regarding the Non-Exempt trusts.[6]

....

b. Article V 2 (e) of the Non-Exempt trusts shall be amended to read as follows:

"(e) *General Power of Appointment.* Whether or not a Child survives the Grantor, each Child shall have the power to appoint in his Will to such appointee or appointees whomsoever, on such terms and in such amounts as he shall determine, all of the remainder of his Share ("the Appointive Property"). To the extent a Child fails to exercise such power, the Appointive Property shall be distributed as otherwise provided in this Agreement. I intend this power of appointment to be a taxable "general power of appointment" as described in IRC Sec. 2041 exercisable in favor of the Child's creditors, his estate, or the creditors of his estate."

c. Article V 2 (c) of the Non-Exempt trusts is amended to read as follows:

"(c) *Death of Child.* Upon the death of a Child, subject to the provisions of paragraphs (d) and (e) below, the Trustee shall distribute any then remaining portion of the Child's Share to the issue of that Child then living by right of representation, or, if there is no issue of that Child then living, two thirds to the living issue of the other Children by right of representation and one third to the descendants of Iona Vivolo by right of representation; provided, that if the Trustee is then holding another Share for the primary benefit of another Child or any issue, that person's portion shall be added to the Share of that beneficiary and shall be held and distributed as a part of that Share."

....

6. Provisions regarding the Tony Vivolo Residuary Trust. The Tony Vivolo Residuary Trusts shall be reinstated for the four surviving sons of Tony, with the same terms as existed before the merger in 2008. To that

[6] The modified provisions relate to the Vivolo Family Limited Liability Company (LLC) as contemplated in the 2005 Vivolo Family Irrevocable Trust Agreement.

> end, each of the Non-Exempt Trusts for Steve, Ron, Nick and Vance, which own 13.97% of the 3020 NE 45th St LLC shall distribute to the Residuary Trusts 7.9767% each and retain 5.9933% each.

In October 2017, Nicholas executed his will. In it, he reserved the ability to dispose of his tangible personal property by stating that he gave "all my interest in certain items of tangible personal property to the persons designated in a separate writing, which is signed by me and included in this Will on page 9 that describes those items of property and directs their disposition." He also provided in his will the following:

> After payment of taxes and liabilities and other expenses of administration, I give, devise and bequeath the rest, residue and remainder of my estate to my brother, STEVEN VIVOLO.[7]... 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: *(e) General Power of Appointment.* Whether or not a Child survives the Grantor, each child shall have the power to appoint in his Will to such appointee or appointees whomsoever, on such terms and in amounts as he shall determine, all of the remainder of his share ("the Appointive Property"). To the extent child fails to exercise such power, the Appointive Property shall be distributed as otherwise provided in this Agreement. I intend this power of appointment to be a taxable "general power of appointment" as described in IRC Sec. 2041 exercisable in favor of the Child's creditors, his estate, or the creditors of his estate."

After Nicholas died in 2020, his will was admitted to probate. At the time of his death, page 9 of his will, which provides the directions for disposition of his tangible personal property, was blank. Steven was appointed as personal representative.

In January 2023, Partners In Care (PIC), the trustee of the Vivolo family trusts and manager of the Vivolo Family LLC, sought court approval for an interim distribution from trusts that were for the benefit of Nicholas. PIC specifically questioned whether the

[7] The will provided that if Steven predeceased Nicholas, or he and Nicholas died in a common accident, the rest, residue and remainder of his estate would go to Steven's immediate family.

provisions in his will met the requirements to exercise his power of appointment with regard to the Tony Vivolo Residuary Trust.

Steven, acting in his capacity as personal representative of Nicholas' estate, filed a response to PIC's petition. Steven agreed with the proposed interim distribution plan regarding the GSTT Exempt Trust and GSTT Non-Exempt Trust. However, he requested that, while the specific language governing the exercise of appointment may be ambiguous, the court should interpret and construe the will provision as a valid exercise of power of appointment over Tony's Residuary Trust and that Nicholas "intended to exercise his power of appointment unto all trusts he had an interest in ..." and "allocate all his assets to Steven."

Christopher also filed a response to PIC's petition. Christopher disputed the sufficiency of the will language as it pertains to the exercise of appointment as to the Residuary Trust.

At the February 2023 hearing before a King County Superior Court commissioner, all parties agreed with the commissioner that the question of whether Nicholas exercised his power of appointment as to the Residuary Trust should be reserved to allow for more briefing. The court approved an interim distribution from the GSTT Exempt Trust and the GSTT Non-Exempt Trust, but, handwritten on the submitted proposed order, directed that the trustee shall not make further distributions from the Residuary Trust pending further order, and indicated that the Residuary Trust is "reserved pending further order in TEDRA proceeding."

The commissioner did not make any oral findings of fact related to the Residuary Trust, but the signed order included the following finding of fact and conclusion of law:

"In his Last Will and Testament, Nick Vivolo has effectively exercised his power of appointment over assets held in the GSTT Non-Exempt Trust and the Tony Vivolo Residuary Trust, and in both cases, he has exercised his power of appointment in favor of Steve Vivolo."

In April 2023 PIC filed a petition requesting instructions on how to distribute the Residuary Trust for the benefit of Nicholas because the question regarding whether he had exercised his appointment over said trust remained unresolved. Christopher and Steven filed separate responses. Christopher argued that Nicholas' will was not ambiguous and that Nicholas did not exercise his power of appointment as to the Residuary Trust. Steven initially responded that the will may be ambiguous. Steven also submitted two declarations for support: one from Tracy Codd, the attorney who advised Nicholas on what language to include in his will; and another from Jason Crummer, a realtor who assisted Nicholas in the purchase of a condominium. Codd's declaration did not include any time frame as to when she met with Nicholas. She wrote that he told her about the TEDRA Agreement and the Non-Exempt GSTT Trust, but not the Residuary Trust. Crummer helped Nicholas purchase a condominium in August of 2016 and continued to check on him from time to time after the property closed. It was during these conversations, Crummer reports, that Nicholas wanted all his "property" to be distributed to Steven, though he never specified any particular asset. Both Codd and Crummer opined that it was their belief that Nicholas wanted to give everything to Steven.

The same commissioner who entered the previous order reserving the issue concluded that it did not need to consider extrinsic evidence because the will is

unambiguous and reflects that Nick had not exercised his power of appointment over the Residuary Trust. On July 14, 2023, the court entered a judgment that in his Last Will and Testament, Nick Vivolo had not exercised his power of appointment with regard to his benefit in the Tony Vivolo Residuary Trust. Steven appeals.[8]

DISCUSSION

Res judicata

Steven contends that the doctrine of res judicata bars re-litigation regarding the commissioner's initial order finding that Nick Vivolo's Last Will and Testament effectively exercised his power of appointment over the Residuary Trust.

Whether res judicata bars an action is a question of law we review de novo. Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 837, 125 P.3d 202 (2005). Res judicata is a doctrine of claim preclusion. Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 730, 254 P.3d 818 (2011). It bars the re-litigation of claims and issues that were litigated, or could have been litigated, in a prior action. Pederson v. Potter, 103 Wn. App. 62, 67, 11 P.3d 833 (2000). The person asserting the defense of res judicata bears the burden of proof. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004). "The threshold requirement of res judicata is a final judgment on the merits in the prior suit." Id. "Once that threshold is met, res judicata requires sameness of subject matter, cause of action, people and parties, and 'the quality of the persons for or against whom the claim is made.'" Id. at 865-66 (quoting Rains v. State, 100 Wn.2d 660, 663, 674 P.2d 165 (1983)).

[8] Steven filed a motion for reconsideration but because of the way it was filed, the commissioner did not see it until after Steven had filed his notice of appeal. The court ruled that under RAP 7.2 the motion was stayed and the court could not consider it without permission from this court.

Res judicata is an affirmative defense that is waived if it is "not affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties." Farmers Ins. Co. of Wash. v. Miller, 87 Wn.2d 70, 76, 549 P.2d 9 (1976); see also CR 8(c). A claim for res judicata will not be considered for the first time on appeal. See Milligan v. Thompson, 110 Wn. App. 628, 633, 42 P.3d 418 (2002) (refusing to consider appellant's res judicata argument because appellant did not argue res judicata when he opposed the respondent's summary judgment motion in the trial court). We consider "only evidence and issues called to the attention of the trial court." RAP 9.12.

We decline to entertain Steven's argument for multiple reasons. First, Steven waived this argument because he did not raise it below. Second, Steven's assertion that the commissioner previously considered the issue on the merits and made a final ruling is disingenuous. At the hearing to consider the trustee's request for an interim distribution, the commissioner began the proceeding by stating,

> And I think I'd like to start there first, the issue being whether or not the request today should be basically reserved, pending outcome of some sort of TEDRA proceeding to determine whether or not the exercise of the power of appointment was – included the trust that was appropriate and the language was appropriate to do so.

All parties agreed, including Christopher's counsel, who said, "As it relates to the reservation of the issue on Tony's trust and whether or not Nick's will effectively exercised the power of appointment, we're in agreement, if that's what the Court's decision is, to reserve that issue and have a separate briefing on that." PIC responded to the dispute by stating it was not taking a position one way or the other, and would

> be more than happy to, sort of, strike out that language, reserve that issue for a later hearing with a provision that the trustee would not make any

> distributions from the mixed share of the Tony Vivolo Residuary Trust as part of this.
>
> Though, I think the other portions of the order and the other preliminary distributions proposed should -- you know, we would still like to move forward with that just to kind of get this ball moving forward.

The final signed order, which had been proposed by PIC, reflects the addition of hand-written language reserving the issue and barring further distribution from the Residuary Trust. But it still included a typed finding of fact and conclusion of law stating that Nicholas exercised his power of appointment over assets held in the GSTT Non-Exempt Trust "and the Tony Vivolo Residuary Trust" and that Nicholas did so in favor of Steven. The record suggests that PIC intended to strike out language related to the issue that the court was reserving on but failed to do so. Lastly, the order was not a final judgment on the merits.

Steven also incorrectly argues that the application of the law of the case doctrine also barred the commissioner from revisiting the issue after it had signed the previous order with the finding. In addition to the fact the record suggests the previous finding was not actually made by the court and was inadvertently included in the signed order, Steven misconstrues the law of the case doctrine.

Under Washington law, "in its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation." Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). "[T]he law of the case

doctrine requires a prior appellate court decision in the same case."[9] In re Estate of Jones, 170 Wn. App. 594, 605, 287 P.3d 610 (2012).

Accordingly, we conclude that Steven's arguments under the law of the case and res judicata arguments are without merit.

Power of Appointment

Steven contends that Nicholas' will unambiguously reflects that he exercised his power of appointment as to the Residuary Trust. We disagree.

This Court reviews de novo a trial court's interpretation of a will. In re Estate of Wright, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008). Interpretation of a statute is also subject to de novo review. In re Estate of Rathbone, 190 Wn.2d 332, 338, 412 P.3d 1283 (2018).

"When called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent." In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985). "The intent must, if possible, be derived from the four corners of the will and the will must be considered in its entirety." In re Estate of Mell, 105 Wn.2d 518, 524, 716 P.2d 836 (1986) (citing Bergau, 103 Wn.2d at 435). "The testator is presumed to have known the law at the time of execution of his will." Id. (citing In re Estate of Patton, 6 Wn. App. 464, 471, 494 P.2d 238 (1972)). "A distinction should be made between will 'interpretation' and will 'construction'. While interpretation is the 'process of discovering the meaning or intention of the testator from permissible data', construction, in a technical sense, is 'assigning meaning to the instrument when the testator's intention

[9] The phrase "law of the case" also has been used to describe when "jury instructions not objected to become the law of the case" in criminal trials. State v. Hickman, 135 Wn.2d 97, 101-03, 954 P.2d 900 (1998) (citing State v. Hames, 74 Wn.2d 721, 725, 446 P.2d 344 (1968)).

cannot be fully ascertained from proper sources.'" In re Estate of Wendl, 37 Wn. App. 894, 897, 684 P.2d 1320 (1984).

"However, even where no ambiguity exists in the will language so as to invoke the rule against construction, it is still necessary to construe and give effect to the testator's intent from the will language. In re Estate of Riemcke, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972). Thus, though in construing intent from the words of the will, the court may not rewrite the will, it is nevertheless appropriate to consider 'the situation as it existed when the will was drawn' with an awareness of 'all the surrounding circumstances.'" Id. (quoting Anderson v. Anderson, 80 Wn.2d 496, 499, 495 P.2d 1037 (1972)). Surrounding circumstances pertain to objective factors, not contemporaneous statements. Id. at 897-98; See, e.g., In re Estate of Newbert, 16 Wn. App. 327, 555 P.2d 1189 (1976) (circumstances to be considered in determining if the testator intended a class gift: the fact of whether there is a natural class among the beneficiaries, the relationship of the testator to the objects of his bounty, the subject matter of the gift, and the skill of the draftsman of the will). "When, after reading the will in its entirety, any uncertainty arises about the testator's intent, extrinsic evidence, including testimony of the drafter, may be admitted to explain and resolve the ambiguity." Mell, 105 Wn.2d at 524 (citing Bergau, 103 Wn.2d at 436).

RCW 11.95A.200 provides that a power of appointment is exercised only:

(1) If the instrument exercising the power is valid under applicable law;
(2) If the terms of the instrument exercising the power:
(a) Manifest the powerholder's intent to exercise the power; and
(b) Subject to RCW 11.95A.230, satisfy the requirements of exercise, if any, imposed by the donor; and
(3) To the extent the appointment is a permissible exercise of the power.

The Washington legislature has given deference to the residuary clause in determining a decedent's intent in exercising a power of appointment, as laid out in RCW 11.95A.210(2), which provides:

> (2) A residuary clause in a powerholder's will, or a comparable clause in the powerholder's revocable trust, manifests the powerholder's intent to exercise a power of appointment only if:
> (a) The terms of the instrument containing the residuary clause do not manifest a contrary intent;
> (b) The power is a general power exercisable in favor of the powerholder's estate;
> (c) There is no gift-in-default clause or the clause is ineffective; and
> (d) The powerholder did not release the power.

Nicholas' residuary clause, alone, cannot support a conclusion that Nicholas exercised his power of appointment as to the Residuary Trust because the terms of his will manifest a contrary intent, and there is a gift-in-default clause within the power of appointment language. Both parties cite to Tony's will as the source of Nicholas' power of appointment, but, as stated in the TEDRA Agreement, the terms of the Residuary Trust are those that existed prior to the merger in 2008.[10] That means the terms were those in Iona's 2005 will, in which she exercised her power of appointment granted to her by Tony as to his Residuary Trust. As expressed in Iona's will, "the Shares from my husband's Residuary Trust described in this Article V shall be administered and distributed in the same manner as the Shares of the Non-GSTT Exempt Trust described in Article II, paragraph 3." In turn, paragraph 3(c) of the Non-GSTT Exempt Trust grants the general power of appointment to each of her children and includes a gift-in-default clause: "To the extent a Child fails to exercise such power, the Appointive Property shall be distributed as otherwise provided in subparagraphs (iii) and (iv) of paragraph 2(b)

[10] Nothing in the record before us establishes that the TEDRA Agreement extinguished the effect of Iona's 2005 will.

above." Tony's will also grants the power of appointment to each of his children and includes a gift-in-default clause.[11] In any event, the parties agree that Nicholas had a power of appointment available to him as to the Residuary Trust and that the grant of this power also included a gift-in-default clause.

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. In granting Steven the remainder of his estate, Nicholas' will states

> 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: *(e) General Power of Appointment.* Whether or not a Child survives the Grantor, each child shall have the power to appoint in his Will to such appointee or appointees whomsoever, on such terms and in amounts as he shall determine, all of the remainder of his share ("the Appointive Property").

Nicholas used the singular "my power to appoint" and not "my powers to appoint" and he did so in reference only to one of the trusts, the Non-Exempt GSTT Trust.[12] And

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[11] Tony's will provided:

> In the event of the death of a child of ours without having exercised his power of appointment and without leaving lawful surviving descendants, his share shall be added to and applied along with the shares set aside hereunder for my surviving children named in Article I of this Will and the lawful surviving descendants of such a deceased child of mine, by right or representation.

[12] We apply grammatical rules in will interpretation. See Shufeldt v. Shufeldt, 130 Wash. 253, 260, 227 P.6 (1924); In re Estate of Smith, 40 Wn. App. 790, 793, 700 P.2d 1181 (1985). Under the last antecedent rule, the qualifying or modifying words and phrases refer to the last antecedent. See PeaceHealth St. Joseph Med. Ctr. v. Dep't of Revenue, 9 Wn. App. 2d 775, 780, 449 P.3d 676 (2019), aff'd, 196 Wn.2d 1, 468 P.3d 1056 (2020). And the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. Id. However, the last antecedent rule is "not inflexible and uniformly binding." Id. Structural or contextual evidence may rebut the

he quoted the power of appointment that was granted to him for that Trust from the TEDRA Agreement.

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.

Steven argues that the use of the term "not limited to" is the language that indicates Nicholas exercised his power of appointment as to all of his trusts, including the Residuary Trust. But this language followed the residuary clause.

We are not persuaded that the term "not limited to" plainly refers to the inclusion of his power of appointment as to the Residuary Trust. In context, at the time of the will, Nicholas allowed himself the ability to later dispose of tangible personal property. Viewed in the context of the entire will, the phrase "not limited to" suggests that he could

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last antecedent inference. Id. at 781. Here, though there is no comma before the phrase "as outlined in the non-exempt GSTT Trust," we nevertheless read the phrase to modify both the last antecedent, "my 'appointive property,'" as well as the antecedent "my power to appoint." "Under the 'series-qualifier' rule of grammar, there is a presumption that 'when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.'" BLACK'S LAW DICTIONARY (10th ed. 2014). This rule applies when two textual signals are present: first, when the modifying phrase makes sense with all items in the series; and second, when the modifying clause appears at the end of a single, integrated list." PeaceHealth St. Joseph Med. Ctr., 9 Wn. App. 2d at 781 (citing Lockhart v. United States, 577 U.S. 347, 355, 136 S. Ct. 958, 194 L. Ed. 2d 48 (2016)). In the instant case, "my power to appoint and my 'appointive property'" is a single integrated list. Thus, the phrase "as outlined in the non-exempt GSST Trust" modifies both.

still leave additional personal property to Steven beyond his power to appoint and his appointive property as outlined in the Non-Exempt GSST Trust.

Steven argues that Nicholas' will need not expressly mention the power if the intent to exercise it is manifested otherwise. First Interstate Bank of Wash. v. Lindberg, 49 Wn. App. 788, 795, 746 P.2d 333 (1987). It is true that a powerholder's intent is ascertained "from the language of the will itself." Bergau, 103 Wn.2d at 435. However, 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.

Steven's reliance on Lindberg, 49 Wn. App. at 795 is unavailing. Unlike the multiple trusts in the instant case, in Lindberg, the court dealt with a straightforward situation involving a single trust. Specifically, the language used in the will at issue in Lindberg provided that "if I have failed to convey to my said Trustee any item of real or personal property and the same remains in my probate estate," the executor was then directed to distribute the testator's assets to the trust. Id. at 795. In contrast, the present case involves multiple trusts. Christopher argues that application of Lindberg provides a prime example of how effective a blanket-exercise clause can be with regard to property disposition. We agree, but the language in Nicholas' will does not provide such a blanket-exercise clause as defined in RCW 11.95A.010(3):

> "Blanket-exercise clause" means a clause in an instrument which exercises a power of appointment and is not a specific-exercise clause. The term 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.

In the instant case, Nicholas did not use any such blanket-exercise clause, and instead referenced only the Non-Exempt GSTT Trust.

We conclude 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.

Attorney Fees

Both Steven and Christopher argue that they are entitled to an award of attorney fees on appeal, pursuant to RAP 18.1, RAP 14.2, and RCW 11.96A.150. RCW 11.96A.150 grants the court discretion to award reasonable attorney fees and costs to the prevailing party. Because Christopher is the prevailing party on appeal, we exercise our discretion to award attorney fees to Christopher upon compliance with RAP 18.1(d). Though Steven asserts that he was responding to the trustee's petition as representative of Nicholas' estate, in effect he was advocating for an interpretation that would benefit himself personally. We grant Christopher's request that the attorney fees be paid from the portion of Nicholas' share of the Residuary Trust to be distributed to Steven.

We affirm.

Coburn, J.

WE CONCUR:

Cheung, J.

Mann, J.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

In re the Matter of: Tony Vivolo Residuary Trust f/b/o Nicolas Vivolo and the Estate of Nick Vivolo	NO. 23-4-03245-1 ORDER ON PETITION FOR INSTRUCTIONS RE NICOLAS VIVOLO POWER OF APPOINTMENT

THIS MATTER, having come before the Court on Trustee, Partners in Care's, Petition for Instructions re Nicolas Vivolo Power of Appointment, and Partners in Care having appeared by and through attorney Kameron L. Kirkevold of Helsell Fetterman; and Steven Vivolo, individually and as Personal Representative of the Estate of Nicholas J. Vivolo, having appeared by and through attorney Jerrica Pierson Seeger of Des Moines Elder Law, and Christopher Vivolo having appeared by and through Ann T. Wilson of Stokes Lawrence P.S., and the Court having reviewed the following pleadings:

1) Petition for Instructions re Nicolas Vivolo Power of Appointment
2) Response to: Partners in Care's Petition for Instructions Re: Nicholas Vivolo Power of Appointment (filed on behalf of Steven Vivolo)
3) Christopher Vivolo's Response to Petition for Instructions Re Nicolas Vivolo Power of Appointment
4) Declaration of Jason Crummer in Support of: Steven Vivolo's Response to Petition for Instructions re Nicholas Vivolo Power of Appointment

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5) Declaration of W. Tracy Codd in Support of: Steven Vivolo's Response to Petition for Instructions re Nicholas Vivolo Power of Appointment

6) Steven Vivolo's Reply: Christopher Vivolo's Response to Petition for Instructions Regarding Nicholas Vivolo Power of Appointment

And the Court having reviewed the above, and heard argument of counsel, the Court now makes the following:

I. FINDINGS OF FACT & CONCLUSIONS OF LAW

1.1 This Court has jurisdiction over this matter and the parties;

1.2 Notice has been properly provided to persons entitled to notice.

1.3 Nicholas Vivolo ("Nick") died testate on January 29, 2020, and his estate is currently being administered under King County Superior Court Cause No. 20-4-02174-9 KNT. Steven Vivolo was appointed personal representative of his estate on April 16, 2020;

1.4 In his Last Will and Testament, Nick Vivolo has effectively exercised his power of appointment over assets held in the GSTT Non-Exempt Trust in favor of Steven Vivolo.

1.5 Based on the language contained within the Last Will and Testament of Nick Vivolo, and without the need to consider evidence beyond the clear and unambiguous terms of said will, Nick Vivolo has not exercised his power of appointment with regard to assets held for his benefit in the Tony Vivolo Residuary Trust, and the assets held in said trust f/b/o Nick Vivolo shall pass pursuant to the terms of the Tony Vivolo Residuary Trust in the absence of an exercise of the power of appointment.

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1.6 The Tony Vivolo Residuary Trust provides that, where Nick Vivolo has not exercised his power of appointment, the remaining assets held in trust for his benefit at the time of his death shall be divided equally between the following individuals and entities:

- Chris Vivolo outright and free of trust
- Joe Vivolo outright and free of trust
- Tony Vivolo Residual Trust f/b/o Steve Vivolo
- Tony Vivolo Residual Trust f/b/o Vance Vivolo

II. ORDER

NOW THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

2.1 Partners in Care, as Trustee of the Tony Vivolo Trust f/b/o Nick Vivolo, shall distribute the residuary assets of such trust in equal shares between the following persons and entities:

- Christopher Vivolo outright and free of trust
- Joe WoodyVivolo outright and free of trust
- Tony Vivolo Residual Trust f/b/o Steve Vivolo
- Tony Vivolo Residual Trust f/b/o Vance Vivolo

Dated: 7/14/23

HENRY H. JUDSON
JUL 14 2023
COURT COMMISSIONER

Judge/Court Commissioner

Presented by:

HELSELL FETTERMAN LLP

KAMERON L. KIRKEVOLD # 40829,
Attorney for Partners In Care

Copy Received:

Des Moins Elder Law

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- Chris Vivolo outright and free of trust
- Joe Vivolo outright and free of trust
- Tony Vivolo Residual Trust f/b/o Steve Vivolo
- Tony Vivolo Residual Trust f/b/o Vance Vivolo

II. ORDER

NOW THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

2.1 Partners in Care, as Trustee of the Tony Vivolo Trust f/b/o Nick Vivolo, shall distribute the residuary assets of such trust in equal shares between the following persons and entities:

- Christopher Vivolo outright and free of trust
- Joe WoodyVivolo outright and free of trust
- Tony Vivolo Residual Trust f/b/o Steve Vivolo
- Tony Vivolo Residual Trust f/b/o Vance Vivolo

Dated: _____

_____
Judge/Court Commissioner

Presented by:

HELSELL FETTERMAN LLP

KAMERON L. KIRKEVOLD # 40829,
Attorney for Partners In Care

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Appellate Court Case Title:	In re the Matter of Tony Vivolo Residuary Trust, Steven Vivolo, Appellant

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