No. 86776-3

Stephens, J. (dissenting)—I disagree that the property at issue here was a nonprobate asset. To me, the issue is plain. The statutory example identified by the majority under former RCW 11.02.005(15) (2007) does not encompass the interest bequeathed to Edwin Anderson. The interest bequeathed to Anderson plainly does fall into one of the categories indentified by the legislature as excluded from the nonprobate asset definition under RCW 11.11.010(7)(a)(ii). Because the interest in the property was not a nonprobate asset, it could not pass under chapter 11.11 RCW, the Testamentary Disposition of Nonprobate Assets Act (Act),[1] and the Trust should have controlled the dispensation of the interest in the property. I would reverse the Court of Appeals and reinstate the trial court's order.

Under the plain language of the statute, as the majority acknowledges, an interest passing under a trust is a nonprobate asset *only* if the trust in question becomes effective or irrevocable upon the grantor's death. Former RCW

[1] The Act is often referred to as the "Superwill" statute.

11.02.005(15). In other words, the trust under which the interest passes must be revocable during the grantor's lifetime. Here, the Trust was revocable only while *both* Homer and Eileen Green were alive. Clerk's Papers (CP) at 46 (Section 1.06(b) ("The Grantors declare this Trust to be revocable during their *joint lifetimes*." (emphasis added))). The Trust became irrevocable upon Eileen's death in 1998; at that point Homer should have created a separate Survivor's Trust, which was to consist of funds from his half of the community property and his separate property, and which was to be revocable by him during his lifetime. CP at 52, 53-54 (Article III and Section 4.01). He did not do so. The interest in the property therefore does not fall under the definition of a "nonprobate asset" under former RCW 11.02.005(15).

The majority argues that the question of revocability is complicated but ultimately irrelevant. It asserts that the "Trust permitted Homer to either create a separate Survivor's Trust or to retain his interests in the original Trust, which would then become the Survivor's Trust." Majority at 11. Either way, the majority maintains, "Homer retained the right to revoke his interest in the Survivor's Trust, and Homer's failure to create the Family Trust does not deprive him of this right." *Id.* at 11-12. But the situation is not the same "either way." The provision the majority cites is about the source of funds for the trusts, not the ultimate right to revoke. It is true that for administrative convenience, the Trust allowed Homer to "retain the amount passing to the Survivor's Trust in the trust estate originally established hereunder by the Survivor instead of distributing it to the Survivor's

Trust, in which case the remaining balance of the original Trust shall become the 'Survivor's Trust[.]'" CP at 53 (Section 4.01). In other words, the Trust did not make Homer fund his Survivor's Trust with funds from the original trust, but allowed him to elect to fund the Family Trust with original funds. Nonetheless, the terms of the Trust are clear that he had to create two separate trusts in order to retain the right to revoke his interest. CP at 52 (Section 3.02) ("As soon as practicable after the death of the first . . . Trustee . . . the [surviving] Trustee *shall* divide the Trust in two." (emphasis added)). The majority treats his failure to do this as the equivalent of having done so.

The majority notes that a term of the Trust indicated that it was to become revocable only "'[u]pon the death or incapacity of both of the Trustors.'" Majority at 12 (emphasis omitted) (quoting CP at 47 (Section 1.06(f))). But under the majority's reading, Section 1.06(f) conflicts with the instruction in Section 1.06(b) that the Trust was revocable during Homer and Eileen's joint lifetimes. In contrast, under a proper reading—that Homer retained the right to revoke his interest only if he created two trusts following Eileen death—the terms do not conflict. Section 1.06(f) operated only if Homer and Eileen died together, or if Homer died after creating a separate, revocable Survivor's Trust. This is the plain import of the trust language.

However, even if the Trust were revocable during Homer's lifetime, and could thus be characterized as a nonprobate asset, the legislature specifically exempted this type of interest passing under trust from the definition of nonprobate

asset. RCW 11.11.010(7)(a)(ii) removes from the definition of nonprobate asset a "deed or conveyance for which possession has been postponed until the death of the owner." Here, the Trust's terms postponed possession of the property—i.e., the conveyance—until "the death of the surviving Trustor, [upon which] the Trustee shall apply and distribute the net income and principal" of the Trust. CP at 60 (Section 6.03).[2] The Trust retained the title until that moment, granting only a life estate to Homer, who was merely a beneficial owner of the property and also acted as Trustee. The property falls squarely under the statute's exception.

The majority asserts that RCW 11.11.010(7)(a) does not exclude all real estate interests, but only those that are joint tenancies and future interests, and concludes that because Homer's interest in the property is not a joint tenancy or future interest, RCW 11.11.010(7)(a) does not apply. Majority at 12. But the exclusion found in RCW 11.11.010(7)(a)(ii) is clearly not concerned with whether the *owner* has a future interest given that it operates only after the owner's death. The exclusion is concerned with whether the beneficiary of the testamentary disposition takes possession of the deed or conveyance at the time of the owner's death—a future interest. Here, Anderson was bequeathed a conveyance that was postponed until the death of Homer. Anderson's interest in the property was not a nonprobate asset.

The majority's reading undermines the purpose of the Superwill statute. The

[2] This provision was later amended to change the beneficiary of the Trust, but the modification did not disturb the postponement of the benefit until the death of the surviving trustor. *See* CP at 192.

legislature intended chapter 11.11 RCW to be read narrowly and applied only to certain limited nonprobate assets. 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, 812 (1999); *see* Final B. Rep. on Substitute S.B. 6181, 55th Leg., Reg. Sess., at 1 (Wash. 1998). From the exemptions to the nonprobate assets the legislature identified in RCW 11.11.010(7)(a), it appears the legislature was especially concerned about the treatment of real property. The reason the legislature might be cautious about categorizing an interest in real property as a nonprobate asset becomes clear when one considers the importance of certainty in recorded land titles. Here, Homer tried to remove the property from the Trust and bequeath it to Anderson. This attempted conveyance creates the very title record issues that the legislature tried to avoid in creating the "Superwill statute." Artura, *supra*, at 813 ("The statute does not apply to real estate property joint tenancies or to future interest deeds *due to the drafter's concerns regarding real estate 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." (emphasis added) (footnote omitted)). When they recorded their conveyance by quitclaim deed of the property to the Trust, the Greenes provided notice to all—including Anderson—of the Trust's interest in the property. Allowing Homer to subsequently transfer the property by will, especially when the putative transfer does not even mention the Trust, would undermine the stability of real estate title records. Thus, I conclude

that the majority's ruling frustrates the purpose of the Act and conflicts with the legislature's intent.

The trial court correctly determined that the property at issue remains subject to the trust created by Homer and Eileen Greene during their joint lifetimes. It was not subject to a later bequest by Homer under the Superwill statute. I would reverse the Court of Appeals and reinstate the trial court's order. Accordingly, I respectfully dissent.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Steven C. González