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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN THE COUNTY OF MASON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN THE COUNTY OF MASON  
IN PROBATE

In Re the Matter of the Estate of )  
SAMUEL B. THELER, ) NO. 3947  
Deceased. ) PETITION REGARDING MODIFICATION OF TESTAMENTARY TRUST

COMES NOW Peoples National Bank of Washington, trustee of the Samuel B. Theler testamentary trust ("trustee") and the North Mason County School District ("school district") and petition the court as follows:

1. Testamentary Trust of Samuel B. Theler.

1.1 Samuel B. Theler died a resident of Mason County, Washington, on August 24, 1968. Mr. Theler left a last will and testament dated January 10, 1964 and a codicil thereto dated January 9, 1967, copies of which are in the file. The will and codicil were duly admitted to probate in the above-referenced cause number.

1.2 Article III and IV(c) of the will provide in pertinent part as follows:

ARTICLE III

I give, devise and bequeath to North Mason County School District, a political sub-division, or its successor in interest, all of that real property abutting and adjoining the present "Sam Theler" playground in Belfair, Washington, to be used for athletic and recreational purposes forever and a portion of which real estate shall be

1 used for a gymnasium or recreation center as  
2 hereinafter specified.

3 \* \* \*

4 ARTICLE IV

5 (c) . . . It is my desire and wish that  
6 when said trustee has accumulated sufficient  
7 funds from the income of my trust estate that  
8 my trustee, in its discretion either turn  
9 over sufficient funds to said School District  
10 for, or cause to be constructed a gymnasium  
11 or center to be known as the "Mary E. Theler"  
12 gymnasium or recreation center. It is my  
13 further desire and wish that said School  
14 District own and operate said gymnasium  
15 and/or center and to have full control of the  
16 same but that the building be used as much as  
17 feasible for public gatherings and meetings.  
18 The trustee in its discretion may expend such  
19 sums from the income of said trust estate as  
20 it deems necessary and proper for the main-  
21 tenance, improvements and additions to said  
22 gymnasium or center, and if circumstances  
23 appear to trustee and said School District to  
24 warrant, and if funds from income and capital  
25 grown purposes are available, trustee may use  
26 or apply such funds for the demolition of the  
27 original structure and construction of a  
28 newer one more adopted to the needs of the  
29 community for any time being.

1.3 The land specifically devised at Article III for  
the gymnasium is not suitable for construction. It lies at the  
very base of Hood Canal, in an area which has very strong  
environmental considerations. Much of the land is marshy or  
swamp-like and the balance of the property is considered  
"fragile" by the various environmental agencies. The Army Corps  
of Engineers has advised that the land is "wetlands" and,  
accordingly, under their regulatory jurisdiction. They have also  
advised that all permits to fill the "wetlands" area will be  
denied thus raising serious roadblocks to the development of a  
gymnasium or recreational center on the property. The letter of  
Christopher L. Hirst, attorney representing the North Mason  
County School District dated November 10, 1982, and attachments

1 thereto are attached as Exhibit A and incorporated herein by  
2 reference.

3 2. Legal Analysis.

4 2.1 While generally the administration of a trust must  
5 conform strictly with the intent of the trustor and the terms of  
6 the trust, it is generally agreed that a court may, upon the  
7 occurrence of emergencies or unusual circumstances not  
8 anticipated by the trustor, and in order to carry out his  
9 ultimate purpose, permit the trustee to the extent necessary to  
10 deal with the trust estate contrary to, or in deviation from, the  
11 express or literal terms of the trust instrument. In this  
12 connection, the court is required to stand in the place of the  
13 creator of the trust and authorize what he would have authorized  
14 had he anticipated the exigencies rendering some change in his  
15 trust terms necessary.

16 There is little Washington law on this subject but  
17 cases from other jurisdictions bear out these general principles.  
18 Several will be reviewed as a sampling. In Whittingham v.  
19 California Trust Co., 214 Cal. 128, 4 P.2d 142 (1931), the  
20 plaintiff, by reason of a drastic change in her condition of  
21 health following the time of the creation of the trust, was in a  
22 necessitous condition. In that case, the court authorized an  
23 early distribution of one-third of her portion of the trust. In  
24 Adams v. Cook, 15 Cal.2d 352, 101 P.2d 494 (1940), certain real  
25 property was conveyed in trust to be sold at a price fixed in the  
26 trust instrument. The beneficiaries, however, applied for  
27 equitable relief in the administration of the property following  
28 the discovery of oil, a circumstance which markedly affected its  
29 value and which was not contemplated at the time of the creation  
30 of the trust. The other court noted that  
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. . . where the primary purpose of the trust would not be accomplished by a strict adherence to the terms of the declaration of trust and . . . when it is made to appear in a court of equity, as shown in the present case, that the benefits and advantages which the trustors desire to confer on the beneficiaries would not accrue to them by a slavish adherence to the terms of the trust, the court may modify the terms of the trust to accomplish the real intent and purpose of the trustors.

15 Cal.2d at 361, 101 P.2d at 489.

The California court described the theory of these cases in Moxley v. Title Insurance and Trust Co., 27 Cal.2d 457, 165 P.2d 15 (1946), as follows:

In decided cases, the courts were dealing with exceptional situations in which modification was decreed in order to carry out, rather than to defeat, the primary purpose of the trustor as expressed in the trust instrument.

The court went on to note that there should be facts in each case which were not reasonably within the contemplation of the testator when the testamentary trust terms were developed. This is clearly the case in the Theler situation.

Similarly, in Bolles v. Boatmen's National Bank of St. Louis, 363 Mo. 949, 225 S.W.2d 725 (1953), the court was faced with a situation where the decedent left a will with a testamentary trust providing for what, in essence, amounted to annuity payments to certain parties, such payments to begin within six months of his death. The trust was to terminate 20 years after the testator's death, at which time payments to the then living individual annuitants were to cease and the real properties held by the trust sold. Unfortunately, the decedent left insufficient personal property at his death to fund the annuity payments, and the question arose whether the real property in the estate should

1 be sold before the time specified in the trust. The court in its  
 2 analysis wrote:

3           So, the situation is one wherein, owing to  
 4           circumstances not anticipated by Thomasson,  
 5           strict compliance with the terms of the trust  
 6           would defeat or prevent the substantial  
 7           attainment of its purpose. "Nevertheless,  
 8           circumstances may and frequently arise where,  
 9           by reason of changes in conditions not  
 10          foreseen by the trustor at the time of his  
 11          execution of the instrument, his ultimate  
 12          purpose will be defeated unless deviation is  
 13          permitted; and in such an instance a court of  
 14          equity has jurisdiction to grant the  
 15          necessary authority. The court's  
 16          jurisdiction may be invoked, not only to  
 17          preserve the estate from loss or destruction,  
 18          but also, as here, where literal compliance  
 19          has become impossible. In this situation,  
 20          where the trust instrument cannot be  
 21          interpreted as permitting the trustee to do  
 22          the act desired, the court does not hold that  
 23          he has the power to deviate, but holding that  
 24          he lacks the power confers the same upon him.  
 25          Insofar as may be the court puts itself in  
 26          the trustor's place, and endeavors to  
 27          authorize what it believes that he himself  
 28          would have authorized if he could have  
 29          anticipated the necessity of the subsequent  
 30          alteration of his plan."

31 255 S.W.2d at 734. The court then went on to structure an  
 arrangement whereby the individual annuitants would receive  
 income from the proceeds of the sale of a building and from  
 certain rental proceeds.

In Washington, it is clear that one of the paramount  
 duties of the court is to ascertain and effectuate the intentions  
 of the testator. RCW 11.12.230, Seattle-First National Bank v.  
Crosby, 42 Wn.2d 234, 254 Pac. 732 (1953). If a trust becomes  
 impossible of fulfillment, the court will order that it be  
 terminated. Townsend v. Schalkenbach, 33 Wn.2d 255, 262, 205  
 P.2d 345 (1949). The court in this case noted, however, that the  
 fact that investments may have to be changed to accomplish the  
 purposes of the settlor does not justify the conclusion that the

1 trust must be terminated. This is the case here. Although the  
 2 exact intent of Mr. Theler is apparently frustrated and impos-  
 3 sible, the trust should not be terminated, but rather some  
 4 appropriate modification should be sought. This has been worked  
 5 out between the trustee and the school district and now approval  
 6 by the court is sought.

7 3. Relief Requested.

8 On the basis of the foregoing authorities, the trustee  
 9 and the school district request that the court approve a proposed  
 10 modification of the trust. The court would not be substituting  
 11 its judgment for the judgment and wishes of the trustor, nor  
 12 would it be a change which would alter the beneficial rights of  
 13 the interested parties, rather the proposed modifications would  
 14 carry out what would have been Mr. Theler's desires had he  
 15 anticipated the circumstances which now confront the trustee.  
 16 The petitioners request that the court approve the development of  
 17 a recreational center on a piece of property which is directly  
 18 contiguous to the property described in Article III of  
 19 Mr. Theler's will. (Such property is legally described on  
 20 Attachment "A".) No other modification of the trust or the will  
 21 is sought by this Petition.

22 WHEREFORE petitioners pray for an order:

23 1. Approving modification of the terms of the Samuel B.  
 24 Theler Will and testamentary trust to permit the construction of  
 25 a gymnasium or recreation center on property owned by the North  
 26 Mason County School District which is contiguous to the

1 property described in Article III of the last will and testament  
2 of Samuel B. Theler.

3 2. Entering an order setting a hearing date on this matter  
4 and giving at least twenty days notice to all interested parties,  
5 specifically the office of Attorney General pursuant to RCW  
6 19.10.120.

7 3. Granting such further just and equitable relief as the  
8 court deems appropriate.

9 DATED this 19 day of January, 1983.

10 PEOPLES NATIONAL BANK OF WASHINGTON,  
11 Trustee of the Samuel B. Theler  
12 Testamentary Trust

13 By George M. Carpenter  
14 Trust officer

15 NORTH MASON COUNTY SCHOOL DISTRICT  
16 NO. 403

17 By Pat K. J. Hamill  
18 Chairman