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No. 69929-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Testamentary Trust of Giuseppe Desimone

DALE COLLINS, a married man,

Appellant/Cross Respondent,

v.

BNY MELLON, N.A., JOSEPH R. DESIMONE and RICHARD L. DESIMONE, JR., in their capacities as co-Trustees of the TESTAMENTARY TRUST OF GIUSEPPE DESIMONE, BENJAMIN DANIELI, as Personal Representative of the Estate of Jacqueline Danieli, KAREN DANIELI, LIZA TAYLOR, and MARIA DANIELI, Beneficiaries,

Respondents/Cross Appellants.

REPLY BRIEF of RESPONDENT/CROSS-APPELLANTS BENJAMIN DANIELI, as Personal Representative of the Estate of Jacqueline Danieli, KAREN DANIELI, LIZA TAYLOR and MARIA DANIELI

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I. INTRODUCTION

Mondo Desimone was one of Giuseppe and Assunta Desimone's five children. Jacqueline Danieli was Mondo Desimone's only child. After her father's death, she stepped into her father's shoes as a beneficiary of Giuseppe Desimone's 1946 Trust. And now, following her death, her six daughters have become beneficiaries of that 1946 Trust. Giuseppe Desimone's 1946 Trust limited his trust beneficiaries to his named children and the future generations of his family "born in lawful wedlock". The trial court correctly dismissed Collins' claim to be deemed a beneficiary of the Giuseppe Desimone 1946 Trust, as it contravenes a hundred years of Washington law defining "issue" as children "born in lawful wedlock" and the intentions expressed in Giuseppe Desimone's will as to whom he chose to include as beneficiaries.

Without argument and without any findings, the trial court then denied the Danieli Beneficiaries' and the trustees' request for fees under the equitable standard found in RCW 11.96A.150. That denial should be reversed. Both on appeal under RAP 18.1 and pursuant to RCW 11.96A.150(1), fees should be awarded to the Danieli beneficiaries.

II. ARGUMENT

Collins contends that his claim should be deemed to be a "good faith claim", or not a frivolous claim[1], thus barring a fee award. RCW does not provide that a "good faith" claim precludes an award of fees. Rather, RCW 11.96A.150, applicable here, sets an equitable standard for an award of fees:

> Either the superior court of any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; . . . In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RAP 18.1(a) in turn provides for an award of fees by this Court as the applicable law grants the right to recover reasonable fees here.

Collins directs the court to *Estate of Eichler,* 102 Wash. 497, 173 P. 435 (1918), to uphold the trial court's action here. However, unlike the

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[1] The standard for an award of fees based upon a claim that an appeal is frivolous differs. If a party files a frivolous appeal, RAP 18.9 authorizes the court to order the offending party to "pay terms or compensatory damages to any other party who has been harmed by the delay . . . or to pay sanctions to the court". An action is frivolous if it is "advanced without reasonable cause" and "when it cannot be supported by any rational argument on the law or facts". RCW 4.84.185. *E.g., Stiles v. Kearney*, 168 Wn. App. 250, 260, 277 P.3d 9 (2012); *Reid v. Dalton*, 124 Wn. App 113, 125, 100 P.3d 349 (2004); *In re Marriage of Fiorito*, 112 Wn. App. 657, 658, 50 P.3d 298 (2002) (no fees under RAP 18.9 as claims not so frivolous as to merit sanctions.)

niece who unsuccessfully contested a later will in that matter, Collins cannot point to any other estate planning documents where he was specifically included as a beneficiary, any expressed affection for himself as a beneficiary, or any family relationship or expressions of love and affection. It is understandable, given those facts, that the court in *Eichler* found the niece's decision to contest a later will to have been brought in good faith, and no imposition of costs against her would be imposed.[2]

Collins had no family relationship with the Desimones. His mother, through whom he traces his claim, had, accepting her description of the facts, a "physical relationship" with a man while she was married but living apart from her husband. CP 64. She never made contact with the purported father of her child, and to the contrary raised him as the son of her husband. CP 31, 65. She never sought to establish paternity and her husband never sought to disprove his presumed status as Collins's father. Collins never sought to establish paternity from the time of his first knowledge in 2001 that the man who raised him as his son was not his biological father. Collins' persistent contention that this is not a paternity action underscores that his interest rests in attempting to claim a share of a substantial trust.

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[2] The applicable statute in 1918 provided that costs, including reasonable attorney fees, could be assessed against a party who unsuccessfully contested a will. *In re Eichelr's Estate,* 102 Wash. at 498.

Estate of Magee, 55 Wn. App. 692, 780 P.2d 269 (1989) provides no better support for Collins to resist a fee award.[3] In *Estate of Magee,* the decedent's son and the decedent's wife had competing basis to characterize property as community or separate. Both also shared the role as co-personal representatives, requiring that they inventory and characterize assets in order to distribute property under Mr. Magee's will. Both had reasonable claims, based upon wills, property deeds, promissory note terms and other ownership documents. While decedent's son prevailed, the court found the widow's position to have been made in good faith and rejected a personal charge against her for fees. At the same time, the court did approve an award of fees to the son, from assets in the estate, but it was an estate in which both the contesting parties would otherwise share.

Collins has no such tangible evidence to support a claim that Giuseppe Desimone intended to include him, or any out-of-wedlock child, within his definition of beneficiaries nor does he have a historical or familiar relationship with the Desimone family to show any extrinsic evidence of intent to include him as a trust beneficiary.

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[3] The applicable statutes in *Estate of Magee* was RCW 11.96.140 which provided, "Either the superior court of the court on appeal, may, in its discretion, order costs, including attorney fees, to be paid by any party to the proceedings or out of the assets of the estate, as justice may require." *Estate of Magee, 55 Wn. App. at 696, n.4.*

Collins finally rests on *Estate of Wright,* 147 Wn. App. 674, 688, 196 P.3d 1075 (2008) to uphold the trial court's denial of fees. That decision is of limited assistance in assessing the equitable factors in this matter as the court's holding was that the personal representative there "fails to articulate a convincing basis for an award of fees", without further discussion.

The Danieli Beneficiaries do have a convincing basis for an award of fees. Giuseppe and Assunta Desimone held all their property as community property and both provided for their named children and families. Collins concedes he cannot make any claim against the trusts of Assunta Desimone, as her last estate planning documents, executed in 1974, thirty years after her husband's death, continue to exclude children born out of wedlock by her use of the term "lawful issue." CP A179; CP 103-113. Collins attempts instead to find a way into Giuseppe Desimone's trust, put in place in 1946, and argue that Giuseppe did not mean to make that same exclusion. To the contrary, Giuseppe's stated intentions were to provide for his children, whom he named in his will, and then to continue to provide for their "issue", that is their children born in wedlock. His intentions to keep the land he and his wife had carefully acquired, to have his family remain together and serve as trustees, and to have the trust co-own the property with his wife after his death all speak

loudly to Giuseppe's intent that "issue" be limited to children born within a marriage of one of his children, and within marriages of his family in later generations.

In 2012, when Collins made a claim to the trustees of the Giuseppe Trust, the trustees carefully considered the issue and carefully articulated to Collins why he was not a beneficiary of Giuseppe's 1946 Trust. Collins elected to initiate litigation, and impose further cost on the trust, and in particular on the Danieli beneficiaries, whose share of their great-grandfather's trust is at risk here. Collins' counsel conceded to the trial court, "It's not disputed . . . that the intestacy statute which was in effect in 1943 defines "issue" as lawful lineal descent . . . "lawful" being children born when their parents were married to each other." RP 10; 12.

Faced with that bar to his claim, Collins makes other arguments that have also been rejected by Washington courts. He contends that this Court should find that the term "issue", used in this trust, had a contrary meaning to the legislative definition of that term in the intestacy statutes. That is contrary to well established principals applicable to the interpretation of trusts and wills. *See In re Estate of Brooks*, 20 Wn. App. 311, 313, 579 P.2d 1351 (1978) ("Where there is room for construction, that meaning will be adopted which favors those who would inherit under the laws of intestacy."; *In re Lambell's Estate*, 200 Wash. 220, 226, 93

P.2d 352 (1939); *cf. Estate of Wright*, 147 Wn. App. at 684 (wills are to be construed consistently with the intestacy statutes). His related arguments have similarly been rejected; for example he contends that it is of no import in determining the meaning of "issue" that Giuseppe Desimone had the assistance of counsel. *In re Price's Estate,* 75 Wn. 2d 884, 888, 454 P.2d 411 (1969) (testator whose will was prepared by attorney was presumably advised of the law of intestacy). One after another, Collins basis for challenging the trustee's rejection of his claim were rejected by the trial court.

Collins would also have the court ignore the fact that paternity has never been established. Instead, he asks to court to avoid application of the statute of limitations restrictions that bar a paternity claim by asserting the court can include him as "issue" without regard to the paternity statutes and application of their statute of limitations or that there simply is no applicable time limit to make such as claim.

The equities here support an award of fees to the Danieli beneficiaries who have borne a substantial cost to respond to Collins' claim. Without being made whole, their interest in this trust will be diminished by the defense costs. The 1943 will that created an irrevocable trust in 1946 limited Giuseppe's legacy to his children, and continues to limit that trust to the succeeding generations of Giuseppe's family born in

wedlock. That should be the holding of this Court. An award of fees, under both RCW 11.96A.150(1) and RAP 18.1, should be granted, with the amount to be determined by further order of this Court.

RESPECTFULLY SUBMITTED this 6th day of November, 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on November 8th, 2013 I caused the foregoing document to be served on the following parties via U.S. mail unless otherwise described below:

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