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No. 69929-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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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,

Respondents/Cross-Appellants.

FILED  
APR 31 11:14:16  
CLERK OF COURT  
SUPERIOR COURT  
JANUARY 31 2016

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REPLY BRIEF OF RESPONDENTS/CROSS-APPELLANTS  
CO-TRUSTEES BNY MELLON, N.A., JOSEPH R. DESIMONE AND  
RICHARD L. DESIMONE, JR.

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## I. INTRODUCTION

The sole issue to be addressed on the Co-Trustees' cross-appeal is whether the King County Superior Court abused its discretion in denying the Co-Trustees' request for an award of attorney's fees incurred to defend Dale Collins' ("Mr. Collins") unfounded claim to the detriment of the Trust beneficiaries.

Before Mr. Collins filed his lawsuit in the trial court, the Co-Trustees thoroughly researched the legal arguments asserted by Mr. Collins and determined that, as a matter of law, Mr. Collins is not and cannot be a beneficiary of the Giuseppe Trust. Mr. Collins chose to go forward anyway and filed the instant lawsuit, forcing the Trust to incur substantial, needless expense. Because Mr. Collins' claim was legally unsupported, the Trust should not have to bear that expense.

The trial court's denial of the Co-Trustees' request for an award of attorney's fees in favor of the Trust was inequitable and contravenes the clear legislative intent of RCW 11.96A.150 to deter meritless claims.

## II. ARGUMENT

### A. Equity Requires an Award of Attorney's Fees at Trial.

Pursuant to RCW 11.96A.150, this Court has the authority to order Mr. Collins to pay the Trust's attorney's fees and costs incurred to defend Mr. Collins' claim. RCW 11.96A.150(1) provides in relevant part:

Either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) from any party to the proceedings.... The court may order the costs to be paid in

such amount and in such manner as the court determines to be equitable.

(Emphasis added.)

Mr. Collins argues that an award of attorney's fees against him would "tend to discourage the assertion of legitimate claims" and that he should not be penalized for bringing a good faith claim. (Collins' Reply Br. 16.) But Mr. Collins did not have a good faith basis to pursue his claim against the Giuseppe Trust.

Mr. Collins concedes that Washington law in effect at the time Giuseppe executed his Will, which repeatedly used the term "issue," defined "issue" as children "born in lawful wedlock." Giuseppe's Will unambiguously states that only "issue" are beneficiaries. Nevertheless, Mr. Collins filed his claim and asserted several illogical arguments in his attempt to circumvent the clear statutory definition of issue. The trial court rejected those arguments, questioning the authority upon which Mr. Collins relied, and ultimately concluded that his arguments had no support.

On appeal, Mr. Collins attempts to mislead this Court by claiming that there is "strong evidence that he is Giuseppe's grandchild" and "he's a descendant of Mondo Desimone." (Collins' Reply Br. 17.) The issue of Mr. Collins' paternity was not before the trial court and was never briefed. The trial court made no such determination. Applying Washington rules of construction, the trial court interpreted Giuseppe's intent as stated in his Will and determined he intended to benefit only his issue, which in 1943 was defined by statute as children born to legally married parents.

In opposition to the Co-Trustee's request for an award of attorney's fees, Mr. Collins cites several cases in which the court denied a request for attorney's fees under RCW 11.96A.150. But the cases cited by Mr. Collins "involved justiciable issues not previously resolved by case law." *Estate of Magee*, 55 Wn. App 692, 696, 780 P.2d 269 (1989). That is not the case here. The statutory meaning of "issue," as defined under Washington law in 1943, when Giuseppe executed his Will, and for more than sixty years thereafter, is descendants born to married parents. As the trial court ruled, Giuseppe's Will unambiguously demonstrates his intent to benefit only his lawful lineal descendants to the exclusion of any descendant born to unmarried parents.

Washington favors the award of attorney's fees where the result is to make the trust or estate whole. The beneficiaries of Giuseppe's Trust have been forced to incur substantial legal fees to defend the Trust against Mr. Collins' baseless claim. Just as the court ruled in *Villegas v. McBride*, 112 Wn. App. 689, 696-97, 50 P.3d 678 (2002), Mr. Collins' litigation deprived the beneficiaries of Giuseppe's Trust of part of their inheritance and is "proper grounds for an award of fees under RCW 11.96A.150." And like the estate in *Laue v. Elder*, 106 Wn. App. 699, 713, 25 P.3d 1032 (2001), the beneficiaries of Giuseppe's Trust are bearing the costs to defend the interests of the Trust against Mr. Collins' lawsuit.

An award of attorney's fees against Mr. Collins, whose conduct necessitated this lawsuit for his personal benefit, would be consistent with

the policy inherent in the equitable attorney fee provision of RCW 11.96A of protecting trusts.

**B. The Trial Court's Denial of Attorney's Fees Was an Abuse of Discretion.**

The trial court denied the Co-Trustees' request for an award of attorney's fees without oral argument and without explanation. Mr. Collins argues that the cases cited by respondents in support of an award of attorney's fees "involved bad faith or other egregious conduct." (Collins' Reply Br. 17.) RCW 11.96A.150 "allows a court considering a fee award to consider any relevant factor, including whether a case presents novel or unique issues." *In re Guardianship of Lamb*, 173 Wn.2d 173, 198, 265 P.3d 876 (2011).

In *Lamb*, the Washington Supreme Court granted direct review on a matter of first impression regarding guardians' fees and upheld the denial of attorney's fees because of the unique issue presented. Likewise, in *In re Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004), the court declined to award attorney's fees under RCW 11.96A.150 because of difficult questions involving the operation and constitutionality of a statute. In *In re Estate of D'Agasto*, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006), the court declined to award attorney's fees under RCW 11.96A.150 because of novel issues of statutory construction.

The present case, however, does not present a novel or unique issue. As the trial court noted, the "clear understanding of the law at the

time that the Will was executed was that children born out of wedlock were not issue within the meaning of the Will.” RP 49. Consequently, no novel issue was presented.

Mr. Collins carelessly forged ahead with his lawsuit in spite of Washington’s rules of construction applied to interpret wills for more than 100 years and asked the trial court to reject the longstanding statutory definition of the words used in Giuseppe’s Will, which Mr. Collins concedes exclude him as a beneficiary. The trial court properly denied Mr. Collins’ claim, but based on the clear understanding of Washington law, the trial court abused its discretion in denying the Co-Trustee’s request for an award of attorney’s fees.


### **III. CONCLUSION**

Mr. Collins’ claim against the Giuseppe Trust was not supported by the applicable law. This Court should reverse the trial court’s denial of attorney’s fees below, allow the same, and exercise its discretion under RCW 11.96A.150 and award the Co-Trustees’ their attorney’s fees on appeal.



RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2013.


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