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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,

vs.

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.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MICHAEL TRICKEY

REPLY BRIEF OF APPELLANT

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A. The Trial Court Erred By Ruling As A Matter Of Law That Giuseppe Intended To Exclude His Grandson Dale From A Class Of Income Beneficiaries That Would Be Determined Only Decades After Giuseppe's Death. (Opening Br. 6-9)

In his will, Giuseppe Desimone created a trust that extended to the limits of the rule against perpetuities, evidencing his strong intent to benefit descendants he would never know, under circumstances he could not contemplate. This court must give effect to Giuseppe's intent to benefit his "grandchildren." (Opening. Br. 8-9) Giuseppe did not define "my grandchildren," and it must be given its ordinary meaning – a meaning that includes appellant Dale Collins. *Estate of Price*, 75 Wn.2d 884, 886, 454 P.2d 411 (1969) ("Words used in a will are understood in their ordinary sense if there is nothing to indicate a contrary intent.").

The trial court's interpretation, and the respondents' arguments in support of it, write the term "grandchildren" out of Giuseppe's will, contrary to *Estate of Wright*, 147 Wn. App. 674, 681 ¶ 16, 196 P.3d 1075 (2008) ("We consider the entire will and give effect to every part."), *rev. denied,* 166 Wn.2d 1005 (2009). That Giuseppe may have used "grandchildren" as short-hand for a specific generation of descendants (Danieli Br. 22-23; Ross Br. 12-

13) does not mean that the term should not be given its plain and ordinary meaning. Respondents' repetitive arguments to the contrary are at base premised on an (inconsistent) reliance on inapplicable, superseded statutes and on impermissible speculation about Giuseppe's intent. Neither support the trial court's judgment as a matter of law.

1. The Former Real Property Intestacy Statutes Do Not Govern Giuseppe's Will.

The parties agree that Giuseppe's intent should govern the construction of his will. Moreover, the parties agree that the *terms* of Giuseppe's will should determine his intent. (*Compare* Opening Br. 6 *with* Danieli Br. 11; Trustee Br. 6; Ross Br. 7); *See Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994) (testator's intent should "be garnered from the language of the will itself"). Although the respondents pay lip service to this "central tenet" of probate law (Danieli Br. 11), they immediately turn to the former statutes governing real property intestacy to support their interpretation of the will – statutes that Giuseppe's will did not incorporate, and that, by definition, are inapplicable to a decedent who leaves a will. *Estate of Wright*, 147 Wn. App. at 683 ¶ 21.

Respondent Ross also makes several arguments aimed at determining *legislative* intent. (*See* Ross Br. 9 (statutes presumed to apply prospectively), 14 (legislative intent in moving definition of "issue" to probate code)). But this court must interpret Giuseppe's will, not a statute, and the law does not support respondents' reliance on the former real property intestacy statutes.

Our Supreme Court noted over a decade before Giuseppe executed his will that the customary meaning of "issue" includes "all descendants." *Bowles v. Denny*, 155 Wash. 535, 541, 295 Pac. 422 (1930) (Opening Br. 7). The respondents' argument that *Bowles* did "not define the word 'issue'" (Trustee Br. 9-10; *see also* Danieli Br. 17-18), ignores *Bowles'* plain statement that, "*unconfined by any indication of intention to the contrary*, the word 'issue' includes in its meaning *all* descendants." 155 Wash. at 541 (emphasis added), *quoting Drake v. Drake*, 134 N.Y. 220, 32 N.E. 114, 17 L.R.A. 664 (1892).

This court relied on another New York case, *Will of Hoffman*, 53 A.D.2d 55, 385 N.Y.S.2d 49 (N.Y.A.D. 1976), in noting the importance of a testator's qualification of the term "descendants" with the word "lawful" to exclude "illegitimates" in *Estate of Wright*, 147 Wn. App. at 684-85 ¶¶ 23-25 (Opening Br. 6-

7). Respondents' contention that *Wright* did not "intend[] to adopt the ruling in *Hoffman* in its entirety" (Danieli Br. 18; Trustee Br. 14) does nothing to refute that Giuseppe could have expressed an intent that illegitimate descendants not benefit from the trust by adding the word "lawful" or "legal" before the term "issue" in defining the class of future beneficiaries. (Opening Br. 9)

But Giuseppe did not use the term "lawful" or "legal" to describe any of his "issue," including his "grandchildren." The fact that Giuseppe also did not use the terms "heirs at law," *i.e.,* those who would inherit at intestacy, only confirms that he did not intend "issue" to have the meaning contained in the real property intestacy statute, contrary to respondent Ross' argument. (Ross Br. 19)

The Danieli respondents also mistakenly cite *Peerless Pac. Co. v. Burckhard, L.R.A.*, 90 Wash. 221, 155 Pac. 1037 (1916), for the proposition that the term "child" did not include illegitimate children in 1943. (Danieli Br. 27; *see also* Trustee Br. 8 (asserting that "child" "means legitimate child") (quotation omitted)) As respondents must concede, *Peerless* was abrogated by *Armijo v. Wesselius*, 73 Wn.2d 716, 440 P.2d 471 (1968). The *Armijo* Court noted that *Peerless*, "one of those proverbial derelicts floating on the sea of the law," had never been relied on by a Washington court

for the proposition that the term "child or children" in statutory enactments means "legitimate child or children," and that it was doubtful "if in fact it ever could" support that proposition. 73 Wn.2d at 719.

Powers v. Wilkinson, 399 Mass. 650, 506 N.E.2d 842 (1987) (Ross Br. 19-20), does not support application of the former Washington real property intestacy statute when interpreting Giuseppe's will. *Powers* applied a Massachusetts statute defining "issue" "as applied to the descent of the estates" in interpreting a trust that "by its terms, was to be construed according to the laws of the Commonwealth." 506 N.E.2d at 844 (citing Ma. Gen'l. Laws ch. 4, § 7, Sixteenth (1984 ed.)). The unpublished decision in *Kennedy v. Trustees of Testamentary Trust of Will of Kennedy*, 406 F. App'x 507 (2d Cir. 2010), *cert. denied*, 131 S.Ct. 1695 (2011) (Ross Br. 21), cites *Powers*, to the same effect. Unlike the statute considered in *Powers* and *Kennedy*, which applied to all Massachusetts' estates, the statute relied upon by respondents in this case narrowly applied "only to this chapter" – the chapter dealing with the intestate descent of real property. (Opening Br. 8 n.2. *citing* Rem. Rev. § 1354) And unlike in *Powers*, Giuseppe did not incorporate this, or any, statutory definition into his will.

2. Speculation And Irrelevant Extrinsic Evidence Do Not Support The Trial Court's Summary Judgment.

That an attorney helped draft Giuseppe's will does not establish that Giuseppe intended that the term "issue" have a technical or statutory meaning. (Danieli Br. 23; Trustee Br. 7; Ross Br. 7) *See Estate of Searl*, 29 Wn.2d 230, 242, 186 P.2d 913 (1947) ("Mr. and Mrs. Searl's wills were drawn by an attorney, and it must be assumed that the word 'approximately,' as used in the wills, *was employed in its customary sense.*") (emphasis added). If anything, the fact that an attorney drafted the will without expressly incorporating the definition of "issue" in the real property intestacy statute, or without making clear the limitation of trust beneficiaries to "lawful" or "legal" "issue," demonstrates that Giuseppe did not intend to adopt the real property intestacy statute's definition.

The absence of such modifying language is instead indicative of Giuseppe's intent that all his grandchildren would be beneficiaries. *Wright*, 147 Wn. App. at 685 ¶ 24. The Trustees' argument that "lawful issue" would be redundant (Trustee Br. 13) is circular – the qualifier is redundant only if one first accepts that "issue" includes only legitimate descendants. And the Danieli respondents' argument that the "non-technical description"

(Daniele Br. 22) "my grandchildren" does not mean what it says writes that term out of Giuseppe's will, contrary to the rules governing the interpretation of wills and trust instruments. (*See* Opening Br. 6)

Whether Mondo Desimone "acknowledged" Dale Collins also is irrelevant to a determination of Giuseppe's intent. (Danieli Br. 27-30; Trustee Br. 18-19; Ross. Br. 17) The "acknowledgement rule" contained in Rem. Rev. Stat. § 1345 applied only to an intestate estate, not where, as here, the decedent left a will. *See, e.g.*, *Estate of Beekman*, 160 Wash. 669, 670, 295 Pac. 942 (1931) (Danieli Br. 28; Trustee Br. 19) (applying statute where deceased died intestate).

Finally, this court should reject the Danieli respondents' invitation to speculate, based on ethnic and religious stereotypes, that Giuseppe intended to exclude illegitimate grandchildren as beneficiaries. The Danieli respondents ask this court to conclude that because Giuseppe left gifts to his churches, rewarded his children for visiting his birthplace in Italy, and gave larger shares to his male descendants than to females, that he also intended to exclude from his trust any descendants born out-of-wedlock. (Danieli Br. 20-24) But respondents do not explain why Giuseppe's

"traditional paternalistic values" and his purported intent to "encourage familial ties" mean that he intended to exclude "illegitimate" grandchildren from benefiting from the trust. The court could just as easily speculate that, since he provided that male descendants would take twice as much from the trust as females, Giuseppe would have been delighted that another male descendant would be a beneficiary of the Desimone trust.

B. The Law Applicable When The Class Of Income Beneficiaries Is Ascertained Must Govern The Interpretation Of Giuseppe's Will. (App. Br. 9-13)

It is indisputable that the terms "issue" and "children" now include "illegitimates." Respondents cannot distinguish *Matter of Sollid*, 32 Wn. App. 349, 647 P.2d 1033 (1982) (Opening Br. 9-10), which applied the law in effect when adopted children made claims to benefit from a trust, rather than the law that existed when a settlor executed the trust, to include as beneficiaries individuals who would not have been included when the trust was created. *Matter of Sollid* did not turn on the strength of "familial ties," as respondents argue, but on whether "the settlor was presumed to understand that a statute fixing the rights of an adopted child would be subject to change." 32 Wn. App. at 357. *See also Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1292 (Del. 1989) (Opening

Br. 10-11) (applying current statutory definition of "issue" and holding that "issue" included illegitimate children because "a settlor, unless he indicates otherwise, expects that the laws governing trusts will change and that the trust he created will be subject to those changes").[1]

The legislature amended the intestacy statute in 1976 – twenty years before Mondo's death – to eliminate any distinctions between children based on the marital status of parents. RCW 11.04.081, *as amended by* Laws 1975-76, 2d Ex. Session, ch. 42, § 24. Thus, under *Matter of Sollid*, to the extent the intestacy statute has any application, it supports Dale's claim that he should be included in the class of income beneficiaries of the Desimone trust.

Matter of Sollid properly recognized that where, as here, a testator creates a trust to provide benefits far into the future, to beneficiaries the testator will never know, a court should give effect to the testator's intent that the class of beneficiaries will evolve with the law. Respondent Ross cites *Matter of Sollid* for the proposition that "[t]here is no reason to believe that 'issue' as used in the statute

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[1] The Danieli respondents note that the Delaware legislature enacted a statute to overturn the holding in *Annan*. (Danieli Br. 20) The Washington Legislature has taken no similar action since *Matter of Sollid* was decided.

of descent and distribution has a different meaning when used in a will or trust instrument." (Ross Br. 15, *quoting Matter of Sollid*, 32 Wn. App. at 357) But *Matter of Sollid* applied the *current* statutory provision regarding the status of adopted children to a trust that *predated* its enactment.

Respondents' argument that the law of adoption has a "unique history" that only recently "has moved toward treating adopted and natural born children equally" (Danieli Br. 13; *see also* Trustee Br. 14-15 ("No similar policy applies to people born out of wedlock.")) ignores the striking parallels between the laws governing the "legitimacy" of adopted children and children born out of wedlock. Just as the legislature amended the intestacy statutes to eliminate the antiquated notion that adopted "strangers to the blood" should be treated less favorably than "natural" children, so too the legislature amended the intestacy statutes so that "illegitimate" children would not be discriminated against because of their parents' marital status. RCW 11.04.081; *see also Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972) ("imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

responsibility or wrongdoing"); *Annan*, 559 A.2d at 1293 (rejecting argument that "the longstanding tradition consistently excluding illegitimates from inheritance rights distinguishes such situations from adopted children cases"). Respondents' attempt to create an artificial distinction between the shared history of discrimination against adoptive and illegitimate children only reinforces the need to look to the current statute.

The respondents do not cite a single case holding that a testator's intent is forever fixed by the law in existence when a will is executed. (Danieli Br. 11-12; Trustee Br. 8-9, 12; Ross Br. 7-11) These cases simply do not support respondents' claim that the members of a class of income beneficiaries that will be ascertained in the future is forever fixed by the law when the will was executed. Even if testators are presumed to know *existing* law when they execute a will, *see, e.g., Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836 (1986) (Danieli Br. 11-12; Trustee Br. 9, 11; Ross Br. 8-9), as *Matter of Sollid* recognized, there is also a presumption, unrebutted in this case, that a testator intends that the construction of his testamentary instruments – including the determination of who is a beneficiary in a class that will be ascertained long after the testator has died – will evolve with the law. And, to the extent

Giuseppe is presumed to have known the law that existed when he executed his will, he also knew that by executing a will he prevented the application of the statutes governing intestate estates. *See, e.g., Erickson v. Reinhold*, 6 Wn. App. 407, 420, 493 P.2d 794 (1972) (Danieli Br. 12; Trustee Br. 9; Ross Br. 8) ("There is a strong presumption that one who takes the time to write a will does not intend to die intestate.").

The other cases cited by respondents support Collins' position as well. In *Estate of Bergau*, 103 Wn.2d 431, 693 P.2d 703 (1985) (Danieli Br. 11; Trustee Br. 12; Ross Br. 27), for instance, the court was asked whether the option price a testator intended by reference to the property's statutory classification should be determined when the will was executed, or upon exercise of the option. The court held that the testator envisioned "the possibility his particular [statutory] assessment program might change," and thus admitted extrinsic evidence to determine his intent. *Estate of Bergau,* 103 Wn.2d at 438. *Estate of Mell* similarly held that a testator intended his property to be distributed not according to the character of property "at the time of execution of the will," but by reference to the property's community or separate character at the time of his death. 105 Wn.2d at 525.

Pitzer v. Union Bank of California, 141 Wn.2d 539, 9 P.3d 805 (2000) (Danieli Br. 27-30; Trustee Br. 16-17), also does not aid respondents. In *Pitzer*, three illegitimate children of Frank Magrini alleged that they were pretermitted heirs, and sought to impose a constructive trust on the estate of his late wife or to reopen Magrini's probate estate, which had been closed for 22 years. Recognizing the importance of finality for a closed estate, the court rejected the claimants' argument that they were entitled to notice of Magrini's probate as "heirs," applying the definition of "heir" that existed at the time of probate. *Pitzer,* 141 Wn.2d at 553.

But unlike the claimants in *Pitzer*, Dale Collins is not trying to reopen a closed estate. He is instead seeking to be declared a member of a class of income beneficiaries of a currently operating trust, based on the law when the class is ascertained. (CP 7) Moreover, the *Pitzer* Court relied heavily on the fact that the testator had named the claimants (whom he identified as his nieces and nephew) as contingent beneficiaries elsewhere in his will, and thus did not intend for them to take as pretermitted heirs. 141 Wn.2d at 550. In contrast, Giuseppe's will lists his children, and then generically refers to numerous succeeding generations, including "my grandchildren." (CP 42) As this court held in *Matter*

of Sollid, whether Dale is a member of the class of income beneficiaries defined as "my grandchildren" must be determined when the class is ascertained.

C. The Uniform Parentage Act Statute Of Limitations Has No Application To This TEDRA Action.

The respondents renew an argument, not accepted by the trial court, that appellant's claim is time-barred. (Danieli Br. 30-34) Collins brought this action under the Trust and Estate Dispute Resolution Act, RCW ch. 11.96A. (CP 3) TEDRA's statute of limitation, RCW 11.96A.070, incorporates the "discovery rule." *See August v. U.S. Bancorp,* 146 Wn. App. 328, 342 ¶ 39, 190 P.3d 86 (2008), *rev. denied,* 165 Wn.2d 1034 (2009). There is at a minimum an issue of fact when Dale Collins knew he was within the class of income beneficiaries of the Desimone trust that would prevent summary judgment for respondents. (CP 34)

Respondents appear to agree, as they rely instead on the (evolving) statute of limitations in the Uniform Parentage Act, RCW ch. 26.26. As the Danieli respondents have previously conceded, however, this is not a paternity action. (CP 225) Thus, the Uniform Parentage Act, RCW ch. 26.26, governing "determinations of parentage," RCW 26.26.021, does not apply. Although

determinations of paternity in estate cases may borrow the mechanisms of the UPA, *see, e.g.*, *McKinnon v. White*, 40 Wn. App. 184, 191, 698 P.2d 94, *rev. denied*, 103 Wn.2d 1042 (1985) (Danieli Br. 31) (discussing HLA testing), the UPA statute of limitations has never been applied to a proceeding under TEDRA. In any event, the time limitations of RCW 26.26.530(2) do not apply to children, who may seek a determination of paternity at any time. *Parentage of C.S.*, 134 Wn. App. 141, 152 n.25, 139 P.3d 366 (2006) (Opening Br. 11; Danieli Br. 32). Collins brought this action well within any applicable statute of limitations after he discovered his claim as an income beneficiary of the Desimone trust.

D. This Court Should Award Fees To Dale Collins – Not To The Trustees Or Respondent Beneficiaries. (Opening Br. 13; Response to Cross-Appeals)

Respondents concede that this court reviews an award or denial of fees under TEDRA for abuse of discretion. (Danieli Br. 34-35; Trustee Br. 20) Indeed, the cases cited by respondents *affirm* the trial court's decision on fees. *Estate of Jones*, 152 Wn.2d 1, 20, 93 P.3d 147 (2004); *Irrevocable Trust of McKean*, 144 Wn. App. 333, 344, 183 P.3d 317 (2008); *Laue v. Estate of Elder*, 106 Wn. App. 699, 713, 25 P.3d 1032 (2001) (affirming fee award but remanding for findings), *rev. denied*, 145 Wn.2d 1036 (2002); *In re*

Boris V. Korry Testamentary Marital Deduction Trust for Wife, 56 Wn. App.749, 756, 785 P.2d 484, *rev. denied*, 114 Wn.2d 1021 (1990) (all Danieli Br. 35-36; Trustee Br. 20-21). The only case reversing a denial of fees involved a small estate and a claim that on its face failed to comply with the pleading requirements of RCW 11.40.070(1). *Villegas v. McBride*, 112 Wn. App. 689, 697, 50 P.3d 678 (2002), *rev.* denied, 149 Wn.2d 1005 (2003) (Trustee Br. 22).

Bringing a good faith claim is not a basis for imposing a fee award on a plaintiff. *Estate of Eichler,* 102 Wash. 497, 500-01, 173 Pac. 435 (1918) ("[T]o penalize appellant for daring to ask an adjudication upon a subject-matter that in right and conscience is probably her own would be to do a great wrong, and tend to discourage the assertion of legitimate claims."); *Estate of Magee*, 55 Wn. App. 692, 696, 780 P.2d 269 (1989) (denying award of fees to personal representative from plaintiff personally because plaintiff "exercised good faith in bringing this appeal, which involves justiciable issues not previously resolved by case law"); *Estate of Wright*, 147 Wn. App. at 688 ¶ 31 ("While we resolve the legal issues that Patterson raises in favor of the personal representative, those issues are not frivolous. . . . Accordingly, as

did the superior court, we decline the personal representative's request for an attorney fee award.").

The trial court did not abuse its discretion in denying fees to the respondents. As the trial court acknowledged, Dale presented strong evidence that he is Giuseppe's grandchild. (1/11 RP 50: "there is ample basis to get to a trier of fact the issue of whether or not he's a descendant of Mondo Desimone". His claim is not "unfounded." (Trustee Br. 21) In contrast, the cases cited by respondents that awarded fees from a party, as opposed to the trust, involved bad faith or other egregious conduct. *Trust of McKean*, 144 Wn. App. at 345 ¶ 32 (party "acted in bad faith;" trial court had also awarded fees); *Estate of Jones*, 152 Wn.2d at 21 (suit "necessitated by [trustee's] multiple breaches of fiduciary duty").

For the reasons set out in the opening brief, Dale Collins is entitled to his attorney's fees on appeal.

II. CONCLUSION

For the reasons set out in this and the opening brief, this court should reverse the trial court's summary judgment, remand for proceedings consistent with Collins' status as an income beneficiary of the Desimone trust, dismiss respondents' cross-

appeal and deny their requests for fees on appeal, and award Collins his fees on appeal.

Dated this 27th day of September, 2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

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DATED at Seattle, Washington this 27th day of September, 2013.

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