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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

v.

BNY MELLON, N.A., JOSEPH R. DESIMONE and RICHARD L. DESIMONE, JR., in their capacities as co-Trustees of the TESTAMENTARY TRUST OF GUISEPPE DESIMONE,

Respondents

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

RESPONSE BRIEF OF VESTED BENEFICIARY OF TESTAMENTARY TRUST OF GIUSEPPE DESIMONE

CATHERINE ROSS, Appearing Pro Se

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY LAW SOURCE

RULES AND REGULATIONS

I. RESPONSE TO ASSIGNMENT OF ERROR

i. The trial court did not err in its January 11, 2013 Order Granting: Co-Trustees and Danieli Parties' Motions for Summary Judgment & dismissing all Dale Collins' (Petitioner) claims against the Testamentary Trust of Giuseppe Desimone , with prejudice. (CP 359-363)

II. ISSUE RELATED TO: NO ERROR

Whether it is unambiguous for the proposition that Giuseppe Desimone's application of the word "issue" in describing his descendants, used at least twenty (20) times in his Will of 1943, meant to include only his "lawful line descendants; and further, whether relevant statutes (RRS 1354; RRS 1345) should be applied at the time of the Will's execution to determine this Testator's intent, instead of retroactively?

III. STATEMENT OF THE CASE

i. Introduction: Because the trial court, after thoroughly reviewing the opposing Parties' pleadings of record and listening to their oral arguments, granted summary judgments to the Co-trustees of the Testamentary Trust and Danieli Parties, Dale Collins appealed.

The trial court judge, in his oral ruling, first pointed out the fact that when one deals with a testamentary trust in a will "that obviously the intent of the testator is of primary importance."

Next, the trial court judge found compelling the Supreme Court *Bergau* case. Judge Trickey quotes this case, in pertinent part, @ p. 436

"Because a testator employs language in the will with regards to facts within his knowledge, the court must consider all the surrounding circumstances, the object sought to be obtained, the testator's relationship to the parties named in the will...a will speaks as to the date of testator's death, the testator's intentions as viewed through the surrounding circumstances and language are determined at the time of the execution of the will". (See: CP 359-363 & Hearing transcript, pgs 48-51). *Estate of Bergau, 103 Wn.2nd 431 (1985)*

Opposing parties in this case both argued that the testator's intent was unambiguous as to testator use of the word "issue", but each had different reasons. (CP, 11-29; 121-133; 134-141; 170-176; 284-304)

Inasmuch as this case involves a will interpretation this Court reviews *de novo* questions of law. *Woodward v. Gramlow, 123 Wash. App. 522, 526 (2004).*

Whether or not Dale Collins is a nonmarital descendant of Giuseppe Desimone is immaterial to this case.

Analogously, this Court stated, in pertinent part, at *Estate of Wright, 147 Wn. App. 674 (2008):*

"The parties disagree about whether or not we must presume that Patterson is Myron Wright's child. This disagreement need not be resolved, as it has little relevance to Josephine Wright's intent as testatrix, the actual issue presented herein". (*@ FN4)*

A. Facts of This Case and alleged Facts of This Case

i. Facts:

The Co-trustees of the Testamentary Trust of Giuseppe Desimone are: Joseph Desimone, Richard Desimone Jr., and BNY Mellon. (CP 134-141) Giuseppe Desimone executed his Will on November 18, 1943. (CP 142 -169) Giuseppe Desimone died on January 4, 1946. (CP 134-141)

In his Will, Giuseppe named his five children and provided: they would share, regarding income distributions, in a testamentary trust and upon their deaths their issue (Giuseppe's grandchildren) would take the share they would have been entitled to if alive, on the basis of one share to each male issue and one half to each female issue. If any of his children died leaving no issue, then the share of that deceased child would go and be divided to among his surviving children and issue of any deceased child. And the issue of any deceased child receiving the share that the deceased child would have taken if alive are to divide it among themselves on "said" basis of one "portion" for each male child and one-half to each female child. In the event that any grandchildren die leaving issue (great-grandchildren), then the same plan as described above with grandchildren is to be followed. Finally, in the event any of Giuseppe's great-grandchildren shall die leaving issue, while they each are entitled to any part of the Trust, the share which each great-grandchild would have taken if alive is to go and be divided among the surviving issue of the grandchild through whom such great grandchild was taking, on the same basis mentioned above (one share to each male child; one-half to each female child). (CP 142-169)

All of Giuseppe Desimone's named children have died and are survived by Joseph Desimone, Richard Desimone Jr., Suzanne Hittman (grandchildren); Karen Danieli, Shelley Caturegli, Catherine Ross, Denise Peterman, Liza Danieli and Maria Danieli (great-grandchildren). These are the current lawful income beneficiaries of this Desimone Trust. (CP 121-133).

At the Testamentary Trust's termination point, which is twenty-one years after the death of the last to die of Giuseppe Desimone's named children and those grandchild born at the time of testator's death, Giuseppe Desimone says emphatically that the corpus shall be divided among and paid to the issue of his children, "per stirpes"; "PROVIDED" that the male issue of Giuseppe's children receive a full share and the "female issue a half share only". (emphasis Giuseppe) (CP 145-159)

When the corpus of the trust is to be distributed and there shall be no direct issue of any of his children living, then such share is to go and be divided among the direct descendants of his other children, "per stirpes", on the basis of one share for each male descendant and one-half share for each female descendant. (emphasis Giuseppe) (CP 145-159)

ii. Alleged facts:

Nearly seven decades after Giuseppe Desimone's death, Dale Collins now makes a claim that he is a beneficiary of Giuseppe's Testamentary Trust because he is the natural son of Mondo Desimone (Giuseppe Desimone's son); all the while acknowledging that he is the product of an affair between a "tall..." man and his mother (Josephine E.

Collins/Daniels), while his mother was married to Orville Collins. Dale Collins believes he is entitled to sixteen years of retroactive income, among other things, from the Giuseppe Desimone Trust. (CP 1-10, 11-29) At the time of Dale Collins' birth, Orville Collins is listed on his birth certificate as his father. (CP 134-141--*See: Co-trustee's Summary Motion, @ page 2 for birth certificate reference).

Dale Collins, in the court record, claims to have known that Mondo Desimone was his natural father in 2007. But he also alleges his presumptive father (Orville Collins), in 2001, told him he was not his natural father but Dale was the product of a "physical relationship" with a "tall, well-dressed, nice-looking man" and Josephine, his mother.

As Orville Collins relates this story to Dale Collins, Orville once saw, decades ago, the real father of Dale's because Orville's sister-in- law, Emma Eaton, pointed the real father out to him, while Orville was attending his mother's funeral in Seattle. Dale also claims, through conversations with Orville, that his mother had given up another son for adoption and Orville was not sure if their oldest son was his son. (CP 30-62)

After Orville's sighting episode of the real father, Orville dropped the matter, "content to raise Dale as his son." *(See: CP 11-29; Petitioner's Summary Motion, pgs. 3-4.)*

iii. Facts:

Mondo Desimone was married to his wife (Louetta) from 1948 till his death in 1996. (CP 1-10) Jacqueline Danieli is his only acknowledged

child. (CP 11-29) Jacqueline Danieli died in July of 2012 and is now survived by her six daughters, who are the great-grandchildren of Giuseppe Desimone . (CP 121-133; 134-141)

B. Procedural History After Trial Court Hearing, concerning cross appeals:

(See procedural history of Respondents, Co-Trustees)

IV. ARGUMENTS

A. Standard of Review

This Court reviews an order granting summary judgment *de novo.*

"An appellate court reviews de novo the trial court's interpretation of a will, including whether or not there is an ambiguity." *Woodard v. Gramlow 123 Wash. App. 522 (2004)*

B. Authority

Dale Collins, the appellant, has the burden of proof to show there was an error by the trial court in granting the Co-trustees and Danieli parties the summary judgments. *Green... v. Normandy Park, 137 Wash. App. 655, 151 P3d 1038 (2007).*

C. Testator's intent controls

A long-standing state statute in effect says the court shall have due regard for the overall direction of any will "and the true intent and meaning of the testator in all matters brought before them". (RCW 11.12.230; formally RRS 1415)

"The paramount duty of a court in construing and interpreting the language of a will is to give effect to the testator's intent." *Estate of Bergau 103 Wn. 2d, 431 (1985).*

To understand the testator's intent, terms of the will must be interpreted according to their meaning at the time the will was executed. *Matter of Estate of Mell, 105 Wn. 518 (1986).* And technical words in a will are presumed to be used in a legalist sense. *Erickson v. Reinbold, 6 Wn. 407 (1972).*

It is irrefutable that Giuseppe Desimone had an experienced drafter, a lawyer, assisting him in the drafting of his Will in 1943. Detail after detail of precise explanations as to whom and when the Testator's bounty should descend and be distributed under the trust created under his Will is clearly and unambiguously manifested. Giuseppe's employment of the legal phrases "per stirpes"; and his discussion of how the corpus of this long-term Trust would terminate at the death of the last survivor of his named children and the last grandchild born at the time of his death, evidences an understanding of the legal theory of law against perpetuities. Giuseppe Desimone specifically named *lives in being* (by name and class) at the time he wrote his Will, in keeping with the requirements against perpetuities. *Betchard v. Iverson, 35 Wn. 2d 344* (1949) So since it is clear that an experienced drafter assisted the Testator in executing his Will, then it is presumed that this Testator had to have known the laws which existed when he finally executed it in 1943. *(cf: Estate of Elmer, 91 Wn. App. 785, 789 (1998))*

D. The Court should Determine Testator's intent With Regard to the Testator's Use of the word "Issue" based upon the Laws at the Time of a Will's Execution , not Retroactively

A court determines testator's intent by examining the entire will, using the time of the date of the execution of a will, and the circumstances surrounding its execution. It does not consider extrinsic evidence, if there is no uncertainty in the will's terms. *Estate of Mell, 105 Wn. 2d 518* . Time after time, WA state Supreme Court rulings have stated: the time of the date of execution of a will and the statutes that are in place at the time of its execution are how they will interpret testator's intent, unless there is an expressed intent to the contrary. *(Estate of Bergau; Estate of Mell; Estate of Elmer (citing Estate of Patton, reviewed denied 80 Wn 2d 1009 (1972).* This is one of the bedrock principles on which our highest court has reached its decisions, concerning interpreting testator's intent.

Secondary authority source also backs up this notion:

"In interpreting a will, a testator is presumed to know the law and to appreciate the effect of the language used in a will". *(cf: Corpus Juris Secumdum, Vol 96 (Wills), p. 212)*

In light of the circumstances surrounding the drafting of Giuseppe Desimone's Will, it is instructive to view the prevailing law culture at the time and the relevant statutes, as this is what Giuseppe's drafter would have relied upon. When Giuseppe executed his Will, the statutory definition of "issue" was: "all lawful lineal descendants of the ancestor" (RRS 1354). [The current statutory definition of "issue" ,as found in the

definition of the probate codes, covering all estates @ RCW 11.02.005 (8), now drops the word "lawful" out of the lineal ancestor reference , as of 2005.]

So, trying, as urged by Dale Collins in his previous pleadings and the Opening Brief, to apply the current statutory definition to "issue" to Giuseppe's Will retroactively is inappropriate and should be rejected by this Court. (See: Appellant's Brief, dated 6-7-13 @ pgs. 9-13; CP 11-29)

Consider: Recently, another Supreme Court ruling, (citing *Burns case, 131 Wn. 2d 104 (1997))* has stated:

"Statutes are presumed to apply prospectively, absent contrary legislative intent". *(In re the Matter of the Estate of Haviland, Supreme Court No. 86412-8, March 14, 2013 @ page 6).*

Importantly, Session Laws of 2005 (@ ch. 97) never applied this "issue" definition retroactively. And in 1943, under RRS 1354, this definition had been on the books for nearly 100 years, so how could Giuseppe and his drafter have assumed this law would be changing nearly 62 years later? It is unreasonable to presume that they would have known this law would change in the future.

Giuseppe and his lawyer may have been astute, but it is doubtful they both had the gift of omniscience. In other words, they could not be all-knowing, able to discern decades later that this relevant probate code would change. And there are no provisions in Giuseppe's Will that either expressly or impliedly state he presumed the laws in place at the time, concerning the relevant probate statutes, would change. None.

And, furthermore, Dale Collins does not cite any relevant provisions from Giuseppe's Will in his Brief (June 7, 2013) or pleadings of record about this matter. (CP 11-29; 210-229; 305-315). Dale Collins argument saying the future "grandchildren" class was unknown to Giuseppe is misplaced; for the members of beneficiaries of Giuseppe's bounty in the future was known by Giuseppe in this sense: only lawful "direct descendants" of his children would be takers in Giuseppe's Trust at time of termination of the trust created under his Will. (CP 142-169)

If Giuseppe had used the word "heirs" or "heirs –at-law" at Trust's termination point, then, yes, the members of the class of future beneficiaries would be unknown to him—for it would have included the possibility of remote collateral relatives taking; thus widening the pool of future beneficiaries (by a substitution provision) beyond Giuseppe's direct "issue" descendants .

But Giuseppe Desimone foreclosed that scenario by carefully avoiding using "heirs" or "heir-at-laws" in his Will.

Instead Giuseppe used the phrase "direct descendants" of his children's issue, per stirpes, when describing his wish for takers at Trust's termination point. (CP 142-169)

[*See : RRS 1369, Ch. 2: "Heirs, meaning of":* This statute refers back to descent chapter for definition; covers RRS 1341-1355 descent meanings.]

A fuller discussion of this follows later in this response.

And other contemporaneous law sources in the 1930s and 1940s, which Giuseppe's drafter would have been aware of, and current law sources, strongly suggest that the term "issue" only included legitimate descendants, unless the context clearly stated otherwise. (See: George Thompson (3rd edition 1947) , entitled *Law of Wills* :

"...if it is designed to include adopted or illegitimate children that intent should appear, as otherwise they will usually be excluded". (pgs. 433-35)

Black's Law Dictionary (3rd edition, 1933) says about "issue"="descendants: All persons who have descended from a common ancestor"... "... the term is commonly held to include only legitimate issue.". (See: p. 1013 @ Real Law section)

In another related treatise, a Washington state one, it says in pertinent part regarding "Nonmaritial children":

"In a significant departure from prior law, the present Washington statute dealing with rights on nonmaritial ...children specifically disregards the marital status of the parent in determining those rights."

Additional historical context from same above source:

..."Under the common law, a nonmarital child could not inherit from or through either his mother or his father. All definitions of parent, child, issue, next of kin were premised on a lawful marital relationship. Most states, by statute, permitted a nonmarital child to inherit from his mother and some permitted from collaterals through the mother as well. In only a few states was inheritance permitted from and through the father unless there was some form of acknowledgment of paternity by the father...."This was the situation in Washington before the amendment of RCW 11.04.081 in 1976." (*See: Mark Reutlinger's Washington Laws of Wills and Intestate succession (2006 edition) @ FN 74, pgs 18- 19)*

The explanation of the term "issue" from the aforementioned treatises is pertinent to the interpretation of the Testator's Will for one primary reason. The presumption from the treatises is that the word "issue" does not include illegitimate descendants, unless a contrary intent is apparent from the will. Nowhere is this "contrary" intent apparent from Giuseppe Desimone's Will.

And the reason the Testator and his drafter included parenthetical references to "grandchildren" "great-grandchildren" following the word "issue" in Article 4, Section 4, was to make clear that "issue" as used in that particular section just referred to the generation below his lawful children and to the generation below those lawful children.

E. Rebuttal against Dale Collins' claim that Testator's use in his Will of phrases "my grandchildren" "my great-grandchildren" , when construed as a whole, after the term "issue" unambiguously means to include both in-wedlock and out-of-wedlock descendants.

Applying general grammatical construction standards to the "my grandchild, etc." phrases to Giuseppe's Will show: these phrases are used parenthetically as a restrictive devise by the Testator because he obviously meant the legal, statutory definition for "issue=all lawful lineal descendants of the ancestor"; but, wished, at Article Four , to limit term to a specific class of lawful "issue". Since the definition in statute, in 1943, clearly says "all lawful lineal descendants..." indefinitely, the Testator just restricted the pool of potential descendants down to a specific class "my grandchildren, my great-grandchildren". These latter

phrases are not controlling at the section of the Will; the noun "issue" is. The phrases are being used in an appositive sense—renaming the noun, with qualifying nouns of restriction. (CP 289-304; Hearing transcript 35 - 36; 43)

In other words, the parenthetical devise employed by the Testator limits "issue" to a specific generational class at certain sectional parts because, as the term "issue" was generally understood at the time, it meant *all* lawful lineal descendants "ad infinitum".

William Page's longstanding *Treatise of Law of Wills* says, in pertinent part:

> "Issue is a word whose primary meaning, in absent anything to show a contrary intent, is that of legitimate lineal descendants indefinitely". (*See: Page 3 on Wills, Section 1027 at 152 (revised: 1941).*

So Dale Collins argument here must fail as it is an unreasonable interpretation of "issue" in Giuseppe Desimone's Will.

F. Response to: Collins argument that Washington statutory definition of "issue" only meant for intestate estates.

Contrary to Dale Collins assertions in his trial court pleadings and in his Brief, this statutory descent "issue" definition may be applied to will and trust instruments. For decades, prior to 1943, this definition was found in Chapter One of the Descent chapter of Washington's Revised Remington Statutes (RRS 1354), under Title X of Probate Code. And, in 1943, this definition applied to the entire descent chapter; and,

importantly, two of these descent statutes covered "testate" topics. (See: RRS 1342; RRS 1356-1).

Also, in 1965, the Washington state legislature amended and clarified sections of the Probate Code , and moved the "issue" definition (which was still unchanged as regards to the" lawful lineal descendant" phrase), along with other additional definitions, to the beginning of Title 11 of the Probate Code; intending that these definitions cover all estates, i.e., testate and intestate ones. On a related note: the other relevant statute to this case, the nonmarital child's rights law (which was now re- codified under RCW. 11.04.081), was only slightly modified regarding how nonmarital persons could inherit through their fathers. No longer is a "witness" requirement needed to father's written acknowledgment for this code.

The strong inference , then, is that when the state legislature placed "issue" definition at the beginning of the entire Probate Law Code, covering all estates, they did it because that had been the original legislative intent to begin with. For it seems illogical to presume that the legislative intent for this "issue" statutory definition, which had not changed in over 100 years by that time, could suddenly be morphed into a meaning which included both testate and intestate estates; whereas prior to 1965, legislative intent was not meant to cover it at all. Clearly, then, it is more reasonable to presume that legislative intent for the descent word "issue" was not meant in the past to be restricted to intestate estates. (cf. Session Laws of 1965, ch. 145; and Laws of

Washington territory, 1854, Sec. 243; & An Act Relating to Wills of 1854 @ Section 7—"issue" word is used in descent sense).

Moreover, Washington case law supports the proposition that the descent "issue" statute may be applied to trusts and wills. For instance, the WA Sollid adoption case, the case which Dale Collins replies so heavily upon, makes this very point, in pertinent part:

> "Next, respondent cites no cases which would prohibit use of the statutory definition of "issue". There is no reason to believe that "issue" as used in the statute of descent and distribution has a different meaning when used in a will or trust instrument". *In re Sollid, 32 Wn. App. 349 (1982) @ p. 357*

Dale Collins cites no cases that would prohibit the statutory definition of "issue" applying to trusts and wills in any of his pleadings of record, nor in his Opening Brief. (CP 11-20; 210-229; 305-315 & Brief, dated 6-7-2013)

In addition, a controlling Washington Supreme Court case says that "issue" definition is not tied to rights of an illegitimate child *Wasmund v. Wasmund, 90 Wash. 274, 275-26 (1916). T*his Wasmund court recognized that the particular statute (Descent 1345), which governed a nonmarital child's rights to inherit, was plain and unambiguous; and that only the state could grant such rights. (@ pgs 278-79) .

Two other Washington courts found this particular "illegitimate child, rights of" statute plain and unambiguous. In the Supreme Court

Gand case, a nonmarital child tried to reach her mother's sister's (collateral relative) estate.

This Gand Court rejected her claim. It said:

"We must as in Wasmund v. Wasmund, supra, assert that the statute is plain." *In re Estate of Gand, 61 Wash. 2d 135 (1962); citing In Re Baker's Estate (1956),* "Where there is no ambiguity in statute, there is nothing for the court to interpret." (*supra, Public Hospital Dist 2 of Okanogan Cy. v Taxpayers of Public Hospital ... 44 Wn 2d 623 (1954)(Note: This court sites RCW 11.04.080)*

So if one were to still hold: 1) that "issue" was only an intestate statute definition and since Giuseppe died testate he couldn't have meant this statutory definition; or 2) that Giuseppe's repeated use of the term "issue" is ambiguous in his Will, Dale would still be barred from reaching Guiseppe's Trust anyway because of the "illegitimate child, rights of "statute (RRS 1345). For , if something a testator's will is not clear about descent or needs to be invalidated, then the courts fall back, by default, to the intestate statutes. See, in pertinent part, *Supreme Court case: Pitzer v Union Bank of California, 141 Wash. 539 (2000) & Estate of Elmer 91 Wn. App. 791-792 (1998).* In fact, this Pitzer court acknowledged that even if the alleged nonmarital children could have prevailed upon their claim to reopen a closed probate estate , the nonmarital children still would have been barred, by the "illegitimate child, rights of" statute; as they had no written acknowledgment from the putative father. This Pitzer court looked at the statute that applied when the will was executed. (see: RCW 11.04.081).

In 1943, date of execution of Giuseppe's Will, the applicable code was RRS 1345. It said: (verbatim quote)

"Every illegitimate child shall be considered as an heir to the person who shall in writing , signed in the presence of a competent witness, have acknowledged himself to be the father of such a child, and shall in all cases be considered an heir of his mother and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he shall not be allowed to claim, as representing his father or his mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him aforesaid, and adopted him into the family, in which case such child and the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate , and without issue, the others shall inherit his estate, and he theirs, as heretofore provided in like manner as if all the children had been legitimate, saving to the father and mother respectively, their rights in the estates of all the said children, as provided in like manner as if all had been legitimate."

None of these specific requirements of proof of paternity, or intermarriage or adoption occurred between Dale Collins' biological parents; which would have been required in 1943, in order for Collins to reach his (alleged) kindred's estate. *In re Estate of Gand 61 Wash. 2d 135 (1962).*

Thus, this too proves, as a matter of law, Dale Collins is not "issue" of Giuseppe Desimone; nor can he be a beneficiary of Giuseppe Desimone's trust.

G. Language in the Will precludes Relief sought by Dale Collins

The Court should presume that the Testator, who had an experienced draftsperson assisting him, would have provided language in the Will to insure that it not be challenged or parts of the Will invalided. Given this, then, it seems farfetched to think that the experienced draftsperson of Giuseppe would have left him or his male descendants wide open to false paternity challenges in the 1940s. If , as Dale Collins claims , the word "issue" was meant to include in-wedlock and out-of-wedlock descendants, then how would Giuseppe's estate have been protected against false paternity claims in the 1940s or thereafter? Giuseppe had four sons, so it seems unlikely no legal precaution was made to protect against this.

By inference, then, the Court may presume that the statutory word "issue", as used twenty times in Giuseppe's Will, was carefully chosen, in part by the Scribner, to guard against false paternity challenges, attempting to reach Giuseppe's estate.

One need only recall that in the 1940s no science existed to conclusively prove paternity. And that is why most states had more strictures placed upon nonmarital children trying to take from father's intestate estates, than mother's.

Thomas Atkinson's *Law of Wills, 2nd edition,* discusses this topic and says in effect states did not remove the ancient bar against inheritance through fathers altogether.

But Atkinson says there was a reason for that:

"...Difficulty in proof of paternity is the main drawback here." *See: Section 22; page 85, (1953) (CP 289-304)*

Also, inference may be drawn by this Court, regarding Giuseppe's intent, to a section of his Will which indirectly shows that Giuseppe Desimone did not intend even acknowledged nonmarital descendants to take of his bounty. At page 5 of the Will, Giuseppe Desimone, in effect says, when talking about the termination point of that Trust, that direct descendants of his children take, not his heirs or heirs-at law. If he would have used the word "heirs" instead, then it would have been possible for an acknowledged nonmarital descendant and his issue to be eligible to take because the word "heirs" included, in part of its meaning, the definition of "illegitimate child, rights of", RRS 1345.

So by using the "direct descendants" phrase, instead of "heirs" or heirs-at-law impliedly shows that Giuseppe only wanted to include "lawful lineal descendants." This is a reasonable inference, given that this Will was drafted under a competent lawyer's careful hand.

Also, since Giuseppe Desimone's Will expressly mentions a descent probate code (RRS 1342) on page two, then the Court may presume he was aware of the rest of the descent probate codes. (CP 142-169)

H. Case Law in other Jurisdictions directly on point for Respondents

In *Powers v Wilkenson , 506 N.E. 2d 842, 844 (1987*), this Massachusetts supreme court had to decide whether or not the donor's intent in a trust instrument, dated 1959, would include or exclude an

unacknowledged nonmarital "issue" , when the donor did not qualify that term in her trust instrument.

At issue: Could a great-grandchild, born out-of-wedlock, be included as "issue", according to the trust document, when that document was executed many decades before that child was born? This court ruled "no". Massachusetts probate definition for "issue", which was found in the *General Laws* section and covered all descent estates, was nearly identical to Washington's state descent definition, to wit:

"Issue, as applied to the descent of estates: shall include all lawful lineal descendants of the ancestor". *(See: Annotated Laws of Massachusetts, C.4, Section 7, Sixteenth, (1950)—the applicable statute at the time of the will's execution in 1959)*

This Massachusetts court importantly said in its ruling:

"We have stated the word 'issue'...must be interpreted against a background of statutory phraseology and construction which has remained wholly consistent for well over a century" *(citing: Fiduciary Trust Co. v. Mishou, 321 Mass. 615 (1947).*

So this court ruled, then, not to apply retroactively a new ruling for this case, but it did rule after 1987 any wills or trusts written after that date which did not qualify "issue" with the word "lawful" would be interpreted by their court to include both in wedlock and out of wedlock descendants. What is instructive for this Court to consider is this: Massachusetts court did not choose to apply retroactively a new definition to include all descendants; they did it prospectively.

The Massachusetts court realized that the donor had a right to rely on the statutorily defined word at the time of the trust's execution.

And they added:

"Because nothing indicated an intent by the donor to include non-marital issue, precedent requires us to presume that the donor intended, in accordance with the law extant at the time the instrument was executed, to exclude non-marital descendants from the class denoted by her use of the word "issue".

A 2010 circuit court of appeals decision (*Kennedy v. Trustees of Testamentary Trust of President John F. Kennedy)* basically affirmed the Powers (Mass, 1987) court's decision and cited this Powers case for its ruling.

This circuit court decided that the alleged illegitimate son of President Kennedy could not be considered a beneficiary because President Kennedy's intent in his will did not anywhere manifest that intent as it applied to the class of descendants denoted by the use of the word "issue" "children". Further this court in effect stated: The applicable law at the time of the will's execution excluded nonmarital persons under Massachusetts probate code. *Kennedy v. The Trustees of the Testamentary Trust of the Last Will and Testament of President John F. Kennedy, 406 Fed. Appx. 507 (C.A.2 (N.Y.); 633 F. Supp. 2d 77 (2010)*

I. Washington adoption and out-of-state Delaware & N.Y. cases cited by Dale Collins are immaterial to this case; for, among other things, no

exception to the general rule of applying statutes as of date of execution of will applies in this case.

i. **Introduction:** Since there is over 100 years of Washington case law that has never ,regarding inheritance matters, ruled to allow the merging of adoption rights in with rights out of wedlock persons, then these adoption cases cited by Collins are irrelevant for his proposition that "issue" statutory definition should be construed by current law . But, again, trying to tie these two types of case together (adoption rights , illegitimate rights) , as Dale Collins would have it, is inapplicable for obvious reasons, among them: an adopted child is freely chosen by the family, raised and nurtured by the family ; whereas out of wedlock persons are often complete strangers to the family. Again, Washington case law has not merged these two very different inheritance rights scenarios together.

Important Related Note: And it is only now at the 11th hour , that Dale Collins, with his opening Brief, has cited two out-of-state Delaware cases (*Annan v Wilmington Trust Co 1989 & Haskell v Wilmington Trust Co 1973)* that do indeed merge these two matters together, i.e., adoption rights with acknowledged and unacknowledged nonmarital rights about testate estates. The opposing parties at the trial court level were never presented with this new twist to his trial court arguments. Thus, they never had the chance to properly vet this issue. The appeal court cannot hear, however, new arguments or added substantive arguments that were not vetted at the trial court level. *Green...v Normandy Park, 137 Wash. App. 655, 151 P3rd 1038 (2007)*

Be that as it may, the newly cited *Delaware* cases and the *Sollid adoption case 32 Wn. App. 349 (1982*) and the *NY Hoffman* cases are not on point for Dale Collins for many reasons.

i. NY Hoffman case, *Matter of Hoffman , 53 A. D. 55 (1976):*

The NY Hoffman case, regarding a nonmarital issue, is not relevant to this case at all for two reasons: 1) As this court discussed, the Surrogate Court recognized acknowledgment (unlike Dale Collins' case) from the father, even though no order of filiation was entered; and 2) when the will in question was executed in 1951, the state of NY didn't appear to have had a specific statutory definition of the word "issue". See: *Matter of Estate of Edgar M. Leventritt NY Surrogate Court, 12/01/77.* See also: Legislative notes for *NY's Estate Power Trust Law (@ Section 1-2.10)*—they indicate this definition was new as of 1968.

So if the court hearing this NY Hoffman case in 1976 had no statutory definition that applied in 1951, then it seems they could set a new precedent for their ruling.

But since Washington State did have a statutory definition in 1943 for "issue", then Dale's argument about this case must fail. It lacks relevance.

ii. Sollid case:

Collins is misapplying the court's adoption ruling in that Sollid case had nothing to do with an out of wedlock individuals trying to reach a testate estate. Second, this Sollid court was careful @ page 356 to note

the case at bench involved a settlor's intent as opposed to testamentary's intent.

Next, the key points of distinction between Giuseppe's Will and Sollid's trust instrument: Sollid case, like many of the Delaware cases cited by Dale Collins, involved action to terminate a trust and distribute the corpus of trust to last surviving issue(s). But Giuseppe's Trust Under Will is not at termination status; so this particular subject about whom to distribute to , at trust termination point, would not seem to be ripe for a decision by any court .

But, the Sollids' Living Irrevocable Trust of 1947 listed the important provision that in the event that no living issue survived at trust's termination date, then:

"the Trustee shall distribute, deliver and pay the trust property to the *heirs at law* of the respective Donors according to the law of descent." (@ p. 350)

But Giuseppe's Will carries no similar language.

Giuseppe specifically omits any substitution provision, any contingency provision to give his bounty at the distribution point to any "heirs at law". This is a key distinction to note between the two trust instruments because the Sollid case and the Delaware cases use these "heir at law" clauses to infer from there that the Settlors/Donors were aware that the intestate laws concerning these "heirs" could change in

the future. Giuseppe's Will expressly states the opposite by omission of these types of phrases. (CP 142-169)

Regarding the retroactive aspect of this Division III Sollid case ruling, which is not controlling for this Court, it is clear that since the statute (RRS 1699) covering "effect of adoption on inheritances" had changed four years before this Sollid trust instrument was executed , then it may be inferred that this Sollid court merely sanctioned already what was implied in state statute, to wit: since adoptive kindred to adopted child could inherit from adopted child, so the "converse must be true"..(cf: Session Laws of 1943, Ch. 268, Section 12)

iii. Delaware cases now cited by Dale Collins in his Opening Brief: *Annna v Wilmington Trust Co, 559 A.2d 1289 (1989) & Haskell v. Wilmington Trust Co., 304 A. 2d 53 (1973):*

The Annan court, which dealt with six Living Trusts, could not clearly ascertain settlor's intent so it applied the Haskell court ruling.

This Haskell ruling was: "If a will or trust instrument makes a gift to "heir"or "next of kin" after the expiration of a life estate, the remainder beneficiaries are normally determined by the law in effect at the date of the death of the life tenant". *Haskell v Wilmington Trust Co, 304 A. 2d 53 (1973).*

To reiterate: Giuseppe Desimone's Will did not say anything about leaving anything to "heirs at law" or "next of kin" or "heirs".

So for Dale Collins to try to urge this Court to apply the applicable laws in effect at the "date of ascertainment" of when Dale Collins would have been eligible to step-in as a beneficiary, by following the "Haskell

rule" instead of the date of execution of Giuseppe's Will, is misplaced and off point.

For consider: In the lower court case for Haskell *(Wilmington Trust Co v Haskell)* the settlor's instrument, unlike in Giuseppe Desimone's Will, specifically calls for using the Delaware laws of intestacy at the date then in effect after the life tenant has died rather than the date of the execution of the trust instrument.

In other words, upon the death of the settlor's children, these six trust instruments mandate if there be no living issue of the life tenants that:

..."failing any such issue then unto the persons or persons who shall then be determined to be the distributees of Trustor by application of the intestacy laws of the state of Delaware then in effect... *Wilmington Trust Co v Haskell, 282 A. 2d 636 (1971).*

Of course, Giuseppe Desimone's Will does not employ any such language to this effect. This Court, then, should apply any applicable statute in interpreting Giuseppe's Will as of the date of execution of it.

So, for all intents and purposes, Dale Collins, now urges this Court to apply an exception to the general Washington state rule of applying any applicable statutes as the date of the execution of a will. Yet, Dale Collins can cite no relevant provisions in Giuseppe Desimone's Will that even hints to this.

A Secondary Law source speaks to this , i.e. , there being only narrow exceptions to the general rule of applying laws to wills and trusts as of the date of execution of them.

Revised PAGE treatise says, in pertinent part:

..."It is generally said that the law which was in force when the will was executed is the law which determines the intention of the testator", unless the will shows that the testator intends to be governed by the law of some point in time other than that of the execution of the will....

William Page's revised Treatise further says: "If the will makes a gift to the "heirs", "next of kin" and the like, of someone other than the testator, the class of heirs, next of kin, and the like, is to be determined by the law as it stands at the death of the ancestor of such heirs and the like, if he dies after testator". (*See: Revised Treatise PAGE on the Law of Wills, edited by: William J. Bowe & Douglas Parker, Vol. 4 of 8, @ pg. 208-209, Section 30.27.)*

But, for argument's sake, if this Court were to apply retroactively the "issue" statutory definition, as Dale Collins is urging this Court to do, then in this instant case that would have the effect of divesting six (6) lawful beneficiares (Giuseppe Desimone's female great-grandchildren), of their rightful shares because Giuseppe's provisions do mandate that each family branch receiving his bounty shall defer to males by giving them a full share to females one half share .

It is instructive to note, however, that the Washington Supreme Court ruling *(In the Matter of the Estate of Haviland, No. 86412-8),* handed down this last Spring, impliedly says: it highly disfavors divesting

individuals of vested rights, by applying laws retroactively, among other things.

In relevant part it says, quoting *Pape v. Dep't of Labor and Industries, 43 Wn. 2d 736, 740-41 (1953) (citing 50 Am. Jur. Statutes, Section 476 @ 492 (1944):* "A retroactive law, in the legal sense, is one which takes away or impairs vested rights acquired in the existing laws..."

CONCLUSION

Dale Collins has not presented to this Court any relevant statutes, case law, secondary law sources to support his request to reverse the trial court's ruling granting summary judgments to the Co-Trustees of the Giuseppe Trust & Danieli parties; and dismissing all his claims against the Giuseppe Desimone Trust, with prejudice.

The trial court found Giuseppe Desimone's use of the word "issue", applied at least twenty times in his will, unambiguously meant for only "lawful lineal descendants" take of Giuseppe's bounty under this trust. Since the trial court has made no error in interpreting Giuseppe Desimone's intent in his Will, this Court should not reverse the Trial court's Order, issued January 11, 2013. (CP 359-363).

This Court should exercise its discretion and award attorneys' fees to the Co-trustees and Danieli parties on appeal pursuant to RAP 18.1 and RCW 11.96A. 150. Awarding attorneys' fees to these parties would seem to be a just and equitable thing to do because Dale Collins' claims have no genuine issue of facts as a matter of law for this Court to consider. The Co-trustees and Danieli parties have been forced to continue this fight, spending tens of thousands of dollars, with a third party who has no claim to the Giuseppe Desimone Testamentary Trust.

Dated this 19th day of August of 2013

Catherine Ross

Catherine Ross, appearing pro se

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:

That on August 19th, 2013, I arranged for service of the Response Brief of Vested Beneficiary, regarding case NO 69929-6, to the court and to the parties to this action and contingent interest parties as follows:

Office of Clerk Court of appeals – Division I One Union Square 600 University Street Seattle, WA 98101	____ Facsimile ____ Messenger ____ U.S. Mail ____ E-Mail Personal delivery to court X
Hans P. Juhl Somers Tamblyn King PLLC 2955 80th Avenue SE, Suite 201 Mercer Island, WA 98040 Served Dale Collins via this counsel	____ Facsimile ____ Messenger ____ U.S. Mail X E-Mail
Ann T. Wilson Law Offices of Ann T. Wilson 1420 5th Ave Ste 3000 Seattle, WA 98101-2393 Served Dale Collins via this counsel	____ Facsimile ____ Messenger ____ U.S. Mail X E-Mail
Co-trustees Joseph R. Desimone Richard L. Desimone, Jr. c/o Karen R. Bertram Kutscher Hereford Bertram Burkart PLLC Hoge Bldg, 705 2nd Avenue, Suite 800	____ Facsimile ____ Messenger ____ U.S. Mail X E-Mail

Seattle, WA 98104-1711	
Karen Danieli, Liza Danieli, Maria Danieli, c/oDeborah J. Phillips Perkins Coie LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
BNY Mellon, N.A. c/o Johanna M. Coolbaugh James K. Treadwell Dennis Walters Karr Tuttle Campbell 701 Fifth Avenue, Suite 3300 Seattle, WA 98104	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Suzanne Hittman c/o Douglas C. Lawrence Mike Garner Stokes Lawrence PS 1420 5th Ave., Ste. 3000 Seattle, WA 98101-2393	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
John Hittman c/o Suzanne Hittman, per prior arrangement	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Richard L. Desimone III c/o Richard L. Desimone Jr, per prior arrangement	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Ann Maria Roth c/o Richard L. Desimone Jr., per prior arrangement	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Sarah C. Campbell c/o Dale Collins' counsels of record, per prior arrangement	___ Facsimile ___ Messenger ___ U.S. Mail

	X E-Mail
Denise Peterman 2839 W. Kennewick Ave. PMB #198 Kennewick, WA 99336	___ Facsimile ___ Messenger X U.S. Mail ___ E-Mail
Laura Jensen c/o Suzanne Hittman, per arrangement	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
John Anthony Desimone c/o Richard L. Desimone Jr, per arrangement	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Richard D. Collins c/o Dale Collins' counsels of record, per arrangement	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Catherine Smith Smith Goodfriend, P.S. 1619 8th Ave. North Seattle, Wa 98109 Served Dale Collins via this counsel	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail
Shelley Caturegli 5522 Atascocita Timbers North Tumble, TX 77346	___ Facsimile ___ Messenger ___ U.S. Mail X E-Mail

DATED at Bellevue, Washington this 19th day of August, 2013.

Catherine Ross

Catherine Ross