

No. 68354-3

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In the Matter of the Estate of Leora M. Givens, Deceased,

ROY ANTHONY GIVENS,

Appellant,

vs.

RHONDA MARY BROWN, as Personal Representative of the
Estate of Leora M. Givens, deceased,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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I. INTRODUCTION

After entering into negotiations to sell the remaining stock in the family business to one of her seven children, the decedent executed a Living Trust in which she stated that “intentionally, and with due deliberation [I] do not leave any portion of the rest, remainder and residue of my estate” to her son due to his ownership of the family corporation, unless “at the time of my death the Stock Redemption Agreement . . . has not been finalized.” The agreement was finalized shortly thereafter, and the decedent surrendered her shares, receiving a promissory note in return. The trial court correctly rejected the son’s tenuous TEDRA petition claiming that he was entitled to the remaining payments due under the promissory note even though he had received 100% of the company’s stock before his mother died.

Relying on undisputed evidence of his mother’s dementia provided from her health care providers and disregarding the testimony of interested parties, the trial court also set aside for lack of capacity a stock brokerage account survivorship agreement. This court should affirm the decision below and award the personal representative her attorney fees under RCW 11.96A.150.

II. RESTATEMENT OF ISSUES

A. Did the trial court correctly interpret the terms of a Living Trust in which the trustor unambiguously expressed her intent to allow one of her seven children to inherit her stock in the family corporation only if he had not finalized an agreement for the purchase of her shares in the corporation prior to her death?

B. Did the trial court correctly rely on the undisputed testimony of the decedent's health care providers in finding that at the time she signed a stock brokerage survivorship agreement she lacked the capacity to contract by reason of dementia.

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

The trial court's decision under the Trust and Estate Dispute Resolution Act, RCW ch. 11.96A, resolved a claim against the estate of Leora Givens brought by her son Roy Anthony Givens, appellant. Leora's daughter, respondent Rhonda Brown, was appointed Leora's personal representative under Leora's Last Will and Testament and was the respondent defending the Estate in the TEDRA action. (CP 4-6) Rhonda and Roy are two of the seven surviving children of Leora.

1. Roy Givens Owned The Majority Interest Of The Corporation Founded By His Father And, After His Father's Death, Sought To Buy His Mother's Minority Interest.

Leora was married to the elder Roy Givens, who with a business partner in 1974 founded Pantrol, Inc., a manufacturer of electrical panels and components. (CP 69)¹ The younger Roy Givens went to work full time in his father's business in 1983, following Roy's attendance at college. (CP 69) The company struggled until the late 1980's. (CP 70) Roy's father retired in 1988. (CP 70) In 1989 Roy purchased his father's partner's 49% interest in the company, and then received another 2% of the company's stock by gift from his parents in 1998 to give him a majority interest. (CP 70)

The company prospered under Roy's management. (CP 70-71) In 2000, Roy and his parents signed an agreement giving Roy the right upon his parents' death to buy his parents' remaining interest in Pantrol for book value up to a maximum of \$1 million. (CP 71) In 2001, Leora's husband died, and Leora succeeded to 49% of the company's stock.

¹ The trial court did not consider the declarations of interested parties regarding their interactions with Leora under the Deadman Statute, RCW 5.60.030. (CP 421) Respondent similarly does not cite to the testimony of interested parties regarding transactions with Leora.

By 2003, the stockholders equity was valued at almost \$3 million. (CP 119) That same year Roy and his mother, through counsel, began negotiating an agreement for the sale of Leora's 49% ownership interest in Pantrol. (CP 91-93)

Prior to his death the elder Mr. Givens received money from Pantrol as a company consultant. Leora continued to receive those monthly payments of \$4,000 from Pantrol after her husband died. Roy believed that all payments received by Leora and her husband should be treated as loans from the corporation and should offset the purchase price for Leora's 49% interest in the company. (CP 294)

2. Leora Established A Living Trust Giving Roy Her Minority Interest In Pantrol, But Only If She And Roy Had Not First Finalized A Stock Redemption Agreement.

While negotiations proceeded over a sale of Leora's 49% interest in the company in 2003, Leora had her attorney prepare an estate plan. (CP 335) Leora was confident that she would ultimately sign an agreement under which Roy would obtain her stock in Pantrol. (CP 335) Since the Pantrol stock would provide Roy with substantial assets, she decided that once Roy got the stock, her six other children would be the sole beneficiaries of her

estate. (CP 335-36) Leora accordingly directed her attorney to prepare a Living Trust under which Roy was not to receive any distribution from her estate. (CP 335)

Leora signed a Revocable Living Trust Agreement on July 7, 2003. (CP 406) In that instrument, she directed that upon her death any balance remaining in her trust estate shall be distributed in equal shares to her six other children, Marsha Marie Marsh, Sharon Ann Givens, Rhonda Mary Brown, Brenda Irene Givens, Craig Francis Givens, and Terri Elizabeth Givens. (CP 400-01) Leora stated that "intentionally, and with due deliberation [I] do not leave any portion of the rest, remainder and residue of my estate to Roy Anthony Givens, due to his interest in Pantrol, Inc." (CP 401)

Leora did not leave Roy out of her estate plan. Instead, she recognized that Roy would acquire her interest in Pantrol, and expressly provided that if the agreement to convey Leora's Pantrol stock was not finalized prior to her death, Roy would be entitled to "any interest in Pantrol, Inc. that I may own or that may be distributed to my estate:"

If at the time of my death the Stock Redemption Agreement between PANTROL, Inc. and myself has not been finalized, thereby invoking the 2000 Stock Cross-Purchase Agreement, I leave any interest in

Pantrol, Inc. that I may own or that may be distributed to my estate to ROY ANTHONY GIVENS.

(CP 400)

3. Roy And His Mother Finalized A Stock Redemption Agreement Before Leora Suffered A Debilitating Stroke Rendering Her Incompetent.

Roy and his mother finalized a Stock Redemption Agreement on January 1, 2004, under which Pantrol agreed to pay Leora \$621,032.63 for her 49% ownership in Pantrol. The company signed a promissory note in favor of Leora and Leora assigned her shares to Pantrol. (CP 60-67)

Leora continued living in Mesa, Arizona, as she had following her husband's retirement. (CP 308) In August 2005, she suffered a debilitating stroke, suffering loss of her short term and long term memory. (CP 308) Leora was initially placed in a skilled nursing facility in Arizona, and then, because she could no longer care for herself, was moved to a locked memory unit in The Gardens at Town Square in Bellevue. (CP 252, 308) She was diagnosed with dementia, stroke induced short term and long term memory loss. According to the medical records that appellant introduced into evidence in support of his TEDRA petition, Leora became increasingly delusional and combative, resulting in her

referral to Northwest Hospital's Geropsychiatric Center, where she was admitted on January 24, 2006:

Leora Givens is a 75 [year old] female who has been admitted directly from the Gardens at Town Square because of concern for increasing symptoms of intrusiveness, agitation, delusions, disorganized behavior, visual hallucinations, and physical intolerance for care provided by the staff.

(CP 252)

Leora's delusions included that she was pregnant and that a hospital employee was her husband. (CP 332) She was aggressive toward staff to the point where the head nurse at the Gardens feared for staff's safety. (CP 327) Leora's treating physician at Northwest Hospital diagnosed her with dementia and behavioral disorder. (CP 331-32) He believed that "she was unable to manage her affairs or her funds in her own best interest."

(CP 332)

4. The Day After She Was Discharged From Northwest Hospital's Geropsychiatric Center, Leora Signed A Brokerage Agreement With A Right Of Survivorship.

Leora was discharged from the geropsychiatric unit and returned to the Gardens on February 13, 2006, with several new medications, including anti-psychotics. (CP 185) While her behavior became less aggressive, her dementia did not improve.

According to the supervising nurse, Leora's "severe memory loss, her unawareness, and her inability to understand remained just as extreme before she went to Northwest Hospital." (CP 328) She remained incapable of caring for herself or "making even the smallest decision." (CP 328) Leora also suffered from severe macular degeneration and was unable to read. (CP 327)

Nonetheless, on February 14, 2006, the day after her return to the Gardens from the geropsychiatric unit at Northwest Hospital, Leora executed a stock brokerage account agreement that included a right of survivorship option. (CP 128-30) Under the "Ameriprise Financial Transfer on Death" survivorship agreement, each of Leora's children had equal survivorship rights to the account upon her death. (CP 136)

5. Prior To Leora's Death In 2010, Roy Negotiated The Sale Of His Stock In Pantrol To A Third Party For An Undisclosed Sum.

Roy Givens was estranged from his mother during her last few years. (CP 351) In 2009, Roy negotiated a sale of his stock in Pantrol to a third party for an undisclosed sum. (CP 73) The Pantrol purchaser assumed Roy's and Pantrol's obligations to Leora under the 2003 Promissory Note. (CP 73) While Roy refused to disclose the purchase price, it was clear that the amount

received by Roy for 100% of Pantrol's stock greatly exceeded the remaining amounts due Leora. (CP 73)²

Leora died on May 1, 2010. At the time of her death, the promissory note from Pantrol had a principal balance of approximately \$492,226.30. (CP 316) The Ameriprise brokerage account was worth approximately \$181,000. (CP 307)

B. Procedural History

Leora's last will and testament, which incorporated her 2003 Living Trust, was admitted to probate and her daughter Rhonda Brown was appointed her personal representative on June 10, 2010. (CP 4-6) The PR filed an inventory that included as part of Leora's estate the securities and cash in the Ameritrade brokerage account, and the 2006 Promissory Note. (CP 304-05)

Roy filed a petition under TEDRA, RCW 11.96A.030, seeking a determination that Leora's survivorship designation was valid according to its terms and demanding that the Promissory Note be distributed to Roy under Leora's Living Trust. (CP 40-43) The PR asserted that Leora lacked the capacity to execute the

² Roy claimed that the terms of his sale had no "material importance or relevancy" to his claims, stating only that the "sale price was reduced by the amount of the balance owed on the Promissory Note." (CP 73)

February 14, 2006 survivorship agreement and that the Living Trust reflected Leora's intent that Roy would get no interest in her estate following execution of the January 1, 2004 Stock Redemption Agreement, which gave Roy 100% of the outstanding Pantrol stock. (CP 291-98)

The issues raised by Roy's petition were resolved on a written record before King County Superior Court Judge Palmer Robinson ("the trial court"). Roy expressly waived the right to present live testimony, agreeing that the trial court could decide the issues on the basis of a documentary record under RCW 11.96A.100. (RP 9, 55)

The trial court found that Leora did not have the capacity to execute the Ameritrade survivorship agreement the day after being released from the hospital with a diagnosis of dementia and symptoms that included delusions. (CP 421-22) The trial court also found that Leora's Living Trust unambiguously expressed an intent not to leave Roy anything after he received Leora's shares of Pantrol stock under the Stock Redemption Agreement:

If the stock Redemption Agreement had not been finalized, Mrs. Given's interest in Pantrol should be distributed to her son Roy Anthony Givens. Her other children would not have an ownership interest in the company. However, the Stock Redemption

Agreement had been finalized. Accordingly, Mrs. Givens was no longer a shareholder; she was a creditor of Pantrol and the income stream to which she was entitled passes under paragraph 5.1(b), as part of the residue of her estate.

(CP 422)

The trial court also denied the Personal Representative's claim for attorney fees, and Roy's motion for reconsideration. (CP 422-23, 468-69) Roy has appealed.³

IV. ARGUMENT

A. Roy Waived Any Claim To An Evidentiary Hearing In The Trial Court, Which Correctly Held That The Trust Was Unambiguous And That Leora Lacked Capacity To Enter Into The Ameritrade Survivorship Agreement.

The trial court correctly interpreted the unambiguous Living Trust and held that Leora lacked capacity to enter into the Ameritrade Survivorship Agreement as a matter of law because the issues raised by Roy in his TEDRA petition raised no disputed issues of fact, and more importantly, because Roy expressly waived any right to an evidentiary hearing. Roy's argument that an evidentiary hearing or trial is necessary to resolve disputed issues of fact (App. Br. 15-16, 22-25, 32-33) is without merit.

³ The Personal Representative has voluntarily dismissed her cross-appeal.

TEDRA expressly envisions that proceedings to resolve disputed issues in probate cases may be decided on a written record, rather than by trial. RCW 11.96A.100(7) (“Testimony of witnesses may be by affidavit.”) The statute also provides that a party must demand an evidentiary hearing in a petition or an answer. RCW 11.96A.100(8) (“Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law.”). This court has held that a court resolving disputed issues of fact in a TEDRA case need not consider live testimony, but may resolve disputed issues by considering affidavits and other written materials as the trial court did here. **Foster v. Gilliam**, 165 Wn. App. 33, 54-55, ¶¶45-48, 268 P.3d 945 (2011) (“It is not necessary that the court hear oral testimony in order to make findings.”), *rev. denied*, 173 Wn.2d 1032 (2012). *See also* RCW 11.96A.170 (right to trial by jury only if “the issues are not sufficiently made up by the written pleadings on file.”)

While the statute is clear enough, here Roy expressly waived any right to present live testimony. Not only did he fail to demand an evidentiary hearing in his petition (CP 40-43) and when noting the case for hearing in the trial court (CP 576-77), he again

waived his right to present live testimony when asked by the trial court if he had any objection to the court deciding the issues based upon the written record. (RP 9, 55) Since Roy consented to the trial court's method of deciding all issues raised in his petition based upon the written record, he invited the alleged error he now raises for the first time on appeal. RAP 2.5(a); *In Re Marriage of Morrow*, 53 Wn. App. 579, 583-84, 770 P.2d 197 (1989).

Roy's related argument that this court must review the trial court's order de novo as a summary judgment order is also without merit.⁴ This court reviews the trial court's factual determinations in TEDRA actions for substantial evidence. *Foster*, 165 Wn. App. at 54, ¶¶45-46.⁵ See *Marriage of Rideout*, 150 Wn.2d 337, 352, 77

⁴ Ignoring RAP 10.4(h) and GR 14.1, Roy repeatedly cites unpublished authority, in particular, to support his argument that this court must review the trial court's determination that Leora lacked testamentary capacity de novo. (App. Br. at 25; see also App. Br. 16-17) This court should sanction Roy's counsel for violating RAP 10.4(h), or, at a minimum disregard these offending portions of Roy's brief. *State v. Nysta*, 168 Wn. App. 30, 44, ¶¶29, 275 P.3d 1162 (2012) ("No matter how well reasoned, unpublished opinions of this court lack precedential value."); *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000) (imposing sanctions for citing unpublished decision), *rev. denied*, 143 Wn.2d 1024 (2001).

⁵ The trial court's "written opinion or memorandum of decision" is sufficient to constitute its findings of fact and conclusions of law. CR 52(a)(4). See *DGHI Enterprises v. Pacific Cities, Inc.*, 137 Wn.2d 933, 951, 977 P.2d 1231 (1999).

P.3d 1174 (2003) (reviewing for substantial evidence factual findings made based on documentary record in family law cases).

Even if this court reviews the trial court's order de novo, the trial court's decision should be affirmed. As more thoroughly discussed below, the trial court found Leora incompetent to execute a contract based on the undisputed testimony of her caregivers, who were not interested in the estate or in any issue raised by Roy's petition. Further, because Leora's Living Trust unambiguously expressed her intent to disinherit Roy once she and Roy had finalized a stock redemption agreement, the trial court properly held that the remaining payments due under the note were property of the estate, rather than of Roy.

B. Leora Unambiguously Expressed Her Intent In Her Living Trust To Leave Roy Nothing Once The Stock Redemption Agreement Was Finalized And Roy Owned 100% Of Pantrol.

Because Leora's Living Trust is unambiguous, Roy's argument that he was entitled to all of Leora's Pantrol stock under the Stock Redemption Agreement and, in addition to the payments due Leora under that agreement fails. The trial court properly rejected Roy's attempt to usurp for himself both the Pantrol stock and also the remaining \$492,000 of payments due the Estate from

the purchaser that assumed Pantrol's obligations under the Note given to Leora as part of the Stock Redemption Agreement, which constituted approximately 40% of Leora's estate.

In interpreting a will or trust, "testamentary intent controls." ***Eisenbach v. Schneider***, 140 Wn. App. 641, 651, ¶24, 166 P.3d 858 (2007); ***Matter of Estate of Mell***, 105 Wn.2d 518, 524, 716 P.2d 836 (1986) ("The primary duty of a court called upon to interpret a will is to ascertain the intent of the testator."); RCW 11.12.030. The court interprets the language used in the instrument in light of the surrounding circumstances at the time it was executed by the decedent:

Although a will speaks as of the date of the testator's death, the testator's intentions, as viewed through the surrounding circumstances and language, are determined as of the time of the execution of the will.

Matter of Estate of Bergau, 103 Wn.2d 431, 436, 693 P.2d 703 (1985).

While surrounding circumstances, such as the nature and value of the decedent's property, may be considered, other extrinsic evidence of the decedent's intent should be considered only if the language used in the trust or will is ambiguous. ***Estate of Mell***, 105 Wn.2d 518, 524, 716 P.2d 836 (1986). However,

“extrinsic evidence may not be considered for the purpose of proving intention as an independent fact, or of importing into the will an intention not expressed therein.” *In re Estate of Curry*, 98 Wn. App. 107, 113, 988 P.2d 505 (1999) (citation and internal quotation omitted), *rev. denied*, 140 Wn.2d 1016 (2000).

The trial court properly followed these principles in the instant case. Leora’s Living Trust unambiguously directed that upon her death any balance remaining in her trust estate shall be distributed in equal shares to her six other children, Marsha Marie Marsh, Sharon Ann Givens, Rhonda Mary Brown, Brenda Irene Givens, Craig Francis Givens, and Terri Elizabeth Givens. (CP 400-01) In that document Leora plainly stated that “intentionally, and with due deliberation [I] do not leave any portion of the rest, remainder and residue of my estate to Roy Ant[h]ony Givens, due to his interest in Pantrol, Inc.,” which constituted 51% of the outstanding shares of Pantrol at the time she executed her Living Trust in 2003. (CP 401)

Cognizant that she was in the process of negotiating an agreement for Roy to control 100% of Pantrol, Leora provided that Roy could inherit her minority interest in the company only if she died before the Stock Redemption Agreement was finalized:

If at the time of my death the Stock Redemption Agreement between PANTROL, Inc. and myself has not been finalized, thereby invoking the 2000 Stock Cross-Purchase Agreement, I leave any interest in PANTROL, Inc. that I may own or that may be distributed to my estate to ROY ANTHONY GIVENS.

(CP 400)

Roy is correct that the Living Trust reflected Leora's clear "intent to leave her interest in Pantrol . . . to Roy," (App. Br. 19), but his argument that Leora intended Roy to have both her stock in Pantrol and the proceeds of its sale under the Stock Redemption Agreement cannot be reconciled with Leora's words. The Living Trust is not ambiguous. Roy, not Leora's other children, owned all of Pantrol, and Roy, not Leora's other children, profited from its sale in 2009 to a third party for a sum that Roy refused to disclose. As it was undisputed that the Stock Redemption Agreement had been "finalized"⁶ well before Leora's death in 2010, Roy's argument that the trial court erred in determining Leora's testamentary intent is without merit.

⁶ To "finalize" means "to put in final or finished form." Meriam Webster Dictionary 436 (10th Ed. 1994)

C. Leora, Who Suffered From Delusions And Memory Loss, Lacked The Capacity To Enter Into The Ameritrade Survivorship Agreement The Day After She Was Released From The Hospital For Treatment For Dementia.

This court should reject Roy's attempt to claim one-seventh of the \$181,000 Ameritrade account as one of Leora's "survivors" under the Ameritrade survivorship agreement.⁷ The trial court determined based on undisputed evidence that Leora, who unquestionably suffered from dementia, lacked the capacity to enter into the Ameritrade survivorship agreement one day after her return from her treatment for her delusional behavior. (CP 421-22) Regardless of the burden or quantum of proof, the trial court did not err in relying on the very medical records Roy himself introduced, as well as on the disinterested testimony of Leora's treating nurse and physician, in holding that Leora lacked the capacity to contract.

One entering into a contract must "possess[] sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue." *Page v. Prudential Life Ins. Co. of America*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942). Mental capacity to contract is determined as of the time of the transaction

⁷ Roy's claim to the account would have resulted in a gross award of less than \$26,000, before reduction for estate's expenses, including its fees in contesting Roy's petition and appeal.

at issue. *Page*, 12 Wn.2d at 109. The trial court correctly held that on February 14, 1996, a day after her release from the hospital, Leora did not possess sufficient mind or reason to enable her to understand the nature, terms, and overall effect of the Ameritrade survivorship agreement. See *Harris v. Rivard*, 64 Wn.2d 173, 175-76, 390 P.2d 1004 (1964) (affirming trial court's finding of lack of capacity to enter into real estate contract shortly after a stroke).

Roy's argument that the trial court erred in relying on "extrinsic evidence" (App. Br. 28) is meritless. First, the trial court relied on the medical records, including Leora's diagnosis by Northwest Hospital, that Roy himself asked the trial court to consider. (CR 165, 421-22) "The invited error doctrine prohibits a party from setting up an error in the trial court then complaining of it on appeal." *In re Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606, cert. denied, 540 U.S. 875 (2003).

Second, the trial court did not engage in a prohibited ex parte factual investigation in citing Leora's diagnosis of dementia with delusions as evidencing a lack of contractual capacity. (CR 165, 421-22) Again, Roy was the one who put this evidence before the court and raised no objection when the trial court asked questions about in oral argument. (RP 10-12)

The trial court rejected Roy's argument on reconsideration that the court's consultation of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) to define the terms in the medical records presented by Roy was a prohibited *ex parte* investigation.

[T]he decedent's medical records were part of the material submitted by the petitioner in support of his original motion. Those records, submitted by petitioner and discussed during argument in the hearing, contain the Axis V diagnosis in the discharge summary, which by definition references the current edition of the DSM (Diagnostic and Statistical Manual of Mental Disorders). Reference to the DSM IV TR is not referring to a learned treatise not cited by the parties; it is akin to a reference to Webster's Dictionary.

(CP 469)

The trial court did not abuse its discretion in rejecting Roy's argument on reconsideration. It did no independent investigation by consulting a standard reference manual to define the terms that Roy himself put before the court. This was not the type of factual investigation that would lead an objective observer to reasonably question the court's impartiality. Compare ***Sherman v. State***, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995) (judge made *ex parte* phone calls to plaintiff's expert).

Third, and contrary to Roy's argument (App. Br. 28), the trial court *did* rule on Roy's evidentiary objections, holding that it would not consider the testimony of interested parties under the Deadman Statute, RCW 5.60.030. (CP 421) The trial court instead relied on the admissible and uncontested evidence from non-interested witnesses with personal knowledge of Leora's dementia:

Karen Ingrassia, a nurse at the Terrace where Leora resided was responsible for Leora's care. She stated that after her stroke, Leora suffered from dementia "that left her unaware of her surroundings and caused short and long term memory loss,. . . did not recognize her family . . .[,] was unable to make important decisions on her own because she did not comprehend what was being asked . . . [and] was unable to read." (CP 327) While the hospitalization and new medications Leora was prescribed during her hospital stay helped her aggression, her dementia remained the

same, including her inability to comprehend, unawareness, and severe memory loss. (CP 328)⁸

Dr. Eric Schendel, Leora's physician when she was hospitalized from January 24 to February 13, 2006, also diagnosed Leora with dementia, delusions, and behavior disorder, concluding that Leora was unable to manage her affairs or funds in her own best interest. (CP 331-32) Roy argues that Dr. Schendel "fails to address any periods of lucidity Ms. Givins could and did have," (App. Br. 31), citing speculation from his own medical expert, Dr. Tran, which he characterizes as "the only admissible evidence of Leora's capacity." (App. Br. 30) But Dr. Tran never met, cared for, or examined Leora, and speculated based on his review of medical records that "her cognitive functioning can be somewhat normal" at certain times of the day. (CP 368) Dr. Tran concluded not that Leora had the capacity to contract, but that he had "insufficient

⁸ Roy argues that because Leora continued to sign her name she had the capacity to contract. (App. Br. 32) Being able to sign one's name, however, is distinct from being able to *understand* the nature, terms, and effect of the Ameritrade survivorship agreement. Under Roy's reasoning, in all cases involving disputes regarding an individual's capacity to contract, the individual's signature on a document would itself establish capacity. Roy's related argument, that Leora signed a will on January 12, 2006, is similarly misplaced, as neither Roy, nor anyone else, has challenged her last will and testament, which incorporated her 2003 Living Trust. (CP 19)

clinical information/documentation to determine” whether she did.
(CP 369)

Dr. Tran’s speculation was insufficient to rebut the undisputed evidence that Leora lacked capacity to contract. Roy, not the personal representative, had the burden of establishing that Leora had the requisite capacity to transfer her property at the time she was diagnosed with dementia:

[W]hen mental incapacity at and about the time of the gift or transfer of the property is shown, then a presumption arises against the validity of the transaction, and the burden of the proof rests upon the party claiming the benefit of the conveyance or contract to show its perfect fairness and the capacity of the other party.

Hackett v. Whitley, 150 Wash. 529, 538, 273 P. 752 (1929).

Finally, even if the trial court could have considered Dr. Tran’s speculation as admissible evidence, and even if the personal representative had the burden of proof by clear and convincing evidence, as argued by Roy, substantial evidence supports the trial court’s determination that Leora lacked capacity to contract. See **State v. N.B.**, 127 Wn. App. 776, 780, 112 P.3d 579 (2005) (“Substantial evidence’ does not define the burden of proof applied by the trier of fact, as the appellate court must look for ‘substantial evidence’ no matter what the burden of proof was below.”). “What

constitutes clear, cogent, and convincing proof necessarily depends upon the character and extent of the evidence considered, viewed in connection with the surrounding facts and circumstances.” ***Bland v. Mentor***, 63 Wn.2d 150, 154, 385 P.2d 727 (1963). Here, the evidence lent itself to but one conclusion: that Leora’s dementia rendered her unable to understand the nature, terms, and overall effect of the Ameritrade survivorship agreement.

D. Roy Should Pay The Personal Representative’s Attorney Fees On Appeal.

This court should award the personal representative attorney fees under TEDRA to compensate the estate for the expenses incurred in defending the trial court’s clear and well-reasoned decision. RCW 11.96A.150 vests discretion in this court to award attorney fees to a party in an appeal of a superior court’s decision resolving a TEDRA petition:

(1) Either the superior court or 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; . . . The court may order the costs, including reasonable attorneys’ fees, to be paid in such amount and in such manner as the court determines to be equitable. 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.

RCW 11.96A.150(1).

“RCW 11.96A.150 expressly authorizes the Court of Appeals to make an independent decision on the question of fees to any party.” *In re Estate of Black*, 116 Wn. App. 476, 492, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). Thus, while the trial court had the discretion to deny fees to the estate, this court must make its own assessment of whether an award of fees on appeal is equitable.

Roy's continued maintenance of this litigation to benefit himself in derogation of the interests of his siblings and estate creditors serves no legitimate purpose. He challenges discretionary determinations, consideration of evidence that he himself offered and invited, and relies on and cites to unpublished decisions to support his tenuous arguments. This court should exercise its discretion and award fees to the personal representative pursuant to RAP 18.1 and RCW 11.96A.150(1).

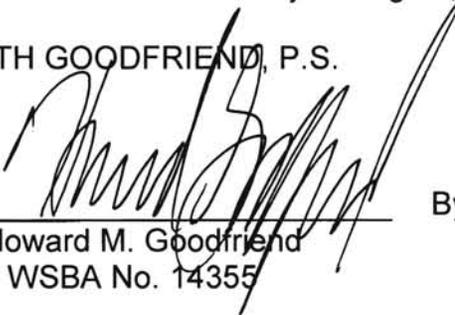
V. CONCLUSION

This court should affirm the trial court's order and direct Roy to pay the personal representative's attorney fees on appeal.

Dated this 22nd day of August, 2012.

SMITH GOODFRIEND, P.S.

By:


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By:


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Attorneys for Respondent

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 22, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
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DATED at Seattle, Washington this 22nd day of August,
2012.



Victoria K. Isaksen