

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *KS*
DITLEVSON

No. 360446-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re:

THE PETERMAN FAMILY REVOCABLE
LIVING TRUST

BRIEF OF APPELLANT RANDEL J. PETERMAN

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A. ASSIGNMENTS OF ERROR.

1. The Trial Court erred in failing to ensure the trial proceeding was conducted with an "Appearance of Fairness."
2. The Trial Court erred in denying Mr. Peterman's request for a continuance of the trial.
3. The Trial Court erred in considering the deposition testimony of Phil Peterman during trial.
4. The Trial Court erred in considering the deposition testimony of Mr. Peterman during trial.
5. The Trial Court erred in awarding attorneys' fees to Mr. Peterman's former counsel.
6. The Trial Court erred in excluding from evidence the majority of documents offered by Mr. Peterman during trial.
7. The Trial Court erred in admitting/considering the videotaped deposition of purported expert witness, Robert Martin, during trial.
8. The Trial Court erred in precluding Mr. Peterman from testifying as to the value of the Wingfield Hills Drive property during trial.
9. The Trial Court erred in awarding prejudgment interest to Petitioner.

10. The Trial Court erred in denying Mr. Peterman's request for a continuance of the hearing for presentation and entry of the Judgment and Order and Findings of Fact and Conclusions of Law on February 9, 2007.
11. The Trial Court erred in entering Finding of Fact No. 9: "*The assets of the trust are identified on the document admitted as Exhibit 8 in the trial of this matter.*"
12. The Trial Court erred in entering Finding of Fact No. 11: "*The primary source of funds in the Wells Fargo checking account consisted of trust money.*"
13. The Trial Court erred in entering Finding of Fact No. 14: "*Randel J. Peterman maintained almost no records regarding the assets of the trust, the disposition of trust assets, the use of trust assets or the expenditure of trust funds, which could have assisted in the preparation of an accounting.*"
14. The Trial Court erred in entering Finding of Fact No. 15: "*Between May, 2000 and March, 2006, Mr. Peterman obtained cash belonging to the trust from Wells Fargo Bank and/or from ATM machines located within casino in the Sparks, Nevada area in amounts exceeding \$400,000.00.*"
15. The Trial Court erred in entering Finding of Fact No. 17: "*After crediting Mr. Peterman with using a reasonable sum of*

cash for construction of a house owned by the trust, he converted \$217,400.65 in cash belonging to the trust to his personal use and benefit.”

16. The Trial Court erred in entering Finding of Fact No. 18: *“Mr. Peterman has no receipts or other documentation to support his use of the cash in the sum set forth in the preceding finding for legitimate trust purposes.”*

17. The Trial Court erred in entering Finding of Fact No. 21: *“Using trust funds, Randel Peterman purchased a home in Sparks, Nevada in August, 2000 in which he and Joyce Peterman resided. Mr. Peterman never paid rent or otherwise contributed to the living expenses incurred for the household.”*

18. The Trial Court erred in entering Finding of Fact No. 26: *“Randel Peterman rented a safe deposit box at a Wells Fargo Bank branch in Sparks, Nevada. The safe deposit box agreement was in the name of Randel Peterman, personally, but the rent on the safe deposit box was paid by the trust.”*

19. The Trial Court erred in entering Finding of Fact No. 27: *“In July, 2005, Randel Peterman displayed the contents of the safe deposit box to his adult son, Phillip Peterman.”*

20. The Trial Court erred in entering Finding of Fact No. 28: *"In July, 2005, the safe deposit box contained large sums of cash, predominantly in \$100 bills."*
21. The Trial Court erred in entering Finding of Fact No. 30: *"The Wingfield Hills lot was purchased with trust funds. Between February, 2002 and March, 2006, Randel Peterman paid dues to play golf at a golf club adjacent to Wingfield Hills known as Red Hawk Country Club."*
22. The Trial Court erred in entering Finding of Fact No. 31: *"Randel Peterman used trust funds to pay the golfing dues."*
23. The Trial Court erred in entering Finding of Fact No. 32: *"Randel Peterman has made no showing that the Red Hawk golf dues increased the value of the Wingfield Hills lot owned by the trust."*
24. The Trial Court erred in entering Finding of Fact No. 35: *"Shirley R. Ellis, with the assistance of her husband and adult son, has substantially completed construction of the house on the Wingfield Hills lot owned by the trust. The house had been under construction, but never completed, during the tenure of Randel J. Peterman as trustee."*
25. The Trial Court erred in entering Finding of Fact No. 37: *"Mr. Peterman failed to maintain any adequate records, invoices,*

bills or other documentation regarding the construction of the house at Wingfield Hills, which would allow this court to accurately determine the reasonable cost of such construction.”

26. The Trial Court erred in entering Finding of Fact No. 38: *“The court finds the testimony of Robert A. Martin to be credible regarding the cost of construction and finds that the sum of \$135.00 per square foot is a reasonable cost for constructing the home which now exists on the Wingfield Hills lot owned by the trust.”*

27. The Trial Court erred in entering Finding of Fact No. 39: *“The court finds that the Wingfield Hills house has 3,052 square feet, which at a cost of \$135.00 per square foot should have resulted in a completed house for a cost of \$412,020.00.”*

28. The Trial Court erred in entering Finding of Fact No. 40: *“The actual cost of constructing the Wingfield Hills house was \$460,140.25, resulting in an excess expenditure in the amount of \$48,120.25. The excess expense in construction of the home is a direct result of the failure of Randel J. Peterman to act reasonably in the hiring and supervision of contractors and subcontractors to perform the construction work upon the house.”*

29. The Trial Court erred in entering Finding of Fact No. 42:

“Randel J. Peterman received the required real estate contract payments, but, failed to make proper distributions to Shirley R. Ellis for her share of such payments.”

30. The Trial Court erred in entering Finding of Fact No. 43:

“Between April, 2005 and February, 2006, Shirley Ellis failed to receive the sum of \$5,056.71 as a result of improper deductions and setoffs to the amounts due her by Randel J. Peterman.”

31. The Trial Court erred in entering Finding of Fact No. 45:

“Randel J. Peterman admitted a document at trial as Exhibit No. 23, which purported to account for expenditure of cash withdrawn from the trust funds and to account for other expenditures from the trust funds. Exhibit 23 is not reliable, there exists no documentation to support the figures set forth in Exhibit 23 and the court finds that the testimony of Randel J. Peterman regarding Exhibit 23 is not credible.”

32. The Trial Court erred in entering Conclusion of Law No. 2:

“The actions of Randel J. Peterman in dealing with contractors to construct a house for cash without adequate receipts or invoices, constitutes a breach of his fiduciary duty.”

33. The Trial Court erred in entering Conclusion of Law No. 3:

"The payment of golf dues by Randel J. Peterman from trust funds constitutes an abuse of trust funds and a breach of fiduciary duty."

34. The Trial Court erred in entering Conclusion of Law No. 4:

"The withdrawal and expenditure of large sums of cash by Randel J. Peterman from the trust, without adequate documentation or record keeping, constitutes a breach of fiduciary duty."

35. The Trial Court erred in entering Conclusion of Law No. 6:

"The failure of the respondent to keep basic accounting records, receipts and documentation to support expenditure of trust funds is a breach of his fiduciary duty."

36. The Trial Court erred in entering Conclusion of Law No. 7:

"The trust suffered damages as a result of the various breaches of fiduciary duty by the respondent, Randel J. Peterman, in the sum of \$358,249.34 for trust sums which were expended by Mr. Peterman to his personal use, in the sum of \$48,120.25 for sums unreasonably expended for construction of the Wingfield Hills house and in the amount of \$5,056.71 for contract payments withheld from Shirley R. Ellis."

37. The Trial Court erred in entering Conclusion of Law No. 8:
“The damages suffered by the trust as a result of the respondent’s breaches of fiduciary duty are liquidated in nature and the trust is entitled to prejudgment interest. Through January 31, 2007, the trust is entitled to interest upon the liquidated damages in the sum of \$121,312.38.”
38. The Trial Court erred in entering Conclusion of Law No. 9:
“The court finds that a reasonable rate of interest upon the judgment being awarded to the trust against the respondent is 12% per year.”
39. The Trial Court erred in entering Conclusion of Law No. 10:
“The respondent incurred attorney fees prior to his discharge as trustee, with the firm of Ingram, Zelasko & Goodwin in the sum of \$10,315.21, which sums should be paid directly from trust funds.”
40. The Trial Court erred in entering Conclusion of Law No. 11:
“The petitioner has incurred attorney fees and costs in the investigation, prosecution and trial of this litigation in the total sum of \$54,680.01, which sums should be paid from trust funds.”
41. The Trial Court erred in entering the Judgment and Order on February 16, 2007.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the Trial Court took the necessary steps to ensure that the trial proceedings were conducted with the “appearance of fairness,” when the Court denied Mr. Peterman’s request for a continuance on the sole basis articulated by Petitioner that “*We came today prepared to proceed to trial,*” which denial immediately followed the court’s granting of Petitioner’s request to exclude Mr. Peterman’s key evidence, despite the Petitioner’s failure to file a motion in limine or seek an order compelling the production of documents; and when the court denied an objection to the introduction of evidence made by Mr. Peterman on the basis that he had not filed a Motion in Limine; and, when the withdrawal of Mr. Peterman’s counsel became effective approximately four weeks before trial, leaving Mr. Peterman to fend for himself pro se and when Mr. Peterman informed the court on several occasions that he could not hear and/or that he could not understand or was unaware on the procedures at trial. (Assignment of Error 1).
2. Whether the Trial Court abused its discretion in denying Mr. Peterman’s request for a continuance during trial, when the

Petitioner's only articulated reason for such denial was that "*We came today prepared to proceed to trial,*" which denial immediately followed the court's granting of Petitioner's request to exclude Mr. Peterman's key evidence, despite the Petitioner's failure to file a motion in limine or to procure an order compelling the production of the excluded documents. (Assignment of Error 2).

3. Whether the Trial Court abused its discretion in considering the deposition testimony during trial of non-party lay witness Phil Peterman, when the record fails to indicate that the deposition was entered into evidence, much of the purported was "summarized" by Petitioner's counsel, and no inquiry was made as to the whereabouts or availability of the witness, pursuant to CR 32. (Assignment of Error 3).
4. Whether the Trial Court abused its discretion in considering the deposition testimony during trial of Mr. Peterman, when the deposition was not admitted as evidence. (Assignment of Error 4).
5. Whether the Trial Court erred in awarding attorneys' fees and costs to Mr. Peterman's former counsel, when the former counsel was not a party to the action, no evidence was presented at trial regarding said fees, and the Trial

Court's own conclusions state that any fees owed to the formal counsel should be paid from trust funds. (Assignment of Error 5).

6. Whether the Trial Court abused its discretion in excluding evidence from the majority of documents offered by Mr. Peterman, when the court prevented Mr. Peterman from making an offer of proof, failed to examine the documents, and excluding the documents based upon Petitioner's counsel's representation that the documents were hearsay. (Assignment of Error 6).
7. Whether the Trial Court abused its discretion in considering the videotaped deposition of Petitioner's purported expert witness, Robert Martin, when the testimony is not part of the record and the deposition was not admitted as an exhibit, and that the record fails to indicate that reasonable notice before the trial date was provided to Mr. Peterman that the deposition was intended to be used, pursuant to CR 32. (Assignment of Error 7).
8. Whether the Trial Court abused its discretion in denying Mr. Peterman the opportunity to testify as to the value of the Wingfield Drive residence, when he was the owner of the

residence and also acted as general contractor in coordinating its construction. (Assignment of Error 8).

9. Whether the Trial Court erred in awarding prejudgment interest to Petitioner, when the damages determination required the fact finder to determine "reasonableness." (Assignment of Error 9).
10. Whether the Trial Court abused its discretion in denying Mr. Peterman's request for a continuance of the hearing for presentation and entry of the Judgment and Order and Findings of Fact and Conclusions of Law on February 9, 2007, when Mr. Peterman was not timely served with the proposed documents and Mr. Peterman requested a continuance. (Assignment of Error 9).
11. Whether the record contains substantial evidence in support of Findings of Fact Numbers 9, 11, 14, 15, 17, 18, 21, 26, 27, 28, 30, 31, 32, 35, 37, 38, 39, 40, 42, 43, and 45. (Assignments of Error 11 through 31).
12. Whether the Findings of Fact entered by the Trial Court support Conclusions of Law Numbers 2, 3, 4, 6, 7, 8, 9, 10 and 11. (Assignments of Error 32 through 40).
13. Whether the Trial Court erred in entering Judgment and Order. (Assignment of Error 41).

B. STATEMENT OF THE CASE

The Respondent below, Randel J. Peterman [“Mr. Peterman” herein], and the Petitioner below, Shirley R. Ellis [“Petitioner” herein], are the children and the sole beneficiaries of the Peterman Family Revocable Living Trust [the “Trust”], which was created by their late parents, Roger and Joyce Peterman. CP 4. On May 5, 2000, Mr. Peterman became the sole Trustee of the Trust. CP 22. The case below concerned the Petitioner’s allegations against Mr. Peterman of various breaches of fiduciary duty during his tenure as Trustee of the Trust. CP 1.

On August 3, 2005, Petitioner filed a Petition for Judicial Proceedings in the Grays Harbor County Superior Court, CP 1, and an Amended Petition for Judicial Proceedings on May 7, 2006. CP 85. On June 20, 2006, the Grays Harbor County Superior Court [hereinafter referred to as the “Trial Court”] issued an Order removing Mr. Peterman as trustee of the Trust, and appointing Petitioner to act as sole trustee of the Trust. CP 122.

Mr. Peterman’s counsel filed an Answer and Affirmative Defenses to Petition for Judicial Proceedings on December 11, 2006. CP 139. Mr. Peterman’s counsel filed a Notice of Intent to Withdraw on December 12, 2006. CP 145. Trial was set for

January 24, 2007. CP 127. Petitioner's Trial Brief was dated and filed on January 23, 2007. CP 155.

The Trial was conducted on January 24 and January 25, 2007, with the Honorable Michael J. Sullivan, a "visiting" judge from Pacific County, presiding. RP 2.

During Petitioner's case-in-chief, the Trial Court allowed Petitioner's counsel to read into the record certain portions of the deposition of a non-party witness, Phil Peterman. RP107. The Deposition of Phil Peterman was not admitted into evidence. RP 106-108.

The Trial Court also allowed Petitioner's counsel to read into the record certain portions of the deposition of Mr. Peterman. RP 111. The Deposition of Mr. Peterman was not admitted into evidence. See RP I and RP II. However, the Court did appear to have admitted several "deposition exhibits," that do not appear to be part of the official record. RP 126-127.

A videotaped deposition of Petitioner's purported expert, Robert Martin, was apparently played in open court. RP 129. The record is void of any evidence that reasonable notice before the trial date was provided to Mr. Peterman that the videotaped deposition was intended to be used. CP, RP 1, RP II. More importantly, the testimony itself was not offered or admitted as part of the record. RP

128-129. The only evidence of the deposition appearing in the record is the notation that "the videotape of Robert Martin was played." RP 129.

Mr. Peterman attempted to introduce extensive documents during his case-in-chief, which the Trial Court excluded. RP 137. It appears from the record that the Court did not review the documents and the documents were excluded based upon representations from Petitioner's counsel that the documents were "objectionable as hearsay." RP 132-133. Mr. Peterman attempted to go through the documents with the Court in an orderly fashion, however, Petitioner's counsel unilaterally advised the Court as to which documents were hearsay. RP 134-136. The Court then summarily excluded "those documents" as being hearsay. RP 137. The Trial Court went on to exclude a several more documents using essentially the same procedure. RP 137-141. The Trial Court denied Mr. Peterman the opportunity to offer testimony regarding the value of the Wingfield house. RP 146, 147.

Following the Trial Court's exclusion of the balance of his documentary evidence, Mr. Peterman requested a continuance, which was denied. RP 141, 148.

Later, the Trial Court sustained Petitioner's objection to the admission of "any documents that Mr. Peterman claims are receipts,

bids, estimates or in any way support the cost of construction of the home that are not part of the documents produced in response to our request for production.” RP 166. Petitioner’s request to exclude Mr. Peterman’s evidence, which was proffered to be documentation of the value of the Mr. Peterman’s expenditures as Trustee, was granted by the Trial Court in the absence of a motion in limine or court order compelling Mr. Peterman’s production of documents. RP 165.

Strikingly, the Trial Court had earlier overruled an objection made by Mr. Peterman on the basis that “there is nothing before the Court in terms of motion in limine for holding out or denying the admission of evidence. I don't see any motions in limine. Did you file any motion in limine?” RP 61.

From the very start of the trial, the court was made aware of Mr. Peterman’s inadequacies with regard to his *pro se* representation: “I would love to be represented by an attorney,” RP 12; “I am just not familiar with the way we are supposed to do things in court,” RP 18; “I don’t know how to do this myself,” RP 133.

Mr. Peterman also informed the court on several occasions that he was unable to hear what was being said in court: “I can't hear. That's one thing I found out is I can't hear. THE COURT: I will try to -- is the hearing device that's supposed to help you; is it

helping? MR. PETERMAN: Yes.” RP 142. “I have got a real hard time hearing.” RP 158. “THE COURT: Did you hear what he said? MR. PETERMAN: No.” RP 166.

The Trial Court made its oral ruling on January 25, 2007, apparently granting the Petitioner every form of relief sought. RP 273-282.

On February 9, 2007, at the hearing on Petitioner’s motion for presentation and entry of Findings of Fact and Conclusions of Law, for presentation and entry of Judgment and Order, and for approval of Petitioner’s attorney’s fees and costs, Mr. Peterman advised the Court that he had not been provided with advance copies of the proposed Judgment and Order, or the proposed Findings of Fact and Conclusions of Law. RP II, 3. Petitioner’s counsel conceded that he was unable to provide the court with a certification that the proposed documents had been timely served on Mr. Peterman. RP II, 5. The Trial Court granted a recess, and instructed the parties to review the documents with each other. RP II, 5-6. Mr. Peterman then requested a continuance, which was denied. RP II, 10.

The Trial Court executed the Findings of Fact and Conclusions of Law on February 9, 2007, CP 439, which were filed with the Trial Court on February 16, 2007. CP 433. The Trial Court executed Judgment and Order on February 9, 2007, CP 442, which

was filed with the Trial Court on February 16, 2007. CP 440. The Trial Court's Judgment included a figure denoted "amount of Judgment" in the amount of \$532,738.68, costs and attorneys' fees to Mr. Peterman's former counsel in the amount of \$10,315.21, and costs and attorneys' fees to Petitioner's counsel in the amount of \$54,680.01. CP 440. This Appeal was filed on March 8, 2007. CP 447.

C. ARGUMENT

1. The Trial Court committed reversible error when it failed to take the steps necessary to ensure that the trial was conducted with an "appearance of fairness."

The critical inquiry under the appearance of fairness doctrine is whether the proceeding would seem fair to a reasonably prudent and disinterested person. Brister v. Council of Tacoma, 27 Wn.App. 474, 486-87, 619 P.2d 982 (1980).

Here, Mr. Peterman was denied due process of law by being involuntarily subjected to a trial before a judge who allowed Petitioner's counsel to prejudge the admissibility of proffered evidence in the hallway, outside of the courtroom and outside of the record. RP 132-141.

There is a dearth of authority defining appellate review standards applicable to this contention. The common law as well as

the federal and state constitutions guarantee to a litigant a trial before an impartial tribunal, be it judge or jury. State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 202 P.2d 927 (1949). Indeed, the law goes farther than requiring an impartial judge; it also requires that a judge appear to be impartial. [Emphasis added] State v. Madry, 8 Wn.App. 61, 504 P.2d 1156, Div. II (1972). The critical concern in determining whether a proceeding appears to be fair is how it would appear to a reasonably prudent and disinterested person. See Chicago, Milwaukee, St. Paul & Pac. R.R. Co. v. State Human Rights Comm'n., 87 Wn.2d 802, 557 P.2d 307 (1976).

Here, the Court allowed the Petitioner to base her case entirely on inadmissible hearsay evidence and “expert” testimony from a lay witness. Further, the Court limited Mr. Peterman’s ability to present his case by summarily excluding much of the evidence as inadmissible hearsay, apparently based solely on the representations of Petitioner’s counsel. Lastly, the Court granted the Petitioner each remedy which she sought and entered the Findings and Conclusions as proposed by the Petitioner, without discussion or edit, despite the fact that some of the factual findings and conclusions of law were not part of the Trial Court’s oral ruling. Mr. Peterman submits that a reasonable prudent and disinterested

person would find the proceeds were not conducted with an appearance of fairness.

2. The Trial Court abused its discretion in denying Mr. Peterman's Motion for a continuance made during trial, following the Trial Court's exclusion of the balance of his documentary evidence.

The denial of a motion for a continuance is reversible error if the ruling was a manifest abuse of discretion. Martonik v. Durkan, 23 Wn.App. 47, 596 P.2d 1054, Div. I (1979). A manifest abuse of discretion occurs where the ruling is manifestly unreasonable or is based on untenable grounds or done for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971). In Balandzich v. Demeroto, 10 Wn. App. 718, 519 P.2d 994, Div. I (1974), the court discussed some of the considerations for a trial judge's exercise of discretion in this area.

In exercising its discretion, the court may properly consider the necessity of reasonably prompt disposition of the litigation; the needs of the moving party; the possible prejudice to the adverse party; the prior history of the litigation, including prior continuances granted the moving party; any conditions imposed in the continuances previously granted; and any other matters that have a material bearing upon the exercise of the discretion vested in the

court. Balandzich, at 720.

Here, the Trial Court's decision to deny Mr. Peterman's continuance was an abuse of discretion, because the judge failed to consider any considerations listed in Balandzich, and the only articulated reason in the record for denial of a continuance came from counsel for Petitioner: "We came today prepared to proceed to trial. Mr. Peterman has had the same notice we have had of this trial date and he needed to be here today prepared to proceed. So we object to any continuance." RP 148. Petitioner's counsel cited no prejudicial impact. RP 148. At bottom, had the trial judge exercised discretion and considered **any** of the Balandzich factors, he would have discovered a veritable "perfect storm" in favor of the granting of a continuance:

a. *The withdrawal of Mr. Peterman's counsel became effective approximately four weeks before trial, leaving Mr. Peterman to fend for himself pro se. CP 145. Although the withdrawal of an attorney in a civil case or his discharge does not give the party an absolute right of continuance, the rationale for this rule, which is not implicated in the case of Mr. Peterman, is that if a contrary rule should prevail, all a party desiring a continuance, under such circumstances, would have to do would be to discharge his counsel or induce him to file a notice of withdrawal. See*

Peterson v. Crockett, 158 Wn. 631, 291 P. 721 (1930). There is no evidence that the

b. *The record shows that, from the inception of the trial, it was clear to the court that Mr. Peterman was unable to hear and was foundering in the court room.* “I would love to be represented by an attorney,” RP 12; “I am just not familiar with the way we are supposed to do things in court,” RP 18; “I don’t know how to do this myself,” RP 133; “I have got a real hard time hearing,” RP 158; “THE COURT: Did you hear what he said? MR. PETERMAN: No.” RP 166.

Mr. Peterman was clearly incapable of representing himself. Thus, at the very least, the Court should have allowed ample time for him to retain counsel.

c. *Mr. Peterman was completely blindsided by Petitioner’s request to exclude evidence, which was summarily granted by the Trial Court despite the absence of a motion in limine or court order.* Because the Court denied his request for a continuance, Mr. Peterman was forced to represent himself. Mr. Peterman then watched the Petitioner build her entire case on inadmissible hearsay evidence and conclusory statements of lay witness unsupported by documentation. Much to Mr. Peterman’s surprise,

the Court summarily denied his offer to rebut the Petitioner's case with evidence like in kind.

While Mr. Peterman should not have been given a "free pass" with respect to his knowledge of the evidentiary standards and Court rules, the Trial Court erred by failing to take the steps to ensure the proceedings were conducted in a fair and equitable manner.

3. The Trial Court abused its discretion in denying Mr. Peterman's request to continue the hearing on the presentation of the Judgment and Order and Findings of Fact and Conclusions of Law.

The denial of a motion for a continuance is reversible error if the ruling was a manifest abuse of discretion. Martonik v. Durkan, *supra*, 23 Wn.App. 47.

The Trial Court entered Findings of Fact and Conclusions of Law on February 9, 2007, and also entered a Judgment and Order in favor of the Peterman Family Revocable Living trust and against Randy Peterman on the same date. CP 439, 442. Prior to entry of the documents, Mr. Peterman advised the Court that he had not been provided with copies of the proposed Judgment and Order or Findings of Fact in advance of the hearing on February 9, 2007. RP II, 3. Petitioner's counsel even conceded that he could not establish

that the proposed documents had not been properly served on Mr. Peterman. RP II, 4. At best, the documents had been mailed to Mr. Peterman four days prior to the hearing. RP II, 4.

A party is entitled to five days notice of a hearing on entry of Findings of Fact. CR 52(c). The lack of proper notice alone warranted a continuance. Mr. Peterman even affirmatively requested a continuance. RP II, 10, which was denied by the Trial Court as being untimely. RP II, 12.

Even more striking was the fact that many of the proposed findings and conclusions submitted by the Petitioner were not explicitly included in the Trial Court's oral ruling. RP 273-282; CP 433-439. Further, there was been virtually no discussion at the trial regarding a judgment being entered against Mr. Peterman. RP 273-282.

The assistance of counsel for Mr. Peterman even at this post trial hearing would likely have further ensured the integrity of the process. Virtually all of the documents were drafted by Petitioner's counsel and, with little or no modification, were entered by the Court. At the very least, Mr. Peterman should have been afforded an opportunity to seek the advice of legal counsel prior to the Court's entry of the Judgment, Findings and Conclusions. The Court denying Mr. Peterman's request for a continuance was an

abuse of discretion. Martonik v. Durkan, *supra*, 23 Wn.App. 47.

4. The Trial Court abused its discretion by summarily excluding from evidence the majority of documents offered by Mr. Peterman.

A Trial Court's evidentiary rulings are generally reviewed for an abuse of discretion. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435, 441 (1994). A Trial Court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. Id.

Mr. Peterman attempted to introduce several documents during his case in chief which the Trial Court summarily excluded as hearsay. RP 137. It appears from the record that the Court did not review the documents and the documents were excluded based upon representations from Petitioner's counsel that the documents were "objectionable as hearsay." RP 132-133. Seeking clarification, Mr. Peterman attempted to go through the documents with the Court in an orderly fashion, however, Petitioner's counsel unilaterally advised the Court with respect to which documents were hearsay. RP 134-136. The Court then summarily excluded "those documents" as hearsay. RP 137. The Trial Court went on to exclude several more documents using essentially the same procedure. RP 137-141.

Mr. Peterman attempted on at least two occasions to make what can only be construed as an offer of proof with respect to the proffered documents. However, the documents never became part of the record as the Trial Court denied their admission based solely upon the representations by Petitioner's counsel. While a party's failure to make an appropriate offer of proof at trial may preclude appellate review of the alleged error, Adcox v. Children's Orthopedic Hosp. and Med. Center, 123 Wn.2d 15, 26, 864 P.2d 921, 928 (1993), here, the Trial Court's off-the-record procedure would prevent the invocation of that rule.

It was an abuse of discretion for the Court to exclude documents it did not take the time to review. The Court should not have relied solely on the representations of Petitioner's counsel when deciding if the documents were admissible. The abuse of discretion is even more profound given the Court's willingness to admit several hearsay documents, and permit extensive hearsay testimony, during the Petitioner's case in chief.

5. The Trial Court abused its discretion in admitting and/or considering the videotaped deposition of Robert Martin.

A Trial Court's evidentiary rulings are generally reviewed for an abuse of discretion. Havens v. C & D Plastics, Inc., supra, 124 Wn.2d at 168.

Deposition testimony of an expert witness may be offered at trial under limited circumstances. CR 32(a)(5). One of the essential prerequisites to offering such testimony is reasonable notice to all parties. CR 32(a)(5)(A). This is even more imperative when testimony is offered through a discovery deposition under CR 26(b)(5). There is no evidence in the record establishing that Mr. Peterman was provided notice of, or was present at, the deposition of Robert Martin.

More importantly, the testimony itself was not admitted as part of the record. RP 128-129. The only evidence of the deposition appearing in the record is the notation that "the videotape of Robert Martin was played." RP 129. "On review we determine 'whether the evidence presented,' viewed in the light most favorable to the nonmoving party, 'would convince 'an unprejudiced, thinking mind.'" Industrial Indem. Co. of Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990)(emphasis added).

As a result, to the extent the findings of fact are based upon any "testimony" of Robert Martin, said findings are not supported by the record.

6. The Trial Court abused its discretion in precluding Mr. Peterman from testifying as to the value of the Wingfield Drive property.

A Trial Court's evidentiary rulings are generally reviewed for an abuse of discretion. Havens v. C & D Plastics, Inc., *supra*, 124 Wn.2d at 168.

The decisional law leaves no room for doubt that the owner may testify as to the value of his property, because he is familiar enough with it to know it is worth. An owner of property may testify as to its value (without qualifying as an expert), upon the assumption that he is particularly familiar with it and, because of his ownership, knows of the uses for which it is particularly adaptable. Weber v. West Seattle Land & Imp. Co., 188 Wn. 512, 516, 63 P.2d 418 (1936).

The Trial Court sustained Petitioner's objection to the admission of testimony from Mr. Peterman regarding the value of the Wingfield house. RP 146, 147. Mr. Peterman coordinated the construction of the Wingfield residence, and as Trustee, was in essence, its owner. Thus, it was abuse of discretion for the Trial Court to deny Mr.

Peterman the opportunity to testify regarding the value of the Wingfield Drive property. Weber v. West Seattle Land & Imp. Co., *supra*, 88 Wn. at 516.

7. The Trial Court abused its discretion in admitting and/or considering the deposition testimony of Phil Peterman.

A Trial Court's evidentiary rulings are generally reviewed for an abuse of discretion. Havens v. C & D Plastics, Inc., *supra*, 124 Wn.2d at 168.

In error, the Trial Court allowed Respondent's counsel to read into the record certain portions of Mr. Peterman's deposition. RP 106-108. Although the deposition of Phil Peterman was published, it was not admitted into evidence. RP 106-108.

In addition, in lieu of the actual reading the Deposition testimony verbatim, Respondent's counsel inexplicably was allowed to summarize a substantial portion of the purported testimony of Mr. Peterman. RP 107-109. The effect is that Respondent's counsel testified as to what he surmised was contained within the document.

In any event, because Petitioner failed to establish she had met the requirements of CR 32, the deposition was inadmissible. When offering deposition testimony of a non-party witness, the party offering the testimony must establish that the witness is essentially unavailable. CR 32. Further, the offering party must also establish

that the party against whom the deposition is offered was provided reasonable notice of the deposition or was present for the deposition. CR 32. There is nothing in the record that evidences the Respondent meeting the minimum prerequisites to the Deposition Testimony of Phil Peterman being admitted as evidence. To the extent that any finding or conclusion relies on the Deposition testimony of Randel Peterman, such reliance is in error.

8. The Trial Court erred in considering the deposition testimony of Mr. Peterman.

A Trial Court's evidentiary rulings are generally reviewed for an abuse of discretion. Havens v. C & D Plastics, Inc., *supra*, 124 Wn.2d at 168.

The Deposition of Randel J. Peterman was also published, but not admitted into evidence. RP 111. However, the Court apparently admitted several "deposition exhibits" attached to the Deposition of Randel Peterman that do not appear to be part of the record. RP 126-127. To the extent that any finding or conclusion relies on the Deposition testimony of Randel Peterman, or any exhibits attached to said deposition, which were not admitted as evidence, such reliance is in error.

9. The record does not contain substantial evidence in support of Findings of Fact Numbers 9, 11, 14, 15, 17, 18, 21, 26, 27, 28, 30, 31, 32, 35, 37, 38, 39, 40, 42, 43, and 45 entered by the Court.

The appellate court will review factual findings only to determine if they are supported by “substantial evidence.” State v. Halstien, 122 Wn.2d 109, 128–29, 857 P.2d 270, 281 (1993). Evidence is “substantial” when it is sufficient to persuade a fair-minded person of the truth of the declared premise. In re Marriage of Monaghan, 78 Wn.App. 918, 923, 899 P.2d 841, Div. II (1995). On review we determine ‘whether the evidence presented,’ viewed in the light most favorable to the nonmoving party, ‘would convince ‘an unprejudiced, thinking mind.’” Hizey v. Carpenter, 119 Wn.2d 251, 271-72 830 P.2d 646 (1992) (quoting Industrial Indem. Co. of Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990).

a. Finding of Fact Number 9

There is not sufficient evidence to support the Trial Court’s finding that Exhibit 8 represented the assets of the trust. Petitioner testified that she did not participate in the creation of Exhibit 8 and could not, with any definitiveness, confirm that Exhibit 8 identified

the assets of the trust. At best, Petitioner's testimony left the veracity and accuracy of Exhibit 8 in doubt.

b. Findings of Fact Number 11, 14, 16, 17, 18,19, 30, 31, 32, 37, 38, 39, 40, 42, 43, and 45.

The Court made a series of findings wherein it determined Mr. Peterman had failed to properly account for, unreasonable expended, and/or essentially wasted, the assets of the trust. There is simply not sufficient evidence in the record to support each of these findings.

The factual findings relating to the accounting of trust assets were based in large part on the unsubstantiated testimony of James Ellis, much of which was hearsay. The Court was not provided with sufficient bank records, cancelled checks, deposit slips, or anything of the like wherein the assets could be traced to a degree sufficient to support the conclusory statements contained in Findings of Fact 11, 14, 16, 17, 18,19, 30, 31, 32, 37, 38, 39, 40, 42, 43, and 45.

The only documentary evidence supporting Petitioner's claim that Mr. Peterman failed to appropriately account for the trust assets were a series of spreadsheets created by James Ellis wherein he testified as to what he gleaned from his review of some of the records, virtually all of which were hearsay documents. Despite the fact that Petitioner contends Mr. Peterman mismanaged hundreds

of thousands of dollars, over several years, utilizing multiple accounts, the court did not hear any testimony that could be construed as a complete, all-encompassing forensic accounting.

To compound problems, Mr. Peterman was summarily denied the ability to present the documentary evidence that would have given the Court the entire picture. The court elected to make findings based upon the conclusory and incomplete testimony of James Ellis, which findings are not supported by the record.

c. Findings of Fact Numbers 26, 27, and 28.

The only discussion of information supporting findings of fact 26, 27, 28 is the purported Deposition testimony of Phillip Peterman, the entirety of which is inadmissible and was not admitted as evidence during the trial. RP 106-108. Accordingly, there is no admissible evidence supporting findings of fact numbers 26, 27, and 28.

d. There is not substantial evidence in support of Finding of Fact No. 35, "Shirley R. Ellis, with the assistance of her husband and adult son, has substantially completed construction of the house on the Wingfield Hills lot owned by the trust. The house had been under construction, but never completed, during the tenure of Randel J. Peterman as trustee."

The phrase "substantial completion of construction" shall mean the state of completion reached when an improvement upon real property may be used or occupied for its intended use. RCW 4.16.310

Substantial completion is the state at which real property 'may be' used or occupied for its intended use, does not require actual use or occupancy. 1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp. (2000) 101 Wn.App. 923, 6 P.3d 74, review granted 143 Wn.2d 1001, 20 P.3d 944, affirmed 144 Wn.2d 570, 29 P.3d 1249.

Here, the record shows only that the converse of the Finding of Fact No. 35 is true: that Mr. Peterman substantially completed the construction of the Wingfield Drive residence. Petitioner and her family went to the Wingfield house in June of 2006. RP 25. It was also established that the Wingfield house was substantially completed by at least October 10, 2004, as Petitioner testified that the Certificate of Occupancy for the Wingfield Drive house was dated October 10, 2004. RP 38. Petitioner testified that there was a one or two year residency requirement before the Wingfield Drive house could be sold. RP 40.

When asked what steps they took to "complete the construction of the house at Wingfield Hills Drive," RP 26, Petitioner's

responses ranged as follows: First we had to clean up the junk, and I think we made two or three trips to the dump. RP 27; ...we called the Salvation Army to get it clean enough... RP 27; ...additional fence built...RP 27; exterior landscaping work. RP 28; clean the interior. RP 28; Repair a bathroom sink. RP 28; Repair the pantry door in the kitchen. RP 28; Some painting. RP 29; planted some additional trees shrubs. RP 30; a sprinkler system. RP 30

Petitioner's counsel asked, "Let me ask you this, um, with the exception of cleaning, making relatively minor repairs to things such as toilets and sinks and doors and giving the interior another coat of paint, would you say that the interior of the house was substantially completed when you arrived; there weren't any major construction jobs inside the house?" RP 29. Petitioner responded, "No. I would say yes to that on the inside." RP 29

Petitioner's counsel asked: "Would you say that there was substantial work needed to be done in the garage or not?" RP 29. Petitioner responded, "Well, as a woman it would look substantial to me....the sheetrock has been installed, but not the – to sand it down and make it smoothe [sic] and no paint and no texture that was done." RP 29.

The testimony leaves but one conclusion, the Wingfield house was substantially completed at the time Mr. Peterman was removed as trustee.

e. There is not substantial evidence in support of Finding of Fact No. 39, "The court finds that the Wingfield Hills house has 3,052 square feet, which at a cost of \$135.00 per square foot should have resulted in a completed house for a cost of \$412,020."

"On review we determine 'whether the evidence presented,' viewed in the light most favorable to the nonmoving party, 'would convince 'an unprejudiced, thinking mind.'" Hizey, 119 Wn.2d at 271-72 (quoting Industrial Indem. Co. of Northwest, Inc. v. Kallevig, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990).

Mr. Ellis, a lay witness, testified that the square footage of the living area of the Wingfield house was "3,052 square feet." RP 92. However, Petitioner also testified that the Wingfield House had an attached garage, RP 29, and there is no indication in the record that the valuation of the Wingfield Drive Property, as calculated in Finding of Fact No. 39, included any consideration of the attached garage.

Also, the Trial Court should not have relied on Mr. Martin's apparent testimony, because the record fails to establish that he provided any "method, reasoning or explanation" for either the 3,052 square foot figure, or the \$135 per square foot figure. See

Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 898 P.2d 275 (1995).

More importantly, Mr. Martin's testimony itself was not admitted as part of the record. RP 128-129. The only evidence of the deposition appearing in the record is the notation that "the videotape of Robert Martin was played." RP 129.

To the extent the findings of fact are based upon any "testimony" of Robert Martin, said findings are not supported by the record.

10. The Findings of Fact do not support Conclusion of Law Numbers 2, 3, 4, 6, 7, 8, 9, 10 and 11.

A Conclusion of Law not supported by the evidence is error. Holland v. Boeing Co., 90 Wash.2d 384, 390-91, 583 P.2d 621 (1978); Carson v. Willstadter, 65 Wn. App. 880, 830 P.2d. 676 Div I (1992).

a. Conclusions of Law Numbers 2, 3, 4, and 6.

Conclusion Number 2, 3, 4 and 6 contain factual statements wherein the Court "finds" that Mr. Peterman did not have "adequate receipts or invoices," "paid golf dues," expended "large sums of cash. . . without adequate consideration," and failed "to keep basic accounting records." CP 438. The Court also concluded that each of these actions constituted a breach of his fiduciary duty. As is

explained above, the aforementioned conclusions are simply not supported by the record.

b. Conclusion of Law Number 7.

As is discussed above, the Petitioner the record is void of substantial evidence that any breach of duty by Mr. Peterman caused harm to the trust, much less harm in the aggregate amount of \$411,426.30.

c. Conclusions of Law Numbers 8 and 9.

Washington courts award prejudgment interest (1) when an amount claimed is liquidated, or (2) when the amount of an unliquidated claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion. Prier v. Refrigeration Eng. Co., 74 Wash.2d 25, 32, 442 P.2d 621 (1968). When the value cannot be fixed within a narrow range of valuation, the person is not held responsible for refusing to pay a sum that essentially could not be determined by application of arithmetic or by the application of accepted standards of valuation. 1 Dan E. Dobbs, Law of Remedies, Damages-Equity-Restitution, 3.6(1) (2d ed. 1993).

Applying this view, a long line of cases has refused to award prejudgment interest when the damages determination requires the fact finder to determine "reasonableness." See, e.g., Pannell v. Food Service of Am., 61 Wn.App. 418, 449, 810 P.2d 952, Div. I (1991); Maryhill Museum of Fine Arts v. Emil's Concrete Const. Co., 50 Wn.App. 895, 903, 751 P.2d 866, Div. III (1988). These cases enunciate a principle: the fact finder's determination of reasonableness necessarily implicates an exercise of discretion. Kiewit-Grice v. State, 77 Wash.App. 867, 874, 895 P.2d 6, *review denied*, 127 Wash.2d 1018, 904 P.2d 299 (1995); Aker Verdal A/S v. Lampson, 65 Wash.App. 177, 192, 828 P.2d 610 (1992); Douglas Northwest, Inc. v. O'Brien & Sons Const., Inc., 64 Wash.App. 661, 691, 828 P.2d 565 (1992).

The courts plainly hold that prejudgment interest simply should not be awarded in a judgment based on quantum meruit. Modern Builders, Inc. of Tacoma v. Manke, 27 Wash.App. 86, 96-97, 615 P.2d 1332 (1980).

The amount claimed by the Petitioner is exclusively based upon the speculative testimony by Robert Martin, the purported expert, who apparently provided his best-guess valuation based on dollars per square foot. At best, this type of valuation mimics quantum meruit, and should be discarded thus making it impossible to pinpoint a

sum certain. It was error for the Trial Court to find Mr. Peterman liable for pre-judgment interest.

d. Conclusion of Law Numbers 10 & 11.

Although the Findings of facts are silent as to any award of fees, the Trial Court erroneously entered conclusions of law No. 10 and 11 wherein it found that the trust was obligated to pay Ingram Zelasko & Goodwin the sum of \$10,315.21, and the trust was also obligated to pay the Petitioner the sum of \$54,680.01 CP 439 (emphasis added).

Simultaneously, the Court entered a judgment “in favor of the Peterman Family Revocable Trust” and against Randy Peterman in the amount of \$10,315.21 for fees “owing to Ingram Zelasko & Goodwin and for \$54,680.01 for legal fees incurred by the Petitioner. CP 441 (emphasis added).

The Petitioner failed to offer sufficient evidence to support such any award of attorney fees. Accordingly, the Court failed to enter any findings related to the Trust or Mr. Peterman being obligated to pay Ingram Zelasko & Goodwin or the Petitioner any sum of money for legal fees. This alone results in the entry of Conclusions No. 10 and 11 being error.

Regardless, it was error for the Court to enter judgment against Mr. Peterman as described above wherein the Court

explicitly concluded that the sums should be paid directly from the trust.

The original oral ruling of the Court was silent as to petitioner's attorney fees. Petitioner filed a Motion for Approval of Attorney Fees and Costs on February 7, 2007. CP 394. The Court then entered a judgment against Mr. Peterman, equal to the amount requested in Petitioner's Motion. As discussed above, the Court's own conclusions, which were entered on the same day as the Judgment, indicated petitioner's legal fees were to be paid out of the trust.

The Petitioner also filed on February 7, 2007 two separate "Notices of Hearing" wherein Petitioner's counsel testified that he mailed a copy of the "Notice of Hearing" to Randel Peterman. CP 431-432 That document makes no mention of Mr. Peterman being served with the actual motion or any supporting documents. Any motion or supporting document must be served at least five days prior to hearing. CR 5.

As was discussed above, Mr. Peterman unequivocally requested a continuance so that he could have the documents reviewed by an attorney. Given the fact that the Petitioner cannot establish Mr. Peterman was served with the documents as required

under the civil rules, the Court denying Mr. Peterman's request was an abuse of discretion.

Even if the Petitioner could establish that her Motion for Approval of Attorney Fees & Costs was served in a timely fashion, the Court erred in entering such an award, wherein it failed to establish a sufficient record to support such a conclusion

11. The Trial Court abused its discretion in entering judgment against Mr. Peterman for fees owing to Ingram Zelasko & Goodwin and Edwards & Hagen.

Washington follows the American Rule wherein attorney fees are generally not available as *costs or damages* absent a contract, statute, or recognized ground in equity. City of Seattle v. McCready, 131 Wash.2d 266, 275 931 P.2d 156, 161 (1997). An award of attorney's fees is reviewed for an abuse of discretion Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 519, 910 P.2d 462 (1996).

When making an award for attorney fees, Trial Courts are required to make an adequate record of articulate grounds so the appellate court can review a fee award. Mahler v. Szucs, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). The Trial Court must also enter findings of fact and conclusions of law to support an attorney fee award. Mahler, 135 Wn.2d at 435 (“[A]bsence of an adequate

record upon which to review a fee award will result in a remand of the award to the Trial Court to develop such a record”).

Here, the Judgment entered by the Court is not consistent with the Court’s own conclusions, nor does the record support a fee award in this case.

The Trial Court offered no statutory, contractual, or equitable basis in making a fee award. Further, the matter was not even discussed at the hearing noted by the Petitioner wherein the judgment was signed.

The only evidence submitted by the Petitioner was an untimely Motion and Declaration from her attorney wherein he testified that a “substantial portion” of fees were related to the actions of Mr. Peterman. CP 395. The logical conclusion is that even Mr. Edwards believed that some portion of the fees were not the result of Mr. Peterman’s actions. More importantly, the Declaration that provides the sole basis for such an award lacks many of the details that a Court must consider when determining a fee award.

In determining reasonable attorney’s fees *“(t)he Trial Court should consider the total hours necessarily expended in the litigation by each attorney, as documented by counsel, and that the total hours expended should then be multiplied by each lawyer’s reasonable hourly rate of compensation considering inter alia the*

difficulty of the problem, each lawyer's skill and experience and the amount involved. The court may also consider the quality of the work performed, but only if the level of skill has varied substantially from the norm of other attorneys possessing the same experience, qualifications and abilities. Bowers v. Transamerica Title Ins. Co., 100 Wash.2d 581, 597-599, 675 P.2d 193 (1983).

Mr. Edwards failed to include either his hourly rate or the amount of time devoted to the tasks undertaken. CP 396-430. Therefore, there is no way to discern the amount of time spent and/or the reasonableness of the fees.

The Trial Court did not have before it sufficient evidence to determine the appropriateness of an award for attorney's and, in any event, did not create a record to sufficiently support such an award. Accordingly, the award of fees in the Judgment and Order was an abuse of discretion.

12. The Trial Court erred in entering the Judgment and Order on February 9, 2007.

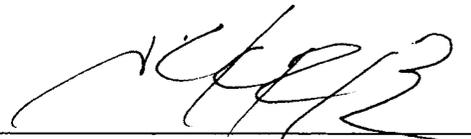
As was noted above, the findings of fact and conclusions of law providing the basis for entry of the Judgment and Order were entered in error, thus the Judgment and Order itself was entered in error.

D. CONCLUSION

Mr. Peterman respectfully requests that the Court find that the Trial Court erred as set forth above. Mr. Peterman also respectfully requests that the Judgment and Order be vacated and the case be remanded for a new trial.

Respectfully submitted this 17th day of May, 2007.

DITLEVSON RODGERS DIXON, P.S.

A handwritten signature in black ink, appearing to read 'C. Scott Kee', written over a horizontal line.

C. SCOTT KEE, WSB #28173

EXPEDITE
 Hearing set:

Date:
Time:
Judge:

07 MAY 17 PM 1:00
STAMPED
BY [Signature]
DEPT. 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION 2

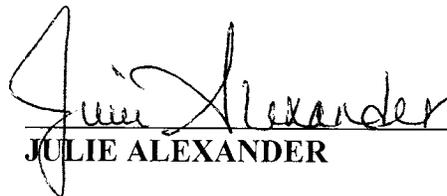
In Re:) Court of Appeals No. 360446
)
THE PETERMAN FAMILY REVOCABLE) Grays Harbor County Superior
LIVING TRUST,) Court No. 05-4-00160-1
)
Randel J. Peterman,) DECLARATION OF MAILING
Appellant,)
vs.)
)
Shirley Ellis,)
Respondent.)

The undersigned certifies that on the 17th day of May, 2007, I caused to be deposited in the United States mail at Olympia, Thurston County, Washington, by postage prepaid, true and correct copies of the Brief of Appellant Randel J. Peterman, to the following parties and counsel of record at their last know address:

Edwards & Hagen, P.S.
David L. Edwards
110 West Market, Ste. 202
Aberdeen, WA 98520

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: 5-17-07



JULIE ALEXANDER

ORIGINAL