

No. 360446-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re:

THE PETERMAN FAMILY REVOCABLE  
LIVING TRUST

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REPLY BRIEF OF APPELLANT RANDEL J. PETERMAN

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## B. ARGUMENT

### General Reply: The Trial Court Failed to Follow the Restrictions and Guidelines Imposed by TEDRA.

Respondent's reliance on RAP 2.5(a) is misplaced: an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a) (Emphasis added). The language is permissive, and the decision whether or not to review a claim of error is thus left to the sound discretion of the appellate court. In all events, denial of review is certainly not *mandatory*, especially in light of the primary purpose of TEDRA, which is to effect the intent of the Trust, as discussed below.

Following the death of Roger Peterman and Joyce Peterman, who were the settlors of the Peterman Family Revocable Living Trust [the "Trust"], the primary purpose of the Trust became essentially to divide the estate equally between the two surviving beneficiaries: Randel Peterman [the appellant herein], and Shirley Ellis [the respondent herein]. CP 4.

A judicial proceeding under Chapter 11.96A RCW ["TEDRA"] is regarded as "special proceeding" under the civil rules of court. RCW 11.96A.090. "The provisions of this title governing such actions control over any inconsistent provision of the civil rules," and "the procedural rules of court apply to judicial proceedings under

this title only to the extent that they are consistent with this title.”

[Emphasis added] Id.

The TEDRA statute provides for judicial resolution of disputes if other methods are unsuccessful, to which end the legislature granted the courts plenary power and authority to administer and settle all trusts and trust matters. RCW 11.96A.020 (1) (b).

In TEDRA judicial proceedings, the trial court must concern itself with the settlors’ *primary* objective in setting up the trust. See In re Riddell, 157 P.3d 888, 892, Wn. App. Div. 2 (May 08, 2007) (NO. 34869-1-II), as amended on reconsideration (Jul 03, 2007).

Certainly, in the instant case, it was neither consistent with the settlors’ intent nor with TEDRA for the trial court to have effectively disinherited the appellant, by way of an unwaveringly strict adherence to procedural rules. Although the trial court may not have been under an affirmative obligation to aid the appellant as he foundered, *pro se*; but in a “special proceeding” conducted under the auspices of TEDRA, the legislature limits the trial court’s application of the procedural rules “to the extent that they are consistent” with TEDRA. RCW 11.96A.090.

**1. The Trial Court erred when it failed to take the steps necessary to ensure that the trial was conducted with an “appearance of fairness.”**

Any review must start with the premise that “the law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.” (Emphasis added) Santos v. Dean, 96 Wn. App. 849, 857, 982 P.2d 632, Div. 3 (1999). 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, 810, 557 P.2d 307 (1976).

Respondent’s argument that, by failing to raise the appearance of fairness issue below, the appellant waived the issue from consideration on appeal is without merit. In addition to the permissive “may” language in the rule, RAP 2.5(a), provides that a party may raise a claim of “manifest error affecting a constitutional right” for the first time in the appellate court. It is consistent with RAP 2.5(a) for a party to raise the issue of denial of procedural due process in a civil case at the appellate level for the first time. Esmieu v. Schrag, 88 Wn.2d 490, 497, 563 P.2d 203 (1977). Here, the intent procedures as provided under TEDRA were not followed.

Respondent's position that appellant waived the appearance of fairness issue below is also unsupported by the cases cited in her response. The rule gleaned from In re Marriage of Wallace, 111 Wn.App. 697, 45 P.3d 1131, Div. 2 (2002), is grounded in three earlier Washington appellate opinions: State v. Bolton, 23 Wn.App. 708, 714-715, 598 P.2d 734, Div. 2 (1979) (where court found that the defendant was willing to "take his chances, hope for a favorable decision and resort to the appearance of fairness argument only if he was unsuccessful."); Matter of Welfare of Carpenter, 21 Wn.App. 814, 820, 587 P.2d 588, Div. 2 (1978) (party may not speculate upon what rulings the court will make on propositions involved in the case and, if the rulings do not happen to be in his favor, then for the first time raise the issue on appeal); and Brauhn v. Brauhn, 10 Wn.App. 592, 597, 518 P.2d 1089, Div. 1 (1974) (litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court's qualifications on appeal). None of these cases involved trust or TEDRA disputes, nor are any of them on point with the circumstances of the trial in the case at hand, as the error complained of here occurred *during* the trial, not prior to trial.

Looking closer at the Brauhn case, the appellate court specifically referenced that "careful review of the record below

shows that the trial court was meticulously fair to both parties.” Brauhn, supra, 10 Wn.App. at 598. Here, Respondent’s position that appellant has failed to submit evidence in support of his assignments of error begs the question, because at trial, respondent’s counsel was allowed to prejudge the admissibility of proffered evidence in the hallway, outside of the courtroom and outside of the record, and the trial court’s actions were documented in the record to the extent possible under the circumstances. RP 132-141.

In sum, the trial court failed to fulfill its duty of conducting the trial with an appearance of fairness, in the context of TEDRA. Given the entirety of the evidentiary rulings, presentation of evidence, and unwarranted discretion exercised by trial court, a reasonable prudent and disinterested person simply would not conclude that the proceeding was conducted with the requisite appearance of fairness. See Chicago, supra, 87 Wn.2d at 810.

**2. The Trial Court abused its discretion in excluding the balance of appellant’s documentary evidence, and in denying appellant’s motion for a continuance.**

As discussed above, the trial below was a TEDRA hearing, wherein preserving the settlors’ intent, rather than strict adherence to procedural rules as seen in adversary proceedings, was

supposed to be of primary importance. RCW 11.96A.090; In re Riddell, *supra*, 157 P.3d at 892. Certainly, too, the legislators intended that TEDRA guidelines would have a “material bearing upon the exercise of the discretion vested in the court.” See Balandzich v. Demeroto, 10 Wn. App. 718, 720, 519 P.2d 994, Div. I (1974).

Under the circumstances, appellant’s request to continue the matter was reasonable and appropriate, given the court’s exclusion of the balance of the documentary evidence that appellant sought to admit. Perhaps most significantly, there is no indication that any prejudice to the settlors’ intent in the Trust would have resulted if the evidence had been admitted, or if the matter had been continued.

That portion of Paradiso v. Drake, 135 Wn.App. 329, 339, 143 P.3d 859, Div. 2 (2006), cited by Respondent as authority for the abuse-of-discretion standard is unpublished, and should be disregarded by the court, accordingly. A party may not cite as an authority an unpublished opinion of the Court of Appeals. RAP 10.4 (h) Unpublished Opinions. Generally, “[u]npublished opinions have no precedential value and should not be cited or relied upon in any manner.” Skamania County v. Woodall, 104 Wn.App. 525, 536, 16 P.3d 701, Div. 2 (2001).

Finally, where there is no substitution of counsel made in conjunction with the withdrawal of an attorney, the Civil Rules provide that the withdrawal of an attorney is not *effective* for 10 days of service on the client. CR 71. Here, appellant's counsel filed a Notice of Intent to Withdraw on December 12, 2006, CP 145, which specified an effective date for the withdrawal as December 26, 2006—a mere twenty-nine days before trial. CR 71. The record does not indicate if and when this Notice was even served on appellant.

**3. The Trial Court abused its discretion in admitting and/or considering the videotaped deposition of Robert Martin wherein the Respondent failed to provide sufficient notice under the Civil Rules that she intended to offer said testimony at trial.**

CR 32(a)(5)(A) provides: “The discovery deposition of an opposing party's rule CR 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.” CR 32(a)(5)(A).

The record is devoid of any indication that respondent provided notice to appellant that he would attempt to admit the

videotaped deposition of Robert Martin at trial; nor did the Court make a record of any inquiry whatsoever as to the history of the deposition. Accordingly, Respondent did not meet the notice requirement of CR 32(a)(5)(A). As a result, appellant was not afforded an opportunity to confront the expert, and respondent now confuses the static notice requirement of CR 32(a)(5)(A) with an affirmative duty to object at trial.

Respondent's brief does not squarely address the issue of whether proper notice of the videotaped deposition was given; rather, respondent cites CR 32(b), which provides, in part, that "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." CR 32(b). The issue is not whether the testimony would have been objectionable had the witness been on the stand; e.g., not being qualified as an expert. The issue is that appellant never had the opportunity to cross examine the witness; e.g., to inquire as to the qualifications, competency, and basis of the witnesses opinion.

The prejudice worked by the unexpected testimony of respondents' purported expert is that the trial court based its valuation of the Wingfield Drive property solely on this testimony,

which valuation played a major role in the formula upon which the trial court based its award against appellant. RP 273-282; CP 433.

**4. The Trial Court abused its discretion in precluding appellant from testifying as to the value of the Wingfield Drive residence where Mr. Peterman was equivalently the owner of the property, and in any event, held the requisite knowledge of an owner.**

The trial court excluded appellant's testimony concerning the fair market value of the Wingfield Drive residence, on the grounds that his opinion was based on hearsay documents. RP 147. To get there, the court actually sustained its own hearsay objection, as respondent's objection had gone only to foundation. RP 147. As discussed below, "both objections" were without merit.

In this state, "[t]he 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 its worth." Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 211, 898 P.2d 275 (1995). Further, "[t]he rationale behind this right is that one who has owned property is presumed to be sufficiently acquainted with its value and the value of surrounding lands to give an intelligent estimate of the value of his property. *Because of this rationale no inquiry into knowledge is required to qualify the owner, although*

*knowledge will affect the weight to be accorded his opinion....* In giving his opinion the owner is entitled to explain his valuation by relevant and competent methods of ascertaining value. (Italics by Court of Appeals) State v. Wilson, 6 Wn.App. 443, 451, 493 P.2d 1252, Div. 2 (1972).

Respondent's response is two-pronged: (1) that appellant was not the "owner" of the Wingfield Drive house; and (2) "although landowners have the right to testify concerning the fair market value of their property, this right is not absolute." State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959).

Appellant coordinated the construction of the Wingfield Drive residence, RP 5, and was for all intents and purposes its "owner" in the context of Port of Seattle, *supra*, 127 Wn.2d at 211. It was established that the Wingfield Drive residence 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. Appellant had the requisite familiarity and knowledge of the property to support his offering an opinion as to its value, in line with the rationale behind the Port of Seattle holding. Id.

The trial court's exclusion of appellant's testimony on the basis of hearsay is also unfounded. When an expert (in this

circumstance the owner is a quasi-expert) is allowed to testify to a valuation opinion, which is in part based on facts which would normally be hearsay and inadmissible as independent evidence, the trial court may in its discretion allow an expert to state such facts for the purpose of showing basis of opinion; but if trial court wishes to exclude such evidence, exclusion must be based on a sound exercise of discretion and not on an erroneous application of hearsay rules. State v. Wineberg, 74 Wn.2d 372, 384, 444 P.2d 787 (1968). It was thus error for the trial court to exclude appellant's testimony on the basis of hearsay.

Nor does the record indicate that appellant was totally reliant on the purported hearsay documents for his opinion as to the value of the Wingfield Drive residence; the court improperly pre-empted what may have been the proper inquiry. In any event, however, appellant said that he "built the house." RP 17.

Appellant offered proof that the Wingfield Drive residence was valued at \$900,000; or, alternatively, that the value of the structure alone was \$630,000. RP 146, 147. The prejudice resulting from the court's error was realized when the court based its award to respondent (in large part) on computations involving the reasonable cost of construction as provided by respondent's purported "expert," Mr. Martin, via videotape. Martin's testimony

went unchallenged due to appellant's inability to cross examine him, and the court's refusal to let appellant testify as to value ensured the result, which was wholly inconsistent with TEDRA.

**5. The trial Court abused its discretion in awarding prejudgment interest where the amount in dispute was unliquidated.**

The amount awarded to respondent was based upon the speculative testimony by Robert Martin, the purported expert, who provided his best-guess valuation based on dollars per square foot.

A liquidated claim is one where the amount of prejudgment interest can be determined from the evidence with exactness *and without reliance on opinion or discretion*. (Emphasis added) Bostain v. Food Exp., Inc., 159 Wn.2d 700, 153 P.3d 846 (2007).<sup>a</sup>

Appellant offered proof that the Wingfield Drive residence was valued at \$900,000; or, alternatively, that the value of the structure alone was \$630,000. RP 146, 147. The prejudice resulting from the court's error was realized when the court based its award to respondent (in large part) on computations involving the

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<sup>a</sup> That portion of Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc., 128 Wn.App. 885, 117 P.3d 1147, Div. 2 (2005), cited by Respondent as authority for the prejudgment interest is unpublished, and should be disregarded by the court, accordingly. *Id.* at 895. A party may not cite as an authority an unpublished opinion of the Court of Appeals. RAP 10.4 (h) Unpublished Opinions. Generally, "[u]npublished opinions have no precedential value and should not be cited or relied upon in any manner." Skamania County v. Woodall, 104 Wash.App. 525, 536 n. 11, 16 P.3d 701, review denied, 144 Wash.2d 1021, 34 P.3d 1232 (2001) (citing RAP 10.4(h)).

reasonable cost of construction as provided by respondent's purported "expert," Mr. Martin, via videotape. Contrary to respondent's argument, this type of valuation precisely mimics *quantum meruit*, which, as a matter of law, does not provide a basis for an award of prejudgment interest. Modern Builders, Inc. of Tacoma v. Manke, 27 Wn.App. 86, 96-97, 615 P.2d 1332, Div. 2 (1980)

#### **D. CONCLUSION**

In viewing the result of this trial through the lens of TEDRA, as the legislature arguably intended, the unfairness of adhering to the rigid procedural standards championed by Respondent is apparent. The practical effect of excluding appellant's evidence on the one hand, allowing all of Respondent's evidence in, on the other hand, and denying Appellant's requests for continuances where no prejudice would have resulted, add up to the ultimate sanction of denying Appellant a defense. Appellant respectfully requests that the Court find that the trial court erred as set forth above. Appellant also respectfully requests that the Judgment and Order be vacated, and the case be remanded for a new trial in accordance with TEDRA.

Respectfully submitted this 27<sup>th</sup> day of July, 2007.

DITLEVSON RODGERS DIXON, P.S.



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Q. SCOTT KEE, WSB #28173

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

In Re: ) Court of Appeals No. 360446  
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THE PETERMAN FAMILY REVOCABLE ) Grays Harbor County Superior  
LIVING TRUST, ) Court No. 05-4-00160-1  
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Randel J. Peterman, ) AFFIDAVIT OF SERVICE  
)  
Appellant. )  
)

STATE OF WASHINGTON )  
) ss.  
County of Thurston )

**Julie Alexander**, being first duly sworn on oath, deposes and states:

1. I am now and at all times herein mentioned was an employee of Ditlevson Rodgers Dixon, P.S, a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18) years, and competent to make this Affidavit:

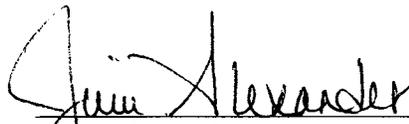
2. On August 1, 2007, I sent via facsimile and I deposited in the mails of the United States a properly postage prepaid, stamped and addressed envelope containing one copy of the *Reply Brief of Appellant* and one copy of this *Affidavit of Service* to counsel of record for Respondent herein as follows:

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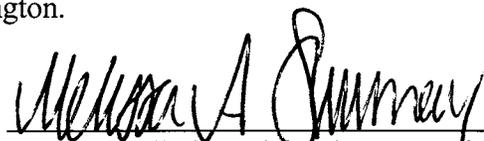
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\_\_\_\_\_  
Julie Alexander

**SIGNED AND SWORN** to before me this 1<sup>st</sup> day of August, 2007, by  
Julie Alexander, at Olympia, Washington.

  
\_\_\_\_\_  
Notary Public in and for the State of  
Washington, residing at TENING.  
My commission expires 9/5/07.