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## I. INTRODUCTION

This case concerns a trust and estates dispute (filed under TEDRA at RCW 11.96A *et seq.*) between three siblings over the estate of their mother, Anne M. Heinzinger. Specifically, it concerns a dispute over the propriety of decedent Anne Heinzinger's actions in 2001 when she established a Revocable Living Trust (the "Heinzinger Road Trust"), and transferred certain real estate into that Trust. In a TEDRA action dated September 29, 2014, the two elder siblings (sisters Catherine Bloom and Margaret Heinzinger) sued their young brother (John Heinzinger), seeking to invalidate the Heinzinger Road Trust on the legal basis that the Trust was made in direct contravention of their mother's Mutual Will.

John<sup>1</sup>, as successor trustee of the Trust, defended the existence and propriety of the Heinzinger Road Trust on the basis of four separate affirmative defenses: (1) unclean hands, (2) ratification, (3) estoppel/waiver, and (4) laches. CP 225-234. Specifically, John alleged that his sisters, Catherine and Margaret, were both aware of the existence of the Trust for more than a decade but made no objection. *Id.* Moreover, sister Margaret was the very individual who had assisted her mother Anne in the establishment of the Trust in the first instance. *Id.* Margaret was the

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<sup>1</sup> The appellants in this case are John Heinzinger and his wife Kelley Heinzinger. However, because this case concerns a legal dispute between family siblings of which Kelley is not an active participant, for ease of reference the appellants' are referred jointly referred to in the singular of "John." Moreover, three of the four actors in this case have the last name Heinzinger. In order to keep the identity of the actors straight, Appellant uses first names. Appellant does so with apology, and no disrespect is intended.

original successor trustee and preferred beneficiary of the Trust. *Id.*

In compliance with statute, after the commencement of the TEDRA petition, John Heinzinger, properly invoked the mediation procedures of RCW 11.96A.300, and the respondents agreed to mediation. CP 54-55. The parties proceeded to mediation on February 26, 2015, but did not settle. Thereafter, John Heinzinger properly invoked the arbitration procedures of RCW 11.96A.310, and again the respondents did not object. CP 58-59. The trial court appointed an arbitrator, attorney Richard Shaneyfelt.

Despite respondents' agreement to TEDRA arbitration, on November 16, 2015 the respondents proceeded to file a motion for summary judgment with the trial court. CP 60-116. Over appellant's objection, the trial court ruled that even though the matter was subject to TEDRA arbitration, summary judgment in the trial court was still appropriate. CP 247-249. The matter proceeded to summary judgment on August 3, 2016, and the trial court granted the respondents' motion for summary judgment invalidating the Heinzinger Road Trust. CP 696-699. At summary judgment the Court declined to consider the appellant's affirmative defenses, and the appellant was deprived of the opportunity for resolution of his affirmative defenses by a trier of fact (in this case in TEDRA arbitration).

As a separate matter, in the course of the lawsuit, appellant moved to disqualify respondents' attorney Knauss on the basis of his conflict of

interest. CP 416-422. The basis of the conflict was John's belief that attorney Knauss originally undertook to represent all three siblings together in the probate of their mother's estate, including filing the initial probate. *Id.*; CP 485-535. Thereafter, attorney Knauss filed the TEDRA action on behalf of the two sisters, Catherine and Margaret, against their brother John. The trial court denied the motion after finding that attorney Knauss and John Heinzinger never formed an attorney client relationship. CP 634-637. John Heinzinger believes that this finding is in error and seeks this Appellant court's de novo review of the trial court's decision to allow attorney Knauss to continue to act as counsel for respondents in this TEDRA matter.

## II. ASSIGNMENTS OF ERROR

- A. The Trial Committed Error When It Allowed Respondents to Proceed With Summary Judgment, Despite The Mandates of RCW 11.96A.260-310, Which Require That the Matter Be Resolved Through the Alternative Dispute Resolution Procedures of the Statute.
- B. The Trial Court Erred When It Granted Respondents' Summary Judgment While Ignoring Questions of Fact Relating to Appellant's Affirmative Defenses.
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## III. ISSUES PRESENTED

- A. Does A Trial Court Retain Jurisdiction to Judicially Resolve a TEDRA Matter on Summary Judgment, Once the Matter Has Been Properly Submitted To Mandatory Arbitration In Compliance With RCW 11.96A.260-310?
- B. Should This Case Be Remanded to Mandatory Arbitration Because There Remain Outstanding Issues of Fact Related to Appellants' Affirmative Defenses of (1) Unclean Hands, (2) Ratification, (3) Estoppel/Waiver, and (4) Laches?

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C. Should Attorney Knauss Be Disqualified from Representation of the Respondents for the Reason That He Has a Concurrent Conflict of Interest in Violation of RPC 1.7?

D. Are Appellants Entitled to Reimbursement of Their Attorney Fees and Costs from the Corpus of The Heinzinger Road Trust (if any)?

#### IV. STATEMENT OF THE CASE

The following statement of the case, closely tracks the factual recitation provided to the trial court in *Respondents John and Kelly Heinzinger's Cross-Motion for Summary Judgment*. CP 257-276. This factual recitation forms the basis of John's belief that he is entitled to resolution of his claims by a trier of fact (in this case mandatory arbitration), and that this case was improperly properly resolved on Summary Judgment.

A. The Subject Real Property - 81 Heinzinger Road.

The primary subject of this case is a parcel of real property located at 81 Heinzinger Road on Marrowstone Island, in Jefferson County.<sup>2</sup> The property has been in the Heinzinger family since 1936 and has been enjoyed by four (4) generations of the Heinzinger family. CP 277-279; CP 354-355. It was originally purchased as part of a larger parcel of property by the parties' grandparents, John and Nina Heinzinger. *Id.*; *see also* CP 382. The grandparents eventually left the undivided property equally to their five children, who in approximately 1987 had it subdivided into 3 separate lots,

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<sup>2</sup> As discussed below, there are actually two tax parcels at issue. 81 Heinzinger Rd. is the primary property upon which Anne Heinzinger built her home and which has access to the "point." The Heinzinger Road Trust also owns a 42.7% interest in an additional 2.25 acres of vacant land commonly referred to as the "Back-10" lot.

to be divided within the family. *Id.*; *see also* CP 357-359. 81 Heinzinger Road is the parcel inherited by the litigants' parents, Lee W. Heinzinger and Anne M. Heinzinger. CP 278. The other subdivided parcels remain in the family. *Id.* Specifically, 83 Heinzinger Road is owned by cousin Julianne Heinzinger, and 85 Heinzinger Rd. is still owned by uncle Paul Heinzinger. *Id.*; *see* CP 384.

B. The 1993 Mutual Wills of Lee W. Heinzinger and Anne M. Heinzinger.

In September 1993, Lee. W. Heinzinger and Anne M. Heinzinger executed reciprocal mutual wills that had been prepared by West Seattle family attorney James G. Barnecut. CP 289-307. The wills were signed in Mr. Barnecut's presence. *Id.* Both wills contemplated the establishment of a credit shelter trust for the surviving spouse during his or her life, and then distribution the estate and trust assets equally to the three siblings upon the passing of the second spouse. *Id.* The three siblings were apprised by their parents that they would inherit equally. CP 279; CP 366; CP 385-386.

C. The Passing of Lee W. Heinzinger in 1995 and Probate of His Estate.

Lee W. Heinzinger passed away in 1995. At the time, Anne Heinzinger was 80. With the assistance of attorney Barnecut, Anne M. Heinzinger admitted her husband's 1993 will to probate in King County Washington. CP 279.

With respect to real estate, the marital couple owned the following

properties which, in accordance with the will, was transferred by Distribution Deeds to Anne Heinzinger:

- (1) A West Seattle residence located at 3251 41st Ave. SW, Seattle, WA; and
- (2) Two tax parcels of vacant real property located on Marrowstone Island:
  - a. Tax Parcel: 021294001 (81 Heinzinger Rd.)
  - b. Tax Parcel: 0953700433 (The "Back 10" Lot)

CP 279. Distribution Deeds were prepared and filed by attorney Barnecut in 1996 to effectuate the estate transfers. CP 309-314. As previously explained, the properties on Marrowstone Island are part of the contiguous group of properties owned by the greater Heinzinger family and originally purchased by grandparents John and Nina Heinzinger.

D. Estate Planning Gifts to Children in Equal Shares.

With respect to the vacant real estate known as the "Back-10 lot" (tax parcel no. 0953700433), with the continued assistance of attorney Barnecut, in 1996, 1997 and 1998, Anne M. Heinzinger made estate planning gifts of partial ownership interest in this real property to each of her three children. CP 315-319. Over the course of those three years, Anne transferred 57.3% of the Back-10 Lot to her children, retaining 42.7% for herself. *Id.* Years later, in February, 2006, she transferred the remaining 42.7% of the "Back-10 lot" into her revocable living trust (the Heinzinger

Road Trust).

E. Sibling Disagreement Over 81 Heinzinger Rd.

In late 1998, respondents Catherine and Margaret came into disagreement over the use and enjoyment of 81 Heinzinger Road. CP 280-281. Margaret had a health scare, and in 1999 sold her South Seattle home. *Id.* At the time she lobbied the idea to her mother and siblings of moving to 81 Heinzinger Rd. on permanent basis and acting as the “caretaker” of the Property. *Id.* John and her mother were in favor of the idea, but Catherine disagreed. *Id.* In Catherine’s own words:

A: ... Anyway, it was my opinion that none of us should have a permanent home on a property that couldn’t be divided.

Q: So the primary issue at that time was whether or not Margaret should be allowed to put a home on the property and be the caretaker of the property, and you felt that would be exclusionary to you?

A: The idea of putting a home on it never came up.

Q: All right.

A: The idea was the she would live there and pay all the expenses and maintain it. I said that, no, the three of us should share it so that each one of us could be there, like a vacation by ourselves and our family.

CP 368-369. Margaret explains:

A: I think there was a reason I moved to Lakewood, because we had talked -- there had been discussion about me staying at Marrowstone as a caretaker and mom was concerned about people coming and digging clams. I don’t think it was a big deal and I think that I felt hurt, but it was decided that it was

better, you know, if I didn't live there, and then John found a wonderful place for me down in Lakewood.

CP 392. Because the three siblings could not agree, Anne Heinzinger initially declined to allow Margaret to move to the property. CP 280. However, by August 2000, Margaret had moved up to Marrowstone Island anyway and was living in a home that neighbored the Back-10 lot. *Id.*

F. Sale of the West Seattle Residence, and Construction of a Home on Marrowstone Island.

At the same time that Margaret was in the process of moving to Marrowstone Island, Anne Heinzinger also made the decision to also sell her home in West Seattle and build a new residence at 81 Heinzinger Road. CP 281. In March 2001, at the age of 85, Anne Heinzinger sold her West Seattle home and moved into a mobile home on the property. Proceeds from the sale of the West Seattle home would be used for construction of a new home at 81 Heinzinger Rd. *Id.*

Construction of a new home for Anne Heinzinger at 81 Heinzinger Rd. commenced in or about September, 2001. CP 281-282. However, within two months, in November, 2001, the general contractor working the project had walked off the job. *Id.* According to Margaret, Anne Heinzinger had become disgruntled with the contractor and refused to pay him. *Id.*; CP 388. Margaret Heinzinger immediately stepped in and acted as the quasi-general contractor on the job to assist her mother in completion of the new residence. *Id.* The house was completed in September 2002, in

time for Anne Heinzinger's 87<sup>th</sup> birthday. *Id.* Margaret was not paid any compensation for assisting her mother in completing the residence on Marrowstone Island. CP 390-391.

G. 2001 Estate Planning: Transfer of the Marrowstone Home Into a Family Road Trust.

Although Margaret Heinzinger was not compensated for assisting her mother with construction of the new residence on Marrowstone Island, in December 2001, Margaret drove her mother to the office of Karen Gates-Hildt, a lawyer that Margaret was also using to update her own estate plans. CP 408-412. With the assistance of Margaret's attorney, Anne Heinzinger formed *The Heinzinger Road Trust*, a revocable living trust. *Id.*; CP 320-328. According to Margaret, Anne's decision was predicated on a desire for the following:

- How to leave an indivisible property that with the construction of her new home represented a disproportionately large share of her estate, to her THREE children without it having to be sold, so they could ALL enjoy it.
- How to provide for her young grandson Nicklaus Heinzinger as she repeatedly expressed concern over his parent's spending habits and worried that if she didn't leave him an inheritance he would get nothing.
- How would the expenses of keeping the Marrowstone property get paid as [John] frequently told her he would consider it a liability if she didn't also provide him some way to use it without it costing him anything.

CP 409. Contemporaneous with establishment of the Trust, on December 7, 2001, Anne M. Heinzinger quit claim deeded 81 Heinzinger Road, into

*The Heinzinger Road Trust*. CP 329.

Although Margaret professes that Anne's intent was to pass 81 Heinzinger Rd. indivisibly to her three children without having it be sold, the initial terms of the Trust benefited Margaret to the exclusion of her siblings who were then unapprised of their mother's plans. Specifically, Margaret Heinzinger was named a life-estate beneficiary of *The Heinzinger Road Trust*, and stood in position to occupy the home as her residence upon Anne's passing. The document reads:

B. After the death of Trustor

After the death of the Trustor herein, the Trustee shall distribute the trust property as follows:

(1) After the death of Trustor ANNE M. HEINZINGER, the trust estate shall be held for the benefit of Trustor's daughter, MARGARET J. HEINZINGER if she survives. Margaret may use any real property that is an asset of the Trust as her residence, or the Trustee may lease said property and distribute said income to Margaret at the Trustee's sole discretion;

(2) If Margaret does not survive the Trustor, or at Margaret's death, or upon Margaret's written request to the Trustee, the Trustee shall hold the trust estate for the benefit of Trustor's grandson, NICKLAUS C. HEINZINGER if he survives. When Nicklaus attains the age of thirty (30), or upon Margaret's death or transfer of her interest to Nicklaus, whichever event occurs later, the remaining trust estate shall be distributed, free of all trusts, to Nicklaus and the trust shall terminate.

CP 322-323. Margaret was also named the Successor Trustee of the Trust.

CP 325-326.

After establishment of *The Heinzinger Road Trust*, Anne and

Margaret together shared the news of the Trust with John. CP 282-283; CP 409-410. The circumstances are best explained in Margaret's own words:

Several days later, I was present when my mother discussed the Heinzinger Road Trust with [John].

My mother told [John] she needed to secure her grandson's inheritance, so was leaving the Marrowstone property in trust for [John]'s son Nick Heinzinger. My mother explained to [John] that he still had one third of the Credit Trust and that I had promised to apply my one third interest and my income to pay ALL the bills and maintenance of the Marrowstone property so he could use it without it being a "liability".

Even with these generous conditions, [John] was strident in his complaint that my mother was "skipping a generation" and said it was terrible of her as neither my father's parents or her parents had skipped over them. My mother tried to explain that she wasn't skipping over [John] as he still had the Credit Trust and would have the free use of Marrowstone until Nick turned 30. She kept repeating she was just protecting Nick.

CP 409-410. Margaret and her mother Anne declined to inform Catherine, who had already made clear in her objection to the idea of Margaret residing on and caring for the Property. CP 282.

H. Falling Out Between Anne Heinzinger and Margaret Heinzinger.

As fate would have it, in 2004, Anne and her daughter Margaret had a severe and permanent falling out. The argument apparently included general animosity created by Margaret's decision to inform her sister Catherine about *The Heinzinger Road Trust* over her mother's objection. Again, in Margaret's own words:

In 2004, I objected to all the conditions that were being

placed on me by both [John] and my mother. I also told them I thought Catherine should be informed of the plans for the Marrowstone property. This was especially important to me as my mother was committed to having her grandson Jeff (my sister's son) live with her.

Neither [John] nor my mother wanted me to say anything to my sister, but I did anyway.

In 2004, my doctor told me that the stress of my living situation was causing me serious health problems. I had been on disability since 1994 for severe health problems.

My objections to all the rules, plus my health issues and my "letting the cat out of the bag" I believe, resulted in [John] and my mother "hating me". They told me this several times before I could complete my move. They unleashed a torrent of unfounded and heinous accusations against me.

CP 411. Unfortunately, the argument became physical and Anne Heinzinger, at the age of 90, was forced to obtain a restraining order against her daughter. CP 413-415. The relationship between Margaret and her mother was forever estranged. The last time Margaret spoke to her mother was at the Jefferson County Courthouse in 2004.

At the same time that Anne sought a restraining order from her daughter, she sought the assistance of another Port Townsend law firm, Harris, Mericle, & Wakayama, for the purpose of revising her Will. With the assistance of Gloria Wakiyama, Anne Heinzinger revised her will two times, once in 2004, and again in 2006.<sup>3</sup> CP 283; CP 330-344. The 2006

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<sup>3</sup> The difference between the 2004 will and the 2006 will is the treatment of Ms. Heinzinger's remaining 42.7% interest in tax parcel 095370433. In the 2004 will that ownership interest was to be distributed in equal shares to John and Catherine. In the 2006 will, that ownership interest was placed into the Heinzinger Road Trust.

will bequeathed all of Anne Heinzinger's personal possessions, and her remaining interest in tax parcel 0953700433 to *The Heinzinger Road Trust*, and left the residue of her estate to Catherine and John in equal shares. *Id.* In addition to making a new will, in 2006 Gloria Wakiyama prepared for Anne M. Heinzinger a 2006 Amendment to the Heinzinger Road Trust. CP 345-348. In the 2006 Amendment, Anne Heinzinger replaced Margaret with her son John as Successor Trustee and as life estate beneficiary. *Id.*

I. 2013 Death of Anne Heinzinger.

Anne Heinzinger lived independently at 81 Heinzinger Rd. until March, 2012, when she was hospitalized after a urinary tract infection. CP 284. At the time she was 96. *Id.* After recovering in the hospital, Anne Heinzinger moved from her home on Marrowstone Island, to an assisted living facility close to John's home called Cottesmore of Life Care, in Gig Harbor, WA. *Id.* Anne Heinzinger lived out the remainder of her life close to her son at Cottesmore, and passed away on January 27, 2013. *Id.*

J. Sisters' Presentment of Anne M. Heinzinger's 1993 Mutual Will.

Within a month of Anne Heinzinger's passing, Catherine and Margaret presented their brother John with a copy of their mother's 1993 will, and informed him that all estate planning made subsequent to that will was invalid. CP 284-285. They threatened John that if he challenged the will, they would seek to cut him completely out of any inheritance by reason of the anti-contest provision contained in the will. CP 306. In an effort to

be conciliatory, John relented and participated with his sisters in the probate of their mother's 1993 Last Will and Testament. CP 284.

K. Probate of the Estate of Anne M. Heinzinger in Jefferson County.

The 1993 Last Will and Testament of Anne M. Heinzinger names all three siblings as co-executors. CP 299-308. The three siblings together retained attorney Ted Knauss to represent them in the filing and administration of their mother's estate. CP 285; CP 485-537. Mr. Knauss undertook to jointly represent John, Catherine, and Margaret without a conflict of interest explanation or letter. *Id.* The Last Will and Testament of Anne M. Heinzinger was filed for probate, on March 28, 2014. CP 1-15. Attorney Knauss prepared all the paper work for the transaction, and presented the matter to the court on behalf of all three co-executors. *Id.*; CP 485-537.

L. TEDRA Action by Respondents as Testamentary Beneficiaries (Under the 1993 Will) to Try and Recover Non-Probate Asset (the Heinzinger Residence).

Despite the fact that Ted Knauss was jointly representing and advising all three co-executors with respect to the probate of their mother's Last Will and Testament, on September 23, 2014, Mr. Knauss filed and served his own client, John Heinzinger, with this pending TEDRA Petition to Reform The Heinzinger Road Trust. CP 285. In the TEDRA, attorney Knauss represented two of his clients (Catherine and Margaret) against his third client (John) seeking to have the Road Trust declared invalidation as

it was made in derogation of the mutual will. *Id.*

M. Demand and Acceptance of TEDRA Mediation.

In defense of this case, and in his capacity as Trustee of the *Heinzinger Road Trust*, John Heinzinger retained undersigned counsel. In answer to the TEDRA complaint, John alleged four affirmative defenses (1) unclean hands, (2) ratification, (3) estoppel/waiver, and (4) laches. CP 225-234. These affirmative defenses were made based on the fact that the respondents had been aware of the existence of *The Heinzinger Road Trust* for over a decade without complaint, and further that Margaret Heinzinger was the individual who had assisted her mother in the establishment of The Road Trust in the first instance. *Id.*

On October 30, 2014, appellant filed and served upon the respondents a Notice of Mediation Under RCW 11.96A.300. On November 18, 2014, the respondents filed an Acceptance of Mediation stating that “[N]otice is hereby given that the Petitioners agree to TEDRA Mediation under RCW 11.96A.300.” CP 54-55. The matter then proceeded to mediation on February 26, 2015, but mediation was unsuccessful.

N. Demand and Acceptance of TEDRA Arbitration.

On March 16, 2015, John properly filed and served up on his sisters a Demand for Arbitration filed in conformity with the requirements of RCW 11.96A.310 and stating “Notice is hereby given that the following matter must be resolved in arbitration under RCW 11.96A.310...” CP 129-131.

Again, the respondents did not object, but instead filed their own list of arbitrators, stating “Notice is hereby given that the [respondents] acceptable Arbitrators for the matter are as follows: Steve Gillard [address omitted], Richard Shaneyfelt [address omitted], and Dave Neupert [address omitted]. CP 58-59. Appellant made no objection to the respondents’ selection of Richard Shaneyfelt as arbitrator, and on December 4, 2016, the Court ordered his appointment. CP 176-179; CP 182.

O. Respondents’ Motion for Summary Judgment.

In the interim, despite their acceptance of TEDRA Arbitration under RCW 11.96A.310, on November 16, 2015, the respondents filed a Motion for Summary Judgment with the trial court. CP 60-116. Appellant objected on the basis the matter was in arbitration and pursuant to statute must be resolved in arbitration. CP 117-121; CP 125-142; CP 208-212. For the reasons set forth in the trial court’s written order dated January 26, 2016, the trial court ruled that the matter could proceed to summary judgment independent of the pending arbitration. CP 247-249.

The matter proceeded to a Summary Judgment hearing on August 3, 2016. From the bench the trial court ruled that there were no genuine issues of material fact and that as a matter of law the Heinzinger Road Trust violated the terms of the mutual will. On September 16, 2016, the trial court signed a written order finding that The Heinzinger Road Trust was a testamentary attempt to contravene the mutual will agreement of Lee and

Anne Heinzinger, and as such the trust was unauthorized and without validity. CP 696-699. The Court found the mutual will of Anne M. Heinzinger to be the operative document that controls the distribution of all property, and directed return of 81 Heinzinger Road to the estate of Anne M. Heinzinger. *Id.* In making its ruling, the Superior Court disregarded, without due consideration, the merit of the appellants' affirmative defenses of (1) unclean hands, (2) waiver, (3) estoppel/waiver, and (4) laches. *Id.*

P. Ruling on Motion to Disqualify.

As a separate matter, during the pendency of the underlying action, on April 12, 2016, appellants filed a Motion to Disqualify attorney Ted Knauss. CP 416-422. The basis of that motion was that attorney Knauss had originally undertaken to represent all three siblings together for the purpose of administering the estate, but then later turned around and assisted Catherine and Margaret in filing this pending TEDRA action against their brother John. *Id.* For the reasons set forth in an Order dated July 27, 2016, the trial court denied the motion on the basis of a finding that there was never an attorney-client relationship between John and attorney Knauss in the first instance. CP 634-37. Appellant seeks de novo review of the courts determination that no attorney-client relationship existed, and requests the disqualification of attorney Knauss from further participation in this matter.

V. ARGUMENT

A. Does a Trial Court Retain Jurisdiction to Judicially Resolve a TEDRA Matter on Summary Judgment, Once the Matter Has Been

Properly Submitted to Mandatory Arbitration in Compliance with RCW 11.96A.260-310?

Appellant John Heinzinger respectfully requests that this Court first consider whether the trial court had the authority to hear the respondents' summary judgment motion, when the parties had already agreed to TEDRA arbitration. Appellant Heinzinger respectfully submits that the statute is unambiguously clear, and that answer to this question is no. Once the parties have proceeded to TEDRA arbitration, then "judicial resolution of the matter ... is only available by complying with the mediation and arbitration provisions of RCW 11.96A.260 through 11.96A.320." See RCW 11.96A.280 (emphasis added). The Superior Court's role becomes that of a de novo review appellate court. See RCW 11.96A.310(9).

The standard of review on appeal of matters of statutory interpretation is de novo. See *State v. Reeves*, 184 Wn. App. 154, 158, 336 P.3d 105 (2014), citing *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). Courts employ statutory interpretation "to determine and give effect to the intent of the legislature." *Id.*, citing *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). To do so, the Courts first look "to the plain language of the statute considering the text of the provision in question, the context of the statute, and the statutory scheme as a whole. *Id.*, citing *State v. Evans*, 177 Wn.2d at 192. If the plain language of the statute is ambiguous, the courts first look to resolve the ambiguity by resorting to other indicia of legislative intent, including statutory construction,

legislative history, and case law. *Id.*, citing *State v. Ervin*, 169 Wn.2d at 820.

In this case, the analysis begins with the codified legislative purpose of the statute (RCW 11.96A. et. seq.) stated at RCW 11.96A.260, and which provides as follows:

The legislature finds that it is in the interest of the citizens of the state of Washington to encourage the prompt and early resolution of disputes in trust, estate, and nonprobate matters. The legislature endorses the use of dispute resolution procedures by means other than litigation. The legislature also finds that the former chapter providing for the nonjudicial resolution of trust, estate, and nonprobate disputes, chapter 11.96 RCW, has resulted in the successful resolution of thousands of disputes since 1984. The nonjudicial procedure has resulted in substantial savings of public funds by removing those disputes from the court system. Enhancement of the statutory framework supporting the nonjudicial process in chapter 11.96 RCW would be beneficial and would foster even greater use of nonjudicial dispute methods to resolve trust, estate, and nonprobate disputes. The legislature further finds that it would be beneficial to allow parties to disputes involving trusts, estates, and nonprobate assets to have access to a process for required mediation followed by arbitration using mediators and arbitrators experienced in trust, estate, and nonprobate matters. Finally, the legislature also believes it would be beneficial to parties with disputes in trusts, estates, and nonprobate matters to clarify and streamline the statutory framework governing the procedures governing these cases in the court system.

Therefore, the legislature adopts RCW 11.96A.270 through 11.96A.320, that enhance chapter 11.96 RCW and allow required mediation and arbitration in disputes involving trusts, estates, and nonprobate matters that are brought to the courts. RCW 11.96A.270 through 11.96A.320 also set forth specific civil procedures for handling trust and estate disputes in the court system. It is intended that the adoption of RCW 11.96A.270 through 11.96A.320 will encourage and direct all parties in trust, estate, and nonprobate matter disputes, and the court system, to provide for expeditious, complete, and final decisions to be made

in disputed trust, estate, and nonprobate matters.

RCW 11.96A.260 (emphasis added). This statutory purpose is further substantiated by the language of RCW 11.96A.270 which provides:

**Intent – Parties can agree otherwise**

The intent of RCW 11.96A.260 through 11.96A.320 is to provide for the efficient settlement of disputes in trust, estate, and nonprobate matters through mediation and arbitration by providing any party the right to proceed first with mediation and then arbitration before formal judicial procedures may be utilized....

RCW 11.96A.270 (emphasis added.) Advancing the stated purposes for the statute, RCW 11.96A.280 which defines the **Scope** of TEDRA mediation and arbitration and provides as follows

A party may cause the matter to be presented for mediation and then arbitration, as provided under RCW 11.96A.260 through 11.96A.320. If a party causes the matter to be presented for resolution under RCW 11.96A.260 through 11.96A.320, then judicial resolution of the matter, as provided in RCW 11.96A.060 or by any other civil action, is available only by complying with the mediation and arbitration provisions of RCW 11.96A.260 through 11.96A.320.

RCW 11.96A.280 (emphasis added.)

A party causes the matter to be presented to mediation and arbitration by following the specific procedures set forth in RCW 11.96A.300 (mediation), and RCW 11.96A.310 (arbitration). The notice to invoke arbitration is provided by the statute and reads in relevant part:

NOTICE OF ARBITRATION UNDER RCW 11.96A.310

To: (Parties)

Notice is hereby given that the following matter must be resolved by arbitration under RCW 11.96A.310:

(State nature of matter)

The matter must be resolved using the arbitration procedures of RCW 11.96A.310 unless a petition objecting to arbitration is filed with the superior court within twenty days of receipt of this notice....

RCW 11.96A.310(2) (emphasis added). RCW 11.96A *et seq.* is clear. It mandates that once the alternative dispute resolutions are invoked, judicial resolution is available “only by complying with the mediation and arbitration provisions of the [statute].”

In this case there is no dispute that arbitration was properly invoked and an arbitrator selected. CP 58-59; CP 129-313. However, in an effort to avoid the arbitration, the respondents proceeded to bring their case before the trial court on summary judgment. CP 60-116. Appellant objected to the presentation of summary judgment, but the Court allowed the matter to proceed. CP 117-121; CP 125-142; CP 208-212. The basis of the Superior Court’s procedural decision is stated in its *Memorandum Opinion and Order on Motion for Revision* dated January 26, 2016. CP 247-249. Importantly, the trial court found that the scope of RCW 11.96A.280 was limited and qualified by the provisions of RCW 11.96A.100 as follows:

The foregoing section 11.96A.100(9) is specific and unambiguous. RCW 11.96A.060 is more general. In this Court’s view, RCW 11.96A.280 may limit other judicial actions, but it does not limit the right to move “for an order relating to procedural matters, including discovery, and for summary judgment.” RCW 11.956A.100(9) [sic].

CP 248. In other words, the Superior Court found the language of RCW 11.96A.100(9) to prevail over the procedures set forth in RCW 11.96A.280-320.

However, in retaining jurisdiction to hear summary judgment under RCW 11.96A.100, the court ignored an express qualifier contained in the statute. RCW 11.96A.100 states:

Unless rules of court require or this title provides otherwise, or unless a court orders otherwise:

(9) Any party may move the court for an order relating to a procedural matter, including discovery, and for summary judgment . . . at any time.

*See* RCW 11.96A.100 (emphasis added). In this case, as cited above, the title does expressly “provide otherwise.” It is RCW 11.96A.100 that was expressly limited by the legislature, not the other way around.

Separately, in its ruling the Superior Court relied on RCW 11.96A.310(5) to offer Mandatory Arbitration Rule 3.2(b) as additional rationale for retaining jurisdiction for summary judgment as follows:

RCW 11.96A.310 (5) provides that RCW 7.06, the superior court mandatory arbitration rules and any local rules pertaining to the same apply to RCW 11.96A. Interestingly, MAR 3.2 “Authority of Arbitrator” sets forth in **subsection (a)** the authority of the arbitrator and **subsection (b)** sets forth the authority of the Court. **Subsection (b)** in relevant part provides “The court shall decide . . . motions for summary judgment.” Whether that rule applies here is not literally before the Court. However, it does suggest that the Court retaining authority to decide motions for summary judgment during pending arbitration proceedings is common and not unusual.

CP 248. Although this rationale of the trial court may follow logical sense, it does not follow the statute. Reading further down the same statute to subsections (5)(c) and (9), it reads:

(5) Arbitration Rules....

(c) The arbitration provisions of this subsection apply to all matters in dispute....To the extent any provision in this title is inconsistent with chapter 7.06 RCW or the rules referenced in (a) of this subsection, the provision of this title control.

(9)(a) The final decision of the arbitrator may be appealed by filing a notice of appeal with the superior court requesting a trial de novo on all issues of law and fact...A trial de novo shall then be held, including a right to jury, if demanded.

(b) If an appeal is not filed within the time provided in (a) of this subsection, the arbitration decision is conclusive and binding on all parties.

RCW 11.96A.310 (emphasis added). It is clear from the plain words of the statute that the legislature intended that the trust and estate matters referred to arbitration, “must” be resolved in arbitration, with the superior court assuming the role the appellate court (in the case of appeal).

Finally, appellant directs the court’s attention to RCW 11.96A.310(3) which sets forth the procedure of objecting to arbitration. The statute provides that if a party timely raises an objection to arbitration, a hearing shall be had and “at the hearing the court shall order that the arbitration proceed except for good cause shown.” RCW 11.96A.310(3) (emphasis added.) Here there was no timely objection, and no hearing to

assess good cause for why the matter should not proceed in arbitration. Instead, without even considering good cause, the court simply allowed the respondents to proceed with litigating their case in court.

The issue presented here is believed to be one of first impression to this Court of Appeals. The appellant is unable to find any other circumstance where a matter has been properly submitted to RCW 11.96A.310 arbitration, and then the trial court has taken occasion to usurp the position of the Arbitrator and decide the matter on summary judgment. This being the case, it is worth considering the practical consequences of the trial court's ruling.

First, accepting the trial court's interpretation that the broader language of RCW 11.96A.100(9) somehow prevails over the more specific provisions of RCW 11.96A.280-310, effectively guts the procedures mandated by the latter statutes. If the trial court broadly retains the discretion to resolve all "procedural matters, including discovery, and for summary judgment" it is free to simply derogate all of the procedures set forth in RCW 11.96A.260-320. For one, non-exclusive, example RCW 11.96A.310(5)(g) provides:

The rules of evidence and discovery applicable to civil causes of action before the superior court as defined in RCW 11.96A.290 apply, unless the parties have agreed otherwise or the arbitrator rules otherwise.

*See* RCW 11.96A.310(5)(g) (emphasis added). But if RCW 11.96A.100 controls over the alternative dispute resolution procedures of the statute, the

arbitrator has no real say in discovery because the trial court can simply usurp control of the arbitration and direct otherwise.

Second, as a matter of practical implication, if the Superior Court retains jurisdiction to resolve all “procedural matters, including discovery, and for summary judgment”, then the fundamental purpose of RCW 11.96A.260-320 is thwarted. As cited above, the first line of RCW 11.96A.260 states:

The legislature finds that it is in the interest of the citizens of the state of Washington to encourage the prompt and early resolution of disputes in trust, estate, and nonprobate matters.

*See* RCW 11.96A.260 (emphasis added). However, if the trial court retains jurisdiction for procedural matters, discovery, and summary judgment, the litigants cannot effectively proceed to arbitration until the trial court has made its rulings on the case.

That is exactly what happened in this case. The respondents filed a motion for summary judgment, which the court ruled could proceed despite the fact that the matter was in arbitration. Appellant was forced to request CR 56(f) relief to be able to conduct discovery in advance of the summary judgment, including taking depositions. Neither side was required, or otherwise incentivized, to proceed with arbitration because of the uncertainty of the summary judgment motion. What would be the point of proceeding with arbitration, if the court was going to resolve the case on summary judgment? An arbitrator was appointed for the case, but

ultimately had no part in the controversy whatsoever because the parties were forced to litigate in the trial court. Consequently, the case then toiled in the trial court for almost two years, despite the legislature's effort to force such cases into an expedited alternative dispute process for the benefit of all involved (including both litigants and the court.)

Finally, appellant respectfully submits that requiring arbitration of this dispute comports with the State of Washington's strong public policy favoring arbitration of disputes. *See Munsey v. Wall Walla College*, 80 Wn. App. 92, 95, 906 P.2d 988 (1995). Arbitration eases court congestion, provides an expeditious method of resolving disputes, and is generally less expensive than litigation in the courts. *Id.* Appellant respectfully submits that trial court committed error when it retained jurisdiction to hear summary judgment in plain derogation of the legislature's mandate that all TEDRA disputes must be resolved through the mediation and arbitration procedures of RCW 11.96A.260-320.

Appellant requests that the case be remanded with directive that the parties submit their case to arbitration in compliance with the TEDRA statute.

B. Should This Case Be Remanded to Mandatory Arbitration Because There Remain Outstanding Issues of Fact Related to Appellants' Affirmative Defenses of (1) Unclean Hands, (2) Ratification, (3) Estoppel/Waiver, and (4) Laches?

The standard of review for an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.

*Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). “Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005); *see also* CR 56(c). A party is entitled to summary judgment “when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). The appellate court may consider all materials that were brought to the attention of the trial court, whether or not the trial court relied on those materials. *Riojas v. Grant County PUD*, 117 Wn. App. 694, 696 n.1, 72 P.3d 1093 (2003). In addition, the appellate court is entitled to consult the law in its review of the case, whether or not a party has cited that law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000).

In the instant case appellant John Heinzinger, as trustee, defended his sister’s efforts to invalidate The Road Trust, on the basis of four affirmative defenses: (1) unclean hands, (2) ratification, (3) waiver, and (4) laches. CP 225-234. Specifically, John alleged that his sisters not only knew about the existence of the Road trust for over a decade without

contest, but more importantly, sister Margaret Heinzinger was the person who assisted her mother in establishing the Heinzinger Road Trust, in the first instance. *Id.*; *see also* CP 277-350. In fact, Margaret was the original successor trustee of the Trust, and primary beneficiary. CP 326. It was only after a falling out with her mother that she was removed from her trustee and beneficiary designations in the Road Trust, and replaced with her brother John. CP 345-348.

The **doctrine of unclean hands** is an affirmative defense in a court of equity that holds that a court should not intervene on behalf of a party whose conduct has been unconscientious, unjust, or marked by lack of good faith. *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 265 P.2d 1045 (1954). It disqualifies a plaintiff from obtaining equitable relief where the complainant is a transgressor herself, who by chance has been injured on account of her own wrongful misconduct. *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 113 P.2d 846 (1941). **Ratification** is the acceptance of a contract after discovery of facts that would warrant rescission of that contract. *See Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 150 P.3d 1163 (2007). **Waiver** is the intentional relinquishment of a known right. *Sherman v. Lunsford*, 44 Wn. App. 858, 723 P.2d 1176 (1986). A party may waive any contract provision made for its benefit, and such waiver may be inferred from circumstances indicating an intent to waive. *See Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wn. App.

53, 808 P.2d 1167 (1991); *Mike M. Johnson, Inc. v. City of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003). **Laches** is an implied waiver arising out of knowledge of existing conditions and acquiescence in them. See *Davidson v. State*, 116 Wn.2d 13, 25 802 P.2d 1374 (1991).

In this case the facts, in the light most favorable to John, are as follows:

- Margaret and Catherine were aware of the existence of an agreement between her mother and her father, contained in their wills, that the three siblings should inherit equally. CP 366; CP 385-386.
- Prior to the advent of *The Heinzinger Road Trust*, Margaret was lobbying her mother to become the “caretaker” of 81 Heinzinger Rd. Margaret knew that her sibling Catherine was not welcome to that idea. CP 280-281; CP 368-369; CP 392.
- Knowing of the parents’ agreement in their wills and her sibling’s objection, Margaret Heinzinger drove her mother to see Margaret’s lawyer (Karen Gates-Hildt) for the purpose of establishing *The Heinzinger Road Trust* to hold 81 Heinzinger Rd and preserve it for future generations. CP 408-412.
- Margaret Heinzinger was made the initial life estate beneficiary of *The Heinzinger Road Trust*, to the exclusion of her sister Catherine and her brother John. CP 320-328.
- Margaret Heinzinger was aware of the terms of *The Heinzinger Road Trust*, and was present when those terms were presented by Anne Heinzinger to John Heinzinger in December of 2001. CP 282-283; CP 409-410.
- Margaret knew that John Heinzinger objected to *The Heinzinger Road Trust*, but agreed with her mother’s decision to put 81 Heinzinger Rd. into trust for the purpose of bypassing John leaving his inheritance to his son. CP 407.
- Margaret made her sister Catherine aware of the existence of The Road Trust in 2004, and yet neither of made a complaint as to the existence of the trust for over a decade. CP 411.

Assuming all facts in the light most favorable to John, this is an archetypal case for the application of the doctrine of unclean hands. Margaret brought this TEDRA action in equity seeking to unwind the creation of a Trust that she herself facilitated to her own self-serving benefit. Application of the doctrine is clear:

When, as is sometimes the fact, the original wrong-doer is the party who sustains the greater injury by reason of [her] inequitable scheme or plan, he ought to bear the burden of the consequences of [her] own folly, and the equity court will not lend [her] its jurisdiction to right a wrong of which [she herself] is the author. Equity leaves the parties in *pari delicto* to fight out their own salvation and remedy their own wrongs in the law court.

*J.L. Cooper & Co. v. Anchor Securities, Inc.*, 9 Wn.2d 45, 113 P.2d 845 (1941). Moreover, a trier of fact could find that Margaret **ratified** the terms *The Heinzinger Road Trust* by her agreement with her mother and acceptance of appointment as trustee; and further that she knowingly **waived** any right to object to the existence of the trust as being in contravention of Anne Heinzinger's Last Will and Testament of 1993. A finder of fact should resolve these issues in arbitration; not the trial court on summary judgment.

Appellant respectfully submits that it was inappropriate for the trial court to simply disregard the appellant's affirmative defenses. Because genuine issues of material fact remain unresolved as to appellant's affirmative defenses, summary judgment was inappropriate. Appellant

should have his day in court – in TEDRA arbitration.

C. Should Attorney Knauss Be Disqualified from Representation of the Respondents for the Reason That He Has a Concurrent Conflict of Interest in Violation of RPC 1.7?

As a final matter for consideration John challenges the trial court's determination that appellant Ted Knauss did not ever represent him in his capacity as co-personal representative of the Estate of Anne Heinzinger, so that he was not disqualified as counsel. The Court's resolution of such factual issue should be resolved on de novo review. See *Jones v. Allstate Insurance Co.*, 146 Wn.2d 291, 306, 45 P.3d 1068 (2002) (Supreme Court exercised de novo review over issue of whether insurance claim adjuster was practicing law). On the issue of whether a violation of Washington's rules of professional conduct require disqualification, "the burden of proof rests upon counsel whose disqualification is sought." See *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000, 1007 (W.D. Wash. 2007), citing *FMC Technologies, Inc. v. Edwards*, 420 F. Supp.2d 1153, 1157-58 (W.D. Wash. 2006).

Under Washington law, the essence of the attorney-client relationship is whether the attorney's advice is sought and received in connection with legal matters. See *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 578, 173 P.3d 898 (2007). The existence of attorney-client relationship turns largely on the client's subjective belief that it exists, so long as that belief is reasonably formed based on the attenuating circumstances, including the

attorney's words and actions. *See Jones v. Allstate Insurance Co.*, 146 Wn.2d 291, 306, 45 P.3d 1068 (2002); *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000 (W.D. Wash. 2007). The relationship need not be memorialized in writing, and even a short consultation may suffice to create an attorney-client relationship. *Id.*; *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). In exercising its discretion to disqualify counsel, courts must (1) balance the right of a client to preserve confidences against the parties rights to employ counsel of its own choosing; (2) must be mindful that "the interest of the clients are primary, and the interest of the lawyers are secondary", and (3) should resolve all doubts in favor of disqualification. *See Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055, 1066 (W.D. Wash 1999) (emphasis added).

The facts relevant to the issue of the nature of the attorney-client relationship between Mr. Knauss and John Heinzinger are as follows:

- In February 2014, Margaret Heinzinger (who lives in Port Angeles) volunteered to her siblings that she would seek out a lawyer to assist all three siblings in the filing and probate of their mother's will. The first attorney Margaret sought declined to represent the siblings, but attorney Ted Knauss took the case. CP 487-488; CP 499.

- In March 2014, Ted Knauss prepared the following legal documents on behalf of all three co-personal representatives of the estate, including John Heinzinger:

- Probate Petition for Appointment of Personal Representatives With Order of Solvency and Non-Intervention Powers. CP 12-

15.

- Order Appointing Personal Representative With Order of Solvency and Non-Intervention Powers. CP 16-17.
- Notice of Appointment and Pendency of Probate. CP 23.
- Notice to Creditors. CP 522-23.
- Oath of Personal Representative John Heinzinger. CP 18-20.
- Letters Testamentary. CP 21-22.

(*See also* CP 512-525.) All of the foregoing documents are prepared on Mr. Knauss letterhead;

- The Notice of Probate – a document drafted for the specific purpose of providing notice of the identity of the co-personal representatives – identified Mr. Knauss as “Attorney for the Co-Personal Representatives”. CP 23.

- The Notice of Creditors also identifies Mr. Knauss as the attorney for the personal representatives for the purposes of making a claim against the estate and provided Mr. Knauss’ address as the location for making a claim. CP 522-523.

- On March 17, 2014, Margaret Heinzinger forwarded to her brother John the paperwork from Ted Knauss’ office. John Heinzinger signed the paperwork unchanged and authorized the filing of the probate by Ted Knauss, with him acting as attorney for the three co-personal representatives. CP 488; CP 504-511.

- On March 28, 2014, attorney Knauss filed the Probate Petition,

and presented the matter to the Court for the Order appointing the personal representatives, including John Heinzinger. CP 1-23.

- After the filing of the probate, John Heinzinger called and spoke directly with Mr. Knauss. Mr. Heinzinger attests that Mr. Knauss assured him that he represented him equally with the sisters, and told him he would be fully appraised of all matters. CP 488-499. (This testimony is denied by Mr. Knauss.)

- During his conversation with John Heinzinger, Mr. Knauss did not say that he was representing only the sisters, nor advise John Heinzinger to secure independent counsel. He also did not decline the opportunity to speak to John Heinzinger on the basis that John was either (1) unrepresented, or (2) otherwise represented by other counsel in the matter. CP 499.

- Mr. Knauss did not ever reach out to any lawyer for John Heinzinger to advise the lawyer of the filing of the probate (including undersigned counsel). CP 537-41.

- Catherine Bloom began charging John Heinzinger for 1/3 of the legal fees incurred by Mr. Knauss, including the fees for the preparation of the initial probate papers. CP 489; CP 527.

- Catherine Bloom testified in her deposition that it was her subjective belief that Ted Knauss was representing all three siblings together, including John Heinzinger. CP 423-432.

From these facts, the question is whether or not an attorney-client relationship was formed. The trial court found in favor of Mr. Knauss, that no

attorney-client relationship was ever formed. By this appeal, appellant contests that determination.

First, foremost, and in appellant's view dispositive, is the fact that Mr. Knauss not only prepared pleadings on John's behalf, but also filed them with the Court holding himself out to be the attorney for the co-personal representatives. On the very face of the documents, Mr. Knauss identifies himself as representing the "co-personal representatives" of the Estate of Anne Heinzinger, including John Heinzinger. CP 1-23. It is irreconcilable that Mr. Knauss could present pleadings to the Court holding himself as the attorney for all three co-personal representatives, while secretly only representing two co-personal representatives.<sup>4</sup> The court need look no further than the probate pleadings themselves to conclude that an attorney-client relationship existed.

Second, and highly relevant, co-personal representative, Catherine Bloom subjectively believed that Mr. Knauss was representing all three of the siblings together. Ms. Catherine Bloom affirmed her subjective belief as to the attorney-client relationship between Mr. Knauss and John Heinzinger in deposition testimony.<sup>5</sup> CP 423-432. That declaration testimony is further

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<sup>4</sup> The "practice of law" includes not only doing or performing services in a court of justice throughout its various stages, but also in a larger sense includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured. *See Jones v. Allstate*, 146 Wn. App. at 301-302.

<sup>5</sup> In her errata to the deposition transcript, Ms. Bloom attempts to change her answer from "yes" to "I am confused on this point." In her opposition declaration she protests that she was "asked to give a legal opinion which I am not qualified to do." However, the issue of whether Ms. Bloom subjectively believed that John was being represented by Mr. Knauss, is not a legal question. It is a fact question, and changing her response to "I am confused"

substantiated by the fact that Catherine consistently provided accounting to John attempting to charge him 1/3 of Mr. Knauss' legal bills. CP 489; CP 527. Ted Knauss is copied on these accounting and so knew that Catherine and Margaret were assigning to John one-third of the bills for his legal services. *Id.* Again, it is irreconcilable for Catherine (with Mr. Knauss' implicit consent) assign 1/3 of Mr. Knauss' legal bills to John Heinzinger, and then protest and claim that Mr. Knauss was only representing Catherine and Margaret, but not John in this case.

Third, and significant, attorney Knauss' communications with Mr. Heinzinger, and lack of communications with the undersigned counsel, undermine Mr. Knauss' denial of an attorney-client relationship. There are only four possible scenarios with respect to the relationship between Mr. Knauss and John Heinzinger: (1) client, (2) prospective client, (3) unrepresented third-party, and (4) represented third-party. If Mr. Knauss subjectively believed that John was not his client, then Mr. Knauss had specific well defined RPC obligations for the way that he interacted with Mr. Heinzinger. *See* RPC 1.18 - Duties to Prospective Clients; RPC 4.2 - Communications with a Person Represented by a Lawyer; and RPC 4.3 – Dealing with a Person Not Represented by a Lawyer. If Mr. Knauss subjectively believed that John was represented by another (including the undersigned counsel), RPC 4.2 forbade him from speaking to Mr. Heinzinger and he should have provided immediate notification of his ex parte

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does not help the Petitioners in this motion. Confusion on the issue still weighs in favor of disqualification.

contact.

If it is determined that an attorney client relationship was formed, then there was (and remains to this day) an active, ongoing, and irreconcilable conflict of interest. Mr. Knauss' continued representation of the Petitioners in the TEDRA action, and the Estate more generally, violates RPC 1.4 (Communication), 1.6 (Confidentiality of Information), 1.7 (Conflict of Interest: Current Clients) and 1.16 (Declining or Terminating Representation).

Rule of Professional Conduct 1.7 reads as follows:

(a) Except as provided in paragraph (b), **a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:**

(1) **the representation of one client will be directly adverse to another client;** or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) **Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:**

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) **the representation does not involve the assertion of a claim by one client against**

**another client represented by the lawyer in the same litigation or other proceeding before a tribunal;** and

(4) **each affected client gives informed consent, confirmed in writing** (following authorization from the other client to make any required disclosures).

(Emphasis added.) A lawyer represents conflicting interests when, on behalf of one client, it is the lawyer's duty to contend that which the lawyer's duty to another client requires him or her to oppose. *In re Marriage of Wixom & Wixom*, 182 Wn. App. 881, 898, 332 P.3d 1063, 1072 (2014) *review denied sub nom. In re Marriage of Wixom*, 353 P.3d 632 (Wash. 2015) (quoting *In re Welfare of Schulz*, 17 Wn. App. 134, 142, 561 P.2d 1122 (1977)).

When a conflict of interest arises, the lawyer must withdraw from further representation of all clients, and Mr. Knauss's failure to withdraw violates Rule of Professional Conduct 1.16, Declining or Terminating Representation, which reads in relevant part as follows:

(a) Except as stated in paragraph (c), **a lawyer** shall not represent a client or, where representation has commenced, **shall**, notwithstanding RCW 2.44.040, **withdraw from the representation of a client if:**

(1) **the representation will result in violation of the Rules of Professional Conduct** or other law;

Mr. Knauss is clearly violating RPC 1.7, and he has a duty to terminate his representation of both the Petitioners and the co-executors of the Estate. His failure to withdraw constitutes a clear violation of RPC 1.16.

D. Are Appellants Entitled to Reimbursement of Their Attorney Fees and Costs from the Corpus of The Heinzinger Road Trust (If Any)?

If this matter is remanded, the validity of the Heinzinger Road Trust will still be argued and resolved in TEDRA arbitration. Should it be determined in that proceeding that the Heinzinger Trust is preserved, John respectfully submits that, as a matter of law, he is entitled to use corpus assets from *The Heinzinger Road Trust*, to pay attorney fees and costs used to protect and defend the Trust.

There is no debate that John is the rightful successor trustee of *The Heinzinger Road Trust*. CP 345-348. As the successor trustee of the Trust, John has a fiduciary responsibility to protect the trust and its assets. In furtherance of his defense of the Trust, John is granted the power to “engage persons, including lawyers, accountants, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of the trustee’s duties or to perform any act, subject to RCW 11.98.071.” *See* RCW 11.98.070 (emphasis added.); CP 323-324.

This TEDRA action concerns an effort by Catherine and Margaret to invade and reform *The Heinzinger Road Trust*. In defense thereof, John Heinzinger, had no choice but to retain undersigned counsel for the purpose of defending/protecting the terms of the Trust, in good faith compliance with his fiduciary duties. There is no question that protecting the terms of the Trust *indirectly* benefits John Heinzinger (because his son is the remainder beneficiary), and also that undersigned counsel otherwise

represents John Heinzinger, in other matters. However, as a matter of policy, the law gives the designated Trustee (whomever that may be) the tools necessary to manage the affairs of, and protect the terms of, the Trust. Otherwise, a Trustee might be forced to compromise the provisions of the Trust, the wishes of the trustor, and rights of the beneficiaries, by being required to make his own financial investment of attorney fees and costs.

The fact that John Heinzinger has a personal (albeit indirect) interest in the outcome of this litigation, is not a valid reason to deny Mr. Heinzinger use of trust assets to protect the Trust, including for the payment of attorney fees. To the contrary, John is statutorily authorized to pay his lawyers to protect the Trust out of the corpus of the trust. As a matter of law, John respectfully submits that he be allowed to use assets of *The Heinzinger Road Trust* to defend the Trust, including, but not limited to, for this appeal, and also in any subsequent TEDRA Arbitration, to the extent such a proceeding is required.

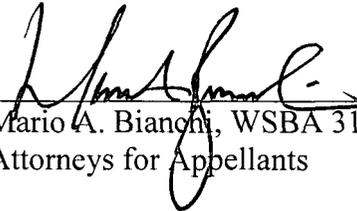
## VI. CONCLUSION

For the reasons stated herein, the Appellant respectfully requests that this Court of Appeals reverse and remand the Order Granting Petitioner's Motion for Summary Judgment, and remand this case to arbitration in compliance with TEDRA. The Court should disqualify Mr. Knauss from further participation in this case, and should allow John Heinzinger to recover attorney fees and costs from the corpus of The

Heinzinger Road Trust assets.

RESPECTFULLY SUBMITTED this 10 day of February, 2017.

LASHER HOLZAPFEL  
SPERRY & EBBERSON P.L.L.C.

By   
Mario A. Bianchi, WSBA 31742  
Attorneys for Appellants

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**CERTIFICATE OF SERVICE**

I, Cheryl A. Knudsen, declare upon penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the law firm of Lasher Holzapfel Sperry & Ebberson PLLC, at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action and competent to be a witness herein.

On the date set forth below I sent for service, in the manner noted, the foregoing APPELLANTS' OPENING BRIEF to be sent out for service via the method(s) indicated below to:

Ted Knauss  
Peninsula Law Firm PLLC  
PO Box 59  
Port Hadlock, WA 98339  
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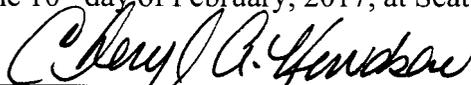
**VIA EMAIL AND FIRST  
CLASS MAIL**

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**VIA EMAIL AND FIRST  
CLASS MAIL**

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

**SIGNED** on the 10<sup>th</sup> day of February, 2017, at Seattle, Washington.

  
Cheryl Knudsen, Legal Assistant