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DIVISION II

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STATE OF WASHINGTON

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No. 49771-9-II

Jefferson County Cause No. 14-4-00028-2

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

In re the Estate of: Anne M. Heinzinger

JOHN HEINZINGER and KELLEY HEINZINGER,

Appellants

v.

CATHERINE BLOOM, MARGARET HEINZINGER,

Respondents

Brief of Respondents

Ted Knauss
WSBA #9668
Peninsula Law Firm PLLC
PO Box 59, 11086 Rhody Dr.
Port Hadlock, WA 98339
(360)379-8500
Attorney for Respondents,
Catherine Bloom and Margaret Heinzinger

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INTRODUCTION

This is an appeal from a trial court summary judgment which recognized the mutual will of decedent as the controlling estate document, and ruling that a revocable living trust created by the decedent and funded with property she received from the probate of her husband's mutual will was a testamentary attempt to contravene the mutual wills agreement and is therefore an unauthorized trust without validity.

I. RESPONDENTS' RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

- a. The trial court was correct in granting summary judgment.
- b. The trial court followed the right procedure in allowing a summary judgment motion to be heard.
- c. The trial court rightly refused to disqualify attorney Ted Knauss.

II. LEGAL ISSUES PRESENTED

- a. Should summary judgment be granted if the pleadings, depositions, and admissions on file, together with the affidavits and declarations, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law?

- b. Can a motion for summary judgment be heard at any time during a TEDRA proceeding?
- c. Should a claimant be heard to claim that TEDRA arbitration barred the trial court from hearing a Summary Judgment motion when the claimant did not timely follow TEDRA arbitration procedure?
- d. Did appellant John Heinzinger have an attorney/client relationship with attorney Ted Knauss.
- e. Should attorney fees be awarded to Respondents, Catherine Bloom and Margaret Heinzinger.

III. STATEMENT OF THE CASE

Because the appellate court should have before it a fair statement of the facts and procedure relevant to the issues presented for review (RAP 10.3(a)(5)), respondents Catherine and Margaret provide this statement of the case.

1. Historical Background of the Matter

Lee W. Heinzinger (Lee) and Anne M. Heinzinger (Anne) were the parents of three living children: appellant herein, John Heinzinger (John), and respondents herein, Catherine Bloom

(Catherine) and Margaret Heinzinger (Margaret). Lee and Anne executed mutual Wills dated September 28, 1993. Clerk's Papers (CP) at 49; CP 724.

The mutual Wills mirrored each other in all respects, including an agreement not to make any changes to those Wills without the consent and agreement of the other spouse. CP 49; CP 725. That agreement is recited in each of their mutual Wills. In the mutual Will of Lee W. Heinzinger it is as follows:

"Whereas, it has been agreed between myself and my wife, **Anne M. Heinzinger**, that we shall each make separate mutual Wills disposing of all our property, whether community or separate or mixed, and wherever situated, in such a way that our children shall derive a certain benefit therefrom after the death of the survivor of us, and that after said Wills are so made neither of us will revoke or destroy either of such Wills or make any other Will or Codicil without the full consent and agreement of both; and ...".

CP 739.

The Will of Anne M. Heinzinger, which has been admitted to probate herein, contains a parallel agreement. CP 1; CP 725.

Each Will directs a parallel distribution of the assets, that is, part of the estate to a credit trust for the life of the surviving spouse with their three children as remainder beneficiaries thereof, and the residue and remainder of the estate to the surviving spouse; and then, upon the death of the surviving spouse, all to be devised and

bequeathed equally to the couples' three children, Catherine, Margaret, and John. CP 3-5; CP 740-743.

In their mutual Wills the spouses named each other as trustee of the credit trust and as personal representative of the estate, and they named the three children as the alternate 'co-Executors'. CP 5,8; CP 743,746.

Upon Lee's death in 1995 Anne admitted his mutual Will to probate and administered the estate as per the terms of Lee's mutual Will (CP 49; CP 724, 725), distributing to herself half of the estate, and placing the other half in the *Lee W. Heinzinger Credit Trust U/A 01/01/1997*, with Anne as the Trustee and Beneficiary for her lifetime, and the three children, Catherine, Margaret and John, beneficiaries upon her death. CP 49; CP 731; CP 25; CP 45.

In 2001 Anne Heinzinger sold the couples' Seattle home and moved to their Marrowstone property. CP 45. Then in December 2001, even though she had been advised of the irrevocable nature of mutual wills and her inability to amend them or add codicils by Attorney Gewald of Lasher Holzapfel Sperry & Ebberson (CP 593-589; CP 643), the same firm that is representing Appellant John Heinzinger, Anne created what she named the "Heinzinger Road Trust" (CP 726 -727, 749- 757) and placed therein the home on

Marrowstone Island (CP 729), then in February of 2006 she deeded to this Trust her remaining interest in the couples' adjoining lots on Marrowstone Island. CP 729-730.

In 2006 Anne made another Will directing all, but a small contingent portion, of her estate be given to the Heinzinger Road Trust (CP 338-344), and then amended the Heinzinger Road Trust, directing that on her death the trust estate be held for the benefit of John Heinzinger for his life, and then given to John's son, Nicklaus Heinzinger, and if Nicklaus failed to survive her, then to John's wife, Kelly Heinzinger; and she named John as Successor Trustee. CP 727 – 729, 758-762; CP 345-348.

On July 2, 2010, without the knowledge of Catherine and Margaret (CP 45; CP 879(3)(d); CP 641) even though advised by counsel of the necessity of obtaining their consent (CP 645-647), Anne M. Heinzinger and John Heinzinger executed a document purporting to be an "*Appointment of Successor Trustee of the Lee W. Heinzinger Credit Trust*" in which Anne appointed John as Successor Trustee of the Credit Trust. CP 769: CP 45. In December of 2010, John, employing this "*Appointment of Successor Trustee of the Lee W. Heinzinger Credit Trust*" as the governing document of the trust, transferred all the trust funds to a new investment account, re-titled as

the *Lee W. Heinzinger Credit Trust U/A 07/12/2010*, (instead of *Lee W. Heinzinger Credit Trust, U/A 01/01/1997* (U/A are initials for a trust 'Under Agreement' and the date is the date the trust is established), and John listed himself as the Trustee and sole Beneficiary. CP 771-772; CP 45.

Anne Heinzinger died January 27, 2013. CP 12; CP 588; CP 440. John, who, with Anne's power of attorney (CP 45; CP 899 – 902; CP 602), had freely used Anne's funds for his personal use, and had also tapped the Credit Trust (CP 45- 46; CP 40; CP 640, 641), attempted to hide the Credit Trust and the existence of the Anne's mutual Will from his sisters (CP 440-441; CP 588), hoping to use the 2006 will of Anne Heinzinger in which he was the sole executor and the major beneficiary via the Heinzinger Road Trust. CP 880(5); CP 892-898. But in March Catherine and Margaret discovered the true nature of their Mother's Estate Documents, that is, the irrevocable *Lee W. Heinzinger Credit Trust, U/A 01/01/1997*, and that their Mother and Father had executed Mutual Wills which were binding, superseding all subsequent testamentary documents. CP 589. They confronted John, requiring the mutual Will be recognized as the controlling document, that the original Credit Trust be recognized as irrevocable, and for an accounting of the

funds John had taken. CP 45 – 46; CP 441; CP 589. At first John refused, but eventually, by counsel, John agreed to provide an accounting of the misused funds (CP 190; CP 600), however John has yet to provide an accounting of the misused funds. CP 46; CP 642. Also by counsel, John agreed that the mutual Will "... is the operative document governing the estate over any subsequent testamentary instruments to the contrary." CP 601.

Catherine and Margaret were also advised that John would cooperate with respect to the probate of the mutual Will. CP 601. So the sisters, Catherine and Margaret, attempted to work with John to gain an accounting, and an agreement as to how to administer the estate. CP 46; CP 441; CP 455. For the next year they met many times, with and without counsel. CP 46; CP 441. John was represented by his current attorneys, Tony Gewald and Mario Bianchi at the 'Lasher law firm'; Catherine employed 'Seattle lawyer, Suzanne Howle'. CP 27; CP 34(9); CP 441; CP 634.

During these negotiations, the three siblings, Catherine, Margaret and John, entered into and signed three TEDRA type agreements: (1) on May 23, 2013 they signed an "Agreement" to freeze the Lee W. Heinzinger Credit Trust account (CP 733, 774-779); (2) on June 18, 2013 they signed "Agreement 2" to Allow

Catherine to pay the estate accounts; and (3) on January 14, 2014, they signed "Agreement -4" for the Lee W. Heinzinger Credit Trust account to be retitled to recognize all three as beneficiaries and trustees, and fees returned. CP 734, 781 - 784. (The investment company has yet to recognize the agreement as authoritative). CP 187; CP 642.

Because John had not filed tax return for neither the estate nor for the credit trust since 2010, a tax return had to be filed in time to claim a refund (CP 46; CP42; CP 45; CP 442, CP 455; CP 590), John eventually agreed to the probate of Anne's mutual Will. CP 590; CP 858; CP 189. Margaret and Catherine retained Peninsula Law Firm to prepare the probate documents. CP 437-439. Margaret picked up the prepared documents and forwarded a copy to John's attorney, Mario Bianchi for his review. CP 442 Thereafter, on March19, 2014, meeting on their own in Port Orchard (CP 442; CP 455; CP 590), the three siblings, Catherine, Margaret and John, signed a petition to probate the mutual Will of Anne M. Heinzinger (CP 1, 2) and to be appointed co-personal representatives. CP 3; CP 442.

2. TRIAL COURT PROCEEDINGS

After obtaining Letters of Testamentary, Catherine and Margaret, attempted to administer the Estate - inventorying the house,

packing and distributing the personal items and considering how to market the real estate, etc. (CP 47; CP 442) ; however, they were not able to obtain John's cooperation. CP 47; CP 442; CP 467; CP . He would agree to meet with them but then would not show (CP 47; CP 442-443); and he continued to fail to provide an accounting of the funds he had misused. Then he then he stopped taking or returning their calls and did not reply to their emails and ignored all attempted correspondence. CP 443; CP 455. Catherine and Margaret felt like they could not proceed because John would not respond to them in any manner whatsoever. CP 443. (This is true to this day. John still refuses to acknowledge or directly respond to any communication from either Catherine or Margaret, although Catherine always sends him regular status reports and accounting for the estate. (CP 455))

As Margaret and Catherine needed to move ahead with the Probate but were stymied because they were not able to communicate with John nor obtain his participation in administering the estate (CP 455; CP 635), Catherine and Margaret, on June 27, 2014, filed three Petitions in probate: (1) a "Petition to Revoke Heinzinger Road Trust and Clear Title to Real Estate" (CP 799 – 836); (2) a "Petition to Appoint Authorized Successor Trustees and Beneficiaries of the Lee W. Heinzinger Credit Trust" (CP 837 – 851);

and (3)" Petition: for an Order Granting a Majority of the Co-Personal Representatives the Power to Act on Behalf of the Estate". CP 852 - 864.

The Note of Hearing on the Petitions was set for August 1, 2014, and copies of the Note and each of the three Petitions were sent to all three co-personal representatives. CP 941. On July 30, 2014, John Heinzinger filed multiple pages of 'Objections in opposition to each Petition' (CP 855-861; CP 862-868; CP 869-877) along with Declarations. CP 878-928. Included in the Oppositions was an argument that the action should be filed as a separate action under the Trust and Estate Dispute Resolution Act (TEDRA). CP 866-867. Since it appeared that motions to require estate disputes be brought under TEDRA are generally granted, Catherine and Margaret filed a TEDRA Petition (CP 723-784), along with a Motion to consolidate the TEDRA action with the Probate. CR 786-787. The TEDRA Petition requested the court to undo what Anne Heinzinger and John Heinzinger did in creating and funding the Heinzinger Road Trust with estate property, claiming it to be in violation of the mutual Wills agreement, and asking the trial court to correct the changes made to *Lee W. Heinzinger Credit Trust, U/A 01/01/1997*. CP 732-784.

The TEDRA Petition and Summons, along with the Motion to Consolidate were mailed to John Heinzinger and his counsel, Mario Bianchi. CP 939-940. By counsel, John objected to the Motion to Consolidate (CP 788-792), and in addition moved to transfer venue to King County. CP 24-31. On November 7, 2014, the Court denied the motion to transfer venue and granted the consolidation. CR 49-52.

Following TEDRA procedures, the parties participated in mediation in February, 2015, but were unsuccessful. Demand for Arbitration was then made by John Heninzinger on March 17, 2015. CP 929-931. On April 6, 2015 Catherine and Margaret responded with their list of acceptable Arbitrators. CP 58-59. John failed to respond to the list of Arbitrators.

On November 16, 2015, over seven months later, Catherine and Margaret filed their Motion for Summary Judgment. CP 60; CP 61-116. After a number of intervening motions, court hearings and the taking of depositions (CP 636), on September 16, 2016 the trial court granted Catherine and Margaret summary judgment, declaring the Heinzinger Road Trust invalid, and declaring the *Lee W. Heinzinger Credit Trust, U/A 01/01/1997* an irrevocable trust, and subsequent amendments invalid. CR 696-699. This appeal followed. CR 700-717.

IV. ARGUMENT

1. Orders Appealed

As per the NOTICE OF APPEAL, appellant John Heinzinger, seeks this Appellate court's review of four trial court orders. CP 700-717. Although appellant has timely appealed the trial court's order granting summary judgment, the appellant has not timely sought review of the other trial court orders. Court Rules on Appeal require a notice of review be filed in trial court within 30 days after the entry of the decision of the trial court. RAP 5.2 (a). Consequently, appellant's appeal of three of the four Trial court's orders: (1) "Order Re Venue and Consolidation" entered on November 7, 2014; (2) "Memorandum Opinion and Order on Motion for Revision" entered on January 35, 2016; and (3) "Memorandum Opinion and Order on Motion to Disqualify Petitioners' Attorney Ted Knauss" entered on July 7, 2016, should be all dismissed for lack of timeliness. RAP 5.2(a).

In addition, in his opening brief, appellant did not specify any assignments of error regarding the Trial court's "Order Re Venue and Consolidation". As the Appellant neither timely appealed nor addressed any trial court errors therein, the Appellate court should not grant review the trial court's "Order Re Venue and Consolidation". Matheson v. Gregoire, 139 Wash. App. 624 (2007).

As to the order on summary judgment, the trial court made six rulings. CP 696-699. Appellant has not raised any issues nor made any argument that the trial court erred in making its rulings regarding the unauthorized and illegal changes made to the irrevocable *Lee Heinzinger Credit Trust, U/A 01/01/1997*. The appellate court will not address arguments not raised in an appellant's opening brief.

It appears Appellant John Heinzinger seeks review of numbers 2, 3 & 4 of the trial court's summary judgment order, that is that:

1. (2) Respondents' (John Heinzinger) Cross-Motion for Summary Judgment is hereby denied.
2. (3) The Mutual Will of Anne M. Heinzinger is the document that controls the distribution of all property that is subject to that Will, including property in the invalid Heinzinger Road Trust.
3. (4) The Heinzinger Road Trust was a testamentary attempt to contravene the Mutual Will agreement of Lee and Anne Heinzinger, and as such the Heinzinger Road Trust is unauthorized and without validity. The property current titled in the invalid Heinzinger Road Trust is to be returned to the estate of Anne M. Heinzinger, and distributed pursuant to the Mutual Will.

CP 698

2. The Trial Court's Summary Judgment Should be Affirmed.

a. Summary Judgment in General

A summary judgment is brought under the authority of Superior Court Civil Rule 56 which directs:

“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” (CR 56(c)) . Doherty v. Metro. Seattle, 83 Wash. App. 464, 921 P.2d 1098 (1996)

The central goal of CR 56 is to conserve the expenditure of judicial resources and the administration of civil justice, providing a fair and effective mechanism. CR 56 prevents wasteful adjudication of issues having no foundation in either law or fact. Young v. Key Pharm., Inc., 112 Wash. 2d 216, 225, 770 P.2d 182 (1989).

A genuine issue of material fact is one that would determine all or some of the outcome of the litigation. Barrie v. Hosts of Am., 618 P.2d 96 (Wash. 1980). It must be an essential element to the case of the party claiming its existence. Young, 112 Wash. 2d at 225, 770 P.2d 182.

b. The Mutual Will of Anne Heinzinger is the Controlling Estate Document

In this matter, there is no genuine issue as to any material fact nor any question at law, that the mutual Will of Anne Heinzinger is the controlling document regarding all estate assets.

A mutual Will is a Will that is executed pursuant to an agreement between two individuals as to the manner of the ultimate

disposition of their property after both are deceased. Newell v. Ayers, 23 Wash. App. 767, 769, 598 (1979); Estate of Richardson, 11 Wash. App. 758, 760-61 (1974). The Agreement and the Will can be combined in one document. The law of mutual wills is that they cannot be revoked or changed if one testator has died and the survivor has taken under the decedent's will. Once the survivor elects to take under the provisions of such a will, she is not free to avoid the obligation to dispose of her property as previously agreed. (See treatise on mutual wills at: "*A Primer on Washington's Law of Mutual Wills*" by Carl J. Carlson – Tousley Brian Stephens PLLC, *Real Property, Probate and Trust*, Winter 2013-2014, pg 21-24.)

Mutual wills are reciprocal wills executed pursuant to a contract between the two testators as to the ultimate disposition of their property after the death of both. Mark Reutlinger & William C. Oltman, *Washington Law of Wills and Intestate Succession*, at 292 (Wash. State Bar Assoc. 2d ed. 2006). A mutual agreement to devise to third parties by Will is a contract effective from the date of execution. Raab v. Wallerich, 46 Wash. 2d 375, 383, 282 P.2d 271 (1955). Mutual Wills, made upon proper understanding and executed pursuant to a contract or policy designed to settle the probable interests of the testators and looking to the just provision

of those having a claim upon their bounty, partake of the nature of a contract and may be specifically enforced. Prince v. Prince, 64 Wash. 552, 556, 117 P. 255 (1911). Consistent with these principles, if two testators who have united in the execution of mutual Wills have devised their property to each other so that the devises form a mutual consideration, neither, after the death of the other and the probate of the Will as to it, is at liberty, after accepting the benefit conferred, to repudiate the contract to the injury of the heirs or next of kin of the testator who predeceased her. The mutual Will was made upon condition that the whole shall be but one transaction. If the Will is not revoked during the joint lives of the testators, he who dies first has a right to rely upon the promise of the survivor. He has fulfilled his part of the agreement, and it is not just to his representatives to permit a revocation when he has been prevented from revoking his will by a reliance upon the other's promise. It is too late for the survivor, after receiving the benefit, to change her mind because the first will is then irrevocable. It would have been differently framed, or perhaps not made at all, if it had not been for his inducement.

Regardless of the wording of a joint or mutual will, or the accompanying agreement, if property is left to third-party

beneficiaries who are to take upon the death of the survivor, any inter vivos transfer made by the survivor with an intent to avoid the agreement, is improper. Annotation, 85 A.L.R.3d 8. For example, in *Newell v Newell*, 23 Wash. App. at 769, the court found that inter vivos gifts of 90 percent of the decedent's property "at a time when he was aged, in very poor health and anticipating his death" were testamentary dispositions, and void because they were contrary to the terms of a mutual will he had executed. And in *Morse v. Williams*, 48 Wash. App. 734 (1987), the court held that a testator opening a JTROS bank account with a third party to be a testamentary disposition, and void as contrary to a mutual will providing that on his death all of his property went to his ex-wife, because he (1) did not intend to transfer a present interest or make an inter vivos gift, and (2) only intended to create an at-death transfer. In *Estate of Hodgson*, 132 Wash. App. 1048 (2006) after probating her deceased husband's will, Irene deposited the "the bulk of her estate" into an JTROS account with a third party. The court held the transfer testamentary, and imposed a constructive trust of its contents, noting:

The transfers were clearly in violation of the terms of the mutual will contract, which contemplated the dividing of the remaining estate equally among the four children of Henry

and Irene...[T]he trial court properly imposed a constructive trust on the funds transferred outside probate”
Estate of Hodgson, 132 Wash. App. 1048 (2006)

As applied to wills, the doctrine of election requires “that one who takes under a will must conform to all its provisions, and if he accepts a benefit thereunder he must renounce every right inconsistent therewith.” Tacoma Sav. & Loan Ass’n v. Nadham, 14 Wash. 2d 576, 596-97, 128 P.2d 982 (1942). Anne Heinzinger probated and elected to take under the provisions of her husband’s mutual Will, therefore she was not free to avoid the obligation to dispose of her property as previously agreed in their mutual Wills. Anne M. Heinzinger, in violation of her mutual Wills commitment, created the *Heinzinger Road Trust*, a living revocable trust, as an alternative testamentary instrument, the terms of which are contrary to the terms of the mutual Wills. Anne knew, or should have known, she did not have the right to make alternative testamentary dispositions. CP 643.

**c. The Heinzinger Road Trust is a Testamentary
Disposition in Violation of the Mutual Wills
Agreement**

The *Heinzinger Road Trust* was an attempted testamentary disposition contrary to the terms of the mutual Will. “A disposition is testamentary when it (1) is executed with testamentary intent; (2) is

revocable during the testator's lifetime; and (3) operates upon property existing at the date of death and is effective upon the testator's death." In re Estate of Verbeek, 2 Wash. App. 144, 149 (1970); Estate of Verbeek, 467 P.2d 178 (Wash. Ct. App. 1970). The Heinzinger Road Trust meets all three prongs of the test. It was executed with testamentary intent; in it Anne specifically declared that she was "...establishing a Trustfor the benefit of the Trustor's family after Trustor's death" (CP 750); and the Heinzinger Road Trust was a revocable living trust as it provided that: "the Trustor may revoke this Trust in whole or part, alter or amend any of its provisions relating to the distributions under this Trust" (CP 751); and the Heinzinger Road Trust was made to operate effective upon the Trustor's death upon property existing on the date of death. The trust specifically provides for the distribution of the property upon her death. CP 751. By its own terms, the Heinzinger Road Trust is a testamentary instrument that is in violation of the mutual Wills agreement. Appellant John Heinzinger has made no argument either in the trial court or in the appellants' brief to the contrary.

Appellant appears to argue that the Heinzinger Road Trust is a non-probate asset, therefore it is not controlled by the mutual Will. It is true that living revocable trusts may be able to by-pass probate, but

non-probate does not mean non-testamentary. By its own terms, the trust becomes irrevocable only on the death of Anne Heinzinger, at which time beneficial ownership of the property therein is passed on to John and his immediate family to the exclusion of his sisters, Catherine and Margaret. The revocable living Heinzinger Road Trust is a testamentary disposition contrary to the disposition called for by the mutual Wills agreement, there for it is void and to be set aside. Newell, 23 Wash. App. at 770.. Newell, 598 P.2d 3 (Wash.App. Div. 3 1979) 23 Wn.App. 767

d. No Genuine Issue as to any Material Fact

As to the fact that the mutual Will of Anne Heinzinger is the controlling document of the estate, and the invalidity of the Heinzinger Road Trust, there is no genuine issue as to any material fact. The material facts are not in dispute and the law is clear. Even Appellant John Heinzinger has admitted that mutual will is the “operative document governing the estate over any subsequent testamentary instruments to the contrary.” CP 189. In a letter dated June 14, 2013, John Heinzinger attorney’s stated:

First, let me confirm here, in writing, that John Heinzinger agrees with his sisters’ assessment that the Last Will and Testament of Anne Heinzinger dated September 28, 1993, is a “mutual will” and is the operative document governing the estate over any subsequent testamentary instruments to the

contrary. Mr. Heinzinger will cooperate with respect to the probate of the September 28, 1993 Will.

CP 189

3. The Trial court's Procedure was Correct

The trial court, by memorandum and order, on January 25, 2016, affirmed Commissioner Gillard's ruling that the Summary Judgment motion would be allowed to be heard. CP 243-245. Appellant's Notice of Review was not filed until October 13, 2016. CP 700. This order was not timely appealed within 30 days of the order. RAP 5.2(a). The appellate court should deny review for untimeliness. Never-the-less, should the appellate court review the order, it is addressed herein.

a. TEDRA Allows Summary Judgment Motions

TEDRA statute Wash. Rev. Code § 11.96A.100, which is entitled, "Procedural Rules", at paragraph (9) states clearly and succinctly:

"Any party may move the court for an order relating to a procedural matter, including discovery, and for summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time;...."

(Id. § 11.96A.100(9))

Nowhere in the TEDRA Statute is the right to move for a summary judgment inhibited, limited, or restrained. Wash. Rev. Code § 11.96A.090(4) provides that the procedural rules of court apply to

judicial proceeding under TEDRA to the extent they are not inconsistent with TEDRA rules and procedures. CR 56(a) provides that a party seeking recovery upon a claim or to obtain a declaratory judgment may move with or without supporting affidavits for a Summary Judgment at any time after the other party has appeared.

The purpose of a Summary Judgment is to avoid useless and wasteful litigation. This is consistent with purpose of the TEDRA.

Statute, as stated in Wash. Rev. Code § 11.96A.260:

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.

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.....

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.

A major purpose of the TEDRA statute is to provide a means for the prompt resolution of estate and trust disputes, and the central goal of CR 56 is to conserve the expenditure of judicial resources and the administration of civil justice, providing a fair and effective

mechanism. CR 56 prevents wasteful adjudication of issues having no foundation in either law or fact.

Appellant argues that the court must make parties proceed to arbitrate a matter even when there is nothing to arbitrate. When there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law, what would be the purpose of arbitration? Appellant asks, "What would be the point of proceeding with arbitration, if the court was going to resolve the case on summary judgment?" Appellant's Brief pg 25. Indeed, what is the point of arbitration if the case can be resolved by summary judgment?

The trial court correctly allowed the summary judgment motion to be heard.

**b. John Heinzinger Waived the Right to Claim
that the Arbitration Procedure of TEDRA is a
Bar to a Summary Judgment Motion**

The procedures to obtain Mediation and Arbitration in TEDRA are set forth in Id. § 11.96A.300.

The parties in this matter conducted mediation, without resolution, on February 26, 2015. Following failed mediation, the subsequent procedure to obtain arbitration is set forth in Wash. Rev. Code § 11.96A.310 which provides that a party may seek arbitration by serving notice no later than twenty (20) days after mediation. If a

party serves the Notice of Arbitration, the burden is then on the other party to object to the arbitration, or to provide a list of acceptable arbitrators within 30 days. Id. § 11.96A.310(2)(b). Once done, the burden is then on the party seeking arbitration to gain an agreement as to a chosen arbitrator, or to Petition the Court to appoint an arbitrator within ten days after the list is required to be furnished. Id. § 11.96A.310(4)(a).

Contrary to appellant's statement in his opening brief that, "In this case there is no dispute that arbitration was properly invoked..."; respondents herein point out, as they did at trial court, the Appellant failed to invoke arbitration. On March 17, 2015, John filed a "Demand for Arbitration". CP 929. Catherine and Margaret responded within the required 30 days with their list of acceptable arbitrators. CP 58-59. As stated above, Wash. Rev. Code § 11.96A.310(4)(a) then provides that, "if the parties cannot agree on an Arbitrator within ten (10) days after the list is required to be furnished, a party may petition the Court to appoint an Arbitrator." John did not respond to Catherine and Margaret's list of arbitrators within ten days. He made no attempt to reach an agreement as to an acceptable arbitrator, he did not respond with his list of acceptable arbitrators, nor even attempt to choose an arbitrator (CP 472), nor did he petition the

Court for the appointment of an Arbitrator until after Catherine and Margaret moved for summary judgment, over 7 months later. CP 472. From April 5, 2015, the date Catherine and Margaret responded with their list of acceptable Arbitrators, until November 16, 2015, when Catherine and Margaret filed their Motion for Summary Judgment, more than seven (7) months later, the Court record is blank. CP 243-244. It was not until after the filing and serving of Catherine and Margaret's Motion for Summary Judgment that then, John, on November 25, 2015, filed a Petition with the Court to Appoint an Arbitrator. CP 943-945. In that Petition for appointment of an arbitrator, is the statement: "Subsequent to receiving Petitioner's List of Arbitrators, undersigned counsel made numerous attempts to contact Petitioners' counsel for the purpose of selecting a mutually agreeable Arbitrator,..." (CP 944), but John's counsel made no effort, made no calls, nor sent any communication to Catherine and Margaret's counsel concerning the selection of an arbitrator, until after Catherine and Margaret had filed and served their Motion for Summary Judgment. CP 472.

Appellant states on page 25 of Appellant's Opening Brief that "The respondents (Catherine and Margaret) filed a motion for summary judgment, which the court ruled could proceed despite the

fact that the matter was in arbitration.” But the matter was not in arbitration when Catherine and Margaret made the motion for Summary Judgment. CP 243-244.

TEDRA requires a party seeking Arbitration to do so timely, and to promptly follow through with obtaining Arbitration. By not timely following up within the ten (10) day period, and, in fact, waiting more than seven (7) months, and then not until after a Summary Judgment Motion was filed and noted, John Heinzinger should not be heard to object to the Motion for Summary Judgment under the guise of ‘pending arbitration’.

4. The Trial Court’s Denial of Appellant’s Cross-Motion for Summary Judgment Should be Affirmed

a. Issues Argued by Appellant

On the basis of John’s claims that: (1) both Catherine and Margaret were both aware of the existence of the Trust for more than a decade but made no objection; *2) Margaret assisted her mother Anne in the establishment of the Trust; and (3) that Margaret was the original successor trustee and preferred beneficiary of the Trust, Appellant John Heinzinger argues that the living revocable Heinzinger Road Trust should be regarded as valid and enforceable, even in the

face of the fact that it is an attempted testamentary disposition in violation of the Anne's mutual Will agreement.

Appellant's Statement of the Case is apparently based John's declaration in support of his motion for summary judgment. See Appellant's Opening Brief, pg 4. But much of this declaration, and in particular those portions that supposedly support his claims, lack evidence of John's personal knowledge, and is inadmissible hearsay testimony and speculation. CR 277-287. To support a denial of summary judgment, affidavit and declarations must meet the requirements of CR 56 (c). Bernal v. Am. Honda Motor Co., 87 Wash. 2d 406, 553 P.2d 107 (1976) CR 56 (c) requires that supporting and opposing affidavits be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein." (CR 56 (c))

In any case, none of these claims are true. CP 603-611. Neither Margret nor Catherine even saw the Heinzinger Road Trust until April 2013. CP 604-605; CP 410. Margaret did not assist her mother in the establishment of the Road Trust (CP 604), nor was she the preferred beneficiary. CP 6087-608. Neither Margaret nor Catherine had the influence over their mother like John did (CP 607),

as evidenced by the changes Anne and John attempted to make to the Credit Trust.

While these claims of John are not true, even if there was some credibly to these claims, they would not rise to a level required to negate Anne's obligation to honor her mutual Wills' agreement.

Appellant complains that, "...the Superior Court disregarded, without due consideration, the merit of the appellants' affirmative defense of (1) unlearn hands, (2) waiver, (3) estoppel/waiver, and (4) laches." However, the Order on Summary Judgment noted that the court heard oral arguments and reviewed the documents submitted by the parties, including those submitted in the trial court by John Heinzinger. CP 696-697.

b. Inadmissible by Deadman's Statute

The Deadman's statute (Wash. Rev. Code § 5.60.030) governs the admissibility of testimony in will contests. It provides, in relevant part:

That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person ... that a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence by any such deceased person

The purpose of the Deadman's statute is to prevent interested parties from giving self-serving testimony regarding conversation or transactions with a decedent. Thompson v. Henderson, 22 Wash. App. 373, 379-80 (1979); Thompson v. Henderson, 591 P.2d 784 (Wash. Ct. App. 1979). A witness is deemed to be a party in interest is he or she stands to gain or lose from the judgment. O'Steen v. Estate of Wineberg, 30 Wash. App. 923, 935 (1982); State v. Shintaku, 640 P.2d 289 (Haw. 1982). Opposing parties who both claim from the deceased are each an adverse party as to the other and an interested party as to the other and thus each is barred from testifying in his own behalf. Estate of Shaughnessy, 97 Wash. 2d 652, 656 (1982).

Most, if not all, of the testimony in the declarations of the parties in regard to contesting the mutual will of Anne Heinzinger and the validity of the Heinzinger Road Trust is not only not relevant and without proper foundation, but is also non-admissible as it is testimony by interested parties which is barred by the deadman's statute.

5. Disqualification for Conflict of Interest

The trial court order denning John Heinzinger's motion to disqualify Ted Knauss was entered on July 27, 2016, the notice of appeal was filed October 13, 2016, more than 30 days after entry of

the order. CP 634-637; CP 700-717. Because it was not timely appealed (RAP 5.2(a)), the appellate court should not grant review of the trial court's "Memorandum and Order on Motion to Disqualify Petitioner's Attorney Ted Knauss". CP 634-637. None-the-less, as a cautionary measure, it is addressed herein.

The existence of an attorney-client relationship may be implied based largely upon the subjective belief of the client, but this belief "does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions." Bohn v. Cody, 119 Wash. 2d 357, 363, 832 P.2d 71 (1992) It is not based on technicalities. Sherman v. State, 128 Wash. 2d 164, 905 P.2d 355 (1995) The existence of an attorney/client relationship is a question of fact, the essence of which may be inferred from the parties' conduct or based upon the client's reasonable subjective belief that such a relationship exists. Teja v. Saran, 68 Wn. App. 793, 795-96, 846 P.2d 1375, *review denied*, 122 Wn.2d 1008, 859 P.2d 604 (1993) (citation omitted). An important factor in determining the existence of the relationship is the client's subjective belief. In re McGlothlen, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). However, the client's subjective belief does not control the issue unless it is reasonably

formed based on the attending circumstances, including the attorney's words or actions.

Attorney Knauss (Peninsula Law Firm PLLC) was retained by Catherine Bloom and Margaret Heinzinger for the "probate and affairs of the Anne Heinzinger Estate". CP 437-439. John Heinzinger never asked Ted Knauss to represent him, nor did Ted Knauss ever agree to represent John Heinzinger . CP 636; CP 469, 473. Ted Knauss has not received any confidential information from John Heinzinger. CP 637. Ted Knauss has never billed John Heinzinger for any attorney fees. CP 473 All of Ted Knauss' attorney fees have been paid personally by Catherine Bloom and Margaret Heinzinger. CP 637; CP 455.

In a Declaration filed on October 17, 2014, John Heinzinger stated:

9. "On January 27, 2013, my mother passed away. ... Shortly thereafter, my sisters approached me through a Seattle Lawyer, Susanne Howle, alleging impropriety of the formation of The Heinzinger Road Trust, and mismanagement of the Lee W. Heinzinger Credit Trust. I, in turn retained my current attorneys, Tony Gewalt and Mario Bianchi at the Lasher law firm, to represent me.

10. "In approximately March of 2014, my sisters sought the assistance of their current counsel, Ted Knauss of the Peninsula Law Firm, PLLC, to probate the Last Will and Testament of Anne Heinzinger in Jefferson County. "

.....

11. Finally, my lawyers are located in Seattle,
Washington,.....
CP 34-35

In all the court filings, from October 2014, up until the filing of the motion to disqualify on April 14, 2016, John Heinzinger, by his own admission, and by that of his attorney, consistently recited that John Heinzinger had been represented continuously by attorney Bianchi, "...with respect to his legal dispute with his sisters Catherine Bloom and Margaret Heinzinger since May of 2013." CP 536. See, for example, in the 'Opposition' filed July 30, 2014, Attorney Bianchi writes: "Mr. John C. Heinzinger has at all times retained the undersigned legal counsel to represent him with respect to the administration of his mother's Estate...". CP 855. In a Declaration dated October 23rd, 2014 Attorney Bianchi states "I am the Attorney for John C. Heinzinger" and attaches a billing statement noting billing for the month of October, from the 2nd thru the 23rd. CP 793 – 796. In every order of the court, reference is made by the court recognizing that the parties are being represented by their own counsel, for instance at CP 243, the court recites, "Petitioners were represented by Ted Knauss; Respondent John Heinzinger by Mario Bianchi, and Nickolas Heinzinger by Isaac Anderson."

The three Petitions in probate were mailed on July 14, 2014 (CP 941); the TERDA Petition was filed and served in October 1, 2014 (CP 946-947); it was not until April 14th of 2016, over a year and half later, that appellant John Heinzinger filed his Motion to Disqualify Ted Knauss; and that motion was filed ten days after the Catherine and Margaret's Motion for Summary Judgment was re-noted. CP 946-947. In between October 2014 and April 2016, numerous motions were made and heard, and depositions of all the parties were taken. CP 635-636

The trial court found that John Heinzinger "... did not ask Mr. Knauss to represent him and Mr. Knauss did not say that he would represent him." (CP 635); and that "Mr. Bianchi has represented respondent (John Heinzinger) in all matters regarding decedent since May 2013." (CP 635); and that, "In this case there is no credible evidence that Mr. Knauss ever was Respondent's [John Henizinger] attorney; nor that Respondent had a reasonable subjective belief that he was actually represented by Mr. Knauss." (CP 636); and the court stated that "Everything that transpired between these parties since Mach, 2014, reinforces that Mr. Knauss never represented Respondent (John Heinzinger) and Respondent could never reasonably believe that he did." CP 636

The trial court's findings are supported by substantial evidence. In re Marriage of Gillespie, 89 Wash. App. 390, 948 P.2d 1338 (1997); In re Marriage of Rideout, 150 Wash. 2d 337, 351-52, 77 P.3d 1174 (2003).

V. CONCLUSION

Anne M. Heinzinger, the surviving spouse, accepted the benefits of her husband's Mutual Will. The mutual Wills provided that upon the death of the last spouse all property would be distributed between the three (3) children. The Heinzinger Road Trust is a testamentary device that is in violation of the Mutual Wills Agreement of Lee and Anne Heinzinger. The mutual Will of Anne Heinzinger should be specifically enforced.

There are no genuine issues as to any material fact and the Respondents herein are entitled to judgment as a matter of law.

TEDRA allows, indeed, encourages, Summary Judgment.

The trial court should be affirmed in all matters.

VI. ATTORNEY FEES

The TEDRA statute, at Wash. Rev. Code § 11.96A.150, provides:

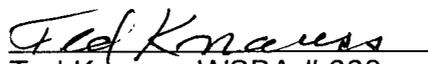
Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved

in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

Washington courts have followed this statute, recognizing that in any title 11 RCW action the court has discretion to award costs, including reasonable attorney fees, to any party from any party in such amount and in such manner as the court determines to be equitable. In re Matthews, 156 Wash. App. 201 (2010). In exercising its discretion, the court may consider any and all factors that it deems relevant and appropriate.

Catherine and Margaret request that they be awarded their attorney fees and cost on appeal.

Respectfully submitted this 10th day of May, 2017.



Ted Knauss, WSBA # 668
Attorney for Respondents Catherine Bloom and
Margaret Heinzinger

Peninsula Law Firm, PLLC
PO Box 59
11086 Rhody Drive
Port Hadlock, WA 98339
(360) 379-8500

PENINSULA LAW FIRM PLLC

www.penlawfirm.com

PO Box 59, 11086 Rhody Drive, Port Hadlock, WA 98339

telephone: 360.379.8500 - fax: 360.379.8502

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May 10, 2017

Washington State Court of Appeals

Division II

950 Broadway, Suite 300

Tacoma, Wa 98402-4454

Re: Case # **49771-9-II** In the Matter of the Estate of Anne M. Heinzinger

Respondents Brief

Enclosed please the **Brief of the Respondents**.



Ted Knauss
Peninsula Law Firm PLLC

enc

cc. Clients

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 49771-9-II

Jefferson County Cause No. 14-4-00028-2

IN THE COURT OF APPEALS, DIVISION II

FOR THE STATE OF WASHINGTON

In re the Estate of: Anne M. Heinzinger

JOHN HEINZINGER and KELLEY HEINZINGER,

Appellants

v.

CATHERINE BLOOM, MARGARET HEINZINGER,

Respondents

Declaration of Service of Brief of Respondents

Ted Knauss
WSBA #9668
Peninsula Law Firm PLLC
PO Box 59, 11086 Rhody Dr.
Port Hadlock, WA 98339
(360)379-8500
Attorney for Respondents

CERTIFICATION OF SERVICE

I certify that on May 11, 2017, I served the following:

Brief of Respondents

By the following means:

Mario A. Bianchi
Lasher Holzapfel Sperry & Ebberson, PLLC
601 Union St., Suite 2600
Seattle, WA 98101

Via: US Mail to:

Isaac Anderson
Law Office of Isaac A. Anderson, PS
10950 State Hwy 104, Suite 201
PO Box 1507
Kingston, WA 98346

Via: US Mail to:


Ted Knauss

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COURT OF APPEALS *www.penlawfirm.com*
DIVISION II
PO Box 59, 11086 Rhody Drive, Port Hadlock, WA 98339
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May 17, 2017 _____
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Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

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Declaration of Service of Respondents Brief

Enclosed please the **Declaration of Service of Brief of the Respondents.**


Ted Knauss
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