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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**IN RE THE TRUST OF
LISA DAWN LEWIS, A SINGLE ADULT.**

**LISA DAWN LEWIS AND DOUGLAS A. SCHAFER,
APPELLANTS,**

V.

**JENNIFER MICK AS TRUSTEE, CAROL RAINEY, AND HALL &
WEST, PS,
RESPONDENTS.**

RESPONDENT'S REPLY BRIEF

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I. INTRODUCTION

Appellant Lewis filed her opening brief on January 31, 2020. Lewis argued for reversal of the trial court's ruling, assigning three errors to the ruling, arguing that the Court had no personal jurisdiction over Lewis when it directed her inheritance into the Trust, and that imposing CR 11 sanctions was an abuse of discretion. Lewis also argued that the Court should not have approved the Trustee's actions and fees, but provided no legal argument.¹

Respondent Mick, the Trustee, filed her responsive cross-appeal brief on April 6. The other parties did not file any response, but joined in supporting Mick's position. Mick argued that (1) the Court made no direction of Lewis' inheritance in this case, and Lewis submitted herself to personal jurisdiction herein; and (2) the Court was correct in imposing CR 11 sanctions. Mick also cross-appealed, arguing that once CR 11 sanctions were imposed, it was an abuse of discretion to reduce them based on the threats of Lewis' counsel. Mick noted that Lewis' appeal of the approval of actions and fees had no basis.

Appellant Lewis filed her reply brief (also a responsive brief to the cross-appeal) on May 6. Lewis argues again on personal jurisdiction, and

¹ Appellant's Brief spent 3 total paragraphs on this topic. See *Brief*, p.30-31. Lewis faults the Trustee for failing to conduct an investigation into the extent of Lewis' benefits. However, Lewis fails to provide any legal support for this duty existing.

discusses CR 11 sanctions. Lewis does not make any attempt to support the appeal of the approval of Trustee's actions and fees, rendering that issue moot. Lewis then raises a variety of new issues not previously argued on appeal and not offered in strict reply to the primary appeal or in response to the cross-appeal. Mick believes those arguments should be stricken and not considered, but as the Court may disagree, will briefly address them in turn herein.²

Lewis' Counsel finishes the reply brief with a statement that, if CR 11 sanctions are upheld, counsel will pay them personally instead of having them levied against the Trust – thus reversing his statement at the Trial Court that sparked this appellate litigation to begin with.³

II. Argument

A. Lewis' Reply arguments on Medicaid attempts to introduce new facts on appeal, and should be disregarded.

The first argument in Lewis' reply⁴ references facts not in evidence, and attempts to introduce new facts. Lewis is correct in noting that Mick's

² Appellant's Reply Brief does not follow the same argument organization as the first two briefs. This brief will follow the organization of Appellant's Reply Brief for ease of reference.

³ VRP3 p.35, ln.6-12.

⁴ Lewis' Reply Brief, p.2-3.

brief cited to Mick’s statement in the trial court record that Lewis’ Medicare premiums were paid by Medicaid.⁵ This was unrebutted in the trial record. Lewis submitted only one declaration,⁶ and in it she simply states that she receives SSDI and Medicare, which are not resource-based. Nowhere does she state that she does not receive other resource-based benefits, and submitted no reply declaration to rebut the assertions regarding the premium payments, food stamps,⁷ or housing assistance.⁸ In Lewis’ reply, she states for the first time that her Medicare premiums are paid by some unnamed state benefit, and that her food stamp eligibility is not resource-based. These factual assertions are unsworn, and are also new facts asserted on appeal, and must therefore be disregarded.⁹

B. Lewis’ argument that Mick converted assets has no merit and is procedurally improper.

The second argument in Lewis’ reply asserts that Mick “deceptively converted Ms. Lewis’ inheritance...”¹⁰ Although the argument that Mick

⁵ Mick’s Response & Cross-Appeal Brief, p.12, citing to p.8 of Appendix A to that brief.

⁶ CP 112-132, including exhibits.

⁷ CP 163, where Lewis’ sister states that Lewis has received Medicaid and food stamps for much of her adult life.

⁸ CP 173, ¶4.

⁹ “This court does not ‘accept evidence on appeal that was not before the trial court.’” *Morgan v. Briney*, 200 Wn.App. 380, 394, 403 P.3d 86, 94 (2017), quoting *State v. Curtiss*, 161 Wn.App. 673, 703, 250 P.3d 496 (2011) (citing RAP 9.11).

¹⁰ Lewis’ Reply Brief, p.3-6.

engaged in conversion was brought before the Trial Court,¹¹ it was not ruled on in either the Court's initial orders¹² or the Order on Reconsideration.¹³ Conversion was not one of the assignments of error made by Lewis, and was not argued in her opening brief. It was not discussed or addressed in Mick's responsive brief. Accordingly, it is not appropriately part of any Reply by Lewis filed with this Court.¹⁴ As the only assignment of error on Mick's Cross-Appeal related to CR 11 sanctions, the issue of conversion is also not properly raised by Lewis in response to Mick's Cross-Appeal.¹⁵

To the extent that this Court decides the conversion issue is properly raised, it will be briefly addressed. Lewis, at the trial level and on appeal, has gone to great lengths to try and address an asserted error by the Trial Court in allowing Lewis' inheritance to be deposited into this Trust.¹⁶ As

¹¹ CP 98-99.

¹² CP 224-227.

¹³ CP 274-275.

¹⁴ RAP 10.3(c), requiring a reply brief to be limited to the issues in the brief to which the reply is directed.

¹⁵ RAP 10.1 appears to contemplate that the second brief filed by an appellant is deemed a Reply Brief regardless of whether there is a cross-appeal. 10.3(c) dictates the scope of any Reply Brief. Nonetheless, even if Lewis' May 6 filing is deemed a responsive brief, the issue of conversion is not responsive to the argument on computation of CR 11 sanctions, which was Mick's sole assignment of error on Cross Appeal.

¹⁶ Lewis asserts in her Reply that the Court ordered the inheritance into the Trust when it signed a restatement that included a "Schedule A." *See* Lewis' Reply Brief, p.3. The argument is entirely bereft of any case law or legal argument, but rests solely on what Lewis styles "a convention among scribes," supposedly established by doing a Google search for "Trust 'schedule A'." Since there is no coherent legal analysis on this point, Mick relies on the arguments set forth in her Responsive Brief, at p.18-20.

fully analyzed in Mick’s Responsive Brief,¹⁷ the disposition of Lewis’ inheritance was made in a separate case, the Estate of Larry Loy. Mick accepted the distribution into the Trust per her power and authority to do so.¹⁸ By contrast, the tort of conversion is defined as “willfully interfering with any chattel, without lawful justification…”¹⁹ That Mick had lawful justification via the court order appointing her trustee renders the conversion argument meritless.

C. Lewis’ argument on Trust creation does not accurately reflect the facts. Lewis’ argument that the Trust fails to be Medicaid-exempt is irrelevant to this appeal.

1. Argument on Trust creation.

On reply, Lewis reiterates the argument she has used throughout all trial and appellate proceedings, but with a new twist.²⁰ For the first time, she argues that the Trust was validly created once Lewis and Mr. Torell, the initial Trustee, signed it.²¹ However, Lewis misapplies the facts

¹⁷ Mick’s Response & Cross-Appeal Brief, p.18-20.

¹⁸ *Id.*, p.19-20, citing in footnote #100 to RCW 11.98.070(1), which specifically grants Trustees the authority to receive property from any source.

¹⁹ *Repin v. State*, 198 Wn.App. 243, 270, 392 P.3d 1174 (2017).

²⁰ Lewis’ Reply Brief, p.6-8 (section 3-A).

²¹ Lewis’ initial motion to the Trial Court argued that the Trust was void for lack of personal jurisdiction. CP 96-99. In her opening brief, Lewis also argues that any signature she affixed to the Trust was done under duress. *See* Lewis’ Opening Brief, p.29-30.

of the case. Mick does not disagree in principle with the arguments that persons can create unfunded trusts to be funded later (which is, in fact, what occurred here²²). However, the document Lewis signed says very plainly on the cover page and on page 2²³ that Lisa Dawn Lewis *and* the Kitsap County Superior Court are the grantors, thus making the Kitsap County Superior Court a party with her. Lewis, in her reply, does not offer any legal authority for how an unfunded trust can be validly created without all parties signing it. Since this argument lacks authority, Mick will rely on the arguments set forth in her Responsive Brief.²⁴

2. Argument on Medicaid exemptions.

On reply, Lewis argues that “the trust fails to exempt its corpus from being counted as a disqualifying resource of Ms. Lewis should she ever apply for Medicaid.”²⁵ This issue is not relevant to any assignment of errors on this appeal, to wit: (1) personal jurisdiction, (2) approval of trustee’s actions and fees, (3) award of CR 11 sanctions, and (4) computation of CR 11 sanctions.²⁶ Lewis makes no attempt in this part of her reply to tie it in to any of those assignments of error, this argument

²² Lewis, Torell, and the Court all signed the Trust document in August, 2017. CP 6-15. No funds were issued to the trust until the next year, in June, 2018. CP 85.

²³ CP 6-7.

²⁴ See Mick’s Response & Cross-Appeal Brief, p.20-25, for the arguments on this issue.

²⁵ Lewis’ Reply Brief, p.8, et seq.

²⁶ The first three assignments of error listed here are raised by Lewis in her Opening Brief at p.2-3; the final error is raised by Mick in her Response & Cross-Appeal Brief at p.6.

was not made in her opening brief, and it was not discussed or addressed in Mick’s responsive brief. Accordingly, it is not appropriately part of any Reply by Lewis filed with this Court.²⁷ The argument is also inherently contradictory.²⁸

D. Lewis’ argument on Medicaid recovery is procedurally improper.

On reply, Lewis offers several pages of analysis on Medicaid recovery rules.²⁹ This is ostensibly done to rebut an alleged unsupported position taken by Mick in her responsive brief.³⁰ However, the quoted passage from Mick’s brief was not an appellate argument, but merely a recap of

²⁷ RAP 10.3(c), requiring a reply brief to be limited to the issues in the brief to which the reply is directed. See also footnote 15 herein.

²⁸ Lewis, in section 3-B of her Reply Brief, sets forth a complex legal history at p.8-14. Lewis cites to the US Supreme Court ruling in *Washington v. Keffeler*, 537 US 371 (2003), and argues that the ruling defers to the Social Security Administration’s online Program Operations Manual System (POMS). Lewis then discusses changes made in the US Code and the POMS as a result of the 8th Circuit’s ruling in *Draper v. Colvin*, 779 F.3d 556 (2015), which changes were effective December 31, 2016. Lewis attaches a relevant part of the POMS to her brief. Lewis then cites to language in *Draper* and in the POMS for why a Court order is unnecessary to establish a Special Needs Trust. See Lewis’ Reply Brief, p.11-12. However, the portion of the appended POMS cited (POMS SI 01120.203B(8), at page A-9 of Lewis’ appendix) is the portion related to trusts established *before* the change in law on December 31, 2016. No similar language appears in POMS SI 01120.203C for Trusts created after that date. Lewis’ trust was created in August, 2017.

²⁹ Lewis’ Reply Brief, p.15-19.

³⁰ *Id.*, at p.15, states: “The Resp. Br. at 33 re-asserts Respondents’ unsupported position that ‘the undoing of the trust would act to harm [Ms. Lewis] by making her funds subject to Medicaid recovery.’”

finding of fact which supported the CR 11 sanctions.³¹ This finding was not challenged on appeal by Lewis, and therefore cannot be challenged for the first time in her reply. The Court, on appeal, will not consider argument that is not supported by assignment of error.³²

E. Lewis' argument for the expansion of law is procedurally improper, contradictory to her prior arguments, and misconstrued the record.

On reply, Lewis' Counsel defends against the award of CR 11 sanctions (her own assignment of error) by attempting to show that she made a good-faith argument for expanding existing law.³³ This is a new argument not originally raised in her opening brief, and thus is procedurally improper.³⁴

To the extent that this Court decides this argument is properly raised, it will be addressed briefly here.

³¹ Mick's Response & Cross-Appeal Brief, p.33, specifically referencing CP 226 and finding of fact #7. Mick *does* elaborate on that finding with the words "by making her funds subject to Medicaid recovery," based on the Court's oral ruling at VRP3 p.32, ln.20-21: "...if they are otherwise subject to a Medicaid lien, and [Lewis] is."

³² "[A]ppellants assign no error to the trial court's findings of fact, either as made or refused. Such findings, then, become the established facts." *Rutter v. Rutter's Estate*, 59 Wn.2d 781, 783-784, 370 P.2d 862 (1962). *See also* RAP 10.3.

³³ Lewis' Reply Brief, p.19-23.

³⁴ RAP 10.3(c), requiring a reply brief to be limited to the issues in the brief to which the reply is directed.

At the outset, this argument by Lewis misconstrues her own arguments at the trial level. In her reply brief, Lewis observes that, in her original motion, she argued that the Trust was being treated as a guardianship case.³⁵ This is correct. Lewis continues in her reply brief to argue for an extension of the law based on due process principles applicable to guardianships and pre-nuptial agreements – the pre-nuptial argument being raised in her reply brief for the first time. But at trial, she was not arguing for expansion of the law. Instead, she argued vigorously why the Trust should be void for lack of personal jurisdiction under current law – not an extension of law. In addition, all arguments related to Lewis’ lack of capacity came from her opponents, which she vigorously disagreed with.³⁶ At no point did Lewis ever concede this. Rather, she unwaveringly asserted her capacity and ability to manage her own affairs.³⁷

Additionally, the establishment of guardianships and trusts are both dictated by statute. Lewis now attempts to argue for a judicial addition to the statutory scheme, as it were, not merely its interpretation. This is beyond the role of the court, which is concerned with determine “what the law is, not what it should be.”³⁸

³⁵ Lewis’ Reply Brief, p.19, citing to CP 95-97.

³⁶ See, e.g., the allegations of Lewis’ cognitive impairment by Larry Hall, CP 158, and Lana Prinz, CP 163.

³⁷ See, e.g., Lewis’ statement in her declaration that “I have full legal capacity...” CP 112.

³⁸ *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014).

F. The Trial Court’s decision to reduce CR 11 sanctions was an abuse of discretion.

On reply, Lewis argues in response to Mick’s assignment of error.³⁹ Lewis opines that Mick falsely represents what happened at the June 17, 2019, hearing.⁴⁰ Mick does not retract any factual assertions.⁴¹ Indeed, the Trial Court itself characterized Mr. Schafer’s statements as “threats”⁴² and stated it did not appreciate those threats.⁴³ Lewis then cites to *Humphrey Industries Ltd. v. Clay St. Associates, LLC*⁴⁴ for authority on discretion for awarding fees. The quote from that case deals exclusively with a court’s authority to award fees under Washington’s LLC Act, which is entirely inapplicable here. Mick does not dispute the court’s authority or discretion to award fees, but only assigns error to the Trial Court’s stating fees were a reasonable amount to award, but then reducing below that reasonable amount based on Counsel’s threat to appeal.

³⁹ Lewis’ Reply Brief, p.23-25.

⁴⁰ *Id.*, p.23, quoting Mick’s Motion for Reconsideration, CP 229-234, specifically the reference to Mr. Schafer’s “tantrum and bullying-like behavior in the courtroom.” CP 230, ln.4-8.

⁴¹ See Mick’s Response & Cross-Appeal Brief, p.33-34, for the detailed recounting of the verbal exchange in question, with numerous citations to the record. Lewis does not dispute any of these citations, opting instead to reference the description in the Motion for Reconsideration, which motion was granted by the Court.

⁴² VRP3 p.35, ln.16.

⁴³ VRP3 p.35, ln.17.

⁴⁴ 170 Wn.2d 495, 242 P.3d 846 (2010), cited at p.24 of Lewis’ Reply Brief.

Beyond this, Mick relies on her arguments in her Cross-Appeal.⁴⁵

III. CONCLUSION

Lewis' reply brief, rather than providing a meaningful response to the issues raised in response to her initial appeal, or providing adequate response to the issues raised on cross-appeal, attempts to raise entirely new issues of fact or law, and substantiates those only with more confusion. The facts of this case remain that Counsel has placed the courts and the opposing parties to a great deal of time and expense for issues that had no basis to begin with and would at best have acted to harm his client. For this reason, the award of attorneys' fees against him below was appropriate and should be upheld, and fees should be awarded against him in full for Mick and all fees at the appellate level should be awarded against him. Lewis' requests on appeal should be denied.

RESPECTFULLY SUBMITTED this 8 day of June, 2020.

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⁴⁵ See Mick's Response & Cross-Appeal Brief, p.33-37.

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