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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 319156-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In re Estate of Elma L. Hayes

JAMES L. HAYES,

Appellant,

vs.

JERRY D. HAYES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Elma Hayes Leased her 1,200 acre Grant County farm to her son James for \$5.00 per acre in the 20 years prior to her death. It is undisputed the Lease unambiguously provided for automatic termination of the Lease should James assign, sublet or transfer the Lease, or could not “personally perform the terms, conditions and covenants.” When Elma died in 2012, her will separated the contiguous farm land into four parcels and devised a parcel to each of her four children, James, John, Jerry, and Patricia. All of Elma’s residual property was similarly split four ways between the children. A probate was opened in Lincoln County and the four parcels were distributed to each of the siblings.

After distribution, James sold his parcel to a third party for \$575,000 in August of 2012, including the surrender of the right to farm pursuant to the Lease on his parcel. Because the Lease automatically terminated when James could no longer personally farm all of the Leased property, James' brother Jerry declared the Lease terminated. James refused to vacate Jerry’s parcel. Jerry commenced an unlawful detainer action in Grant County. Conceding the Lease was unambiguous, James sought to avoid the likely outcome in Grant County by filing a Trust and Estate Dispute Resolution Act (TEDRA) Petition in Lincoln County, asking the court to exercise its authority under TEDRA to reform the

Lease and estate documents in accordance with what James claimed was Elma's intent—to allow him to sell his parcel for over a half a million dollars, but continue to farm his siblings' property with his favorable Lease terms of \$5.00/acre.

Because James did not like the outcome of the exercise of the court's discretion in Lincoln County which enforced the unambiguous Lease, James appeals. He now reverses his position and argues the trial court did not have the authority to order that which he demanded, i.e. re-writing of the Lease. Contrary to the very clear requests in his TEDRA petition, James' appeal asserts he never requested clarification or enforcement of rights under the Lease. This is untrue.

Analyzing the relief that James requested in his Petition and at the TEDRA hearing, the trial court properly exercised its discretion to determine that the unambiguous Lease terminated upon James' sale, and no basis for reversal exists of that ruling.

II. SOLE ISSUE RELATED TO APPELLANT'S NUMEROUS ISSUES RE APPELLANT'S ASSIGNMENTS OF ERROR

Issue on Appeal: Did the Trial Court err in a TEDRA action by enforcing the unambiguous terms of a lease which automatically terminated the lease when the Tenant could not personally farm all the Leased ground due to his own actions?

III. COUNTER STATEMENT OF THE CASE

After her husband died in 1991, Elma Hayes was the sole owner of a 1,200 acre farm near Hartline, Washington. (CP 5-6) Elma had four children, James, Jerry, Patricia, and John. (CP 128) On December 22, 1993, Elma Hayes, as Landlord, and her son James, as Tenant, executed a farm Lease for the Hartline property. (CP 17)¹ The Lease was prepared by her attorney Kenneth Carpenter. (CP 159) The 25 year Lease term commenced on September 1, 1993, and was to end September 1, 2018. (CP 17) It required James to pay an annual cash rent of \$5 per acre, which totaled just over \$6,000 a year; a standard Lease in the area at that time was 1/3 to 2/3 crop share Lease rates in the area of \$20 to \$25 per acre. (CP 129, 544) As part of the consideration for the Lease, James was required to pay any and all farm expenses, and to pay off two farm credit service loans existing on the property; he otherwise was entitled to all profits from the farming operation. (CP 129) The farming equipment was gifted to James. (CP 322)

The Lease provides in Section 14:

It is understood that this Lease is personal to the Named Tenant and no assignment or subletting or transfer by operation of law by the Tenant will be recognized, without

¹ Although the Lease also names the three other siblings as Landlords, it is undisputed they did not sign the Lease nor did they act as Landlords at any time during Elma's life.

the written consent of the Landlord. In the event the Tenant cannot personally perform the terms, conditions, and covenants required herein upon the Tenant, then this Lease will terminate immediately...

(CP 22)

Elma executed her revised Last Will and Testament on January 28, 2003. (CP 42-49). The Will was likewise prepared by attorney Kenneth Carpenter. (CP 160) James farmed all the Leased ground up to Elma's death on February 13, 2012. (CP 129, 544) Her Last Will and Testament divided the land into four parcels of approximately 300 acres each, and devised a parcel to each of her four children. (CP 43-44; 129, 544) James and Patricia were appointed Personal Representatives for Elma's Probate Estate on March 20, 2012. (CP 290) James and Patricia transferred the land to each of the siblings beginning in June 2012 through September 2012 pursuant to Deed of Disbursement by Co-Personal Representatives. (CP 51-61) The conveyances do not recite the existence of the Lease. The Will made no provision regarding the Lease, and thus Elma's interest was conveyed as residual personal property to all of the siblings equally. (CP 544) No Will contest was ever initiated. (CP 10-11, 544)

James' parcel was transferred on June 25, 2012. (CP 54) On August 7, 2012, James transferred his ownership interest in this parcel by a statutory warranty deed to Isaak Land, Inc. for the sum of \$575,000.

(CP 545) The Real Estate Contract provides title was to be by warranty deed, without lien, and that James had the right to convey the property free and clear of encumbrances, except those mentioned. The Lease is not mentioned. (CP 340-352) Of the purchase price, James reported that \$157,000 was paid to extinguish the Lease on the transferred property, which he calculated as the then current market rate of the Lease (\$52,000.00) over three years. (CP 324, 401; 411) The purchaser attested that the land was transferred fee simple and the property is not encumbered by the Lease. (CP 353-354; 545)

James thereafter asserted to his siblings that his Lease continued to encumber their three individual parcels, despite his transfer of a substantial portion of the property subject to the Lease. (CP 219; 401-02, 411) Jerry sent an e-mail to James advising him the Lease was terminated. (CP 401) James responded to Jerry that he could "buy out" the Lease on his property for the same sum of \$157,000. (CP 324; 402) Jerry sent James a second written Notice of Automatic Termination of the farm Lease on October 30, 2012, notifying James that he no longer had any right to occupy or farm Jerry's individual parcel. (CP 402)

Based on the unchallenged terms of the Lease and James' refusal to vacate the property, Jerry filed an unlawful detainer action in Grant County to eject James from his property. (CP 12) That action was based

on the termination of the Lease by its very language. While the motion to eject was under advisement in Grant County, James filed the underlying TEDRA petition in Lincoln County, naming his siblings and asking for a declaration of rights and legal relations under RCW 11.96A.080. "...acknowledging and recognizing the intention of the decedent, Elma L. Hayes, to partition the 1993 Farm Lease into four separate leases".

(CP 12) That petition specifically requested as relief:

1. For issuance of a Declaration acknowledging and recognizing the intention of the decedent, Elma Hayes, to partition the 1993 Farm Lease into four separate Leases, and each such partitioned Lease applicable to a single parcel of real property, and each such partitioned Lease with a single Beneficiary as landlord; ...
2. For issuance of a further Declaration acknowledging and recognizing the intention of decedent, Elma Hayes, to preclude each Beneficiary from enforcing the covenants set forth in the 1993 Farm Lease....

(CP 13)

James admits that his TEDRA petition asked the court to determine that Elma Hayes intended to partition the "1993 Farm Lease into four separate Leases," applicable to each of her children's parcels of property, and to preclude each beneficiary from enforcing the covenants of the 1993 Farm Lease, including the automatic termination provision. (See, Appellant's Brief, p. 12) While couched in terms of the testator's intent,

the obvious impact would not be to enforce the estate documents, but is in fact a request to re-write the 1993 Farm Lease itself, and preclude the automatic termination of the Lease based on James' sale.

James noted a TEDRA hearing on his petition, which was held on June 20, 2013. James' Pre-Hearing Statement of Proof sets out clearly the evidence to be offered at the hearing will be of the objectives and intentions of Elma relating to the Lease. (CP 154) James's Pre-Hearing Memorandum of Law states the two "factual issues to be determined at the hearing" deal with the intentions of Elma. At that hearing, over opposing counsel's objections, James' counsel insisted that the TEDRA hearing was on "the merits" and meant to resolve "all issues of fact and all issues of law." (RP 6-9)

Judge Strohmaier proceeded with the TEDRA hearing on the merits as demanded by James. James sought to admit certain testimony of Attorney Kenneth Carpenter in support of his claim on Elma's intent. (RP 4, 9) Mr. Carpenter was the attorney that drafted both the Lease and Elma's Will. (CP 610-11) Over the objections of statute of frauds, the deadman's statute, and attorney-client privilege, Mr. Carpenter's testimony was presented by a Declaration and a Supplemental Declaration which in part made several statements of opinion about what Elma likely intended; Mr. Carpenter's live testimony was also offered. (RP 4) The

purpose of the testimony is patently intended to alter the very documents Mr. Carpenter drafted. The court struck the following portions of Mr. Carpenter's Declarations which outlined what he "believed" would have been Elma's intent:

...

9. I believe that it would be inconsistent with her intent to distribute to any of Elma's children a landlord's interest in any parcel of real property that she specifically devised to one of her other children.

(CP 160, 548)

...

5. Elma decided to give each child a separate parcel of property, with the understanding that James would be permitted to farm each parcel of property for the 25 years of his Lease.

(CP 209, 548)

...

7. Just as Elma had decided before executing the 1993 Farm Lease that it was not a good idea to have her children as co-landlords during her lifetime, she had no intention of making them co-landlords after her death. The suggestion that Jerry (or John or Patricia for that matter) might have legal right to receive profits from property owned by James himself or another sibling – like the suggestion that Jerry (or John or Patricia) might have a legal right to control what James did on property that was owned by James himself or another sibling – is not only contrary to common sense, but also, totally foreign to what Elma Hayes was trying to accomplish through specific

bequests set forth in her 2003 Last Will and Testament.

(CP 210, 549)

The court gave the parties the opportunity to interview Mr. Carpenter prior to determining whether his viva voce testimony would be admissible. As represented to the Court, it was confirmed that Mr. Carpenter did not have discussions with Elma about the sale of a parcel of the land or the term of the Lease. (RP 68-71) Mr. Carpenter admitted he had **no** discussions regarding the sale of the property or any term of the Lease; James' counsel admitted that Mr. Carpenter did not specifically discuss the effect of the property division or whether Jim could sell his property. (RP 70-71) The proposed testimony was instead based (just as with the stricken portions of the Declarations), on Mr. Carpenter's assumptions and opinions. As a result, Mr. Carpenter was unable to testify. (RP 70-71).

Based on the undisputed facts, and the unambiguous terms of both Elma's Will and the 1993 Farm Lease, the court orally ruled that the Lease terminated at the point that James sold his portion of the property. (RP 75-76) The court entered Findings of Fact and Conclusions of Law and Order on July 2, 2013, as well as an Order on Motion to Strike Portions of Declaration. (CP 542-49) The Findings comport with the

undisputed evidence in the record. James moved for reconsideration of both the Order Striking Portions of Carpenter's Declaration and the Findings and Conclusions on the TEDRA Petition; both were denied on August 6, 2013. (CP 615-616)

James appeals, asking this court to reverse the trial court's ruling, arguing evidentiary error, excluding relevant evidence from Mr. Carpenter, re-arguing that the substantive evidence established Elma's intent to vitiate the unambiguous terms of the Lease, and asserting he had been deprived a fair hearing or due process in the TEDRA proceeding which he himself requested. Remarkably, James asserts that "at no time" did he ask the probate court to "make any ruling whatsoever with respect to the provisions of the 1993 Farm Lease." (Appellants' brief, p. 21) Nothing in the evidence presented to the trial court or in the argument to this court establishes that the trial court erred in refusing to ignore the unambiguous Lease and unambiguous Will. Respectfully, the appeal must be denied.

IV. ARGUMENT

A. Standard of Review.

James attacks the trial court rulings on a variety of intermingled bases, making it difficult to establish the standard of review he relies upon to make his arguments. However, in analyzing the appropriate TEDRA

standard of review for procedural issues, Washington courts recognize the “plenary power” granted to the trial court, and afford “significant deference” to the trial court’s procedural management of a case. See, In Re Estate of Fitzgerald, 172 Wn. App. 437, 294 P.3d 720 (2012). A decision following a TEDRA bench trial is reviewed only to determine whether the findings of fact are supported by substantial evidence and whether those findings of fact support the conclusions of law. Dorsey v. King County, 51 Wn. App. 664, 668-669, 754 P.2d 1255 (1988)². And where the relevant facts are undisputed, and the parties dispute only the legal effect of these facts, the standard of review is de novo. In Re Estate of Earls, 164 Wn. App. 447, 262 P.3d 832 (2011). Under any of these generally applicable standards, Judge Strohmaier’s procedural rulings, findings of fact, and conclusions of law were all appropriately made, and should not be reversed.

B. The trial court properly excluded Mr. Carpenter’s speculative opinions.

TEDRA is a special proceeding under the civil rules. RCW 11.96A.090(1). The procedural rules of the Court are suspended if inconsistent with the statute. RCW 11.96A.090(4). The statutory scheme

² In Re Estate of Washburn, 2012 WL 2159404 (Wash. App. 2012) (standard applied in TEDRA action)

envisions that proceedings to resolve disputed issues in probate-related matters may be decided on the written record, rather than by trial. RCW 11.96A.100(7) ("Testimony of witnesses may be by affidavit"). The statute also provides that a party must demand an evidentiary hearing in a petition or answer. RCW 11.96A.100(8) ("Unless requested otherwise by a party in a petition...the initial hearing must be a hearing on the merits to resolve **all** issues of fact and all issues of law"). This Court has held that a court resolving disputed issues of fact in a TEDRA case need not consider live testimony, but may resolve disputed issues by conclusory affidavits and other written materials as the trial court did here. Foster v. Gilliam, 165 Wn. App. 38, 54-55, 268 P.3d 945 (2011) ("It is not necessary that the court hear oral testimony in order to make findings"); see also, RCW 11.96A.170 (right to trial by jury only if "the issues are not sufficiently made up by the written pleadings on file").

A trial court's decision to admit or exclude evidence lies within its sound discretion. Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87 P.3d 774 (2004). A court abuses its discretion

only if it bases its ruling on an erroneous view of the law. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).³

James wanted Judge Strohmaier to accept the testimony of the lawyer who drafted Elma's Will and the Farm Lease to contradict their clear terms. The trial court acted within its discretion to reject the inadmissible testimony, both by Declaration and via voce in reaching its Findings and Conclusions under TEDRA. Judge Strohmaier did not enter a ruling based on an erroneous view of the law. This Court is asked to reach the same result as Judge Strohmaier for the above stated reasons and for the reason stated in the objections to the testimony made at trial.

1. The trial court is entitled to sua sponte exclude inadmissible evidence.

A trial court may, of its own motion, exclude or strike evidence that is incompetent or inadmissible for any purpose, even though no objection is interposed to such evidence. 88 C.J.S. §250; Fed. Trial Handbook Civil §11:20 (4th ed. 2013). Here, Jerry did object to Mr. Carpenter's Declaration on several grounds, and specifically addressed the "opinion" objections in response to James' motion for reconsideration, even if the trial court may have initially addressed the "opinion" evidence.

³ Jerry's evidentiary objections to the testimony were set forth in a Motion to Strike Portions of the Declarations of Mr. Carpenter and Mr. Hayes. (CP 268)

(CP 583-87) Both the court and Respondents were within their rights to oppose and exclude the evidence.

2. **Mr. Carpenter's stricken testimony was limited to those statements which reflected Mr. Carpenter's opinion about Elma's intent, as opposed to personal information based on her expressions of intent.**

"Opinion testimony" is defined as testimony based on one's belief or idea rather than on direct knowledge of the facts at issue. State v. Demery, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). It is a misnomer to say Mr. Carpenter's testimony is based on personal knowledge; he attempted in part to testify about Elma's intent, but did so based on his beliefs rather than a discussion in which she expressed the "intent" advanced by James. Over objection, his testimony was allowed and considered regarding the surrounding facts and circumstances of which he had knowledge, and Mr. Carpenter was simply precluded from extrapolating intent from those facts.

The testimony proffered by Mr. Carpenter in his first Declaration, Supplemental Declaration, acknowledgement to the Court at the time of the hearing on the merits, and Declaration in Support of Motion for Reconsideration, all reflect that he had no discussions with Elma that contradicted the plain language of the Lease; i.e. the right to farm was personal to James, and the Lease terminated if he could not farm the

leased property. There is no writing that suggests the personal obligation to farm all the property set out in Section 14 of the Lease was limited in any fashion, whether by language of the Lease or in Elma's Will. The stricken testimony very clearly was provided in terms of what Mr. Carpenter "believed" was his client's intent. (CP 158-60, 208-10) However, he did not draft the Lease consistent with his testimony. There was no confusion at the hearing on the merits; all question was clarified when counsel for the parties interviewed Mr. Carpenter and James' counsel thereafter conceded on the record that Mr. Carpenter had never discussed the specific issues with Elma. (RP 70-71)

Mr. Carpenter's Declaration in support of the motion for reconsideration on what he *would* have testified similarly lacks any foundation that Mr. Carpenter had any discussions with Elma regarding her intent to separate the Lease into four separate Leases and preclude enforcement of the automatic termination provision contrary to the specific language of Section 14 of the Lease. (CP 610-13) Such testimony was and remains inadmissible for the reasons stated at the hearing as well as being opinion evidence and/or testimony irrelevant to Elma's intent, and was properly stricken, or not considered. This court is asked to affirm Judge Strohmaier's evidentiary ruling.

3. The evidence stricken was not based on Elma's "state of mind," and the court did not abuse its discretion in excluding it as not helpful.

Contrary to James' assertions, opinion testimony under ER 701 is admissible only if based on the "perception" of a witness, i.e. on observation of the percipient events. For example, the cases on which James relies to suggest that "personal knowledge" of a person's "state of mind" is admissible are irrelevant criminal cases regarding **physical** observations. In one, a police officer was allowed to testify about the physical "demeanor" of a mother when interviewed regarding the molestation of her child as an opinion under ER 701. State v. Warner, 134 Wn. App. 44, 58-59, 138 P.3d 1081 (2006). In the other, State v. Perez, 137 Wn. App. 97, 102, 151 P.3d 249 (2007), a social worker who interviewed a child victim was allowed to testify that the child seemed "traumatized." This is not the "state of mind" evidence James offers. There is nothing about Elma's demeanor that would be admissible to allow testimony that she did not intend that the Lease remain as personal in nature as to James. James is offering testimony of the drafting attorney to contradict unambiguous written documents and which the lawyer admits was never discussed with Elma. This is not the "perception" evidence contemplated by ER 701. Lay opinion about the state of mind of another person is inadmissible under ER 701. State v. Farr-Lenzini,

93 Wn. App. 453, 462, 970 P.2d 313 (1997), superseded by statute on other grounds.

Also contrary to James' assertion that state of mind evidence by an attorney is admissible regarding a testator's intent, is the authority cited by James which establishes that such intent must be determined first from the language of the Will. In re Estate of Sherry, 158 Wn. App. 69, 76, 240 P.3d 1182 (2010). In that case, a wife's will was determined to "unambiguously" require farm land be divided into separate parcels based on the intent established from the written instrument itself. The court considered extrinsic evidence, i.e. the attorney's affidavit, **only** as to the father's will. Id. at 82 ("if there is ambiguity as to the testator's intent, extrinsic facts are admissible to explain the language in the will...testimony of the drafter including as to the testator's intent, is one piece of evidence admissible to explain the language"). And even then, the attorney's affidavit contained direct expressions of the testator's intent: "Fred told me that, in his opinion," how the allocation of assets should occur. Id. at 83. Here, there is no claim that the Will or the Lease was ambiguous. Mr. Carpenter's testimony was offered to reform the express written documents in the fashion favorable to James, also Mr. Carpenter's client. James offered **no** evidence of express statements by Elma on her intent. This testimony does not overcome its inadmissible nature due to

the state of mind argument. This court is asked to affirm Judge Strohmaier's ruling as well within the trial court's discretion to exclude.

Moreover, an opinion which is not helpful to the trier of fact is not admissible under ER 701 or 702. City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993). Similarly, "[a]n otherwise admissible opinion may be excluded under ER 403 if it is confusing, misleading, or if the danger of unfair prejudice outweighs its probative value." Id. No basis exists here to override the trial court and require consideration of Mr. Carpenter's stricken testimony.

C. James requested the TEDRA hearing on the merits and was afforded a fair hearing and due process.

James asserts that the TEDRA hearing he noted was conducted unfairly and that he was denied due process. Both assertions are based on the same arguments, and will be addressed together. Ultimately, James' lack of fairness argument lies in the incorrect assertion that the issues **which he asked the court to decide** were not properly within the scope of the hearing on the merits and that the court's ruling somehow establishes bias and prejudice. The record demonstrates that this appeal is based on a "sour grapes" reaction to a decision that denied James the relief he specifically sought.

TEDRA gives the trial court "full and ample power and authority" to administer and settle all estate and trust matters, including "estates and assets...including matters involving nonprobate assets." RCW 11.96A.020(1)(2); In re Irrevocable Trust of McKean, 144 Wn. App. 333, 343, 183 P.3d 317 (2008) (TEDRA grants "plenary powers" to the trial court). The statute provides:

If this title should in any case or under any circumstances be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matter [listed in the statute], the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matter be expeditiously administered and settled by the court.

RCW 11.96A.020(2).

A "fair hearing" under a due process analysis requires "such procedural protections as the particular situation demands." In re Martin, 154 Wn. App. 252, 265, 223 P.3d 1221 (2009). The hallmarks of due process are notice and an opportunity to be heard. James cannot complain on either basis. James noted the hearing, James offered the testimony, and James was given the full opportunity to argue and to reargue to Judge Strohmaier. Under TEDRA, the trial court abided by the statutory grant of its authority and there was nothing unfair about the nature of the hearing requiring reversal.

1. **The 1993 Farm Lease was at issue by James' request, and he cannot now disclaim the court's authority or assert lack of due process because he disliked the outcome; the hearing was not "expanded" beyond the proper scope, nor did James lack notice of the issues he himself raised.**

As the Petitioner, James filed for a Declaration of Rights and Legal Relations under RCW 11.96A.080 on May 3, 2013, asking the court to rewrite a single specific Lease into four new Leases with terms not included in the original Lease, and to preclude the beneficiaries of an estate from enforcing an automatic terminate provision in that Lease. (CP 5-14) By his own Petition, James acknowledges that the Lease did not provide for four new Leases upon Elma's death. James argues it should be rewritten. The trial court did not agree with James. Now that the issues have been decided against him, James argues on appeal that the hearing was unfairly expanded to address the very Lease which he raised. The change in position asks all to engage in a funambulist's exercise that lacks logic and is simply not supported by any legal authority.

The two issues raised by James in the TEDRA Petition were (1) whether the death of Elma Hayes created four Leases, and (2) whether the covenant in the Lease requiring termination upon the failure of Mr. James Hayes to farm all of the Leased ground was enforceable. (CP 13) The court resolved those issues by declaring there was one

unified Lease encumbering the 1,225 acres of real property and the Lease terminated by its terms upon James' sale of his encumbered parcel. (CP 545)

James now contends the court acted outside the scope of the issues he brought forth in the Petition. James also argues that the trial judge acted beyond his authority by concluding the Lease terminated by its terms upon James' fee simple sale of his Lease-encumbered parcel of real property, arguing that the hearing was limited to issues of the interpretation of Elma's Will. James presented the pertinent issue as: "Whether it was the intention of decedent, Elma L. Hayes, to preclude each Beneficiary from enforcing the covenants set forth in the 1993 Farm Lease...." (CP 139-40, 564-65) Accordingly, Petitioner did in fact ask the court to rule on the relevant covenants. It simply is not reversible error for a court to apply the facts to the law to the requested relief in a TEDRA petition and no law has been cited for such a proposition.

Judge Strohmaier entered a finding that Lease Article 14 provided that James as the tenant had a "personal" interest in the Lease and he was specifically precluded from assigning, subletting, or transferring his tenant right to the Lease without the consent of the Landlord. (CP 544) The court further entered a finding that on August 7, 2012, James transferred his ownership interest in his parcel of land free and clear of all liens,

encumbrances and defects, by statutory warranty deed to Isaak Land, Inc. for the sum of \$575,000.00. (CP 545) The court, finding the covenants to be enforceable, concluded James breached the Lease and that it automatically terminated upon the sale. (CP 545) The covenant was inextricably linked to actual termination.

As to estates, the superior court "has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court." RCW 11.96A.020(2). Ironically, James proceeded in this case arguing these issues were probate matters that only the Lincoln County Court could resolve, not the Grant County Court where the ejectment action was pending. James requested and was granted the merits hearing which resolved the issues he asserted. James was not deprived of notice that these issues would be decided as a matter of due process – he himself requested that they be decided. His assertion that the "entire focus" of the evidence and argument at the TEDRA hearing was on Elma's intent with respect to her Will, and not the Lease, is simply incomprehensible considering the request for relief in the petition and the statement of the issues in James' prehearing Statement of Proof submitted to the trial court. (See, Appellants' brief, p. 30; CP 13, 139-40) The issues were fully briefed

and argued before the trial court and Petitioner cannot now claim to be prejudiced by his own procedural strategy.

2. The court exercised its discretion in determining that the evidence did not overcome the unambiguous Lease and estate documents; he did not take improper "judicial notice" of facts.

A judge is expected to bring his or her own "opinions," insights, common sense, and everyday life experiences into the fact-finding process. State v. Carlson, 61 Wn. App. 865, 878, 812 P.2d 536 (1991). Fact finders do not leave their common experience and common sense outside the courtroom door. State v. Rainwater, 75 Wn. App. 256, 262, 876 P.2d 979 n.7 (1994). This is particularly true in a TEDRA action which vests with the trial judge the power to do what is right. Such use of experience does not constitute improper judicial notice.

Even if considered judicial notice, a judge's use of knowledge commonly used in the geographical area is not improper. ER 201(b)(2) authorizes a court to take judicial notice of facts "generally known within the territorial jurisdiction of the trial court." See, e.g., Commercial State Bank v. Palmerton-Moore Grain Co., 152 Wash. 89, 277 P. 389 (1929) (price of wheat subject to judicial notice); Trudeau v. Pacific States Box & Basket Co., 20 Wn.2d 561, 148 P.2d 453 (1944) (court judicially noticed amount of freight shipped between Raymond to Yakima).

In Keegan v. Grant County Public Utility Dist. No., 34 Wn. App. 274, 283-284, 661 P.2d 146 (1983), the trial court judicially noticed that a proposed expert who worked as Chief Appraiser for the Bureau of Reclamation was in the business primarily of farm land and the water services and canals, and 99 percent of the Bureau is concerned with agricultural land and the water works that serve the land; the expert was thus disqualified to testify on the value of residential property.

Here, the trial court's comments constituted no more than the common experience and common sense known in Lincoln County regarding farm estates and Lease values. (CP 617-21) The trial court did not decide disputed issues on extrinsic facts, but instead based his decision on the unambiguous written documents and the evidence presented at the hearing, which established that Elma Hayes never expressed intent to vary the terms of the Lease. Part of James' argument also asked the court to equitably decide this case involves forfeiture. A court's determination of what is equitable obviously requires the court to contemplate a personal sense of fairness. A court sitting in equity has broad discretion to fashion a remedy "to do substantial justice." Esmieu v. Hsieh, 92 Wn.2d 530, 535, 598 P.2d 1369 (1979). The exercise of the court's common experience and discussion does not preclude a fair hearing or result in the lack of due process. James has not offered any authority to support his position that

he was treated unfairly. Rather the Judge opined that James by selling his land for \$575,000.00 while holding his siblings to the Lease was at their expense. And basically constituted taking from three kids and giving it all to one. (RP 74) James is invoking equity but he has not done equity and should not be heard to assert he has been treated unfairly by his siblings or the court.

3. The court's exercise of its discretion to preclude inadmissible evidence in a civil matter does not deprive a litigant of due process.

Judges are accorded "wide latitude" in excluding evidence, and such exclusions will be reversed only for an abuse of discretion. Kappelman v. Lutz, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). An evidentiary exclusion gives rise to a due process violation only in the criminal arena when a defendant is denied his right to present a defense. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). There is no indication the trial court here abused its discretion by excluding evidence on unreasonable or untenable grounds, and did not deny any due process rights to which Appellant was due under the civil TEDRA proceeding. James came to the hearing on the merits to present testimony and had that opportunity which he did by Declaration. The only limitation placed on his offer was what the court properly considered to be inadmissible evidence.

4. There exists no evidence of bias which rendered the hearing unfair.

James' assertion that the trial court displayed bias which deprived him of due process and required the judge to recuse himself lacks any basis in fact and law. The right to a fair hearing under due process prohibits **actual** bias of the trial judge and prohibits the probability of unfairness. State v. Chamberlin, 161 Wn.2d 30, 39, 162 P.3d 389 (2007). There is no evidence here of actual bias under due process or any implication of an unfair hearing. Certainly no evidence has been offered in this record of actual bias.

Under the appearance of fairness doctrine, a judicial proceeding is valid if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing. In re Guardianship of Wells, 150 Wn. App. 491, 502, 208 P.3d 1126 (2009). Evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied; a party claiming bias has the burden to support such a claim. Id. at 503. Speculation of bias is insufficient; a party must produce sufficient evidence of bias such as personal or pecuniary interest on the part of the decision maker. Tatham v. Rogers, 170 Wn. App. 76, 96, 283 P.3d 583 (2014). The appearance of

the fairness doctrine is directed at "the evil" of a biased decision maker. In re Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010).

James asserts there existed "personal bias or prejudice" requiring recusal by the trial court, but fails to identify any specific statements or conduct which reasonably establish such bias; he presented no evidence of pecuniary or personal interest in any aspect of this case, nor any objective "evil" intent by the trial court. In reality, this claim of bias is based on Judge Strohmaier's exercise of his discretion in declining to admit evidence, and his determination of law and fact which were within his authority to make. There is no reasonable or objective evidence of bias, and James' claim of judicial wrongdoing because he disliked the result is offensive to the judicial process.

D. James submitted no evidence of an intent by Elma to create four Leases, and the trial court properly based its decision on her unambiguous will provision.

Contrary to Appellant's assertion, the standard of review applicable here is not the de novo review of a summary judgment. When a party requests that the court address specific fact issues, the resulting Findings and Conclusions do not constitute a summary judgment, and the appellate court simply reviews the trial court's factual determinations for substantial evidence. In re Riddell, 138 Wn. App. 485, 491-92, 157 P.3d 888 (2007); see also Holland v. Boeing Co., 90 Wn.2d 384, 390, 583 P.2d 621 (1978);

Sunnyside Valley Irr. Dist. v. Dickie, 111 Wn. App. 209, 214, 43 P.3d 1277 (2002). Substantial evidence is evidence “in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” Nguyen v. State, Dep't of Health Med. Quality Assurance Comm'n, 144 Wn.2d 516, 536, 29 P.3d 689 (2001).

The substantive admissible evidence here supported the trial court's determination based on the terms of the relevant documents very simply because the relevant facts were undisputed - - Elma distributed her farm land into four parcels owned by each child, and the 1993 Farm Lease terminated upon transfer of the property to which it applied. As a result, the trial court made appropriate factual and legal conclusions.

Appellant has consistently argued without legal or factual support there were four separate Leases created at the time Elma passed away. In the proceedings below, Appellant urged theories of *de facto* partition and merger to refute the unambiguous language in the Last Will & Testament and the Farm Lease. The trial court rejected those arguments and held: “Upon the death of Elma there was one unified Lease encumbering the described 1,225 acres of real property.” (CP 528) Appellant now contends there is uncontroverted circumstantial evidence supporting a contrary conclusion and order. (Appellant's brief, p. 32) The trial court

properly rejected this argument based on the language of the Will, and lack of any other appropriate facts or law.

Appellant claims that prior to the execution of the Lease, Elma did not want Jerry, John, and Patricia to serve as co-landlords. (Appellant's brief, p. 8) However, the court struck that language from Paragraph 7 of the Supplemental Declaration of Kenneth D. Carpenter for being inadmissible opinion testimony. (CP 549) At the June 20, 2013 hearing, the court repeatedly asked counsel for Appellant whether Mr. Carpenter could testify to having had a conversation with the testatrix regarding her intentions to create four Leases and allow the tenant to hold the other siblings in a type of indentured servitude. The answer was no. (RP 40, 42, 47, 67-68, 70-71) Appellant relies entirely upon the fact that Jerry, John and Patricia did not sign the Lease as support for his argument. (Mr. Carpenter reports the conversation with his client where he advised her, the other siblings' signature was unnecessary and she acted accordingly.) (CP 209) As Mr. Carpenter noted, Elma was the sole owner of the property. In this case the fact of lack of signature only means the siblings were not bound as co-landlords at the inception of the Lease. See, RCW 19.36.010.

Washington holds that a landlord's death does not terminate a tenancy for years. See, RCW 11.04.250 (a lease on land owned by the

decedent will continue for the benefit of the heir or devisee of such land); see generally, In re Barclays Estate, 1 Wn.2d 82, 95 P.2d 393 (1939). A lease is generally treated as personal property. Andrews v. Cusin, 65 Wn.2d 205, 207, 396 P.2d 155 (1964) (“[A] leasehold interest in real estate for a term less than life is personal property.”). A lease may be devised just as any other property. Obligations created by testators become the obligation of devisees, to the extent of the value of the inherited property, upon acceptance of the inheritance. See, Higgenbotham v. Topel, 9 Wn. App. 254, 257, 511 P.2d 1365 (1973) (devisee of wheat land took title burdened by leases lawfully created by executor where devisee did not reject bequest; devisee liable under lease to extent of value of the inheritance); North Pacific Mortgage Co. v. Sieler, 146 Wash. 530, 535, 264 P. 4 (1928).

Lease Article 14 provides: “This Lease shall be binding upon the heirs, personal representatives, and assigns of the Landlord herein.” (CP 22) Elma’s Will did not make a specific bequest of the Lease, so distribution was controlled by the residuary clause, which provided:

I hereby give, devise and bequeath all of the rest, residue and remainder of my property of every kind, nature and description, wheresoever located and situated unto JAMES L. HAYES, JOHN D. HAYES, JERRY D. HAYES, and PATRICIA A. ELDER, as their sole and separate property.

(CP 44) (emphasis in original). The language of the will shows Elma's intent to transfer ownership of the single Lease as residual personal property to all of the siblings collectively. The children did not reject the bequest of the residual estate; therefore, each child owned a separate undivided interest in the Lease.

Accordingly, James, John, Jerry and Patricia inherited rights as joint owners of a single Lease and those rights had to be exercised collectively. See generally, Andersen v. Frye & Bruhn, 69 Wash. 89, 124 P. 499 (1912); Godefroy v. Hupp, 93 Wash. 371, 160 P. 1056 (1916). There is absolutely no mention in the Lease or Elma's Will of creating four separate Leases; nor has any legal authority for such a proposition been provided to the trial court or to this court. The trial court made the appropriate ruling based on the facts and law, and it should not be disturbed on appeal.

E. The court properly concluded that no equitable basis existed to block that forfeiture.

Appellant suggests that the court failed to properly exercise "equity" and avoid James' forfeiture under the express terms of the Lease. As previously noted, a court in equity has broad discretion to "do substantial justice." Esmieu, supra. The authority of a trial court to fashion an equitable remedy is reviewed for abuse of discretion.

Sac Downtown Partnership v. Kahn, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). The trial court's equity power is "flexible and fact-specific." Proctor v. Huntington, 169 Wn.2d 491, 503, 238 P.3d 1117 (2010). And under TEDRA, the trial court has "plenary power" to resolve issues. RCW 11.96A.020(1)(2); In re Trust of McKean, 144 Wn. App. at 343.

If there were any merit to James' forfeiture argument, then equity would actually favor forfeiture since it is based on a "full, clear, and strict proof of the legal right thereto." Theisius v. Sealander, 26 Wn.2d 810, 817, 175 P.2d 619 (1946); John R. Hansen v. Pac. Int'l Corp., 76 Wn.2d 220, 228, 455 P.2d 946 (1969) ("unless the right thereto is so clear as to permit no denial"). Written leases commonly contain a clause that more or less restricts the tenant's power to assign, sublet, or transfer—usually the power to do all three, as we have here. A landlord may reserve the right to terminate the Lease if a transfer is made without consent, or ratify the transfer and enforce the other terms of the Lease. A Lease can provide for automatic termination in the event the tenant transferred his interest in the Leased property without the landlord's consent. Washington courts hold enforceable those clauses that require the landlord's consent, even if withheld for a reason sufficient to himself or without giving any reason. Coulos v. Desimone, 34 Wn.2d 87, 94-95, 208 P.2d 105 (1949); Johnson v. Yousoofian, 84 Wn. App. 755, 759-60, 930 P.2d 921 (1996).

As discussed above, the Lease provided for automatic termination if James could not personally perform under the Lease. (CP 22) Personal performance meant farming all 1,225 acres for the nominal \$5.00 annual rent and assumption of the financial obligations. James chose not to perform and instead sought to maximize his return on the sale of his property while seeking to penalize his siblings.

James is on the wrong side of his equity argument. It was his sale and lease termination and his act alone that terminated the Lease. He now seeks to have his cake and it too. James realized in excess of \$300,000 above what his siblings could ever get for the sale of their properties. He enjoyed 20 years of significant profits while paying to his Landlord a nominal rent. And he reaped these profits all while taking an average of \$11,500 in government subsidies on Jerry's parcel alone every two years. (CP 406) When James sold his parcel, he treated the \$157,500 Lease buyout as his own. James acknowledged that if he "let everyone out of their lease that they could now make a better deal with another leaser." (CP 406) But James did not act as if the Lease remained in effect. He did not put the money into the estate account for the benefit of the Landlord, i.e. all of the residual heirs. Rather he kept it all and now sees no inconsistency in his position.

James made a conscious business decision to maximize the return from the sale as opposed to continuing under the Lease. James's argument that he is entitled to personal gain while holding his siblings captive is not a basis to reverse the trial court's order.

F. Attorney fees should be awarded to Respondent against Appellant.

This Court is asked to award Jerry's attorney's fees and costs directly against James under TEDRA, and not out of the estate. James pursued this action for his own benefit, irrespective of the clearly delineated estate plan documents and Lease, which were assets of the estate.

The Lease provides for an award of attorney fees to a prevailing party to a breach. Section 11 of the Lease provides: "[I]n the event of breach by any party of any of the terms and conditions of this Lease, the prevailing party shall be entitled to reasonable attorney fees and court costs against the other party." (CP 21) By assigning the Lease rights to his land and by not personally farming all of the Land, James has breached the Lease. James Hayes predicated his TEDRA action on a challenge to the form of the existing Lease. As such, the claim arises out of the Lease. Jerry Hayes has prevailed in this matter below and urges that the appeal be denied. The contract provides for fees and they should be awarded.

In addition, RCW 11.96A.150 vests discretion with the court the authority to award attorney fees "to any party," "from any party," in an amount as the court deems equitable. RCW 11.96A.150 expressly authorizes the Court of Appeals to make an independent decision on the question of fees to any party. In re Estate of Black, 116 Wn. App. 476, 492, 66 P.3d 670 (2003), aff'd on other grounds, 153 Wn.2d 152 (2004).

In this instance, James has pursued this TEDRA action and the appeal wholly based on his individual interests, and for his own financial gain. While pursuing his own interests James has remained the Personal Representative of the estate. The remedy he sought was to have the terms of the 1993 Farm Lease overridden to permit him to sell his land for hundreds of thousands of dollars, and continue to encumber his siblings' land with a terminated Lease, solely to allow him additional profit to the detriment of his siblings. Not only is there no evidence for this position, it is also contrary to the notion of fairness and responsibility as a Personal Representative. While the trial court awarded Jerry fees against the estate, it is not equitable to make the siblings collectively share in the cost of James' pursuit of a ruling that would have only benefited him. Equity here demands that fees be awarded against James.

V. CONCLUSION

For the above stated reasons and those shown in the record, the Court is asked to deny the appeal of James on all grounds, affirm the trial court for the reasons supported by the record and this briefing and award attorney fees and costs to Jerry and against James.

DATED this 17th day of March, 2014.



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WINSTON & CASHATT, LAWYERS, a
Professional Service Corporation
Attorneys for Respondent

FILED

MAR 17 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

In the Matter of the Estate of

ELMA L. HAYES,

Decedent,

Court of Appeals No. 319156
Superior Court No. 12-400018-1

JAMES L. HAYES,

Petitioner/Appellant,

PROOF OF SERVICE

vs.

JERRY D. HAYES,

Respondent.

STATE OF WASHINGTON)

: ss.

County of Spokane)

Cheryl L. Krengel, being first duly sworn upon oath, deposes and states as follows:

1. At all times hereinafter mentioned I was a citizen of the United States and a resident of the State of Washington, over the age of 18 years, and not a party to this matter.

PROOF OF SERVICE
PAGE 1

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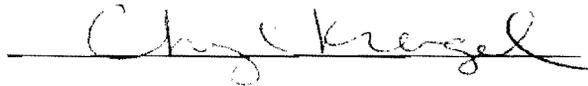
CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 17 day of March, 2014, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Robert P. Hailey
Randall | Danskin
601 W. Riverside Ave., Suite 1500
Spokane, WA 99201

Attorney for Defendant

VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED
BY FACSIMILE
VIA FEDERAL EXPRESS
VIA EMAIL



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