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Court of Appeals  
Division III  
State of Washington

Court of Appeals No. 322297

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WASHINGTON STATE COURT OF APPEALS  
DIVISION III

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STRUNK FAMILY TRUST,

*Respondent,*

vs.

BRIGIT STRUNK,

*Appellant.*

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**AMENDED BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION .....	1
II. FACTUAL STATEMENT....	2
III. ARGUMENT.....	7
A. ALL FINDINGS OF FACT HAVE BECOME VERITIES ON APPEAL.....	7
B. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT.....	7
1. <u>The Statue of Frauds prohibited Brigit Strunk’s claim regarding any oral agreement giving rise to a life estate...</u>	7
2. <u>RCW 5.60.030 prohibits Brigit Strunk from testifying about any alleged oral agreement with her father,.....</u>	10
3. <u>There was insufficient evidence to support creation of a constructive trust.....</u>	11
4. <u>The parties held a landlord tenant relationship, proper process was followed, and Brigit was a tenant at will.....</u>	13
IV. CONCLUSION.....	17

## TABLE OF AUTHORITIES

### WASHINGTON SUPREME COURT CASES:

<i>State v. Hill,</i> 123 Wn.2d 641, 644 (1994) .....	7
<i>Oman v. Yates,</i> 70 Wn.2d 181, 185-86 (1967) .....	7
<i>Holohan v. Melville,</i> 41 Wn.2d 380, 385 (1952) .....	7
<i>Pardee v. Jolly,</i> 163 Wn.2d 558, 182 P.3d 967 (2008) .....	8
<i>Martin v. Shaen,</i> 26 Wash.2d 346, 353, 173 P.2d 968 (1946) .....	9
<i>Manning v. Mount St. Michael's Seminary,</i> 78 Wash.2d 542, 546, 477 P.2d 635 (1970) .....	11, 12
<i>Baker v. Leonard,</i> 120 Wash.2d 538, 547-49, 843 P.2d 1050, 1054-55 (1993) .....	12
<i>Ockfen v. Ockfen,</i> 35 Wash.2d 439, 443, 213 P.2d 614 (1950) .....	12
<i>Kausky v. Kosten,</i> 27 Wash.2d 721, 727-28, 179 P.2d 950 (1947) .....	12
<i>Tuschoff v. Westover,</i> 5 Wn.2d 69 (1964) .....	14
<i>Young v. Riley,</i> 59 Wn.2d 50 (1961) .....	14
<i>Najewitz v. City of Seattle,</i> 21 Wn.2d 656 (1944) .....	15, 16

**WASHINGTON APPELLATE COURT CASES:**

*State v. Eversole*,  
109 Wn. App. 1011 (2001) ..... 7

*Wildman v. Taylor*,  
46 Wash. App. 546, 549, 731 P.2d 541 (1987) ..... 10

*Lasher v. Univ. of Washington*,  
91 Wash. App. 165, 169, 957 P.2d 229, 231 (1998) ..... 10, 11

*Lappin v. Lucurell*,  
13 Wash. App. 277, 534 P.2d 1038 (1975) ..... 11

*Kessler v. Nielsen*,  
3 Wn. App. 120 (1970) ..... 14

*Turner v. White*,  
20 Wash. App. 290, 292, 579 P.2d 410 ..... 15

**SECONDARY SOURCES:**

*Martyn v. First Federal Sav. & Loan Ass'n of West Palm Beach*,  
257 So. 2d 576 (1971) ..... 8

*Carter v. McCall*,  
193 S.C. 456, 151 A.L.R. (1940) ..... 8

*Casolo v. Nardella*,  
275 A.D. 502 (1949) ..... 8

*Montuori v. Bailen*,  
290 Mass. 72 (1935) ..... 9

*Ohmer v. Ohmer*,  
149 Ohio Misc. 2d 60 (2008) ..... 9

*Baker v. Jim Walter Homes, Inc.*,  
438 F. Supp.2d 649 (2006) ..... 9

*Croasdale v. Butell*,  
177 Kan. 487, 280 P.2d 593 (1955) ..... 9

**REVISED CODE OF WASHINGTON:**

RCW 64.04.010 ..... 7, 8  
RCW 64.04.020 ..... 8  
RCW 19.36.010 ..... 9  
RCWA Chapter 59.18 ..... 13  
RCWA Chapter 59.12 ..... 14  
RCWA Chapter 59.04.010 ..... 14  
RCWA Chapter 59.04.020 ..... 14  
RCWA Chapter 64.04.010 ..... 14  
RCWA Chapter 64.04.020 ..... 14  
RCWA Chapter 60.72.010 ..... 14  
RCW 59.18.040 ..... 14  
RCW 59.12.030 ..... 14, 15  
RCW 59.16.010 ..... 15  
RCW 59.04 ..... 15  
RCW 59.18.200 ..... 15  
RCW 59.18.020 ..... 15  
RCW 59.04.050 ..... 15

**OTHER SOURCES**

*Restatement Second, Contracts § 127* ..... 8  
*4 S. Symons, Equity Jurisprudence § 1053, at 119 (5<sup>th</sup> ed. 1941)* . 12  
*17 Wash. Prac., Real Estate § 6.1 (2d ed.)* ..... 12  
*32 Am.Jur., Landlord and Tenant, pp. 81, 83, §§ 66, 68* ..... 16

## I. INTRODUCTION

In The Respondent, Wayne C. May is Trustee of the Strunk Family Trust. The settlor of the family trust is Oscar Strunk. Wayne May is also the legal guardian of Oscar Strunk's person and estate. The appellant, Brigit Strunk is Oscar Strunk's daughter.

This unlawful detainer action was filed by Wayne May, as trustee, in effort to dispossess Brigit Strunk from her occupancy of 65204 Whan Road, Benton City (hereinafter the 'subject property'). Brigit Strunk refused to vacate the property, after notice of termination, despite having no legal title or written agreement entitling her to continue residency thereon. In response, Brigit Strunk alleged only that a verbal promise of her father that "she and her children would always have a place to live" constitutes creation of a life estate.

On December 9, 2013, this matter came before the court, on the regular civil docket, for a show cause hearing before the Honorable Judge Swisher. Attorney for Brigit, Bill Edelblute, informed the court that the Brigit Strunk was filing a counter-claim, the day of the hearing, and the defense was prepared to call witnesses. Due to time constraints on the docket, Judge Swisher asked the parties to seek a special setting from

court administration. Prior to the special setting, a summary judgment motion was made by the trustee and subsequently granted.

## II. FACTUAL STATEMENT

The relevant facts for this unlawful detainer action are simple and straight forward. The Strunk Family Trust is the sole legal owner of the subject property located at 65204 Whan Rd., Benton City. CP 42-44. Brigit Strunk was unlawfully occupying the property as no written agreement exists permitting her possession. To the extent a monthly tenancy was potentially established, proper notice was given to terminate. To the extent an at will tenancy existed, reasonable notice was issued. Brigit Strunk counters and/or justifies her occupancy solely upon an alleged verbal conversation with her father. See Appellants Brief filed herein.

As indicated below, this court may benefit from a basic understanding of the history between the parties in effort to provide proper context. Attorney Shea Meehan, former counsel to Oscar Strunk, filed a declaration in support of summary judgment. CP 80-84. Initially and prior to the eviction action, Shea Meehan was contacted to assist Mr. Strunk in defending a vulnerable adult protection action brought by the former trustee, Stephen Trefts against Oscar's daughter, Brigit Strunk. Id.

Mr. Trefts was the trustee of a trust established by Oscar Strunk and his late wife. *Id.* At the time of Brigit Strunk's eviction, Wayne May was the trustee. *Id.* The vast majority of Oscar Strunk's assets were in the trust, including the subject property. *Id.* The history of the trust indicates that it was established out of concern that Mr. Strunk and his late wife had regarding Brigit Strunk's irresponsibility with finances and decision-making. CP 80-84.

Trustee Stephen Trefts filed a vulnerable adult protection petition as a result of allegations regarding Brigit Strunk's use of Oscar Strunk's finances. CP 80-84. Shea Meehan indicated that Oscar Strunk expressed concern about Brigit Strunk's financial irresponsibility. *Id.* In fact, Mr. Strunk advised Meehan that Brigit "takes it too far" and "goes overboard". *Id.* Ultimately, however, the vulnerable adult protection action was successfully defended and dismissed. CP 81.

Nevertheless, Meehan met with Oscar Strunk and Brigit Strunk after the vulnerable adult protection action. *Id.* Meehan advised both that Oscar was not able to spend money that was in trust on Brigit or her children in the fashion he had been spending his own money because the terms of the trust did not allow for that. *Id.* To the contrary, the terms of the trust specifically limited the spending the trustee may do for Brigit

Strunk and her children so long as Oscar Strunk is alive. Id. Notably, even after Oscar's death, the trust indicates that it is primarily for the benefit of Strunk's grandchildren, not primarily for Brigit Strunk. Id.

As a result of the income that Mr. Strunk had access to, Meehan advised Oscar that his patterns were unsustainable. Id. In meetings with Oscar Strunk and a proposed successor trustee, it was discussed that certain expenses were expenses that Brigit would need to pay, not Mr. Strunk. Id. It had appeared to Shea Meehan, counsel for Oscar Strunk, that Brigit and her children were living solely off the income and resources of Oscar Strunk. CP 82.

Brigit Strunk contacted Shea for a number of weeks expressing concern that her father had 'no money'. Id. On "Mr. Strunk's behalf," Brigit Strunk had asked Shea Meehan to contact the trustee of Oscar Strunk and obtain additional funds. Id. Shea Meehan provides examples of items that gave him concern: "In a 10 day period from July 27 to August 5, there were expenditures of \$1,199.51 at Albertsons, WinCo, Ki-Be Market, Target, and Walmart." Id. According to Shea Meehan, "[t]hese expenditures appeared excessive in light of Mr. Strunk's needs for groceries, gas, and sundries. Id. I was also concerned regarding the amount that was spent in that 10 day period when Mr. Strunk was aware

that the income he has access to each month (i.e. the income not controlled by the trustee) was \$1,247.25.” Additionally, Shea Meehan observed during the same 10 day period, there were cash withdrawals from Mr. Strunk’s account in the amount of \$1,900.00. Id.

On September 19, 2012, Meehan contacted Brigit Strunk to discuss the expenditures. CP 83. He asked what the expenditures were for. Id. She indicated that the expenditures at the Ki-Be Market were for gas for Excursion and she relied on Mr. Strunk for monthly payments of the vehicle. Id. With regard to other expenditures, Brigit Strunk indicated that WinCo would be for groceries and that the expenditures at places such as Target or Walmart “might be for paper towels”. Id. Meehan also observed expenditures for items such as Zumba Fitness. Id. Ms. Strunk admitted to Meehan that this was something she purchased for herself with Mr. Strunk’s money. Id.

Attorneys take their ethical obligations to clients very seriously. Shea Meehan is no exception. CP 83. Shea Meehan did his best to maintain a normal client-lawyer relationship with Oscar Strunk. Id. Ultimately, Shea Meehan was led to conclude that Mr. Strunk had capacity but his capacity was diminished to the point that he was at risk of substantial harm unless action was taken. CP 84. In light of Oscar’s

conversations with Shea Meehan and what he observed within Oscar's bank records; Shea Meehan became convinced that Mr. Strunk was unable to control the degree to which Brigit Strunk and possibly others around him were spending his money. Id. As a result, Shea Meehan petitioned the court for a guardianship over Oscar Strunk. Id. At such time, Shea Meehan did not believe there was any functional alternative in place that could prevent Oscar from requiring a guardian over his person and estate. CP 84.

Meehan's petition was granted. On April 12, 2013, Wayne May was appointed full guardianship over Oscar Strunk's person and estate. CP 87. Thereafter, on July 12, 2013, Wayne May was appointed Successor Trustee for the Strunk Family Trust. CP 23-27. Stepping into Oscar Strunk's shoes as guardian and trustee for the family trust, Wayne May filed a complaint for unlawful detainer on November 21, 2013. CP 1-3.

Acting as trustee for the trust, Wayne May, claimed ownership over the rental property located at 65204 Whan Road, Benton City, Washington. Id. The trustee alleged no written agreement existed which entitled Brigit Strunk to possession of the property. Id. A 20-day notice to terminate tenancy was personally served upon Brigit Strunk on October 18, 2013. Id. The trustee further alleged that Brigit Strunk has failed to

vacate the premises and was holding over without any right to possession after expiration of the notice to terminate. Id.

### III. ARGUMENT

#### A. All findings of fact have become verities on appeal.

The court below has issued a number of findings of fact regarding ownership of the subject property, lack of a written lease agreement, service of notice of termination, and Brigit Strunk's tenancy. Along these lines, Brigit Strunk's opening brief fails to challenge or object to any findings of the court. Such failure to object to the court's findings renders them verities on appeal. **State v Hill**, 123 Wn.2d 641, 644 (1994); **State v Eversole**, 109 Wn.App. 1011 (2001). Accordingly, the findings of fact issued by the court below shall constitute accepted facts on appeal.

#### B. The trial court did not err in granting summary judgment.

1. The Statute of Frauds prohibited Brigit Strunk's claim regarding any oral agreement giving rise to a life estate.

Real property conveyances, including gifts, must be accomplished by deed. RCW 64.04.010; **Oman v Yates**, 70 Wn.2d 181, 185-86 (1967)(gifts in general); **Holohan v Melville**, 41 Wn.2d 380, 385 (1952)(gift of real property). Washington jurisprudence demands a writing to transfer any interests real property for good reason. Accordingly, statute

requires “[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized ... to take acknowledgment of deeds.” RCW 64.04.020.

Such law is commonly understood and referred to as the statute of frauds. Likewise, the statute of frauds, by its terms, applies to “[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate”. RCW 64.04.010; **Pardee v Jolly**, 163 Wn.2d 558, 182 P.3d 967 (2008).

The term "interest" in land, as used in the Statute of Frauds, means some portion of the title or right of possession. **Martyn v First Federal Sav. & Loan Ass'n of West Paulm Beach**, 257 So. 2d 576 (1971); **Carter v McCall**, 193 S.C. 456, 151 A.L.R. (1940). Under the Restatement Second of Contracts, an interest in land within the meaning of the statute of frauds is "... any right, privilege, power or immunity, or combination thereof, which is an interest in land under the law of property and is not 'goods' within the Uniform Commercial Code." Restatement Second, Contracts § 127. In fact, an oral agreement between tenants in common whereby each agrees not to bring an action of partition against the others is void since the right to bring partition is an interest in real property. **Casolo v Nardella**, 275 A.D. 502 (1949). Also, a contract to

surrender the possession of land, or to forbear for a time to exercise a right to take and retain possession, is within the Statute of Frauds. **Montuori v Bailen**, 290 Mass. 72 (1935). Most importantly, the promise of a life estate in property is subject to the Statute of Frauds. **Ohmer v Ohmer**, 149 Ohio Misc. 2d 60 (2008).

Moreover, "land" or "real estate" includes everything belonging or attached to it, above and below the surface. **Baker v Jim Walter Homes, Inc.**, 438 F. Supp.2d 649 (2006). Thus, growing grass has been considered a part of the realty so that an agreement allowing it to be severed, such as for grazing purposes, must be in writing. **Croasdale v Butell**, 177 Kan. 487, 280 P.2d 593 (1955). Therefore, without a writing of some form, Brigit's claim of a life estate to the subject property must fail.

Additionally, RCW 19.36.010 provides in part: "[A]ny agreement, contract, and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith." Indeed, without a writing, Ms. Strunk's claim must be dismissed. No authority exists to support the proposition asserted by Brigit Strunk herein. Most importantly, Brigit Strunk's assertion in favor of a life estate is contradicted by the written intent of Mr. Strunk evidenced in the trust document itself. Likewise, had

Oscar Strunk's intention been to provide this daughter with a life estate, the trust documents evidence Mr. Strunk had adequate opportunity to effectuate a proper, written, legal conveyance. Certainly, the spirit of the law behind the statute of frauds was created specifically to resolve claims like Brigit Strunk attempts to create.

2. RCW 5.60.030 prohibits Brigit Strunk from testifying about any alleged oral agreement with her father.

Assuming the court gets past the statute of frauds, the Deadman Statute is an additional hurdle for Ms. Strunk. The purpose of said statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with a dead or, in our case, incompetent person. **Wildman v. Taylor**, 46 Wash.App. 546, 549, 731 P.2d 541 (1987). Washington law prohibits such self-serving testimony namely because the other party is not available or able to contest. Where the law has silenced Oscar by declaring him legally incompetent, this statute operates to silence Brigit.

Specifically, "an adversely interested party cannot testify indirectly to that to which he is prohibited from testifying [about] directly, and thereby create an inference as to what did or did not transpire between himself and the [deceased/incompetent] person." **Martin v. Shaen**, 26 Wash.2d 346, 353, 173 P.2d 968 (1946); **Lasher v. Univ. of Washington**,

91 Wash. App. 165, 169, 957 P.2d 229, 231 (1998). A person is a party-in-interest for purposes of the deadman's statute when he stands to gain or lose in the action in question. **Lappin v. Lucurell**, (1975) 13 Wash.App. 277, 534 P.2d 1038, review denied. Clearly, Brigit Strunk, is a party-in-interest herein. Since Brigit relied solely on her own declaration concerning statements from her father who is now legally declared incompetent, the court correctly dismissed her claim.

3. There was insufficient evidence to support creation of a constructive trust.

Constructive trusts arising in equity are imposed only when there is clear, cogent, and convincing evidence of the basis for impressing the trust. **Manning v. Mount St. Michael's Seminary**, 78 Wash.2d 542, 546, 477 P.2d 635 (1970). However, this court must not consider any equitable relief given the certainty of the law as indicated above. Furthermore, Ms. Strunk has been found by the court previously to have engaged in gross financial exploitation of her father such that equity has no basis to intervene. Finally, given the declaration and claims of Ms. Strunk, there is insufficient evidence for her to meet the heightened burden of proof standard required for a constructive trust.

Courts use a variety of language to convey the circumstances when courts will intervene to compel the holder of legal title to convey the

beneficial interest to the one who justly deserves it. **Baker v. Leonard**, 120 Wash. 2d 538, 547-49, 843 P.2d 1050, 1054-55 (1993). While fraud, misrepresentation, bad faith, or overreaching generally provide the rationale for the imposition of a constructive trust, **Manning**, 78 Wash.2d at 546, 477 P.2d 635; **Ockfen v. Ockfen**, 35 Wash.2d 439, 443, 213 P.2d 614 (1950), constructive trusts are also imposed in broader circumstances not arising to fraud or undue influence. **Baker**, 120 Wash. 2d at 547-49. In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust. **Kausky v. Kosten**, 27 Wash.2d 721, 727-28, 179 P.2d 950 (1947). Nothing asserted by Ms. Strunk suggests she justly 'deserves' the property in question or that the law must intervene so she is not 'wronged'. To the contrary, she has made no assertion that she has been wronged. In fact, by her own admission, she has been residing in the property, rent free for years. Further, the undisputed facts showed: she made no improvements to the property, paid very little rent temporarily, the home is in a completely unsafe condition thereby creating a liability to

its legal owner, she has never paid the taxes, never paid for insurance, in fact, liability insurance cannot be obtained due to the condition of the property, she has only recently begun paying for her own utilities, and she is currently wasting this valuable trust asset. The only equitable relief lied with the court returning the property to the trust as sole legal and rightful owner.

4. The parties held a landlord tenant relationship, proper process was followed, and Brigit was a tenant at will.

Landlord and tenant law is one of the major branches of the practice of real estate law. Entire books, even multi-volume treatises, are written on the subject. However, the great bulk of Washington law on landlord-tenant relations is contained in decisions of the Washington State Supreme Court and the Washington State Court of Appeals, which must number some 800. 17 Wash. Prac., Real Estate § 6.1 (2d ed.). Statute law, though important, is supplemental. Id. There is no comprehensive landlord-tenant code. Id. The nearest thing to it is the Residential Landlord-Tenant Act, RCWA Chapter 59.18, which governs certain aspects of the landlord-tenant relationship, mainly condition of the premises, tenant deposits, evictions, and unlawful detainer for most, though not all, residential tenancies. Id. The general unlawful detainer act is RCWA Chapter 59.12. Other statutes touch upon limited aspects of

landlord-tenant law, such as RCWA 59.04.010 to.020 and RCWA 64.04.010 to.020, which are statutes of frauds regulating the form of certain leases; and RCWA 60.72.010, which is a landlord's rent lien statute. Id.

The relationship between Brigit Strunk and the landowner, the trustee, can only be that of a landlord and a tenant. Provided that Ms. Strunk possess property in which she holds no legal interest, and in which her parents permitted her to enter/occupy, and that she paid some amount for rent years ago, a landlord tenant relationship appears. Thus, the landlord tenant chapters govern. Likewise, the relationship here fails to qualify as a living arrangements exempted from said chapter. See RCW 59.18.040. Along these lines, the trustee's unlawful detainer action is proper and seeks to restore possession to the property's rightful, legal owner. The unlawful detainer statute, RCW 59.12.030, et seq., is a special statutory procedure to determine the right to possession. **Tuschoff v Westover**, 5 Wn.2d 69 (1964); **Young v Riley**, 59 Wn.2d 50, (1961); **Kessler v Nielsen**, 3 Wn.App. 120 (1970). Ergo, the court was only called upon to determine which party has the right to properly possess the property at issue. Such issue was ripe for summary judgment based upon the law and undisputed material facts.

Despite the existence of a landlord tenant relationship and the applicability of the landlord tenant laws, the nature of Brigit Strunk's leasehold interest is not defined by statute. *See* RCW 59.12.030, 59.16.010, 59.04 et seq. Accordingly, there is no statutory procedure for termination thereof. *See* RCW 59.18.200, 59.12.030. The undisputed facts show that Brigit Strunk's tenancy was for an indefinite term, not a periodic or month to month tenancy. Additionally, there were no payments constituting "rent" nor did any agreement exist which identified a rental amount in which Brigit Strunk must pay in exchange for possession. Hence, no 'monthly or periodic rent' has been 'reserved'. *See* RCW 59.18.020, 59.12.030. Likewise, Brigit Strunk's tenancy cannot be classified as a tenancy by sufferance, because, the undisputed facts show that she was given permission to occupy the property when she entered the same. *See* RCW 59.04.050. When a tenant occupies premises with permission of the owner, and such permission is terminable without notice and the agreement provides for no payment of rent, the result is known at common-law as a tenancy at will. **Turner v. White**, 20 Wash.App. 290, 292, 579 P.2d 410

The 1944 decision of the Supremes in *Najewitz v City of Seattle*, 21 Wn.2d 656 (1944), clearly established the existence of tenancies at will.1 In **Najewitz**, the caretaker of a city gravel pit, whose employment

was at will and whose home on the premises was included as part of his employment, and thus, held to be a tenant at will. Id. Such facts, mirror Strunk's tenancy. Significantly, at common law, an at will tenancy is terminable without notice. 32 Am.Jur., Landlord and Tenant, pp. 81, 83, §§ 66, 68, **Najewitz**, 21 Wn.2d at 658.

To reach its conclusion in **Najewitz**, the Court held that an agreement creating a tenancy which does not fall within any of the four categories of tenancy defined by statute (i.e. a tenancy at will), suggests the rights of the parties can only be properly determined by resorting to the common law. 21 Wn.2d at 659. Measured by such rules, the agreement clearly creates a tenancy at will when the term is indefinite and no monthly or periodic rent is reserved. Id. As a result, **Najewitz** reasoned there is no time basis from which a thirty-day notice of termination could start. Id. In other words, the tenancy was terminated when demand for possession was made upon the land, and the only possible right a tenant may have had thereafter is a reasonable time within which to vacate. **Najewitz**, 21 Wn.2d at 659. Accordingly, the trustee's notice of termination providing for over 30 days to vacate was sufficient.

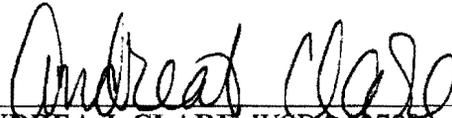
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**IV. CONCLUSION**

Based on the foregoing, the respondent/trustee Wayne May, hereby respectfully requests the court affirm the trial court's order granting summary judgment.

**DATED** this 10 day of July, 2014.

TELQUIST ZIOBRO McMILLEN, PLLC

A handwritten signature in cursive script, appearing to read "Andrea Clare", is written over a horizontal line.

ANDREA J. CLARE, WSBA #37889

*Attorneys for the Appellant*

**CERTIFICATE OF FILING AND SERVICE**

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on July 10, 2014, I also caused a true and correct copy of the foregoing document to be served on the following counsel, via Legal Messenger:

William Edelblute  
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Kennewick, WA 99336

**DATED** this 10 day of July, 2014, at Richland, Washington.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: Amber Peters

**AMBER PETERS,**

*Legal Assistant to Andrea J. Clare*