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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

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IN THE MATTER OF THE ESTATE OF  
LESTER J. KILE, Deceased

CODY KENDALL,

Respondent,

v.

JEANNIE KILE,

Appellant.

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

During his life, Lester J. Kile provided for his daughter (Appellant Jeannie Kile) and made sure she had the farm. He leased his farm to her for decades. Income from that farm was paid to her. In his will, he provided that the farm would be hers. And in her divorce, he came to her aid to keep the farm from being taken from her by her husband. The order awarding the farm to Respondent Cody Kendall does violence to the wishes of Lester J. Kile, both as shown by his actions during his life and by the express provisions of his Last Will and Testament (“the Will”). The probate court’s order has effectively rewritten the Will, and supplanted in its place a misreading of a litigation document, not a testamentary document. The purpose of this appeal is to correct that injustice and restore the consistent desire expressed by Lester J. Kile for decades before his death, and most importantly, in the document he left to dispose of his property upon his death. For that reason, Appellant asks the Court to reverse the court below.

## II. OBJECTION TO RESPONSE STATEMENT OF CASE

As an initial matter, Respondent’s statement of the case is rife with uncited statements. “Reference to the record must be included for each factual statement.” RAP 10.3(5). Appellant requests that this court disregard uncited statements.

### III. ARGUMENT

#### A. TEDRA Does Not Command Blanket Deference To the Probate Court

Instead of providing a standard of review for each issue, *see generally* RAP 10.3(a)(6), (b), Respondent argues in favor of a general deference to the probate court for TEDRA cases. His argument is based on a single case that does not stand for that proposition. Specifically, that single case held only that courts have discretion to deny continuances for discovery in TEDRA actions. *In re Estate of Fitzgerald*, 172 Wn. App. 437, 447-48, 294 P.3d 720 (2012). There is no case that suggests the filing of a TEDRA petition somehow transmutes the ordinary standards of review into more deferential standards. Accordingly, the Court should apply the well-settled standards as identified in Appellant's opening brief.

#### B. The Will is Unambiguous that the Trustee Can Choose Who Shall Operate the Farm

The primary goal in construing a will is to ascertain the intent of the testator. *Kjosness v. Lende*, 63 Wn.2d 803, 807, 389 P.2d 280 (1964) (quoting *Shufeldt v. Shufeldt*, 130 Wash. 253, 258, 227 P. 6, 8 (1924)). Whenever possible, that intent should be ascertained "from the language of the will itself, unaided by extrinsic facts." *Id.*

The Will unambiguously named Jeannie Kile as trustee of the farm: “I give, devise and bequeath to my daughter, Jeannie Kile, as Trustee in trust, all of my interest in Kile Farms, Inc. . . . and any real property and personal property held in my name that is leased or managed, or otherwise utilized by Kile Farms, Inc.” Ex. 1 at 4. The Will also unambiguously granted Jeannie Kile, as trustee, the authority to choose an operator: “the Trustee shall manage the Farm pursuant to common practices of farming, making arrangements or contracts for appropriate payment to persons responsible for farming activity, including persons related to the Trustee.” Ex. 1 at 4. Indeed, on summary judgment, Judge Clarke concluded that “the Last Will and Testament unambiguously grants Jeannie, as trustee of the Testamentary Trust therein, the power to manage the farm and make contracts and arrangements for its operation.” CP at 113. The transcript of the summary judgment oral ruling confirms a broad grant of authority to Jeannie to choose an operator. 1 RP at 9-10.

Respondent’s argument is an attempt to flip the summary judgment order on its head. Despite the fact that the summary judgment order held explicitly that Jeannie could choose her operator, Cody argues that it should be used to open the door to extrinsic evidence to try and establish the opposite.

While it is true that the summary judgment order found the word “operates” ambiguous, that word appears in a paragraph unrelated to the issue of *who* should operate the farm. The third paragraph of section E is about payment of income. Ex. P1 at 4-5. The Will first awards income to Jeannie: “The income from the trust . . . shall be distributed on a periodic basis, at least annually to Jeannie Kile.” The Will then provides that Cody can receive income if he is operating the farm: “If however, Cody Kendall operates the farm at any time herein, then he shall be entitled to two-thirds of such income and Jeannie Kile shall be entitled to one-third.”

The statement is a conditional. It does not say that Cody “shall” operate or “has the right” to operate the farm. Lester could have easily written that into his will had it been his desire. Instead, it simply provides that if he happens to operate the farm, he would get a share of the income from the farm. Full stop.

The “operates” provision creates no ambiguities with regard to Jeannie’s authority to name the operator. Read together, the provisions provide that Jeannie can choose the operator, and if she chooses Cody, he will get two-thirds of the income. That also means that if Jeannie does not choose Cody, he is not entitled to any income. Indeed, the Will explicitly provides that Jeannie is the beneficiary of the income. Ex. 1 at 4. It is only if she chooses to have Cody operate the farm that he is entitled to any

income. Ex. 1 at 4-5. By being structured this way, the Will specifically anticipates that Cody is merely a possible operator.

Respondent's argument is an exercise of form over substance. A necessary prerequisite to his argument is that the existence of an ambiguity anywhere in a Will means you can disregard the language everywhere. That flies in the face of a court's primary obligation, which is to give effect to the testator's will with resort only to the text, wherever possible. *Kjosness*, 63 Wn.2d at 807. By resorting to extrinsic evidence to conjure a right for Cody to be operator, the probate court contradicted the express terms of a will. It effectively modified the Will using parol evidence, which is not allowed. *In re Estate of France*, 64 Wn.2d 703, 706, 393 P.2d 940 (1964). Accordingly, the probate court committed an error of law and should be reversed.

C. The Probate Court Erred in Applying Judicial Estoppel

Judicial estoppel applies when (1) a party takes a clearly inconsistent position in two proceedings, (2) acceptance of the position in the second proceeding would create a perception that either the first or second court was misled, and (3) the inconsistent position either benefitted the party in the first action or was accepted by the court in the first action. *Taylor v. Bell*, 185 Wn. App. 270, 281-83, 340 P.3d 951 (2014).

Application of these factors is reviewed de novo. *Baldwin v. Silver*, 147 Wn. App. 531, 535, 196 P.3d 170 (2008).

In his response, the Respondent has wisely abandoned any argument that Jeannie benefitted from her allegedly inconsistent statements. Instead, the Respondent attempts to invoke the “accepted by the court” standard to support estoppel. Unfortunately for Respondent, the probate court never found that any position was accepted by the dissolution court and its ruling is not based on that prong. *See* CP 204-225. Furthermore, the Respondent cites to no evidence that an allegedly inconsistent position was accepted by the dissolution court. That is because there is no such evidence anywhere in the record.

Additionally, Jeannie’s testimony was consistent in the dissolution and probate actions. The Respondent continues to ignore the actual testimony of Jeannie before the dissolution court that dovetailed perfectly with her position before the probate court. That testimony was filed at trial before the probate court and was identified in Appellant’s opening brief on pages 24 through 26. The response brief fails to address it in any way or even refer to the opening brief.

Respondent also continues to ignore the dissolution court’s findings, which fail to even mention Cody at all, let alone show some belief on behalf of the dissolution court that Cody had any right to operate

the farm. *See* Ex. P35. Instead, the findings entered by the dissolution court are perfectly consistent with Jeannie's position in front of the probate court. *See* Ex P35. The findings' harmony with Jeannie's argument is explained on pages 27 to 30 of Appellant's opening brief. Respondent's response brief does not engage in any way with Appellant's position. Similarly, Respondent also fails to address the fact that any acceptance by the court was wiped out on appeal, which deprives the court of the ability to apply judicial estoppel. *Northwest Cascade, Inc. v. Unique Const., Inc.*, 187 Wn. App. 685, 701 n.9, 351 P.3d 172 (2015). The failure of Respondent to engage with Appellant's argument is due to the fact that there is no argument available to Respondent to contest Appellant's view.

In short, Respondent has failed to provide a single basis to support the probate court's application of judicial estoppel. Accordingly, the trial court's use of that doctrine was error and should be reversed.

D. The Record Provides No Basis for Removal of Jeannie as Personal Representative or Trustee

Respondent's removal argument is a morass of conflated standards and disconnected allegations. First, Respondent combines arguments for removal as personal representative and removal as trustee, despite the fact that the two removals are governed by different standards (chapter 11.28

RCW for personal representatives and chapter 11.98 RCW for trustees). It should be noted that the Respondent cites only to trustee related authority and provides no authority regarding Jeannie's role as personal representative. Second, Respondent throws out several allegations that are unrelated to any of the standards he cites in the hopes that something sticks. Third, Respondent ignores the actual findings made by the probate court in an attempt to manufacture a basis for removal.

Where a party fails to cite to any authority, the court may assume that none exists. *King County v. Seawest Inv. Associates, LLC*, 141 Wn. App. 304, 317, 170 P.3d 53 (2007). Accordingly, I will address those arguments for which Respondent provided some authority.

With regard to the trustee position, Respondent asserts that Jeannie made discretionary distributions of farm income for her own benefit in violation of RCW 11.98.200. For this prospect, he cites to page three of Exhibit P24, a letter-report from Respondent's expert Brian Madison. First of all, Mr. Madison testified that he never reviewed Jeannie's personal or business accounts, 3 RP at 224. More importantly, the letter never says Jeannie distributed any income to herself. A review of the cited page shows that Mr. Madison never identifies a single distribution from the trust to Jeannie. *See* Ex. P24 at 3. Instead, the letter describes the fact that Jeannie is the sole income beneficiary under the terms of the

Will because Cody is not operating the farm. Ex. P24 at 3. The letter also describes the lease arrangement between Lester J. Kile (and later his estate) and Kile Farms, Inc. That lease arrangement is explained in more detail in on page 36 of the Appellant's opening brief. In short, the argument for discretionary distributions has no basis in the record.

Respondent's second argument also relates to trustees. Respondent cites to *In re LeFevre*, 9 Wn.2d 145, 113 P.2d 1014 (1941), asserting that strict liability applies to the comingling of funds. However, he identifies no comingling whatsoever with Jeannie's personal accounts. In fact, his own expert testified that there was no evidence of comingling. 3 RP at 233. It is that same expert to whom Respondent cites in support of his argument in favor of comingling. Even the direct source cited, Ex. P24, fails to identify comingling of personal funds. Accordingly, there is no basis to apply *LeFevre*.

Furthermore, the facts of *LeFevre* show that it has no application here. In that case, a guardian of a minor took possession of cash proceeds and placed them in a bank account in accordance with court order. 9 Wn.2d at 147, 150. However, the guardian also placed some of her own money into the same account. *Id.* at 147. Some years later, and without the required notice or court order, the guardian invested all of the funds in bonds in her own name. *Id.* at 147, 155. The company that issued the

bonds failed and all money was lost. *Id.* at 147-48. The court found liability based solely on the guardian's taking of the funds in her own name. *Id.* at 158-59. No such conduct exists here. Accordingly, the case is inapposite.

Cody accuses Jeannie of violating RCW 11.106.020 by failing to provide an accounting to Cody. RCW 11.106.020 requires a trustee to provide an annual statement to each "permissible distributee." A permissible distributee is "a trust beneficiary who is currently eligible to receive distributions of trust income of principal." RCW 11.98.002 (emphasis added). Cody was eligible to receive distributions only if he was operating the farm. Ex. P1 at 4-5. As Jeannie decided to have someone else operate the farm, Cody was not a permissible distributee and no annual statement was owed to him.

The final accusation for which any legal authority is provided is that removal was appropriate based on bad will generated by litigation. First of all, the absence of any facts to support such a finding are established in detail on pages 42 to 43 of the Appellant's opening brief. The response brief fails to engage with Appellant's argument in any way. Second, Cody cannot provide any evidence from Jeannie of this ill will. In his response on page 19, Cody provides two quotes from the probate

court, not Jeannie, in support of his argument. The probate court's statements are not evidence.

Troublingly, for the second time, Cody has misrepresented to the court that a quote (the "huge disappointment" quote) came from Jeannie when Jeannie never said anything like it. The verbatim report of proceedings clearly shows the quote came from the probate court. 4 RP at 462. This same misrepresentation was made in Respondent's response to the motion for discretionary review and was corrected in Appellant's reply in the motion for discretionary review. Despite previously being corrected, Respondent persists in attempting to mislead the court.

Cody's remaining allegations regarding ill will are not supported by the record, and no citations to the record attend them. They should be disregarded. RAP 10.3(5) ("Reference to the record must be included for each factual statement").

It bears repeating that the basis offered by the probate court for removing Jeannie from her positions was the breach of two duties that did not exist. Specifically, the court's finding number 20 and conclusion number six state that Jeannie breached a duty by failing to appoint Cody as operator of the farm and turn over two-thirds of the profit to him. CP at 210-11, 216. As no duty existed to appoint Cody as operator or pay him

two-thirds of the income, Ex. P1 at 4-5, there is no breach warranting removal.

The remaining allegations of alleged breaches are unsupported by legal authority and have been shown to be without factual basis in Appellant's opening brief. One of the accusations, however, misrepresents the terms of the Will in ways that warrant a specific response.

Nothing in the Will requires farming to be performed by a family member. The farm trust is set to persist "as long as there are family members willing and able to farm or manage the farming activity." Ex. P1 at 4 (emphasis added). By being phrased in the disjunctive, this provision requires only one of the roles to be performed by a family member. In other words, if Jeannie continues to manage the farm, that is sufficient to keep the trust going, irrespective of who is farming.

This interpretation is confirmed by a later provision which states: "The Trust shall be terminated and the property sold only in the event that Jeannie Kile and Cody Kendall are both unable or unwilling to serve as Trustee and manage the farm and there are no beneficiaries under this Will who are willing to farm such Farm property." Ex. P1 at 5 (emphasis added). By this provision being written in the conjunctive, it shows that both conditions must be met—neither family member willing to manage

and no family members willing to farm—before the trust will terminate. Accordingly, as long as Jeannie is managing the farm, she can appoint non-family operators of the farm.

Every basis for removal of Jeannie as trustee (or personal representative) provided by Respondent is either not supported in law or not supported in fact. Furthermore, the probate court was obligated to find that removal was “clearly necessary to save trust property,” *In re Estate of Ehlers*, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996). No such finding was made. Accordingly, even had any of the bases proffered by Respondent had merit, the record still does not make a sufficient finding to support removal. Accordingly, the court should reverse the court’s decision and reinstate Jeannie.

E. The Damages are Not Supported by Substantial Evidence

The purpose of a damages award is not to provide a windfall to another party but to place the damaged party in the position he or she would have occupied had the injury not occurred. *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 544, 871 P.2d 601 (1994).

The sole argument offered by Respondent in support of the probate court’s damages award is that the award is based on the report of Renee Grandinetti and thereby supported by substantial evidence. Respondent ignores the fundamental flaws in Ms. Grandinetti’s report that render it

useless. Indeed, Respondent fails in any way to rehabilitate Ms. Grandinetti's report.

First of all, it is important to remember that all damages awarded in this case flowed from alleged breaches of nonexistent duties. The basis for damages was a failure to pay Cody two-thirds of the farm income and a failure to let Cody live on the farm property, two nonexistent obligations that have no basis in the Will. Those duties were conjured solely by resort to extrinsic evidence to contradict the unambiguous terms of the Will. Accordingly, there were no damages because there was no breach.

Even if there was a basis to award damages for nonpayment of farm income, Ms. Grandinetti's analysis is so fundamentally flawed as to not constitute substantial evidence. As explained in greater detail in the Appellant's opening brief, Ms. Grandinetti failed to account for the basic costs of operating the farm, costs that Jeannie bore personally. Despite the fact that wheat cannot grow without seeds, Ms. Grandinetti did not include any expenses for seeds. Despite the fact that equipment cannot run without fuel, there were no costs for fuel included in Ms. Grandinetti's calculation. Ms. Grandinetti's omission of these and other costs is uncontested in the record. The cost omissions were significant and accounting for the missing costs (as experts Allen Hatley and Todd

Carlson have done in their testimony and exhibits R227 and R228) reduced damages to approximately \$66,000.

Ms. Grandinetti made other mistakes. She failed to account for a \$25,000 lease payments from Kile Farms, Inc. to Lester Kile (and later his estate). She failed to account for \$89,273.31 in proceeds from prior sales held in bank accounts owned by the trust, the estate, and Kile Farms, Inc. Ex. R224. Cody took those bank accounts after he was appointed successor trustee. *Id.* This fact is uncontested in the record.

When Ms. Grandinetti's calculations are adjusted to account for all of these mistakes, the result is that Cody actually was net positive \$22,535.31. In other words, there were no damages.

Both the probate court and Respondent ignored the flaws and omissions in Ms. Grandinetti's report. The flaws create an inappropriate windfall for the Respondent by awarding proceeds of the farm without accounting for both the significant costs he would have had to incur as well as the farm income he actually received. Because no reasonable fact finder could find that one can grow wheat without seeds, the damages award should be vacated.

F. The Probate Court's Award of Attorney Fees and Costs Was Based on Breaches of Non-Existent Duties

The only support Respondent can muster for the fee and cost award is a conclusory statement that Jeannie breached her fiduciary obligation. As established above and in Appellant's opening brief, the alleged breaches were based upon false duties that did not arise from the Will. Without a duty there cannot be a breach. Therefore, the award should be vacated and the funds executed upon to pay the fee judgment should be ordered returned.

G. Fees Should Be Awarded to Appellant

Appellant renews her request for fees in this case. Fees are available under RAP 18.1 and RCW 11.96A.150. The response brief's inability to even address the arguments raised by Appellant's opening brief makes plain the lack of substance to Respondent's opposition to this appeal. Accordingly, fees are appropriate.

H. The Findings' Lack of Evidentiary Support is Made Plain by Respondent's Inability to Muster Any

Unable to provide evidentiary support for the court's baseless factual findings, Cody makes a blanket assertion, without any basis in fact or law, that challenges to factual findings are outside the scope of this appeal. The notice filed on July 6, 2015, that began this appeal

specifically sought review of the “Judgment entered on May 21, 2105, and the attendant findings of fact and conclusion[s] of law.” CP at 417. A copy of the findings and conclusions were attached. CP at 430-46. Accordingly, the challenged findings are well within the scope of review.

Cody’s inability to muster any factual support for the challenged findings is telling. Given the dearth of evidence in the record supporting the challenged findings, this Court should conclude that the findings are not supported by substantial evidence in the record.

#### IV. CONCLUSION

The most consistent characteristic of Respondent’s Response Brief is its lack of responsiveness. Respondent has no answers to the arguments presented in Appellant’s opening brief, so he resorts to deflection, distraction, and outright misrepresentation.

The probate court’s errors in this case flow from its rewriting of the Will through extrinsic evidence. Appellant asks this Court to restore the Will to its plain meaning, vacate the court’s orders below, restore Appellant as trustee and personal representative, and award reasonable fees and costs.

RESPECTFULLY submitted this 2 day of September, 2016.

  
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