

**FILED  
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Division III  
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No. 35879-8-III

**COURT OF APPEALS DIVISION III**

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IN RE THE ESTATE OF  
HELEN LOUISE GIORGI GRIMSLEY OWEN,  
*Deceased.*

Paul Grimsley,  
*Appellant*

v.

Karen Grimsley, Personal Representative,

Owen Grimsley Homestead Trust  
a Massachusetts Trust,  
*And*

Lorna Johnson and Douglas Barnes,  
as individuals and in their Marital Community,  
*Respondent(s).*

Other parties:

Michael Grimsley, Beneficiary  
Diane Grimsley, Beneficiary

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**BRIEF OF APPELLANT**

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APPEAL FROM THE SUPERIOR COURT FOR  
SPOKANE COUNTY

Hon. Timothy Fenessy  
Cause No. 15-4-00818-0  
(consolidated with 16-4-01713-6)

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR..... 1  
A. Assignments..... 1  
B. Issues on Appeal..... 2

III. ARGUMENT..... 5  
3.1 Introduction..... 5  
3.2 The Trial Court erred in denying the Appellant's motion for Change of  
Venue under RCW11.96.050(3)..... 7  
    3.2.1 Unlawful Drafting/Practice of law..... 12  
    3.2.2 Claims under CR21/23B..... 13  
    3.3.1 Relief was due the Appellant against the PR as a matter  
    of law..... 11  
    3.3.3 Orders on Summary Judgment didn't comport with  
    CR 56(d)..... 15  
3.4. The PR's Summary Judgment Motion against the Appellant should  
have been denied in its entirety..... 15  
    3.4.2 No legally cognizable debt asserted by the PR..... 16  
    3.4.2 No legally cognizable debt was asserted by the PR nor  
    should have been granted..... 16  
3.5. Trial court erred in denying the Appellant' motion to disqualify an  
attorney from the same firm as the Personal Representative's attorney  
from representing the OGH or Lorna Johnson as its principle,  
because the PR did not have the authority to waive an imputed  
conflict of interest between beneficiaries and another party under  
RPC 1.7 and RPC 1.10..... 17  
3.6. Any further testimony or offers of evidence by interested parties (all  
of them) should have been precluded by The Dead Man's Statute  
(RCW 5.60.030)..... 19  
3.7 The Trial Court erred in not recognizing the Appellant's right to  
compulsory set-off against whatever judgments or obligations were  
imposed..... 25  
3.8. It was not "just" for the court to order the PR's attorney fees or  
administrative costs to be borne by the Appellant under RCW  
11.96A.150 ..... 25

IV. CONCLUSION..... 26

## TABLE OF AUTHORITIES

### STATUTES

RCW 2.48.180.....	3, 13
RCW 4.16.040.....	4, 17, 24
RCW 5.60.030.....	4, 19, 21
RCW 7.52.010.....	16
RCW 11.12.010.....	3, 13
RCW 11.12.230.....	27
RCW 11.28.240.....	8
RCW 11.28.250.....	3, 11
RCW 11.68.070.....	3, 11
RCW Chapter 11.96A.....	9, 13
RCW 11.96A.050(2), (3), (4) and (5).....	3,7, 8, 27
RCW 11.96A.060.....	27
RCW 11.96A.150.....	2, 5, 25
RCW Chapter 11.98A.....	10
RCW Chapter 23B.....	4, 13
RCW 23.90.040(4).....	10
RCW 64.28.010.....	16
RCW 64.28.020(1).....	16

### CASES

<i>Bentzen v. Demmons</i> , 68 Wash.App. 339, 344, 842 P.2d 1015 (1993).....	21
<i>Diel v. Beekman</i> , 7 Wash.App. 139, 152, 499 P.2d 37 (1972).....	22
<i>In re Estate of Burmeister</i> , 70 Wash.App. 532, 539, 854 P.2d 653 (1993) (quoting former RCW 11.96.140 (1994), repealed by LAWS OF 1999, ch. 42, § 637), rev'd on other grounds, 124 Wash.2d 282, 877 P.2d 195 (1994).....	25
<i>In re Estate of Clifton Eugene Miller</i> , 134 Wn. App. 885 (2006).....	20
<i>In re Estate of Clifton Eugene Miller</i> , 134 Wn. App. 885 at 889 (2006).....	24
<i>In re Estate of Ney</i> , 183 Wash. 503, 48 P.2d 924 (1935).....	26
<i>In re Estate of Stein</i> , 78 Wash.App. 251, 259, 896 P.2d 740 (1995).....	26
<i>Jacobs v. Brock</i> , 73 Wash.2d 234, 237-38, 437 P.2d 920 (1968).....	22
<i>Jacobsen v. State</i> , 89 Wash.2d 104, 569 P.2d 1152 (1977).....	11
<i>Lappin v. Lucurell</i> , 13 Wash.App. 277, 289-91, 534 P.2d 1038 (1975).....	22
<i>McGugart v. Brumback</i> , 77 Wash.2d 441, 444, 463 P.2d 140 (1969).....	21

Table of Authorities (Continued)

**RULES AND REGULATIONS**

CR 21.....	13
RPC 1.7.....	18
RPC 1.10.....	18

**SECONDARY AUTHORITIES**

Not applicable.

## I. ASSIGNMENTS OF ERROR

### A. Assignments

Assignment of Error 1: The Trial Court denied the Appellant due process under RCW 11.96.050(3) when it denied the Petitioners' motion to change venue on 10/23/2015 and 12/21/2016.

Assignment of Error 2: The Court erred in denying the Appellant's Motion for Summary Judgment on 10/9/2017 as against the Personal Representative of the Decedent and the Trustee of the Owen Grimsley Homestead as a matter of law.

Assignment of Error 3: The Trial Court erred in partially granting the Personal Representative's Motion for Summary Judgment on 12/9/2019 and imposing a rent obligation upon Appellant Paul Grimsley.

Assignment of Error 4: Trial court erred in denying the Appellant's Motion to Disqualify an attorney from the same firm as the attorney for the PR as representation for the Owen Grimsley Trust or Lorna Johnson under RPC 1.7 and RPC 1.10; as the Personal Representative had authority to waive the conflict.

Assignment of Error 6: The Trial Court erred in issuing *Findings of Fact and Conclusions of Law* on 12/8/2017 that no liability on the part of Ms. Johnson/Mr. Barnes existed under RCW11.12.010 (Unlawful Drafting); RCW 2.48.180 (Unlawful Practice of Law); or CR21/RCW 23B, or that no injuries had been incurred by the Appellant.

Assignment of Error 7: The Trial Court erred in entering a judgment for debt based "illustrative" evidence in violation of both the Dead Man's Statute, and the statute of limitations under RCW 4.16.040;

Assignment of Error 8: The Appellant had the right to compulsory set-off of any judgments rightly entered based on rights to 1/4 distribution from the Owen Grimsley Homestead as well as the Estate.

Assignment of Error 8: The Trial Court's award of judgment against the Appellant for attorney's fees and Personal Representative's expenses was unjust and an abuse of discretion

## B. Issues on Appeal

Issue #1: Can a beneficiary's objection/motion for change of venue under RCW 11.96.050(3) lawfully be denied based on a procedural step taken without notice to parties? (Assignment of Error 1)

Issue #2: Was the Appellant not due relief on his Motion for Summary Judgment a matter of law? If not, should the Trial Court's orders partially granting both the Appellant's motion and the PR's not have stated what issues of fact or law remained per CR 56(d)? (Assignment of Error 2)

Issue #3: Were the PR's claims of debt from over 20 years prior not barred by the six-year statute of limitations for actions on such claims under RCW 4.16.040? (Assignment of Error 7)

Issue #4: May a Personal Representative sue her sibling beneficiary for rent on behalf of the Estate as a tenant-in-common? (Assignment of Error 3)

Issue #5: Did the Personal Representative have the authority to waive an imputed conflict of interest between beneficiaries and another party under RPC 1.7 and RPC 1.10? (Assignment of Error 4)

Issue #6: Did the Dead Man's Statute (RCW 5.60.030) not apply to all parties in this case as "interested parties, and preclude those persons from testifying (including "illustrative" evidence) as to transactions with the Decedent which she could have controverted? (Assignment(s) of Error 2 and 7)

Issue #7: Was it proper for a Court to dismiss claims against a Personal Representative mid-trial when a quantum of evidence and testimony indicated a failure to fulfill basic duties and waste of the estate? (Assignment of Error 5)

Issue #8: Did Johnson/Barnes activity concerning the Decedent's Estate not constitute Unlawful Drafting under RCW 11.12.010; or the Unlawful Practice of Law under RCW 2.48.180? (Assignment of Error 6)

Issue #9: Does Johnson's liability for misconduct under RCW 23B as the "Trustee" of a Massachusetts Trust require a finding of specific injury on

the part of the Appellant (and did the record not support such a finding)?  
(Assignment of Error 6)

Issue #10: Is it “just” for the Trial Court to have awarded attorney’s fees to the PR under the circumstances? (Assignment of Error 8)

Issue #11: Once the right was asserted, was the Appellant not entitled to compulsory set-off of any judgments entered? (Assignment(s) of Error 7 and 8)

## II. STATEMENT OF CASE

The Trial Court denied the Appellant and his brother due process under RCW11.96.050(3) when it denied their objection/motion for change of venue from Spokane County to Ferry County based on the Personal Representative's (PR's) preference and/or the fact that the Letters Testamentary had been issued; because Letters Testamentary can be/were entered without notice to the parties.

At the time of Appellant's Summary Judgment motion, existing pleadings and affidavits on file left no issue of material fact as to the misconduct of the Personal Representative of the Estate (PR) under RCW 11.68.070 and RCW 11.28.250; and Decedent Helen Owen's neighbor Lorna Johnson and/or her spouse Douglas Johnson whom had violated both RCW 11.12.010 (Unlawful Drafting) and RCW 2.48.180 (Unlawful Practice of Law) when they drafted her *Last Will and Testament* and executed of *Declaration and Contract Creating the Owen Grimsley Home-*

*stead* (OGH) for the purpose of receiving her existing land interests, as as beneficiary under Will of remaining real estate interests and any debt owed by the Decedent's children. No specific injury need be found for Johnson to be liable for her ongoing breach of duty of good faith and other obligations to the Appellant under several applicable sections of RCW 23B; but there was injury in the form of delayed distribution, increased acrimony, continued confusion of proceedings, and increased costs of litigation the parties as well as the estate, from which the Appellant was entitled as a matter of law.

The PR's counter- motion for summary judgment should have been denied in its entirety, as the Estate has no authority to charge rent as a tenant-in-common with Appellant Paul Grimsley for the parcel he live(s) on; and the PR's claim for debt purported to be entered into or incurred prior to than 2002 was barred by the six-year statute of limitations under RCW 4.16.040.

As no further relevant testimony or further evidence was admissible from any interested party as to transactions with the Decedent under the Dead Man's Statute (RCW 5.60.030), thus no trial should have been necessary. That notwithstanding, the Trial Court should not have enabled "double-dipping" by a second attorney from the firm representing the PR to represent either Lorna Johnson or the OGH at trial, as the first attor-

ney's state conflict under RPC 1.7 was imputed to the rest of the firm under RPC 1.10, and the PR lacked authority to waive the conflict which exist(s)ed between Johnson and the Appellant and his brother as estate beneficiaries and shareholders of the OGH.<sup>1</sup>

The Trial Court's unjust dismissal of all claims against the PR mid-trial, and award of debt judgment(s) and of attorney's fees under RCW 11.96A.150 to the PR, while denying the Appellant's right to compulsory set-off of existing property interests and rights to Estate distribution within the same action were errors of law as well as abuses of discretion, and should be reversed.

### **III. ARGUMENT**

#### **3.1 Introduction**

The Decedent, Ms. Helen Louise Giorgi Grimsley Owen, lived and died in Ferry County, Washington as a homemaker and rancher. Ms. Owen had been a beneficiary of a trust based in Santa Barbara, California which had been created by her mother ("Giorgi Trust"). The Giorgi Trust held and granted Ms. Owen ownership interest in several parcels located in Ferry County, subject to easement and sale over a

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<sup>1</sup> Despite the Appellate Court's recent ruling affirming that Mr. Zener does not represent Johnson, the lack of clarity as to the nature of Mr. Zener's representation on behalf of the OGH, OGH contractual provisions purporting to indemnify Ms. Johnson (despite the court's order otherwise); as well as Ms. Johnson's the lack of participation in appellate proceedings thusfar continues to be problematic.

period of years. As of February 26, 2015, three weeks before her death, Ms. Owen still owned three land parcels outright with an aggregate assessed value of \$110,400.00; and also held a 65% (64.5%) interest in 6 additional properties (“Giorgi Properties”) that had been valued an aggregate value of over \$1 Million. The Decedent held only a life estate in the remaining 35.5% of each of the Giorgi Properties, which, according to the terms of the Giorgi Trust, would pass upon Ms. Owen’s death in equal share to Ms. Owen's four children: Michael, Diane, Karen and Paul Grimsley, in fee simple. (*Memorandum*,5/18/2016 ATTACHMENTS F, H, I (CP 49-144)

On February 26, 2015, Ms. Owen signed two documents drawn up by her neighbor, Lorna Johnson: The *Declaration and Contract Creating the Owen Grimsley Homestead* (“OGH”)—a “Massachusetts Trust”—of which Johnson's husband Douglas Barnes was “Creator” and Johnson herself the sole “Trustee” The OGH Contract transferred the Decedent’s 3 parcels owned outright in “equal exchange” for 20 of 100 “certificate units,” which, according to the contract terms, dissolved upon her death. (*Memorandum* 5/18/2016, ATTACHMENT C; Respondent's Exhibit R-202, Admitted Page 433; Trial Exhib. P-12: 2015 *Ferry County Auditor “Report Cards” for Properties held by Owen Grimsley Homestead*, Admitted Page 624) The second document, the Decedent's *Last Will and*

*Testament* (“Will”) provided that the Giorgi Properties (inclusive of all four siblings' independent land interests) should also be transferred into the ownership of the OGH; and also that debts owed to Ms. Owen by her children would become part of the Decedents Estate and made payable to OGH. (*Last Will and Testament*, Page1, Articles III and IV; Trial Exhibit P-1 *Last Will and Testament of Helen Owen*, Admitted page 239; See also 5/18/2018 *Memorandum Attachments A-C*; Trial Exhibit P-2: *Owen Grimsley Homestead Application for Registration with the State of Washington*, Admitted Page 366). Upon Ms. Owen's death, Johnson and Barnes brought witnesses to the will reading and had the Appellant and his siblings sign *Verification of the Reading of the Will and Presentment of the Trust* acknowledging their receipt of certificates indicating “20 units” each. (P-10 *Verification of the Reading of the Will and Presentment of the Trust*, Exhibit P-10, admitted Page 408; P-9 *Owen Grimsley Homestead Certificate Units* (1-5), admitted Page 255 and 376)

**3.2 *The Trial Court erred in denying the Appellant's motion for Change of Venue under RCW11.96.050(3).***

As of October 5, 2015 Beneficiaries Paul and Michael Grimsley filed Motion for a Change of Venue per RCW 11.96A.050(2), (3) and (4), for on the grounds that Ferry County was the statutorily mandated venue.

Ferry County; as it is the county with the strongest connection to both the Grimsley and Giorgi Trusts (RCW 11.96A.050(3)); the county of the decedent's residence (RCW 11.96A.050(4)(a)). the county in which any part of the probate estate and any nonprobate asset was or might be (RCW 11.96A.050(4)(b)(i)); (RCW 11.96A.050(4)(b)(ii)); the county in which the decedent died. (RCW 11.96A.050(4)(b)(iii)). RCW 11.96A.050(5) did not apply because venue was timely moved for and should have been granted under subsection (4) of RCW 11.96A.050. The Trial Court erroneously denied the motion on October 23, 2015, on the basis that the PR had selected Spokane County, "RCW 11.96A.050(4) and Letters Testamentary were issued." (CP 32) However, in this case as the PR had filed petitions for same on 6/11/2015 without particular notice to any party, citing RCW 11.28.240. *Order(s) Issuing Letters Testamentary; Adjudicating the estate to be Solvent, Waiving Bond; and Directing Administration without Court Intervention* were entered on the same day, leaving no opportunity to be heard. The Trial Court's decision on this basis denied Due Process by rendering illusory the statutory right of a beneficiary/heir to object to venue. (CP 9-10, 16-18, 21-23, 24, 26-30, 32, 157-181;190-192; VRP 3-15, 19-24)

As of May of 2016, the PR had refused to meet or communicate, had opposed the Appellant's *Notice of Mediation*, and made no

distributions of any kind nor provided an accounting as requested by the Appellant and his brother, Michael. For her part, Johnson had not responded to written requests for discovery concerning the OGH, and repeatedly represented that she didn't have to. The PR filed her one and only *Inventory and Appraisement* with the Court on 9/16/2016 with no monetary amounts listed (CP 154-156). She later forwarded another version to the parties with the amounts listed. This accounting included no list or valuations of any personal property of the Decedents located on her own property, but inflated valuations of items alleged to be located on the parcel upon which Appellant Paul Grimsley resides. There was also a “summary” of debt assessed against the Brothers Grimsley for a combined debt to the Estate of almost a \$.5 Million, based on alleged transactions dating back to the 1990s. The PR's purported tasks and expenses included several questionable activities/time allotments, and other items concerning the estate which the Appellant and his brother took issue.

The Brothers Grimsley filed for relief under the Washington State Trust and Estate Dispute Resolution Act or “TEDRA” (RCW 11.96A), asking for judicial reformation of the *Will*, removal and/or sanction of the PR, dissolution of the OGH, and/or removal of/damages against Lorna Johnson and Douglas Barnes for their role in the Decedent's estate planning and breach of fiduciary duties regarding the OGH. The TEDRA

petition was amended by stipulation to include causes of action under RCW 23B in response to the argument Johnson had raised in her answer-- that a Massachusetts Trust which is non-testamentary and governed by RCW 23.90.040(4) rather than RCW Chapter 11. 98A. (3/20/2017 *Petition for TEDRA*, CP 202-203; 5/3/2017 *Petition for Relief Under Washington State Trust and Estate Dispute Resolution Act (TEDRA) (amended)* pages 14-16, CP 231-251)

The PR Subsequently agreed to (in fact, moved to compel) mediation which occurred in May of 2017. The resulting *Partial Mediated Settlement Agreement* was confirmed by Court Order on 8/25/2017. (CP705-707). Therein, the Brothers Grimsley agreed to give the PR permission to liquidate the properties, inclusive of the 8.9% percent existing interest each beneficiary already had in each parcel-- provided that they would be credited/remunerated for same as part of distribution by the Estate. Appellant Paul Grimsley's credit from sale of his property interest would be allocated toward his purchase of the parcel upon which he resided. The PR agreed that the estate would pay the costs of mediation costs/fees.

***3.3 The Appellant's Motion for Summary Judgment should have been granted because no genuine issues of fact existed, and/or the Court did not identify issues of fact remaining in an order***

The Brothers Grimsley were due relief as a matter of law against all parties as any movant is whenever the pleading, depositions and other records on file, together with any affidavits submitted with the motion, show that there is no genuine issue of material fact that the moving party is entitled to judgment as a matter of law. *Jacobsen v. State*, 89 Wash.2d 104, 569 P.2d 1152 (1977) By the time the Brothers Grimsley moved for summary judgment on 6/23/2017 (CP 287-300)--and the other parties made cross motions, (7/21/2017 *Personal Representative's Motion for Summary Judgment* 7/21/2017 (CP 322-323), 7/25/7/25/2017 *Trustee's Motion for Summary Judgment*, CP 417-459).

**3.3.1 Relief was due the Appellant against the PR as a matter of law.** At the time of summary judgment motion, no genuine issue of fact existed with regard to the PR's failure to fulfill basic duties and avoid waste of the estate, and the authority for removal under RCW 11.68.070 and RCW 11.28.250. The PR had gone over 2 years without transferring land to the OGH, or dividing personal items per the Will, or making distributions of any kind. She had ignored the Appellant's *Request for Discovery* filed 3/21/2016 and 7/20/2017 asking for an accounting of non probate assets, as well as a statement of the Personal Representative's position with regard to the OGH.

When finally filed on 9/16/2016 the *Inventory and Appraisalment of Estate* was inaccurate, featured a log of activities and costs a request for compensation at an hourly rate exceeding that of her regular employment for duplicated/inappropriate/inflated work items, and costs of travel and hotel stays directly related to her choice of remote venue; in addition to tens of thousands of dollars in attorneys fees to date. (CP 9-11, 14-15, 34, 35-40, 42-44, 45-48, 145-150, 151-153, 154-156, 182-89, 194-201, 226-228, 265-276, 301, 305- 306 307-314, 322-323, 324-341, 342-345, 464-477, 506-509, 529-549, 564-606, 705-707, 753-765, 785-793, 825-827, 833-835, 869-873, 874-878, 882-900, 915-919, 927-945; 948-953, 999-1002, 1006-1011, 1039-1041) For the same reasons, the Trial Court's dismissal of the Appellant's claim against the PR mid-trial 10/18/2018 despite even further evidence on the record of the PR's disregard for her duties to the Estate or the Appellant (CP 908-909)

***3.3.2 Relief was due the Appellant against the PR as a matter of law.***

**3.3.2.1 Unlawful Drafting/Practice of law.** No issues of material fact remained with regard to Johnson/Barnes improper role in the Decedent's estate planning as it clearly went well beyond the

verbatim transcription allowable under RCW 11.12.010. Ms. Johnson's continued representation of an "unincorporated business association" and other parties in proceedings, constituted Unlawful Practice of Law under RCW 2.48.180. The Trial Court's acquiescence to Johnson's continued representing the OGH as a business entity during proceedings up until trial was also unlawful practice of law and led to undue procedural confusion and cost of litigation (CP 42-44, 45-48, 287-300, 346-400, 417-459, 484-499, 565-574, 608-700, 745-751, 891-893;VRP 25-76)

3.3.2.2 Claims under CR21/23B. The Trial Court failed to rule or make cognizable findings as to claims asserted under CR21/RCW 23B. The Court made an isolated finding mid-trial that Ms. Owen intended the OGH "to be part of her estate" However, as Ms Johnson had asserted in answer, a Massachusetts Trusts is not a testamentary trust governed by RCW Chapter 11.96A, but rather RCW 23, which is why the Brothers Grimsley amended their petition to specifically invoke CR 21 (Actions against unincorporated business associations) and provisions under RCW 23B applying to Massachusetts Trust business

entities regarding fiduciary duties of principals and the issuance of securities. At the time of Summary Judgment Mrs. Johnson had not responded to formal discovery requests for information which fulfilled CR 21. She had very affirmatively stated in pleadings that as “Trustee” of the OGH entity she did not follow RCW 23B provisions because she was the person who decided whether the law applies, and she had decided that it didn't. The Appellant asserts that there did not need to be specific damages to find Ms. Johnson liable for what amounts to criminal acts under the law, but the Trial Court certainly erred in finding that there had been no injury as the misconduct in question increased costs and litigation for all parties, and when the Appellant's rights to distribution from the Estate and OGH entity remain in jeopardy. Johnson's theory that the court had no jurisdiction and no law applied on theory of an absolute right to contract and a corporate right to “privacy” should have been disposed of by the court prior to trial and relief granted the Appellant as a matter of law. (CP 937-945, 565-574; 608-700; 287-300;417-459; CP 21-23; 723-725-510-522; 500-505; 45-48; 484-400; 42-44; 937-945; 948-952; 12;1608-700; 49-144, 190-192; 229-230; 202-223; 231-251; 307-14 CP 510-522; 500-505 Exhibits P-1, P-2, P-10, P21)

**3.3.3 Orders on Summary Judgment didn't comport with CR 56(d)**

The resulting mix of partial grants and denials subsequently entered with regard to representation of Ms. Johnson, and with regard to rent were not properly issued identifying remaining issues of fact for trial under CR 56(d) and added to confusion and costs of litigation going forward, with order presentations and motions for reconsideration still being decided as trial began. (CP745-747; CP 891-893)

**3.4. The PR's Summary Judgment Motion against the Appellant should have been denied in its entirety**

As no legally cognizable debt was asserted, no lawful basis for an award of rent exists among tenants-in-common , the Personal Representative's motion for summary judgment motion should have been denied in its entirety as a matter of law.

3.4.1 **No Lawful Authority for Rent Between Tenants-in-Common.** The Trial Court erred in "Partially" granting the Personal Representative's *Motion for Summary Judgment* against Appellant Paul Grimsley for rent for the parcel he resides during the pendency of probate. The Estate was/is only partial owner of the 6 Giorgi in which all beneficiaries already had an ownership interest. Every

interest created in favor of two or more persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint tenancy, as provided in RCW 64.28.010, or unless acquired by executors or trustees.” RCW 64.28.020 (1) Here, none of the statutory exceptions applied. As the Estate holds a mere tenant-in-common interest with all 4 Grimsley siblings on all 6 Giorgi Properties, and since by definition a tenancy-in-common is an indivisible right in the property, there was no authority to impose rent upon Appellant Paul Grimsley for the right to occupy the parcel upon which he resides absent a formal partition action under RCW 7.52.010, which did not occur in this instance. (CP 307-314, 346-400, 460-463, 464-483, 745-751, and 891-893; VRP150-160)

***3.4.2 No legally cognizable debt was asserted by the PR nor should have been granted.*** No genuine issue of fact remained as to the PR's claims of debt, which should have been dismissed as part of the Appellant(s) summary judgment but was instead erroneously granted at trial. The Trial Court erred in finding debt of any kind on the part of the Appellant(s)--not only because the evidence offered was “illustrative” and barred by the Deadmans statute as discussed below

—but also because the claim(s) purported to be based in transactions no more recent than 2002 were barred by RCW 4.16.040 which gives written contracts and accounts receivable a statute of limitations of 6 years. (CP 42-44, 45-48, 194-201, and 484-499; Trial Exhibits R102-R124)

***3.5. Trial court erred in denying the Appellant's motion to disqualify an attorney from the same firm as the Personal Representative's attorney from representing the OGH or Lorna Johnson, because the PR did not have the authority to waive an imputed conflict of interest between beneficiaries and another party under RPC 1.7 and RPC 1.10***

When the Trial Court ultimately granted the Appellant's Summary Judgment motion at least as regarded Johnson's continued lay representation of the OGH, Johnson approached the PR's attorney, Sean Boutz from the firm of Evans, Craven & Lackie to represent her. However whereas Boutz declined on the basis of a conflict of interest, Attorney Jeremy Zener, (then with the same firm and having already done work on the PR's case), made notice of appearance on behalf of the OGH. Johnson chose to continue to represent herself and her spouse on the Appellant's claims regarding her unlawful involvement in their mother's testamentary process as well as her personal misconduct in her professional capacity as "Trustee" of the OGH. The Court denied the Appellant's *Motion to Disqualify* Counselor Zener from representing

either Johnson or OGH on the basis of a concurrent conflict of interest prohibited by RPC 1.7 and imputed to Zener as part of the same firm as Boutz per RPC 1.10, and that the concurrent conflict between themselves and the PR (as Estate beneficiaries she was trying to disinherit) and OGH shareholders (bringing the action against Johnson and the OGH) was not waivable by the PR. Therefore the Appellant's motion should have been granted.

In the alternative, in keeping with the Trial Court's finding that the Decedent had intended the OGH to be part of her estate--then the court should have consolidated representation or party status accordingly.<sup>2</sup> Lack of clarity or finality from the Trial Court as to the construction and/or enforceability of these provisions will likely result in future complications. The first attorney's stated RPC 1.7 conflict of interest between the PR and the Owen Grimsley Trust was imputed to the entire firm via RPC 1.10. This representation was in direct conflict with the interest of the beneficiaries of the Owen Grimsley Homestead, and this conflict was not waivable by the Personal Representative, therefore this

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<sup>2</sup> The Trial Court's failure to properly rule on this issue either way has led to increased confusion and costs of litigation in the form of duplication and/or overlap in pleadings and arguments--as well as a question of who is ultimately responsible for attorney's fees for Zener as the attorney for the OGH versus Ms. Johnson. It should be noted that although the Trial Court did not award attorney's fees to either, the terms of the OGH Contract allow for payment of Johnson's expenses as trustee. *OGH Contract*, Page 2, Section 4 purports to indemnify Johnson. Page 4, Section 9 limits the recovery of any 3<sup>rd</sup> party to "the funds and property of the OGH for payment or for settlement of their damages.

decision by the Trial Court must be reversed. (CP 846-862; 25-25; 809-811; 894-896; 825-827 839-845; VRP135-149)

**3.6. Any further testimony or offers of evidence by interested parties (all of them) should have been precluded by The Dead Man's Statute (RCW 5.60.030) which states in pertinent part:**

“[i]n an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years.”

Here, Trial Court was highly inconsistent in applying this law. The Court had granted the PR's *Motion(s) in Limine* prohibiting witness testimony on this basis—and also having previously granted the PR's *Motion to Strike* various portions of declarations in support of the action against the PR, for the same reason(s) (VRP 195 Line 15 - 200). Yet the Trial Court went on to allow testimony from fairly all parties as to conversations and transactions with the Decedent, admitted the purported summary compiled by both the PR and Johnson as “illustrative evidence” of purported transactions with the Decedent as offered by the PR in

support of a finding of debt by the Appellant or his brother. (CP 43-44, 460-463, 484-499 and 478-483; VRP 163 - 167, 195-200; R-102)

As cited/argued at trial, issues of 1) standard of review of findings and conclusions, 2) proper application of the Dead Man's Statute among beneficiaries as “interested parties,” 3) rent and debt claims to/against the Estate, and 4) the 6-year statute of limitations on debt actions have all been addressed within the analogous case of *In re Estate of Clifton Eugene Miller*, 134 Wn. App. 885 (2006), which affirms the Appellant's theories and forms controlling precedent. (VRP 195-200). In *Miller*, the Decedent's beneficiaries disputed a claim by the Decedent's mother against the Estate for informal loans she'd extended him while living as well as back rent owed by the Decedent (which had been substantiated with a written lease). The Decedent's mother's testimony was barred as a party in interest, because she only stood to gain from the evidence/testimony she offered. Although her daughter's testimony as to the Decedent's party-admission of the nature the advances assisted her Mom in overcoming the presumption of a gift-- any finding of debt would deplete her own share of the Estate--she only stood to lose. And although court in *Miller* did find loan debt—as well as rent debt dating back to 1982s, recovery could only extend as far back as the 6-year statute of limitations:

## “STANDARD OF REVIEW

“When reviewing a trial court's findings of fact and conclusions of law, we review the findings of fact to determine if they are supported by substantial evidence in the record. If such a showing is made, the court must decide whether those findings support the trial court's conclusions of law. *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999). Issues of law are reviewed de novo. *Ackley-Bell v. Seattle Sch. Dist. No. 1*, 87 Wash.App. 158, 165, 940 P.2d 685 (1997).”

## “ANALYSIS

“1.) Was Ms. Oestreich's testimony barred by the dead man's statute?

“The dead man's statute, RCW 5.60.030, reads, in part:

'[I]n an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, . person.' (Emphasis added.)

“ The purpose of the dead man's statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased. *McGugart v. Brumback*, 77 Wash.2d 441, 444, 463 P.2d 140 (1969). A “party in interest” is a person who stands to gain or lose by the operation of the action or judgment in question. *Bentzen v. Demmons*, 68 Wash.App. 339, 344, 842 P.2d 1015 (1993). The test for determining whether a witness's testimony concerns a transaction with a deceased, is whether the deceased, if living, could contradict the

witness. *Diel v. Beekman*, 7 Wash.App. 139, 152, 499 P.2d 37 (1972). Moreover, a party cannot testify indirectly to create an inference as to what did or did not transpire between the party and the deceased. *Lappin v. Lucurell*, 13 Wash.App. 277, 289-91, 534 P.2d 1038 (1975).”

“The Uhlmans contend the court erred by allowing Ms. Oestreich's testimony about her impression that the checks she paid to Mr. Miller were loans. She testified, in part, as follows:

“Q.Mrs. Oestreich, speaking now in terms of your own impression of the checks that you wrote to Clifton, Jr., was it your impression that those checks were loans or gifts?

“A.They were loans.

“Q. Limiting your answer to your own personal impression, when you were writing these checks as set forth in Exhibit 3 to Clifton Miller, Jr., was it your impression that those checks were being made as loans or as gifts?

“A.They were loans.

RP at 39, 41.

“ Ms. Oestreich's testimony is inadmissible under the dead man's statute because her testimony indirectly seeks to prove the existence of loan transactions between Ms. Oestreich and Mr. Miller. Under the dead man's statute, Ms. Oestreich is barred from testifying directly or indirectly about any loan transaction with Mr. Miller, which Mr. Miller, if living, could contradict.”*In re Estate of Clifton Eugene Miller*, 134 Wn. App. 885, 890-891 (2006)

Here, as in *Miller*, no “feelings or Impressions” exception applies:

”Relying on *Jacobs v. Brock*, 73 Wash.2d 234, 237-38, 437 P.2d 920 (1968), Ms. Oestreich argues that her testimony is admissible under the feelings and impressions

exception to the dead man's statute. An interested person's statement of his or her own personal impression is not testimony concerning a transaction with the deceased person. Consequently, this testimony does not fit within the exceptions to the dead man's statute. *Id.* at 238, 437 P.2d 920.” *In re Estate of Clifton Eugene Miller*, 134 Wn. App. 885, 891 (2006)

...“Under the dead man's statute, a “party in interest” is not allowed “to testify in his or her own behalf” as to any transaction or statement with the deceased. RCW 5.60.030. For purposes of the dead man's statute, a witness is a party in interest if he or she stands to gain or lose from the judgment. *O'Steen v. The Estate of Wineberg*, 30 Wash.App. 923, 935, 640 P.2d 28 (1982). The interest must be a direct and certain interest in the outcome of the proceeding. *Adams Marine Servs., Inc. v. Fishel*, 42 Wash.2d 555, 562, 257 P.2d 203 (1953). To make this determination, the court asks whether the witness will gain or lose by the direct legal operation of the judgment rendered in the litigation at hand. *Id.*”

“Ms. Freeman is a party in interest because she is an heir to her father's estate and she stands to gain or lose from the judgment in this action. Significantly, the statute also provides that a party in interest “shall not be admitted to testify in his or her own behalf” as to any transaction with the deceased. RCW 5.60.030.” *In re Estate of Clifton Eugene Miller*, 134 Wn. App. 88, 893 (2006)

As argued at trial, each and every party to this case was a “party in interest,” for the purposes of the Dead Man's Statute, because each stood to gain or lose in some way from the outcome based on their testimony regarding statements of (including transactions with) the Decedent-- which, if alive, she could certainly contradict. Here, the PR and her sister

Diane stood to gain by the depletion of her brothers' share(s) in the Estate and/or any debt payments to OGH as beneficiaries of both; just as the Brothers Grimsley stood to gain from providing testimony otherwise. The community of Johnson/Barnes which stood to benefit from testimony as to debt which would be in turn payable to the OGH; and because (among other provisions), the OGH Contract allowed trustee(s) to become certificate holder(s), as long as s/he/they remain in the minority. (*Declaration and Contract*, Page 3, Section 7, Trial Exhib. R-21, first bullet).

So to, the Trial Court's admission of the PR's offer of a "summary" of purported handwritten ledgers ending in 2002 as "illustrative" evidence of debt not referenced in the Will should not have been held admissible under the Dead Man's statute, nor best evidence or hearsay rules. It also lacked relevance as such debt claims are clearly time-barred by RCW 4.16.040:

"The court determined that Ms. Freeman was not a party in interest because the effect of her testimony would reduce her share of her father's estate. Based on Ms. Oestreich's testimony and Ms. Freeman's declaration, the court determined that the presumption of gift had been overcome in the amount of \$57,582.83, including the claim for rent for the six-year statute of limitation period. *"In re Estate of Clifton Eugene Miller*, 134 Wn. App. 885 at 889 (2006)

***3.7 The Trial Court erred in not recognizing the Appellant's right to compulsory set-off against whatever judgments or obligations were imposed.***

In any event, as asserted/invoked in their TEDRA petition and requested again within Appellant Paul Grimsley's *Petitioners' Memorandum of Objections to Representatives Proposed Findings Of Fact and Conclusions of Law, and Motion for Judgment and Order*, 12/17/2018, Page 3, CP 933-936), the Trial Court was obligated to afford the Brothers Grimsley compulsory set- off of any judgments entered as against their 25% share of the Estate and distribution from the Massachusetts Trust, as yet undetermined.

***3.8. It was not "just" for the court to order the PR's attorney fees or administrative costs to be borne by the Appellant under RCW 11.96A.150 .***

The Court demonstrated overt bias in more than one respect, but specifically erred in unjustly awarding punitive attorney's fees to the PR under RCW 11.96A.150, which gives the court discretionary authority to award attorney fees from estate assets "as justice may require." *In re Estate of Burmeister*, 70 Wash.App. 532, 539, 854 P.2d 653 (1993) (quoting former RCW 11.96.140 (1994), repealed by LAWS OF 1999, ch. 42, § 637), rev'd on other grounds, 124 Wash.2d 282, 877 P.2d 195 (1994). Appellant asserts this award was not just by any means—but even had an

award of attorney fees been legitimate, the statute does not authorize the Trial Court's additional award of costs associated with the Administration of the Estate, nor attorneys fees even after an action has ended. Such awards conflict with *Will* which provides that such costs administration of the Estate be borne by the Estate. (Trial Exhib. P-2, Page 2); as well as *Partial Mediated Settlement Agreement* in reference to the costs of mediation. The Trial Court not only failed to consider the foregoing, but furthermore refused to acknowledge the relative position of the parties, or costs or expenditures on the part of the Brothers Grimsley whatsoever—purposely misconstruing a comment on the “pro bono” nature of their representation to mean there were no attorneys fees-- or costs --despite being corrected more than once.<sup>3</sup> (CP 1004-1005) (CP 154-156, 194-201, 301, 705-707, 879-881, 933-936, 948-993, 994-1002, 1005-1011, 1015-16, 1021-1022, 1023-1088, 1004-1005).

#### IV. CONCLUSION

Proceedings for probate of wills are equitable in nature. *In re Estate of Ney*, 183 Wash. 503, 48 P.2d 924 (1935). The overriding consideration in Washington probate proceedings is the determination of the decedent's wishes. *In re Estate of Stein*, 78 Wash.App. 251, 259, 896

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<sup>3</sup> Judge Fennessy was so adamant on this point in fact, that when Appellant Paul Grimsley attached an invoice to his response to the PR's motion for attorney's fees by way of clarification, he issued *Notice Rejection of Creditor's Claim* on 2/16/2018 as to the Appellant(s) attorney's services and costs, without such a claim having even been formally made.

P.2d 740 (1995). All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them. (RCW 11.12.230) Here, the intent of the testator is that her children benefit equally from her estate. The Court failed to properly exercise "full power and authority" to proceed "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)), (RCW 11.96A.060). The Appellant requests the Appellate Court's relief.

The Court's denial of the Appellant's Motion for Summary Judgment on 10/9/2017 and 12/9/2017 as against all parties , and granting of the PR's Summary Judgment motion with regard to rent. The finding of no injury done nor liability on the part of the Johnson and Barnes should be vacated/reversed. The OGH should be dissolved and associated assets restored to the estate for equal distribution to the beneficiaries in keeping with the intent of the testator.

The Trial Court's unjust order(s) that the PR's attorney's fees and the costs of administrating the Estate to be born by the Brothers Grimsley are errors of law and abuse of discretion. They must be reversed.

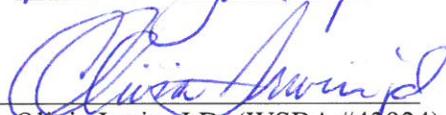
The *Partial Mediated Settlement* signed by the parties must be enforced on the point of costs; as well as the Appellant's right of purchase of

the parcel upon which he resides; as well as full credit to all beneficiaries for their 8.9% existing ownership in the Giorgi Properties.

As the court wrongly denied the motion to change venue of proceedings from Spokane County to Ferry County that decision should be reversed and the venue changed to Ferry County for the duration of the probate proceedings upon remand.

As Attorney Jeremy Zener was disqualified from representing Ms. Johnson or the OGH due to unwaivable conflict of interest under RPCs 1.7 and 1.10, his role (and who his client is) must be clarified or he must be discharged from further proceedings in this matter.

Respectfully submitted this 18<sup>th</sup> day of January, 2019

  
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