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NO. 358798

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

In re the Estate of Helen Louise Giorgi Grimsley Owen

RESPONDENT PERSONAL REPRESENTATIVE KAREN
GRIMSLEY'S BRIEF IN OPPOSITION TO BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Paul Grimsley (“Appellant”) appeals a number of issues and assigns multiple errors to the actions of the trial court throughout the parties underlying litigation. Respondent Karen Grimsley is the personal representative of the Estate of Helen Louise Giorgi Grimsley (“Respondent”) and submits that 1) Appellant is unable to establish with any evidence in the record that reversal is appropriate, 2) Appellant has failed to provide this Court with the necessary legal authority, including applicable standards of review, that would justify reversing the trial court rulings, including any abuse of discretion, 3) the Findings of Fact and Conclusions of Law entered by the trial court were not based upon substantial evidence, 4) Appellant’s self-serving opinions are insufficient to establish trial court error, 5) to the extent Appellant argues as such, Michael Grimsley did not file a timely notice of appeal, and is therefore, not a party to this appeal, and 6) Appellant’s appeal is so devoid of merit that it is frivolous.

Thus, for the reasons set forth above and herein, Respondent respectfully requests the Court affirm the trial court rulings, including the Findings of Fact and Conclusions of Law, which were entered upon completion of the parties’ trial.

II. STATEMENT OF THE ISSUES

1. Whether the trial court's denial of Appellant's motions for change of venue were consistent with RCW 11.96A.050.
2. Whether questions of fact precluded the trial court from granting Appellant's summary judgment motion to remove Respondent as personal representative. If so, was the order denying summary judgment consistent with CR 56(d).
3. Whether the Estate was entitled to recover debts from the Appellant?
4. Whether Appellant is required to pay rent to the Estate as a result of residing on real property that is owned by the Estate.
5. Whether a conflict of interest existed between Respondent and the Owen Grimsley Homestead under RPC 1.7 and RPC 1.10.
6. Whether the Dead Man's Statute, RCW 5.60.030, applied to the trial court's determination that Appellant was indebted to the Estate in the amount of \$55,298.68.
7. Whether the trial court properly dismissed Appellant's claims during trial to remove Respondent as personal representative of the Estate.
8. Whether the trial court abused its discretion in awarding Respondent attorneys' fees and costs under RCW 11.96A.150.
9. Whether Appellant has been denied a compulsory set-off of his beneficial interest under the Estate against the judgment entered by the trial court.

III. STATEMENT OF THE CASE

On February 26, 2015, Helen Louise Giorgi Grimsley Owen (“Helen Owen”) executed a Last Will and Testament of Helen Louise Giorgi Grimsley Owen (“Will”). CP 1-8; CP 766-68. The Will was a valid and binding representation of her intent and desires. *Id.* On March 13, 2015, Helen Owen died in Washington. *Id.* Helen Owen had four (4) children at the time of her death, which included Karen Grimsley, Diane Grimsley, Paul Grimsley, and Michael Grimsley. *Id.* All of Helen Owen’s children were identified in the Will as beneficiaries (“Beneficiaries”). *Id.* Helen Owen’s estate was comprised of both personal and real property (“Estate”), but the substantial majority of Estate assets are real property located in Ferry County, Washington. *Id.* The personal property was largely farming related equipment. *Id.* At the time of Helen Owen’s death she was the owner of or maintained an interest in nine (9) parcels, all in Ferry County, Washington. *Id.* Three (3) parcels were conveyed to the Owen Grimsley Homestead (“OGH”) prior to her death and six (6) parcels were held by Helen Owen and the Laura C. Giorgi Trust (“LG Trust”), which was a California Trust. *Id.*

Upon Helen Owen’s death, the LG Trust was required to distribute her interest in the properties equally to the Beneficiaries. CP 766-68. In the spring of 2017, the LG Trust completed the probate in California, which

resulted in each of the Beneficiaries receiving an 8.9% interest in the six (6) parcels. *Id.* The remaining property interest is held by the Estate pending its closure and resolution of this appeal. *Id.*

Between June 2015 and the present date, the Respondent has been managing the Estate and attempting to bring the probate matter to a point where the Estate could be closed. *Id.* However, Appellant has objected to the LG Trust conveyances, rejected the Estate's claim that he owed monies to the Estate for past debts as mandated by the Will, and refused to allow access to and/or sale of real and personal property. *Id.*; CP 937-945.

In addition to Respondent's efforts to sell Estate property, the Respondent was also directed to collect any Estate debts that the Beneficiaries may have had with Helen Owen at the time of her death. *Id.*; CP 1-8. Consistent with Helen Owen's intent, she kept detailed ledgers of the debts incurred by Appellant that showed substantial funds were loaned for numerous activities and expenses. CP 937-945.

The parties were unable to resolve their dispute leading to a trial on the merits wherein the trial court rendered Findings of Fact and Conclusions of Law (collectively "FOF and COL") that are now at issue on appeal, including a judgment against Appellant in the principal amount of \$176,269.06. CP 937-945; CP 1004-1011. The trial court rulings, including

the FOF and COL, were supported by relevant and substantial evidence in the record and should be affirmed on appeal.

IV. ARGUMENT

A. The Trial Court Rulings Should Be Affirmed

1. The Trial Court's Denial of Appellant's Motions for Change of Venue Was Appropriate

There is no foundation or argument that Appellant has presented to this Court that the trial court did not rule correctly in denying Appellant's multiple attempts to change venue. Therefore, the Court should affirm the trial court.

First, on October 23, 2015, the trial court entered an Order denying Appellant's request for a change of venue. CP 32. The trial court found that "RCW 11.96A.050(4) allows for the Petitioner [Respondent here] to select the county in Washington where venue is determined. Petitioner and Personal Representative Karen Grimsley, pursuant to the Will, filed the action in Spokane County and Letters Testamentary were issued on 6/11/15." CP 32. Based upon this finding, the trial court ordered that Spokane County was the appropriate venue for the probate and denied Appellant's motion. *Id.* Given the statutory authority contained in RCW 11.96A.050(4) and RCW 11.96A.050(5), the trial court's denial was proper.

Next, over a year later in December 2016, after the TEDRA matter was filed, and by stipulation consolidated with the probate matter, Appellant took another run at changing venue. CP 1111-1113. However, the facts that give rise to the TEDRA, and the Probate for that matter, had not changed since the inception of the Probate filing in June 2015 leading to the trial court, again, denying Appellant's motion. *Id.* Specifically, the trial court ordered, among other things, the following:

Petitioners' Motion for Change of Venue is denied as the Court a) previously denied Petitioners Motion to Change of Venue of the above described probate matter on October 23, 2015, which is incorporated herein, b) the probate matter identified above was filed on June 16, 2015 in Spokane County by the Estate's personal representative, pursuant to the decedent's Last Will and Testament and RCW 11.96A.050(4), and Letters Testamentary were issued, c) more than four months have passed since the Notice of Appointment of Personal Representative and Pendency of Probate was sent on June 16, 2015, and d) no factual issues have changed since the Court's previous Order that would warrant a change of venue to Ferry County; and recognizing the TEDRA was filed.

CP 1112.

Nothing cited by Appellant in his appeal demonstrates that the trial court's orders were anything but correct. Appellant is merely attempting to re-assert the same trial court arguments that were denied except a one line

passage in Appellant's Brief claiming a "Due Process" denial. *Appellant's Brief*, p. 8. Yet, Appellant provides no constitutional citation or other relevant legal authority to justify the statement rendering it meritless on appeal.¹

RCW 11.96A.050(4) & (8) state,

Venue for proceedings pertaining to the probate of wills, the administration and disposition of a decedent's property, including nonprobate assets, and any other matter not identified in subsection (1), (2), or (3) of this section, **must be in any county in the state of Washington that the petitioner selects.** A party to a proceeding may request that venue be changed if the request is **made within four months of the mailing of the notice of appointment and pendency of probate** required by RCW 11.28.237, and except for good cause shown, venue must be moved as follows:

- (a) If the decedent was a resident of the state of Washington at the time of death, to the county of decedent's residence; or
- (b) If the decedent was not a resident of the state of Washington at the time of death, to any of the following:
 - i. Any county in which any part of the probate estate might be;

¹ Presumably, Appellant contends the lack of notice of the probate filing before it was filed is a due process violation. However, notwithstanding the lack of legal authority citations, notice was not required under RCW 11.68 nor had Appellant requested special notice pursuant to RCW 11.28.240. See, CP 1-10.

- ii. If there are no probate assets, any county where any nonprobate asset might be; or
- iii. The county in which the decedent died.

RCW 11.96A.050(4)(emphasis added).

Any request to change venue that is made more than four months after the commencement of the action, may be granted in the discretion of the court.

RCW 11.96A.050(8).

As is evident from RCW 11.96A.050(4), Respondent selected Spokane County as the county in which to pursue resolution of the Estate. Furthermore, pursuant to RCW 11.96A.050(8), more than four (4) months had passed since the mailing of the Notice of Appointment of Personal Representative and Pendency of Probate, which was done on June 16, 2015. CP 13; CP 1048. With Appellant's lack of supportive facts and law, he is unable to establish that the trial court's actions were inappropriate.

Finally, Appellant has neither raised nor asserted an issue with FOF No. 5 concerning the original change of venue ruling. See, CP 940. However, if Appellant had, or attempts to, raise the issue, "[a]n appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence. Substantial evidence is evidence that is sufficient to persuade the rational,

fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004). The trial court had substantial evidence in which to deny the Appellant’s Motion to Change Venue. CP 32; CP 1111-1113. Accordingly, the Court should affirm the trial court.

2. Denial of Appellant’s Summary Judgment Motion Was Warranted as Genuine Issues of Material Fact Existed

The appellate court reviews summary judgment orders de novo. *Miller v. Likins*, 109 Wash. App. 140, 144, 34 P.3d 835 (2001). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Kirby v. City of Tacoma*, 124 Wash. App. 454, 463, 98 P.3d 827 (2004). The Court of Appeals considers all facts submitted and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Kirby*, 124 Wash. App. at 463, 98 P.3d 827. If reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment is proper. *Haubry v. Snow*, 106 Wash. App. 666, 670, 31 P.3d 1186 (2001). Appellate courts may affirm a superior court’s ruling on any grounds the record adequately supports. *LaMon v. Butler*, 112 Wash.2d 193, 200–01, 770 P.2d 1027, cert. denied, 493 U.S. 814, 110 S.Ct. 61, 107 L.Ed.2d 29 (1989).

A summary judgment movant is entitled to summary judgment if it submits affidavits establishing it is entitled to judgment as a matter of law. *Ranger Ins. Co. v. Pierce Co.*, 164 Wash.2d 545, 192 P.3d 886 (2008). Affidavits made in support of, or in opposition to, a motion for summary judgment must be based on personal knowledge, set forth admissible evidentiary facts, and affirmatively show that the affiant is competent to testify to the matters therein. CR 56(e).

An adverse party may not rest upon mere allegations or denials of a pleading, but a response must set forth specific facts showing that there is a genuine issue for trial. CR 56(e). If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. *Id.*

Further, a nonmoving party may not rely on speculation, argumentative assertions, or in having its affidavits considered at face value; rather, after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions. *Becker v. Wash. State Univ.*, 165 Wash. App. 235, 266 P.3d 893, review denied, 173 Wash.2d 1033, 277 P.3d 668 (2011); *State v. Kaiser*, 161 Wash. App. 705, 254 P.3d 850; *Doty-Fielding v. Town of South Prairie*, 143 Wash. App. 559, 178 P.3d 1054, review denied, 165

Wash.2d 1004, 198 P.3d 511 (2008); *Greenhalgh v. Dept. of Corrections*, 160 Wash. App. 706, 248 P.3d 150 (2011).

Ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to create a question of fact. *Snohomish Co. v. Rugg*, 115 Wash. App. 218, 61 P.3d 1184; *Lane v. Harborview Med. Ctr.*, 154 Wash. App. 279, 227 P.3d 297 (2010).

A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment. *Cano-Garcia v. King Co.*, 168 Wash. App. 223, 277 P.3d 34, *review denied*, 175 Wash.2d 1010, 287 P.3d 594 (2012). If a non-moving party attempts to respond using “facts” prohibited by CR 56(e), summary judgment, if appropriate, shall be entered against the adverse party. CR 56.

a. Appellant is not due relief against Respondent as a matter of law

Appellant seeks relief against Respondent, but fails to specifically identify, or the legal basis therefor, how the trial court should have granted Appellant’s summary judgment motion. Even with de novo review, Appellant’s citation to numerous documents in the record without explanation, does not make summary judgment appropriate. Rather, Appellant is merely re-iterating the same arguments that were made to the trial court and unsuccessful.

The fact that Appellant opines that “no genuine issues of fact existed with regard to the PR’s failure to fulfill basic duties and avoid waste of the estate...” does not establish summary judgment, especially when many of the statements contained in the declarations filed in support of the motion were struck as “hearsay and/or contrary to the dead man statute.” VRP 31-32; CP 1144-1146. The trial court properly determined that there were issues of fact that needed to be resolved at trial and precluded summary judgment. VRP 58; CP 891-893.

At trial, the court subsequently dismissed Appellant’s claims to remove Respondent as personal representative after Appellant failed to establish sufficient evidence that Respondent had failed to perform her duties. VRP 636-643; CP 908-909. In dismissing the Appellant’s claim, the trial court stated, among other things, the following:

Well, Ms. Irwin, and your clients, the issue isn’t whether or not someone has an obligation to, quote, make things go smoothly. The obligation of the personal representative is to marshal the assets, to pay out the bills, to follow the directives of the will, and to ensure that the decedent’s wishes are followed. And I have nothing before me that would indicate that Ms. Karen Grimsley has done anything other than pursue what she understood to be her mother’s wishes in this regard. I understand that, Ms. Irwin, Mr. Paul Grimsley and Mr. Michael Grimsley have a different view, but I don’t have any evidence from which to reach the conclusions that I’m being asked to reach.

What I have is a woman who possessed personal interest in real estate as well as personal property and also was the beneficiary of a California trust. And she undertook to dispose of those interests, and her sons have indicated that they believed, following their mother's death, that her will and the Massachusetts trust, which she had set up, were unnecessary or were otherwise not important. But I think that that's Karen Grimsley's charge was to protect that interest of their mother as set forth in her last will and testament, which is on file here.

So, again, I'm going to grant the dismissal of the claim against Karen Grimsley and for removal of her as the personal representative.

VRP 642-643.

Based upon the lack of evidence at trial, there were most certainly issues of fact that precluded summary judgment removing Respondent as personal representative of the Estate.

Appellant also attempts to argue that the Respondent failed to answer discovery and provide an Estate inventory, yet Appellant is unable to point anywhere in the record where such alleged failures were i) sufficient to grant summary judgment, ii) Appellant had filed any motions with the trial court seeking to compel a response from the Respondent, or iii) that the Respondent did not in fact provide Appellant with the requested

documentation. Therefore, the trial court's denial of Appellant's summary judgment should be affirmed.

b. Appellant is not due relief as a matter of law

Appellant asserts two (2) arguments involving: i) the unlawful drafting/practicing of law, and ii) claims under CR 21/23B. *Appellant's Brief, pp. 12-14*. Such claims do not involve Respondent and are directed at the other respondents in this case. Thus, Respondent has not provided a response herein. Nevertheless, the arguments set forth in Appellant's briefing fail to establish relief as a matter of law, which should result in affirming the trial court.

c. Respondent's summary judgment order was consistent with CR 56(d)

Albeit a very brief contention, Appellant argues that Respondent's summary judgment order was not consistent with CR 56(d). Appellant's claim is without legal support.

CR 56(d) states,

If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the

facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

The trial court determined that there were “genuine issues of material fact on virtually everything in front of the court.” VRP 58. As such, the trial court was unable to specifically set forth what material facts were not in substantial controversy. The order granting and denying in part Respondent’s summary judgment motion was consistent with CR 56(d) and the trial court order should be affirmed. CP 748-751.

3. Appellant was a Resident of and Lived on Estate Property Requiring Rent to be Paid to the Estate

Appellant appeals the trial court’s ruling granting Respondent’s summary judgment motion wherein Appellant was ordered to pay monthly rent in the amount of \$300.00 per month “from March 2015 to August 17 for each of the parcels ... and continuing thereafter for each month until such time as Paul Grimsley fully vacates said parcels as determined by the Estate....” CP 748-751. Contrary to Appellant’s purported claims, there is no tenants-in-common ownership and Appellant has set forth no evidence in the record to support such a claim.

“In the construction of a will the fundamental rule is that the intent of the testator is paramount and is to be determined from the four corners of the will when read as a whole.” *In re Patton’s Estate*, 6 Wash. App. 464, 467, 494 P.2d 238 (1972). “Words used in a will are to be understood in their ordinary sense if there is nothing to indicate a contrary intent.” *In re Patton’s Estate*, 6 Wash. App. at 468. “The testator’s intention is to be determined as of the date of execution of the will.” *Id.* “The court cannot rewrite the will; the intent of the testator, as manifested by the language of the will, must be given effect if it is lawful.” *Holmes v. Holmes*, 65 Wash.2d 230, 233, 396 P.2d 633 (1964).

“Until the estate is closed, the heirs may not treat estate real property as their own.” *In re Estate of Jones*, 152 Wash.2d 1, 14, 93 P.3d 147 (2004). “An executor is entitled to possess and control estate property during the administration of the estate and has a right to it even against other heirs.” *Id.* “Where a person’s only right to possession of the property arises from his status as [beneficiary], he does not have a right to remain on and use the property when there are other reasonable alternatives open (e.g., renting the property).” *Id.* “If he chooses to use the house for his own benefit he must pay rent.” *Id.* “This is true even where [a beneficiary] claims to remain on the property to protect it from vandalism and decay.” *Id.* at 15.

Here, Appellant maintained a partial ownership interest in Estate property of 8.9%, similar to all Beneficiaries, with the Estate maintaining the remaining ownership interest. Furthermore, Appellant's 8.9% interest was only obtained after Helen Owen's death and a real property conveyance was made to each of the Beneficiaries from the LG Trust. Prior to such conveyance, Appellant maintained no ownership interest in Estate property even though he continued to reside and use such property free from rent.

Between the Estate and the other three (3) Beneficiaries combined, they collectively own 91.1% of the Estate real property for which Respondent had a fiduciary obligation to ensure Estate assets were protected and monies that may be owed were properly collected. The trial court concurred and granted summary judgment. The trial court stated,

Now, I will grant summary judgment to the estate with regard to the debt of Paul Grimsley for the rent to have been incurred subsequent to Ms. Owen's passing because at that point the estate and the PR has obligations to the estate and the other heirs. And if the PR determines this is an asset of the estate from which I must generate some sort of income and/or for which I must charge some rent, then that is the PR's choice and there is no evidence in front of the court contrary to that.

VRP 59.

Appellant failed to provide the trial court with any evidence that would have created an issue of fact precluding summary judgment. As,

such, the trial court correctly ruled under the law that Appellant was required to pay rent for use of Estate property. Accordingly, the trial court should be affirmed.

4. There was no basis to disqualify attorney Jeremy Zener as counsel for the OGH

Appellant has repeatedly raised the contention, and again on appeal in his opening brief as well as before this Court by separate motion, that attorney Jeremy Zener maintained a conflict of interest to represent the OGH. There is no conflict under RPC 1.7, RPC 1.10, or any other Rules of Professional of Conduct (“RPC”) that would justify Mr. Zener’s removal as OGH’s counsel. Thus, the Court should affirm the trial court’s denial of Appellant’s Motion to Disqualify.

“Appellate courts review RPC conflict issues, and related motions to withdraw, de novo. See *State v. Vicuna*, 119 Wash. App. 26, 30-31, 79 P.3d 1 (2003). In *Vicuna*, the court reasoned that “[t]he determination of whether a conflict exists precluding continued representation of a client is a question of law and is reviewed de novo.” *Id.* We therefore apply a de novo standard in determining whether a conflict exists under the RPCs that would require... withdrawal. An error of law necessarily constitutes an abuse of discretion. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 182 Wash.2d 519, 531, 342 P.3d 308 (2015). If a conflict creates a legal duty

to withdraw, denying withdrawal is an abuse of discretion.” *State v. O’Neil*, 198 Wash. App. 537, 543, 393 P.3d 1238, 1241 (2017).

Initially, Mr. Zener is no longer an attorney with Evans, Craven & Lackie, P.S., but is now a member of Paine Hamblen and he can fully address the issues raised by Appellant in more detail. However, as set forth to the trial court in the declaration of Respondent’s attorney, Sean P. Boutz, in opposition to Appellant’s Motion, Mr. Boutz and Mr. Zener both conferred with their respective clients, addressed the dual representation, and after being properly informed in writing each client provided their informed written consent. CP 863-867. At no time did Mr. Boutz represent the OGH. *Id.*

Furthermore, any waiver of the alleged conflict of interest between the Respondent and the OGH was not one that Appellant had the right to interject himself under the RPC. To the contrary, the issue was one between the respective clients of Mr. Boutz and Mr. Zener. Appellant was already adversarial to both the Respondent and the OGH and nothing the OGH did to retain counsel altered that position.² Therefore, the Court should affirm the trial court’s denial of Appellant’s Motion to Disqualify.

² Appellant’s issue on appeal is even more misleading in light of the fact that Appellant repeatedly claimed the OGH needed attorney representation. However, once the OGH sought to obtain counsel it was not Appellant’s prerogative or right to dictate the representation that the OGH received, but merely that the law required representation. See CP 864.

5. The Trial Court Correctly Applied The Dead Man Statute

Appellant argues that RCW 5.60.030, or the Dead Man's Statute, was not applied appropriately by the trial court. *Appellant Brief, pp. 19-24*. In short, the trial court should have prohibited testimony concerning the detailed ledgers that Helen Owen maintained proving the debts owed to her by the Appellant. The Appellant misconstrues RCW 5.60.030, and therefore, the trial court should be affirmed.

RCW 5.60.030 provides:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in 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: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity,

and have no other or further interest in the action.

“The purpose of the statute is to prevent interested parties from giving self-serving testimony regarding conversations and transactions with the deceased because the dead cannot respond to unfavorable testimony. *Kellar v. Estate of Kellar*, 172 Wash. App. 562, 574, 291 P.3d 906 (2012) (citing *In re Estate of Cordero*, 127 Wash. App. 783, 789, 113 P.3d 16 (2005)). The test to determine whether the testimony concerns a transaction covered by the statute is whether the deceased, if living, could contradict the witness of his own knowledge.” *Estate of Kellar*, 172 Wash. App. at 574 (citing *Estate of Lennon v. Lennon*, 108 Wash. App. 167, 178, 29 P.3d 1258 (2001)). RCW 5.60.030 “excludes testimony when offered against the decedent’s estate.” *Matter of Davis Estate*, 23 Wash. App. 384, 385, 597 P.2d 404 (1979).

For many years, Helen Owen loaned money to Appellant and she kept detailed ledgers demonstrating the substantial amount of loans made to him, along with his siblings, including Appellant’s very limited attempts to repay such loans. CP 942. Appellant purports to claim loan forgiveness, but his assertions to this affect at trial were unsubstantiated. CP 937-945. Most importantly, however, such claims were nothing more than self-serving testimony concerning conversations or transactions involving Helen

Owen that she was unable to testify about, including the authenticity or accuracy of such testimony and that Appellant did not owe the debts.

Further, Helen Owen could have most definitely contradicted the testimony if she were living. This is exactly the type of testimony that is precluded by the Dead Man's Statute and not how Appellant claims RCW 5.60.030 should have been applied. As the trial court properly determined, there was substantial evidence from the ledgers evidence to prove that Appellant owed significant debt to Helen Owen's Estate.

Appellant also makes a cursory claim that his debts are barred by the statute of limitations, RCW 4.16.040, but the respective debts did not begin to accrue for purposes of the statute of limitations until the day of Helen Owen's death, or March 13, 2015. Thus, Appellant's debts are squarely within the six (6) year limitation period set forth in RCW 4.16.040.

As such, there is no legal basis in which to reverse the trial court and its' rulings, including the applicable FOF and COL, which should be affirmed.

6. There is no compulsory set-off in the TEDRA action

Appellant alleges a short and cursory argument that he is entitled to a compulsory set-off against the judgment imposed against him by the trial court. *Appellant's Brief*, p. 25. Again, while not clear, it appears that Appellant believes his twenty-five percent (25%) beneficiary interest in the

Estate should apply towards reducing the judgment amount. Appellant's argument is either misplaced or inapplicable for several reasons.

First, Appellant confuses this matter (TEDRA action) with the probate matter. While the two actions were consolidated, the probate matter and its completion have yet to be finalized due to, primarily, the real property assets that comprise the substantial portion of the Estate have not been sold. Only after the resolution of this appeal and the sale of the Estate's assets can a determination of an off-set occur. Furthermore, COL No. 11 addresses this issue wherein it provides, "Petitioners' debts to the Estate as contained herein are to be considered and evaluated in the liquidation of Estate assets and subsequent distribution to the OGH." CP 943.

Second, Appellant's support for his set-off argument is to merely cite to his trial court briefing objecting to the Respondent's proposed findings of fact and conclusions of law without anything more. "An appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence. Substantial evidence is evidence that is sufficient to persuade the rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004). Appellant fails to set forth which actual FOF and COL are at issue let alone objections to proposed findings of fact and conclusions of law.

Third, to the extent Appellant seeks a compulsory set-off, there is no citation to any legal authority or standard of review for which to address this argument. Therefore, the Court should decline to even entertain this issue, but if so, Appellant has failed to demonstrate the trial court committed any error.

7. There was no abuse of discretion in awarding Respondent's Attorney Fees And Costs

Appellant asserts that the trial court “demonstrated overt bias” in “unjustly awarding punitive attorney’s fees to the PR under RCW 11.96A.150....” *Appellant’s Brief*, p. 25. Yet, Appellant provides this Court with no basis to support such speculative assertions. Appellant cites to numerous pages contained within the Clerk’s Papers, but there is no delineation as to how those citations justify reversal of the trial court’s award of the Respondent’s attorney fees and costs. Rather, Appellant’s citations are merely a re-argument of the same arguments made to the trial court.

Even though the Appellant has omitted the standard of review on appeal, abuse of discretion, he fails to demonstrate in any capacity that the trial court abused its discretion. As such, the trial court’s award of attorney fees and costs should be affirmed.

RCW 11.96A.150 gives the trial court discretionary authority to award attorney fees from estate assets. Appellate courts will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion. *In re Estate of Marks*, 91 Wash. App. 325, 337, 957 P.2d 235 (1998); *In re Estate of Larson*, 103 Wash.2d 517, 521, 694 P.2d 1051 (1985). Discretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. *In re Estate of Niehenke*, 117 Wash.2d 631, 647, 818 P.2d 1324 (1991). Because of the “almost limitless sets of factual circumstances that might arise in a probate proceeding,” the legislature “wisely” left the matter of fees to the trial court, directing only that the award be made “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).” *In re Estate of Black*, 116 Wash. App. 476, 489, 66 P.3d 670, 677 (2003), *aff'd on other grounds*, 153 Wash. 2d 152, 102 P.3d 796 (2004).

Here, contrary to Appellant’s contentions, RCW 11.96A.150 provided the trial court with discretionary authority to award Respondent her attorney fees and costs. See, RCW 11.96A.150(1)&(2). Appellant cites no legal authority for the proposition that Respondent was not entitled to an award other than to cite the statute that the trial court correctly relied upon.

Appellant asserts other unfounded claims in support of reversal, but again, there is no justification supporting the claims, and certainly, nothing that rises to the level of abuse of discretion by the trial court. Appellant claims a) conflict with the decedent's will, b) the parties' Partial Mediated Settlement Agreement, and c) the parties' positions relative to Appellant's costs or expenditures and "pro bono" representation.

While these unsupported claims are not made clear by Appellant they are not reasons to reverse the trial court. First, to the extent Appellant argues that the award of Respondent's attorneys' fees and costs conflicts with the decedent's will and the costs of administering the Estate, the trial court addressed this specific issue when considering Respondent's request. VRP 895-898; CP 1004-1011. The trial specifically inquired about the breakdown of the fees and costs and was satisfied that Respondent's request was appropriate. *Id.*

Second, the trial court's award of fees and costs has absolutely nothing to do with the parties Partial Mediated Settlement Agreement ("PMSA"). It is simply irrelevant. However, even it had some impact on the trial court's conduct, which it does not, Appellant has not established how the PMSA resulted in the trial court having abused its discretion.

Third, similar to the PMSA, Appellant's receipt of pro bono legal services is irrelevant to an award of Respondent's attorneys' fees and costs.³ RCW 11.96A.150 provides that the prevailing party may recover fees and costs in an estate and probate matter. The trial court correctly awarded Respondent her attorneys' fees and costs and Appellant has raised no justification for how his pro bono legal services caused the trial court to abuse its discretion. Thus, the Court should affirm the award of Respondent's attorneys' fees and costs.

B. Motion for an Award of Respondent's Attorneys' Fees and Costs

Pursuant to RAP 18.1, Respondent hereby moves the Court for an award of her attorney's fees and costs. Attorney's fees are generally not recoverable unless permitted by contract, statute, or a recognized ground of equity. *Aldrich & Hedman, Inc. v. Blakely*, 31 Wash. App. 16, 19, 639 P.2d 235, 237 (1982). RCW 11.96A.150 provides, in pertinent part,

- (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) from any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from

³ Appellant references in Footnote 3 the Estate's Notice of Rejection of Creditor's Claim on 2/16/18. While such reference has no basis to reverse the trial court's award of Respondent's attorneys' fees and costs, for the Court's clarification, the Notice was sent to ensure Appellant didn't attempt to assert a potential claim for his attorney fees and costs against the Estate as a result of the TEDRA action and a declaration from Appellant's counsel setting forth legal fees and costs in excess of \$35,000. CP 1012-1016.

any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determined to be equitable. In exercising discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and RCW 11.24.050, unless such statute specifically provides otherwise....

RCW 11.96A.150(1) & (2).

Additionally, RAP 18.9(a) authorizes the appellate court, on its own initiative or on motion of a party, to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court." Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party. *Rhinehart v. Seattle Times, Inc.*, 59 Wash. App 332, 342, 798 P.2d 1155 (1990); see also *Yurtis v. Phipps*, 143 Wash. App. 680, 697, 181 P.3d 849 (2008)(finding that issues in the case had been raised on three prior

occasions and the case was so devoid of merit that there was not reasonable possibility of appellant's success warranting RAP 18.9(a) sanctions).

Here, pursuant to the statutory authority set forth in RCW 11.96A.150(1) & (2), Respondent is entitled to recover her attorneys' fees and costs on appeal. Furthermore, Appellant's appeal establishes no evidentiary basis and/or is so devoid of merit that an award of Respondent's attorney's fees and costs is justified.

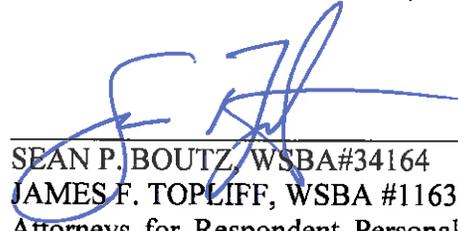
V. CONCLUSION

Appellant's appeal is nothing more than a re-hash of prior arguments to the trial court that were justifiably determined in favor of the Estate and Respondent. Appellant is unable to establish with any credible evidence that the decisions of the trial court warrant reversal. Instead, Appellant individually opines that his opinions are the prevailing opinion without any supportive evidence, or outright speculates that the trial court committed reversible error. Because such opinions and speculation are unable to satisfy Appellant's burden on appeal and for the reasons set forth herein, the Respondent respectfully requests this Court affirm the trial court rulings and judgment against Appellant and award Respondent's attorneys' fees and costs on appeal.

RESPECTFULLY SUBMITTED this 20 day of March, 2019.

EVANS, CRAVEN & LACKIE, P.S.

By:



SEAN P. BOUTZ, WSBA#34164
JAMES F. TOPLIFF, WSBA #11632
Attorneys for Respondent Personal Representative
Karen Grimsley

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2019, a copy of Respondent Personal Representative Karen Grimsley's Brief in Opposition to Brief of Appellant was served on Appellant and Respondents at the following address via U.S. Mail and emailed as set forth below:

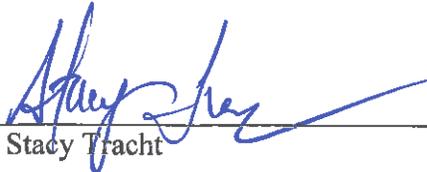
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of March, 2019, at Spokane, Washington.



Stacy Tracht

EVANS, CRAVEN & LACKIE, P.S.

March 20, 2019 - 9:44 AM

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Comments:

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