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CASE NO. 358798

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

IN RE: ESTATE OF HELEN LOUISE GIORGI GRIMSLEY OWEN

RESPONDENT OWEN GRIMSLEY HOMESTEAD TRUST'S RESPONSE TO APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Paul Grimsley ("Appellant") has appealed many decisions of the trial court. For most of the issues raised by Appellant, the standard of review on appeal is abuse of discretion, and Appellant's brief fails to show that the trial court abused its discretion.

Additionally, Appellant's brief is virtually devoid of legal authority for his arguments, and further, Appellant fails to comply with the Rules of Appellate Procedure by providing the Court with what amount to "string citations" to the record. *See, e.g. Appellant's Brief*, at 12. Rather than providing citations to the record for each statement and/or assertion made, Appellant submits these blanket string citations and leaves it for the Court and the respondents to figure out which citation supports which parts of the brief. This is inappropriate and violates the Rules of Appellate Procedure.

For the reasons set forth herein, the Owen Grimsley Homestead Trust respectfully requests that the Court affirm the trial court and grant the Trust reasonable attorney fees and costs on appeal.

II. STATEMENT OF ISSUES

A. Whether the trial court abused its discretion by denying Appellant's motion for change of venue?

Short Answer: *No. The trial court's decision denying Appellant's motion for change of venue was within the court's considerable discretion.*

B. Whether Appellant's motion for summary judgment was properly denied when genuine issues of material fact remained for trial?

Short Answer: *Yes. The trial court properly determined that many genuine issues of material fact existed for trial.*

C. Whether the trial court erred in denying Appellant's Motion to Disqualify an attorney when 1) Appellant had no standing to raise the argument, 2) there was no conflict of interest between the Personal Representative and the Owen Grimsley Homestead Trust, and 3) even if there was a conflict of interest, the affected parties provided informed consent?

Short Answer: *No. The trial court did not err in finding that Appellant did not have standing to raise the conflict of interest between the Personal Representative and the Owen Grimsley Homestead Trust, further finding that there was no conflict, and finally that the parties provided their informed consent to the representation.*

D. Whether the trial court erred in its application of the "deadman's statute" (RCW 5.60.030)?

Short Answer: *No. The trial court properly applied RCW 5.60.030 when it rejected testimony as to conversations with the deceased in which the parties had an interest.*

E. Whether the trial court erred when it found that Appellant had failed to prove damages resulting from any alleged violation of RCW 23B, *et seq.*?

Short Answer: *No. The trial court did not err because Appellant abjectly failed to provide any proof whatsoever of damages resulting from his allegations that Lorna Johnson as trustee of the Owen Grimsley Homestead Trust failed to adhere to the reporting requirements of RCW 23B, et seq.*

F. Whether the Owen Grimsley Homestead Trust is entitled to attorney fees on appeal pursuant to RAP 18.1 and RCW 11.96A.150?

Short Answer: *Yes. The appellate court has considerable discretion to award reasonable attorney fees and costs to the Owen Grimsley Homestead Trust.*

III. STATEMENT OF THE CASE

Helen Louise Giorgi Grimsley Owen ("the decedent") executed her Last Will and Testament on February 26, 2015. CP 1-8. The will was valid and neither the will nor the decedent's capacity to make the will was challenged at trial. VRP 110, 120.

The decedent's estate was primarily comprised of real property located in Ferry County. CP 1-8, 766-68. At the time of her death, the decedent owned outright or maintained an interest in nine parcels of real property. *Id.* Three of the nine parcels were conveyed to the Owen Grimsley Homestead Trust (hereinafter "the Trust") prior to decedent's death. *Id.* The remaining six parcels were held by the decedent and the Laura C. Giorgi Trust ("Giorgi Trust"). *Id.*

When decedent died, the Giorgi Trust was put into probate in California. CP 766-68. Each of decedent's four children received an 8.9% interest in the six properties, with the remaining property interest being held by decedent's estate ultimately to be distributed to the Trust pursuant to the terms of decedent's will. CP 1-8, 766-68.

Appellant and his brother, Michael, filed a Trust and Estate Dispute Resolution Act (TEDRA) Petition. CP 202-23. An amended petition was filed a short time later. CP 231-51. Ultimately the TEDRA action was

consolidated with the probate action (CP 229-30), and matter proceeded to a bench trial.

At the conclusion of trial, the trial court entered findings of fact and conclusions of law. CP 937-45, 1004-11. The trial court denied Appellant relief in all respects, including as to the Trust and its trustee, Lorna Johnson. *Id.*

For the reasons set forth herein, the trial court should be affirmed on appeal.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS CONSIDERABLE DISCRETION BY DENYING APPELLANT'S MOTION FOR CHANGE OF VENUE.

A trial court's decision to grant or deny a motion for a change of venue is within the trial court's discretion, and appellate courts are reluctant to reverse the trial court's decision absent a showing of abuse of discretion. *State v. Clark*, 143 Wn. 2d 731, 756, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 122 S. Ct. 475, 151 L.Ed.2d 389 (2001); *State v. Hoffman*, 116 Wn. 2d 51, 71, 804 P.2d 577 (1991).

An abuse of discretion occurs when no reasonable person would adopt the trial court's position. *State v. Boot*, 89 Wn. App. 780, 786, 950 P.2d 964 (*citing State v. Nelson*, 108 Wn. 2d 491, 504–05, 740 P.2d 835 (1987)), *review denied*, 135 Wn. 2d 1015, 960 P.2d 939 (1998).

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. RCW 11.96A.050(4).

Once letters testamentary or of administration have been granted in the state of Washington, all orders, settlements, trials, and other proceedings under this title must be had or made in the county in which such letters have been granted unless venue is moved as provided in subsection (4) of this section. RCW 11.96A.050(5).

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 (upon establishing certain conditions) – except for good cause shown. RCW 11.96A.050(4). Good cause is established here in the plain terms of the Last Will and Testament, which provides unfettered discretion to the personal representative (Karen Grimsley) to determine the appropriate venue for the probate proceeding. CP 6-8.

Further, Appellant has not shown that the trial court abused its discretion in retaining the case. Indeed, Appellant misconstrues venue for jurisdiction. *Appellant's Brief*, at 9. Venue is left to the discretion of the trial

court (*see State v. Clark, supra*), whereas jurisdiction over the subject matter of an action is elementary prerequisite to the exercise of judicial power. *See, e.g., In re Adoption of Buehl*, 87 Wn. 2d 649, 655, 555 P.2d 1334 (1976).

The trial court properly exercised its discretion in finding venue was proper in Spokane County. As such, this Court should affirm the trial court's denial of Appellant's motion for change of venue.

B. APPELLANT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED BY THE TRIAL COURT BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED AT THE TIME THE MOTION WAS MADE.

Summary judgment will only be granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn. 2d 217, 220, 802 P.2d 1360 (1991). The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn. 2d 345, 349, 588 P.2d 1346 (1979) (*citing Morris v. McNicol*, 83 Wn. 2d 491, 494–95, 519 P.2d 7 (1974)). The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. *Lamon*,

91 Wn. 2d at 350, (*citing Morris*, 83 Wn. 2d at 494–95). An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn. 2d 337, 341, 883 P.2d 1383 (1994).

Appellant has failed to set forth any legal authority for his argument that the trial court erred in denying his motion for summary judgment against the Trust and/or the trustee, Lorna Johnson. Indeed, Appellant has failed to identify the actions of Ms. Johnson which he alleges constituted an unlawful practice of law.

At trial, Ms. Johnson testified that she assisted the decedent with her estate planning by becoming the trustee of the Trust. VRP 338. Appellant has not identified any legal authority for the proposition that a non-attorney cannot serve as a trustee.

Ms. Johnson also testified that the decedent drafted her own will, and that Ms. Johnson merely typed it for her after it had been drafted. VRP 346. Appellant has again failed to provide this Court with any legal authority that would prohibit Ms. Johnson from transcribing the decedent's will for her. In fact, the only legal authority that Appellant even mentions is RCW 11.12.010 which states, in pertinent part:

> Any person of sound mind who has attained the age of eighteen years may, by last will, devise all his or her estate, both real and personal.

There is no dispute that the decedent was of sound mind when she drafted her will. Indeed, Appellant (through counsel) admitted at trial that the decedent was of sound mind (VRP 120), and further, repeatedly stated that he was not challenging the will. VRP 110, 119, 226, and 298. Appellant argues (without authority) that he was entitled to judgment as a matter of law, yet the *undisputed* evidence at trial was that the decedent drafted her own will and that Ms. Johnson did not "unlawfully draft" anything with regard to the decedent's will. Thus, the trial court properly denied Appellant's motion for summary judgment.

C. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISQUALIFY THE TRUST'S ATTORNEY.

A version of this issue has already been briefed and argued before Commissioner Wasson in this appeal. *See Commissioner's Ruling*, filed December 11, 2018. Appellant also repeatedly raised this issue before the trial court. *See, e.g. Order Denying Motion for Disqualification of Attorney*, CP 894-96. Both the trial court and Commissioner Wasson have consistently denied the motion, and the Trust respectfully requests the Court affirm those decisions.

Washington courts have inherent power to determine who may appear before them as legal counsel. *Hahn v. Boeing Co.*, 95 Wn. 2d 28, 31, 621 P.2d 1263 (1980) (*citing State v. Cook*, 84 Wn. 2d 342, 525 P.2d 761

(1974)). Among the grounds on which an attorney may be disqualified are a conflict of interest that prejudices the rights of his or her client or former client an opposing party, or that poses a threat to the integrity of the judicial process. *See* RPC 1.7, 1.9–1.12; *Hahn*, 95 Wn. 2d at 36, (conflict prejudicing opposing party and threatening integrity of judicial process (*citing Ceramco, Inc. v. Lee Pharm.*, 510 F.2d 268 (2d Cir. 1975))); *State v. Stenger*, 111 Wn. 2d 516, 760 P.2d 357 (1988) (conflict prejudicing former client). A court's exercise of discretion is viewed not in hindsight, but in view of the circumstances before the court at the time of its decision. *See In re Pers. Restraint of Duncan*, 167 Wn. 2d 398, 408, 219 P.3d 666 (2009).

Initially, it should be noted that Appellant does not have standing to raise the conflict of interest as between the personal representative and the Trust, because his position has *always* been adversarial to both given the TEDRA petition (and amended petition) filed on his behalf. CP 202-23; 231-51. However, as is shown below, there was and is no conflict of interest as between the personal representative and the Trust, and even if there were, the personal representative and the Trust provided informed written consent to proceed.

Whether circumstances demonstrate a conflict under ethical rules is a question of law that is reviewed de novo. *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 279, 135 P.3d 955 (2006) (*citing State v.*

Vicuna, 119 Wn. App. 26, 30–31, 79 P.3d 1 (2003)). Determining the proper resolution of the alleged conflict requires the exercise of discretion, and we review the trial court's resolution for abuse of discretion. *Id.* at 279–80, (*citing Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.,* 124 Wn. 2d 789, 813, 881 P.2d 1020 (1994).

During the initial hearing on this issue, Appellant baldly argued to the trial court that the Estate of Helen Owen and the Trust had interests that were "diametrically opposed." VRP 117. Yet, Appellant could not provide the Court with any support for that argument except that the deceased did not understand what a Massachusetts trust was. VRP 118.

To the contrary, the undersigned and counsel for the personal representative, Mr. Sean Boutz, argued that no conflict existed between the Estate and the Trust because neither was asserting a claim against the other. For example, Mr. Boutz argued "the [personal representative] is taking no position with regard to the outcome of the what the will language says relative to the estate in conveyance of assets to the trust…[s]he is merely trying to enforce what the terms are, and those terms are that all of the estate assets, once it's completed, are to be conveyed to [the Trust]." VRP 123.

The Court subsequently denied the Motion for Disqualification and allowed the undersigned to represent the Trust as well as the Grass Fed Cattle Company Trust (the latter of which was voluntarily dismissed by

Appellant on the first day of trial). The trial court signed an order to that effect. CP 894-96.

The trial court correctly pointed out that Appellant did not have standing to raise the "conflict of interest" issue because neither attorney purported to represent the Appellant. VRP 129. The only "conflict" that existed was as between Appellant and the remaining parties, which is certainly expected in litigation, and indeed in this particular case, was the result of Appellant's own pleadings and causes of action. Neither the personal representative, the Trust, Ms. Johnson nor Mr. Barnes alleged any claim, defense or cause of action against one another at the trial court level nor on appeal. Simply put, there is no conflict of interest between the personal representative and the Trust.

Just as below, Appellant has failed to provide this Court with the mechanism for disqualifying the undersigned except to assert that Ms. Johnson's interests as trustee are "diametrically opposed" to the beneficiaries of the very same trust in which she is the trustee. Appellant's position is further belied by the fact that at no time in this case has he attempted to relieve Ms. Johnson of her duties as trustee for such a "conflict of interest." If Ms. Johnson does not have a conflict of interest with the beneficiaries (which she most certainly does not in law or fact), then counsel retained for the Trust does not either.

Appellant argued to Commissioner Wasson that "[Ms. Johnson's] interests should be considered by this Court to be separate and in conflict with that of the Homestead entity and its beneficiaries/shareholders." *See Appellant's Objection to Attorney Zener*, filed previously with this Court, at 4. The argument is illogical on its face and, even if Appellant had attempted to support his absurd argument with some authority, the argument is patently unsupported by any evidence that was presented at trial. Indeed, Ms. Johnson testified *exactly* to the contrary:

> Q: Do you have any intention of obtaining any of these certificates – either the ones that have been issued to the beneficiaries or the ones that have been dissolved, do you have any intention of obtaining those certificates for your own benefit?
>
> A: No.

VRP 441.

Even assuming that Appellant had standing to raise the conflict of interest and further could somehow establish a conflict of interest (which he has not to the trial court nor to this Court in his opening brief), the personal representative and the Trust provided informed consent to any such illusory conflict. Counsel for the personal representative and counsel for the Trust conferred with their respective clients, addressed the dual representation, and after being properly informed in writing, each client provided her informed written consent. CP 863-67.

D. THE TRIAL COURT DID NOT ERR IN APPLYING THE "DEADMAN'S STATUTE" (RCW 5.60.030).

The "deadman's statute," RCW 5.60.030 states:

> 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 dead man's 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. *Parks v. Fink*, 173 Wn. App. 366, 375, 293 P.3d 1275, *review denied* 177 Wn. 2d 1025, 309 P.3d 504 (2013); *Ebel v. Fairwood Park II Homeowners' Ass'n* 136 Wn. App. 787, 791-92, 150 P.3d

1163 (2007) ("A person is a party in interest ... when he or she stands to gain or lose" by the operation and effect of the action or judgment in question).

The deadman's statute does not bar documentary evidence, although it may limit testimony about the documents. *Laue v. Estate of Elder* 106 Wn. App. 699, 706, 25 P.3d 1032, *reconsideration denied, as amended, review denied,* 145 Wn. 2d 1036, 43 P.3d 20 (2001); *see also Thor v. McDearmid,* 63 Wn. App. 193, 202, 817 P.2d 1380 (1991).

The trial court granted a motion in limine prohibiting testimony implicated by RCW 5.60.030. VRP 208.

Appellant argues that the decedent's ledgers tabulating debts owed to the Estate (and thereby payable to the Trust under the terms of the will) should have been barred by RCW 5.60.030. However, this assertion is in direct contradiction to controlling Washington State precedent to the contrary, which explicitly stands for the proposition that documents are *not* barred by the deadman's statute. *Laue, supra*; *Thor, supra*.

The admissibility of testimony is discretionary with the trial court. *State v. Manthie*, 39 Wn. App. 815, 696 P.2d 33 (1985). The failure of a party to object at trial precludes review on appeal. *Brown v. Safeway Stores, Inc.*, 94 Wn. 2d 359, 617 P.2d 704 (1980).

Contrary to Appellant's assertion that "each and every party to this case was a 'party in interest,'" the Trust and Lorna Johnson as trustee, are *not* parties in interest. Neither the Trust nor Ms. Johnson benefit from the proper distribution and management of the assets contained in the Trust. Only the beneficiaries of the Trust and the will have an interest in the distribution of the assets. Both documents very clearly do not purport to distribute any assets to Ms. Johnson. Nonetheless, Appellant has failed to set forth a single citation to the record which shows that Ms. Johnson violated RCW 5.60.030 or the trial court's motion in limine precluding such testimony. Perhaps even more importantly, Appellant has further failed to provide citations to the record wherein he preserved this issue for appeal. For all of these reasons, the Court should affirm the trial court's rulings regarding RCW 5.60.030.

E. APPELLANT FAILED TO SET FORTH ANY EVIDENCE AT TRIAL OF HIS DAMAGES RESULTING FROM HIS ALLEGATIONS THAT THE TRUSTEE FAILED TO COMPLY WITH THE REPORTING REQUIREMENTS CONTAINED IN RCW 23B, *ET SEQ.*

Consistent with the theme in this case both at trial and on appeal, Appellant has failed to provide the Court with any legal authority for how the Trust and/or Ms. Johnson failed to comply with RCW 23B, *et seq.* Other than passing mentions of "RCW 23B," Appellant does not even identify

which statutes contained in RCW 23B, *et seq.* apply to the Trust, and further how the Trust failed to comply.

RCW 23B contains 22 chapters and 270 distinct sections (not including subsections); yet Appellant fails to cite a single one in support of his arguments. Further confounding, is Appellant fails to cite a single case or other legal authority for any of his allegations against the Trust and/or Ms. Johnson.

Rule of Appellate Procedure 10.3(a)(6) directs each party to supply, in its brief, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." Failure to provide argument and citation to authority in support of an assignment of error precludes appellate consideration under RAP 10.3(a)(6). *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992). "[P]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (*quoting Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)).

Here, Appellant fails to provide any citations to authority and further fails to specifically identify the portions of the record that for which he seeks reversal of the trial court's decision with respect to the "RCW 23B" issue

contained in his brief. Such failures preclude this Court's review of the same.

However, the trial court's ruling should be affirmed anyway because Appellant failed to provide the Court with any evidence to his damages arising out of any alleged "violations" of RCW 23B, *et seq.* The trial court found at trial that "there have been certainly no damage with regard to the establishment or the administration of the Massachusetts trust." VRP 862. As such, the Court found that Appellant (and Michael Grimsley) were not entitled to any relief from the Trust or from Ms. Johnson in any way, including for any alleged violations of "RCW 23B." The Court was not obligated to create a remedy for Appellant when he did not endeavor to identify any cognizable remedy to the Court. Indeed, Appellant failed at trial and has failed again on appeal to even provide a coherent argument for what the remedy *might* be for a violation of "RCW 23B."

F. THE TRUST IS ENTITLED TO REASONABLE ATTORNEY FEES ON APPEAL.

Rule of Appellate Procedure 18.1 provides this Court with discretion to award reasonable attorney fees and costs on appeal. The Trust submits that an award of reasonable attorney fees and costs is appropriate here. The applicable legal authority for awarding fees here is found in the Trust and

Estate Dispute Resolution Act at RCW 11.96A.150, which 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.... The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its 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.

The Trust respectfully requests that it be awarded its reasonable attorney fees and costs associated with responding to this appeal and that such award be directed against Appellant.

V. CONCLUSION

The Trust respectfully requests the Court affirm the trial court in all respects as set forth herein, and as set forth in the briefs of the other respondents to this appeal.

The Trust further respectfully requests the Court grant the Trust its reasonable attorney fees pursuant to RAP 18.1 and RCW 11.96A.150.

///

RESPECTFULLY SUBMITTED this 21st day of March, 2019.

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By:_____
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was served electronically via the Court of Appeals:

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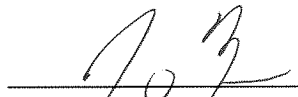

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