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NO. 362388

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF:
ANNE LORRAINE TROYER, DECEASED

TIMOTHY M. TROYER
Petitioner-Appellant,

v.

LORI A. TROYER
Respondent-Appellee.

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF THE ISSUE2

III. STATEMENT OF THE CASE.....2

 A. Tim threatens to use his prospective appointment as personal representative to retaliate against Lori and Irene. .2

 B. Trial court finds by clear and convincing evidence that Tim cannot fulfill the fiduciary duties he would have owed to Lori and Irene as beneficiaries, and appoints a third-party to administer the Estate.6

IV. ARGUMENT7

 A. Standard of Review7

 B. Tim waived any argument concerning the application of the disqualification statute, RCW 11.36.010, by failing to raise the argument below.....8

 1. Lori would be prejudiced if this argument is considered for the first time on appeal.....9

 2. Tim’s new argument does not meet the exception for manifest errors affecting a constitutional right under RAP 2.5(a).11

 C. The trial court did not abuse its discretion in refusing to appoint Tim and instead appointing a neutral third-party to administer the Estate.12

 1. The objection statute, RCW 11.28.020, is broader in scope than the disqualification statute, RCW 11.36.010, and allows courts to consider any objection that implicates the fairness of the estate administration process to the beneficiaries.12

2.	The trial court did not abuse its discretion in finding that Tim’s threats to use his appointment to “fuck” Lori and “make [her] pay” were a sufficient basis for sustaining the objection.....	15
3.	The trial court did not abuse its discretion in concluding that the appointment of a neutral third-party was necessary to protect the interests of all beneficiaries.	16
D.	There is no fundamental right to serve as personal representative and the right of a particular person to be appointed is secondary to the interests of beneficiaries in a fair and efficient distribution of the estate.	17
E.	The Court should award Lori attorneys’ fees and costs incurred in responding to Tim’s meritless appeal.....	19
V.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Cases

<i>In re Bredl's Estate,</i> 117 Wash. 372 (1921).....	15
<i>In re Estate of Ehlers,</i> 80 Wn. App. 751 (1996).....	8
<i>In re Estate of Jones,</i> 152 Wn. 2d 1 (2004)	7, 8, 16
<i>In re Langill's Estate,</i> 117 Wash. 268 (1921)	13-15, 18
<i>In re Stotts' Estates,</i> 133 Wash. 100 (1925)	15, 16, 17
<i>In re Thomas' Estate,</i> 167 Wash. 127 (1932)	17
<i>Matter of Aaberg's Estates,</i> 25 Wn. App. 336 (1980).....	8
<i>State ex rel. Lauridsen v. Superior Court for King Cnty.,</i> 179 Wash. 198 (1934)	15
<i>State v. McFarland,</i> 127 Wn. 2d 322 (1995)	11
<i>State v. Riley,</i> 121 Wn.2d 22 (1993).....	9
<i>Wingert v. Yellow Freight Sys., Inc.,</i> 146 Wn.2d 841.....	9

Statutes

Laws 1917, ch. 156, § 4813
Laws 1917, ch. 156, § 8713
RCW 11.28.020 *passim*
RCW 11.36.0108, 9, 12, 13
RCW 11.96A.150.....19

Court Rules

RAP 2.5(a)9, 11, 12
RAP 18.119

I. INTRODUCTION

No way watch what I do crazy lady[.] I'm going to make you pay both you and your sister both of you should be in jail [for] what you both did. Game on!!!!!! You have no idea what I'm going to do to fuck you!!!! You played me[.]

- Text message from Tim Troyer to his sister, Lori Troyer, responding to Lori's offer to take Tim's place as the personal representative of their mother's estate.

Appellant Timothy Troyer (“Tim”) and Appellee Lori Troyer (“Lori”) are siblings.¹ After their mother passed away in 2018, Tim and Lori had a falling out over a difficult decision that Lori had made to place their mother in an adult family home. When the time came to probate their mother's estate, Tim told Lori that he would use his position as executor to retaliate against her for making that decision—in Tim's words, to “fuck” her and “make [her] pay.”

The trial court refused to appoint Tim as the executor, finding by clear and convincing evidence that Tim could not fulfill the fiduciary duties of good faith, diligence and undivided loyalty that he would have owed to Lori and her sister as beneficiaries. There was no abuse of discretion in that decision. This Court should affirm.

¹ Because the parties and the decedent share the same last name, this brief will refer to them by their first names. No disrespect is intended.

II. STATEMENT OF THE ISSUE

Whether the trial court abused its broad discretion in refusing to appoint Tim as the personal representative of the Estate, where the court found by clear and convincing evidence that Tim could not fulfill the fiduciary duties he would have owed to the beneficiaries.

III. STATEMENT OF THE CASE

A. Tim threatens to use his prospective appointment as personal representative to retaliate against Lori and Irene.

The decedent, Anne Lorraine Troyer (“Anne”), executed her last will and testament (“Will”) in 1984. CP 1-3. The Will directs that Anne’s estate be distributed in equal shares to her children, Lori, Tim, and Irene Ornovitz (“Irene”). CP 1. Tim is named in the Will as the personal representative of the estate. CP 1.

Anne suffered from dementia in the later years of her life. CP 106. Tim was Anne’s primary caregiver during this time. CP 106. Tim lived with Anne in her longtime home and assisted her with daily tasks like cooking and cleaning. CP 106.

In May 2017, Anne announced that she was no longer comfortable living with Tim. One night after Tim had gone to bed, Anne gathered her purse and cell phone and made her way over to a neighbor’s house with her walker. CP 48. She informed the neighbor that Tim had been abusing her and that she needed to escape the house. CP 48. At Anne’s request,

the neighbor drove Anne to Lori's house. CP 48. Anne was shaking uncontrollably when she arrived. CP 48.

On May 7, 2017, Lori informed Tim that Anne was afraid of going back to the house. CP 48. Tim responded as follows via text message (typos in original):

No way I'm Not letting you do this see you in court I have way more money and the best lawyers your not doing this it's so messed up you talk 10 years of my life away. Be ready for a battle you don't know shit

This is on. You think you know everything. Crazy!!!! I'm not letting you control my life and I know your mom way better then you do. Fuck this I'll take you to court. The end!!!!!!

CP 23, 48.

On May 13, 2017, Lori sent Tim a text message to let him know that she would be stopping by the house to pick up Anne's mail. CP 49.

The following exchange ensued:

Lori: Heading up today to get mom's mail
Tim: Wow better not see me
Lori: Ok, when will you be away?
Tim: Stay. Away. She has no mail. You bitch!!!
Lori: Ok, thanks. I'll let her know.
Tim: Fuck you!!!
Tim: Soon. You stole my mom
Tim: Cunt!!!!

CP 24, 49.

A few days later, Lori made arrangements for Anne to move in to an adult family home. CP 49. She did so as Anne's agent pursuant to a durable power of attorney. CP 49.

Anne lived in the adult family home for the remainder of 2017 and into 2018. CP 49. In early March 2018, Anne took a turn for the worse and passed away. CP 49.

Anne's passing caused Tim to lash out against Lori and Irene. CP 49. On March 18, 2018, Tim sent Lori the following text messages (typos in original):

You played your power of attorney bs and run the show do the right thing that's not to much to ask. It's not that hard I've done it before. You want to be the boss just do it she had a lot of friends that should know your alone because you played your power trip just do the right thing that's not to much to ask or is it!!!!

By the way I spent the last 12 years with mom with no support don't lay that on me. And I'll be gone soon enough don't worry and don't put a time line on that you have no control on me anymore. You did such a good job with that Lol.

CP 34, 49.

On March 22, 2018, Lori sent Tim a text message notifying him of the date and time of Anne's memorial service. CP 49. Tim responded with the following text message (typos in original):

Do. Bs me. Get your shit together I signed mom's death certificate guit lieing. To everyone what a way to put your mom's days. With. You are such a bad lady there's a special place in hell for you and your idiot sister you not only took your mom away you took your brother rip your family a apart. So you good de a control. Freak

and you new nothing. Mom hated. You and Irene for what you did live that. Big shot. Your such a fake person like I Saudi see through like a piece of glass after the funeral you and Irene are died to me never want to see. You again. You both died to me March 15. 4:25. Am you should be so ashamed for what you did you weren't brought up that way so fucked up!!!!

CP 35, 50.

Lori forwarded this text message to Irene. CP 50. Irene felt so threatened that she decided not to travel to Spokane for Anne's memorial service. CP 50.

Tim's hostilities toward Lori continued unabated. This caused Lori to question whether Tim was capable of fairly administering their mother's Estate. CP 50. On April 11, 2018, Lori, through her attorney, sent Tim a letter offering to take his place as the executor of the Estate. CP 50. Later that day, Tim sent Lori the following text messages (typos in original):

No way watch what I do crazy lady

I'm going to make you pay both you and your sister both of you should be in jail what you both did. Game on!!!!!!

You have no idea what I'm going to do to fuck you!!!!

You played me[.]

CP 35, 50.

B. Trial court finds by clear and convincing evidence that Tim cannot fulfill the fiduciary duties he would have owed to Lori and Irene as beneficiaries, and appoints a neutral third-party to administer the Estate.

On May 8, 2018, Tim filed a petition to be appointed as the personal representative of the Estate. CP 37-39. Lori, thereafter, filed an objection to Tim's appointment pursuant to RCW 11.28.020, asserting that Tim was not capable of fulfilling the fiduciary duties he would owe to her and Irene as beneficiaries if he were appointed. CP 40-46.

The trial court held an evidentiary hearing on the objection on June 8, 2018. VRP 1-85. Lori and Tim both testified. After weighing both witnesses' credibility, the court found by clear and convincing evidence that Tim was not capable of carrying out the fiduciary duties he would owe to Lori and Irene if he were appointed as the personal representative:

So those are the things that the Court has to consider[,] the relationship that you have had with your sister[,] [B]ut then I jump to after your mom's death and what went on and the statements that you made telling her that you are going to F her. You're going to show her, [she] and the other sister, that you are in control, and you're going to show them.

That concerns the Court. Especially the duty of a PR is a fiduciary duty, to look out for the best interests of all of the beneficiaries. When you say I'm going to show you what I'm going to do and go through the statements that you made specifically talking about your duty as a PR, the Court has some serious concerns that you cannot be the person to be the PR.

I don't believe that you can step into the shoes and be that based on the testimony presented, and that is on a clear and convincing standard because of the testimony presented, of the evidence presented, the statements that you made and admitted to the Court [is] going to make that ruling.

VRP 81.

The trial court subsequently issued written findings of fact and conclusions of law. The court again reiterated that Tim was not able to fulfill the fiduciary duties of a personal representative:

Tim's statements reflect an intent to use the powers that would be granted to him as the personal representative to retaliate against Lori, and to a lesser extent Irene, for decisions that Lori made about the Decedent's care.

The Court finds, by clear and convincing evidence, that Tim is not capable of fulfilling the fiduciary duties that he would owe to Lori and Irene if appointed as the personal representative. Having directly threatened to use the appointment to "fuck" them and "make [them] pay," Tim is not in a position to treat Lori and Irene with the good faith, diligence and undivided loyalty that the appointment requires.

CP 109. The Court thus sustained Lori's objection and appointed a neutral third-party, James Spurgetis, to administer the Estate. CP 110.

IV. ARGUMENT

A. Standard of Review

A trial court's findings of fact are treated as verities on appeal so long as the findings are supported by substantial evidence. *In re Estate of Jones*, 152 Wn.2d 1, 8 (2004). Substantial evidence is "evidence that is

sufficient to persuade a rational, fair-minded person of the truth of the finding.” *Id.*

Probate courts have “broad discretion” over matters pertaining to the appointment and removal of personal representatives under title 11 RCW. *Matter of Aaberg’s Estates*, 25 Wn. App. 336, 340 (1980). The only inquiry on appeal is whether the decision below was “so arbitrary as to amount to an abuse of discretion.” *Id.* This is a “manifest abuse of discretion” standard. *In re Estate of Ehlers*, 80 Wn. App. 751, 761 (1996). If any one of the grounds supporting the lower court’s decision is valid, the decision must be upheld. *Jones*, 152 Wn. 2d at 10 & n.2. The appellate court may also affirm on any basis that is supported by the lower court’s findings. *Id.*

B. Tim waived any argument concerning the application of the disqualification statute, RCW 11.36.010, by failing to raise the argument below.

Tim’s main argument on appeal is that the objection statute, RCW 11.28.020, is merely a vehicle for asserting procedural objections under the disqualification statute, RCW 11.36.010. In other words, Tim’s position is that the only allowable basis for sustaining an objection under the objection statute is if the named personal representative is disqualified under one of the disqualification criteria set forth in the disqualification statute (being a minor, a person of unsound mind, a convicted felon, etc.).

That argument fails for a host of reasons addressed in Section C below. However, because the argument is being raised for the first time on appeal, the Court should decline to address it. *See State v. Riley*, 121 Wn.2d 22, 31 (1993) (“Arguments not raised in the trial court generally will not be considered on appeal.”); *Wingert v. Yellow Freight Sys., Inc.*, 146 Wn.2d 841, 853 (2002) (same); *see also* RAP 2.5(a) (prohibiting appellant from raising new claims of error on appeal unless the error affects a constitutional right).

1. Lori would be prejudiced if this argument is considered for the first time on appeal.

Tim never mentioned the disqualification statute in the proceedings below. Nor did he ever argue that the objection statute, RCW 11.28.020, was merely a vehicle for raising procedural objections to a named personal representative’s qualifications.

The parties and the trial court all understood that the purpose of the evidentiary hearing was to decide whether Tim could fulfill the fiduciary duties he would owe to Lori and Irene if he was appointed as the personal representative. Lori confined her evidence and argument to that specific question.

Had Lori known that Tim would attempt to shift the focus to the disqualification statute on appeal, she would have presented additional evidence—and requested an additional finding—that Tim was disqualified

under the disqualification statute by virtue of being a “person of unsound mind.” Additional evidence bearing on Tim’s alcoholism and irrational behavior, in particular, would have been relevant to that determination.

Lori made a conscious decision not to belabor Tim’s alcoholism and irrational behavior at the evidentiary hearing because she recognized that these were peripheral issues that had little bearing on the decision that the trial court was being asked to make. She also did not want to unduly embarrass her brother in a public forum. Had Lori known that Tim would attempt to use the disqualification statute as an escape hatch on appeal, she would have addressed the statute directly below.

The prejudice to Lori is obvious. Lori proved her case under RCW 11.28.020. On appeal, Tim is now arguing for the first time that an entirely different statute applies—and that the trial court’s findings of fact make *him* the prevailing party. *See, e.g.*, Opening Br. at 3 (framing issue as whether the trial court’s findings “establish that Tim . . . is disqualified under RCW 11.36.010”); *id.* at 11 (“Tim is not disqualified under RCW 11.36.010.”).

This is a textbook example of why new arguments are not considered on appeal. Tim could have, and should have, raised this argument below. Having failed to do so, he should not be permitted to pursue it on appeal.

2. Tim's new argument does not meet the exception for manifest errors affecting a constitutional right under RAP 2.5(a).

As an exception to the rule that new arguments will not be considered on appeal, RAP 2.5(a) gives appellate courts discretion to address "manifest error affecting a constitutional right." RAP 2.5(a). Errors that fall within this exception are those that may result in serious injustice and "adversely affect public perceptions of the fairness and integrity of judicial proceedings." *State v. McFarland*, 127 Wn.2d 322, 333 (1995).

Tim's new argument does not fall within the ambit of RAP 2.5(a). For one thing, there is no constitutional right to be appointed as a personal representative of an estate. This issue is addressed in Section D below.

Moreover, even if a constitutional right was somehow implicated, the alleged error hardly rises to the level of "manifest" error that impugns the fairness and integrity of the judicial system. *McFarland*, 127 Wn.2d at 333. The trial court held an evidentiary hearing on Lori's objection. Both parties presented evidence and made legal arguments. The court issued a thorough and thoughtful ruling. Due process was served.

Assuming *arguendo* that an error was made, it does not meet the RAP 2.5(a) exception and therefore should not be considered for the first time on appeal.

C. The trial court did not abuse its discretion in refusing to appoint Tim and instead appointing a neutral third-party to administer the Estate.

The trial court did not err in sustaining Lori's objection to Tim's appointment. Contrary to Tim's assertions, RCW 11.28.020 is not merely a vehicle for raising procedural objections under RCW 11.36.010. The statute instead authorizes a court to refuse an appointment under a broad array of circumstances, including when, as here, there is evidence that the named personal representative intends to administer the estate in a manner that is detrimental to the beneficiaries. The trial court acted well within its discretion in declining to appoint Tim and appointing a neutral third-party to act as administrator.

1. The objection statute, RCW 11.28.020, is broader in scope than the disqualification statute, RCW 11.36.010, and allows courts to consider any objection that implicates the fairness of the estate administration process to the beneficiaries.

As noted above, Tim's primary argument on appeal is that the objection statute, RCW 11.28.020, can only be used to raise procedural objections under the disqualification statute, RCW 11.36.010. In Tim's view, a probate court can only sustain an objection under RCW 11.28.020 when the named personal representative is disqualified under one of the disqualification criteria set forth in RCW 11.36.010 (being a minor, a person of unsound mind, a convicted felon, etc.).

That argument is wrong. RCW 11.28.020 is not merely a vehicle for raising procedural objections under the disqualification statute. While RCW 11.28.020 certainly can be used for that purpose, it is by no means *limited* to that purpose.

In re Langill's Estate, 117 Wash. 268 (1921), is on all fours. *Langill's Estate* involved an objection to the appointment of an executor that was filed pursuant RCW 11.28.020's predecessor statute, Section 48 of the Probate Code of 1917.² Like Lori's objection here, the objection at issue in *Langill's Estate* was not tied to the disqualification statute. *Id.* at 268-69. Rather, like Lori's objection, the objection was addressed to the executor's inability to carry out his fiduciary duties and administer the estate in the best interests of the beneficiaries. *Id.*

The probate court sustained the objection and appointed a different party to administer the estate. *Id.* at 268. On appeal, the executor raised the very same argument that Tim advances here—*i.e.*, that an appointment can only be refused when the prospective appointee is disqualified under the disqualification statute.³ *Id.* at 269. The Supreme Court rejected that

² Section 48 of the Probate Code of 1917 is word-for-word identical to RCW 11.28.020. See Laws 1917, ch. 156, § 48 (available [here](#)). Although *Langill's Estate* does not specifically mention § 48, it is clear from the context that the objection was made pursuant to that statute. The objection was filed before an executor was appointed, and the court held a "hearing" on the objection. Section 48 is the only statute in the Probate Code of 1917 that would have allowed for a pre-appointment objection and a hearing.

³ When *Langill's Estate* was decided in 1921, the disqualification statute was codified as Section 87 of the Probate Code of 1917. See Laws 1917, ch. 156, § 87 (available [here](#)).

argument, explaining that probate courts' authority over the appointment process extends far beyond the disqualification statute, and allows courts to consider any objection that implicates the fairness of the process to the beneficiaries:

The appellant contends that these provisions of the [disqualification] statute are mandatory; that the enumeration of certain disqualifications by the statute precludes the idea that other disqualifications may exist; and that in determining who may be appointed as an executor or administrator, the courts are without power or right to adjudge a person disqualified on grounds which the statute does not make disqualifications.

We are unable to agree with these contentions. *The statute, while it defines certain things as disqualifications, does not say in terms, nor do we think by necessary implication, that there shall be no other.* The purpose of administration is to preserve the estate, and cause it to pass to the heirs and distributees without waste or loss, and without undue delay. *In appointing an administrator the court acts judicially, not ministerially, and it is as much its judicial duty to guard an estate against possible waste and loss as it is to take action against waste and loss after it has occurred.*

Id. (emphasis added).

Langill's Estate is the death knell for Tim's argument. The only difference between that case and this case is that the objection statute and the disqualification statute were codified in different places than they are

The disqualification statute has since been recodified as RCW 11.36.010. The language remains identical in all material respects.

today. But they are the *same* statutes, and have gone materially unchanged since *Langill's Estate* was decided.

Moreover, the Court's reasoning still rings true. Appointing a personal representative is not a ministerial process of verifying that the statutory qualifications are satisfied, but rather an exercise in applying experience and discretion to ensure that the estate will be properly administered. This Court should apply *Langill's Estate* as settled law⁴ and affirm the decision below as a proper exercise of the trial court's discretion.

2. The trial court did not abuse its discretion in finding that Tim's threats to use his appointment to "fuck" Lori and "make [her] pay" were a sufficient basis for sustaining the objection.

The trial court did not abuse its discretion in refusing to appoint Tim as personal representative. After hearing and weighing the credibility of testimony, a court may refuse to appoint a proposed representative upon a showing of a conflict which would impair the rights of beneficiaries.

The ultimate objective of the court in appointing a representative is to

⁴ Our Supreme Court has adhered to the dispositive holding in *Langill's Estate* on at least three other occasions. See *In re Stotts' Estates*, 133 Wash. 100, 104-05 (1925) (holding that courts are not bound by "enumerated causes of disqualification," and may refuse to appoint an executor who is "hostile to the observance" of the rights of the beneficiaries); *In re Bredl's Estate*, 117 Wash. 372, 375 (1921) (holding that courts may refuse to appoint an executor who has displayed "dishonesty of purpose in seeking the appointment, or who has betrayed a gross unfitness in other respects," even if the executor is entitled to the appointment by statute); *State ex rel. Lauridsen v. Superior Court for King Cnty.*, 179 Wash. 198, 204 (1934) (noting that courts can refuse appointments for reasons other than disqualification under the disqualification statute).

ensure the proper distribution of the estate by protecting the rights of the beneficiaries and preventing waste of the estate. *In re Estate of Jones*, 152 Wn. 2d 1, 19 (2004). A personal representative must ensure that the estate is properly and impartially passed on to beneficiaries. *In re Stotts' Estates*, 133 Wash. 100, 105 (1925). When there is a conflict which threatens to impair the rights of the beneficiaries, that potential representative should be disqualified. *Jones*, 152 Wn. 2d at 19.

In this case, there is an ongoing conflict between Tim and Lori, making Tim incapable of fulfilling the fiduciary duties he would owe Lori and Irene, as beneficiaries. Tim has indicated his intention to use the appointment to “fuck” them and “make [them] pay.” CP 50. The trial court did not credit Tim’s testimony that he would be able to administer the estate impartially. CP 109. Tim’s statements reflect his plans to use his powers as personal representative to retaliate against Lori and Irene. Since Tim is not able to fulfill the duties of good faith, diligence, and undivided loyalty that are owed by a personal representative to beneficiaries, Tim was properly disqualified from appointment.

3. The trial court did not abuse its discretion in concluding that the appointment of a neutral third-party was necessary to protect the interests of all beneficiaries.

The trial court selected the best course of action in appointing a neutral third-party to serve as executor of the Estate. When appointing an

executor, the court must aim to preserve the estate and prevent waste, loss, or undue delay. *Langill's Estate*, 117 Wash. at 269. The executor must be impartial in assisting the estate to ensure proper administration. *Stotts' Estates*, 133 Wash. at 105. A suitable person who is not a family member or beneficiary of the estate may be appointed when ill-will among family members would result in continuous litigation and loss to the estate. *In re Thomas' Estate*, 167 Wash. 127, 133-34 (1932).

James Spurgetis was appointed by the trial court to administer the Estate. CP 110. The trial court found that the appointment of a neutral third-party was needed to protect the interests of the beneficiaries. VRP 82; CP 110. Mr. Spurgetis is not a member of the family and has no conflict with any beneficiaries, ensuring he will impartially and properly administer the Estate. This Court should affirm the trial court's decision disqualifying Tim and appointing Mr. Spurgetis as personal representative of the Estate.

D. There is no fundamental right to serve as personal representative and the right of a particular person to be appointed is secondary to the interests of beneficiaries in a fair and efficient distribution of the estate.

The trial court did not abuse its discretion in refusing to appoint Tim as the personal representative. Contrary to Tim's assertions, there is no fundamental right to serve as the executor of an estate. Once again, our Supreme Court's decision in *Langill's Estate* is instructive.

Langill's Estate holds that the beneficiaries of an estate are entitled to “have [the] estate administered and distributed in accordance with the law.” 117 Wash. at 270. This is a *primary right* that trumps the rights of all other interested parties—including the named executor’s right to administer the estate. *Id.* Accordingly, when a conflict arises between the named executor’s right to administer the estate and the beneficiaries’ right to have the estate administered in their best interests, the named executor’s right must yield:

It is true that the right to administer an estate is a valuable right. But, to paraphrase the language of Mr. Justice Woods . . . no right is arbitrary or unqualified by a correlative right. *The right of those interested to have an estate administered and distributed in accordance with law is the dominant right; the right of any particular person to administer the estate is a secondary right. When the allowance of the claim to exercise this secondary right may result in defeating the primary right, it should be refused.*

Id. at 269-70 (emphasis added) (internal citation omitted).

While nearly 100 years old, the passage above fits this case to the letter. Tim’s right to administer the Estate must yield to Lori’s and Irene’s right to have the Estate administered in their best interests as beneficiaries. Having announced his intentions to retaliate against the beneficiaries, Tim can hardly claim that the trial court abused its discretion in appointing a neutral third-party instead.

Tim also argues the court's refusal to accept his appointment deprives him of due process rights under the Constitution of the United States. RCW 11.28.020 provides the process for a ruling on an objection to the appointment of a personal representative, ensuring any objection "shall be heard and determined by the court." RCW 11.28.020. Pursuant to this process, Tim was provided ample time and opportunity to present his case against the objection at the trial court. The trial court heard testimony from both Tim and Lori and weighed the credibility of that testimony. The trial court did not credit Tim's testimony that he could administer the Estate impartially, given the totality of the circumstances and the facts before the court. CP 109. Tim was not deprived of due process. The court gave Tim an opportunity to be heard, but determined he was unable to fulfill the fiduciary duties that an appointment as personal representative would require.

E. The Court should award Lori attorneys' fees and costs incurred in responding to Tim's meritless appeal.

The positions Tim has taken in this appeal are wholly without merit. Tim's arguments concerning the disqualification statute are particularly meritless, as they are directly foreclosed by longstanding Washington Supreme Court precedent. Lori respectfully requests that the Court award attorneys' fees and costs pursuant to RCW 11.96A.150 and RAP 18.1.

V. CONCLUSION

The trial court did not abuse its discretion in refusing to appoint Tim as the personal representative of the Estate after finding by clear and convincing evidence that Tim was not capable of fulfilling the fiduciary duties he would have owed to the beneficiaries. The decision below should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of January, 2019.

WITHERSPOON BRAJCICH MCPHEE, PLLC

By: /s/ John T. Drake
John T. Drake, WSBA No. 44314
Attorney for Respondent Lori Troyer

CERTIFICATE OF SERVICE

I, John T. Drake, hereby certify that a true and correct copy of the foregoing was served on the following recipient on January 23, 2019, in the manner indicated below.

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