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STATE OF WASHINGTON
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No. 69929-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Testamentary Trust of Giuseppe Desimone,

DALE COLLINS, a married man,

Appellant,

vs.

BNY MELLON, N.A., JOSEPH R. DESIMONE and RICHARD L.
DESIMONE, JR., in their capacities as co-Trustees of the
TESTAMENTARY TRUST OF GUISEPPE DESIMONE,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE MICHAEL TRICKEY

BRIEF OF APPELLANT

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RAP 18.113

I. ASSIGNMENT OF ERROR

1. The trial court erred in entering its January 11, 2013 Order Granting Co-trustees' and Danieli Parties' Motions for Summary Judgment. (CP 359-63)

II. ISSUE RELATED TO ASSIGNMENT OF ERROR

Whether appellant is an income beneficiary of his grandfather's testamentary trust, which left property in trust for his "issue (my grandchildren)" after the death of the testator's children?

III. STATEMENT OF THE CASE

Because the trial court dismissed his claims on summary judgment, the facts must be taken in the light most favorable to appellant's claims. *Roberts v. King County*, 107 Wn. App. 806, 808, 27 P.3d 1267 (2001), *rev. denied*, 145 Wn. 2d 1024 (2002). This statement of the case is written accordingly. No disrespect is intended by the use of individuals' first names for clarity.

A. Statement of Facts.

Appellant Dale Collins is Giuseppe Desimone's grandson. Dale was born in April 1949 as a result of a brief affair between Giuseppe's son Mondo Desimone and Dale's mother Josephine in the summer of 1948. (CP 31-33, 64-65)

Giuseppe owned and operated the Pike Place Market, and had extensive other real property holdings in King County. (CP 267-79) When Giuseppe died in 1946 (CP 260), his will, which he had executed in 1943, left his half of the extensive community estate in trust (hereafter, the “Desimone trust”). Giuseppe instructed his trustees: “I wish my Trustees to know that I have an abiding faith in the value of land as an investment. I have chosen the land which I own carefully, and wish it to be retained . . .”. (CP 46) Giuseppe’s will provided for his estate to be maintained in trust for the maximum time possible under the rule against perpetuities at the time – “upon the arrival of the date twenty-one years following the death of the last survivor of my children and those of my grandchildren who shall have been born at the time of my death.” (CP 43) *See Betchard v. Iverson*, 35 Wn.2d 344, 347, 212 P.2d 783 (1949), *codified as* former RCW 11.98.010 by Laws of 1959, ch. 146, § 1.¹

After listing his five children, Giuseppe directed that the income from the Desimone trust be “annually divided between and paid to my children aforementioned.” (CP 40, 42) His will continued:

¹ In 2001, the Legislature changed the rule against perpetuities to impose a uniform limit of 150 years on trusts. RCW 11.98.130.

“[i]n the event that any of my said children shall die leaving issue (my grandchildren) surviving them, then the share of the income to which such child would have been entitled if alive shall be annually divided between and paid to its issue on the basis of one portion thereof to each male issue and one half portion thereof to each female issue.” (CP 42) On the death of Giuseppe’s “grandchildren . . . leaving issue (my great-grandchildren) then the share to which such deceased grandchild would have been entitled if then alive shall go to and be paid annually to its issue, my great-grandchildren, on the basis of one share to each male issue of such deceased grandchild and one half-share to each female issue thereof.” (CP 42) Similar provision for payment of income was made for great great-grandchildren, after the death of a great-grandchild. (CP 42-43) The corpus of the Desimone trust – largely real estate that Giuseppe had directed his trustees not to sell – was not to be distributed until 21 years following the death of the last survivor “of my said children and of those of my grandchildren who shall be born at the time of my death,” when the trust was to be divided, per stirpes, “one share to each male issue and one-half share to each female issue.” (CP 44)

Giuseppe's will did not define the terms "issue" or "grandchildren." Giuseppe's will by its terms did not limit its beneficiaries to his "lawful lineal descendants." (CP 53)

Giuseppe had five children (four sons and one daughter), including Dale's father Mondo. (CP 40) One of Giuseppe's sons died in March 1949, leaving no children, while Giuseppe's will was in probate. (CP 260, 264) Giuseppe's four surviving children (three sons and one daughter) were the initial income beneficiaries of the Desimone trust. Until each of Giuseppe's children died, the income beneficiaries in the next class (of grandchildren or great-grandchildren) could not be ascertained. The current income beneficiaries of the Desimone trust are all grandchildren or great-grandchildren of Giuseppe Desimone. (CP 2-3, 10)

B. Procedural History.

Mondo died in 1996. (See CP 289) Dale was raised by his mother and her husband in Alaska, and only learned that Mondo was his father in 2008. (CP 33) Dale commenced this action in a timely fashion after meeting his half-sister and some of his cousins and learning of the Desimone trust from them. (CP 34)

Dale moved for summary judgment seeking a determination he was a beneficiary of the Desimone trust because Giuseppe's will

by its terms did not limit the beneficiaries to Giuseppe’s “lawful” or “legal” issue, and Dale is one of Giuseppe’s grandchildren, who are defined as beneficiaries of the Desimone trust. (CP 12) The respondent trustees and beneficiaries (some, but not all, of the acknowledged beneficiaries have objected to Dale’s claims), moved for summary judgment on the grounds that Giuseppe’s will’s use of the term “issue” precluded his grandson Dale from being a beneficiary of the Desimone trust because the intestacy scheme for real estate in 1943, defined “issue” as “lawful lineal descendants.” Rem. Rev. § 1354. (CP 125)

The trial court granted summary judgment to the respondents. (CP 359-63) Dale appeals. Respondents appealed the trial court’s discretionary denial of a fee award under RCW 11.96A.150. The appeals have been consolidated.

IV. ARGUMENT

A. Standard Of Review.

This court reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Washington Builders Ben. Trust*, 173 Wn. App. 34, 56 ¶ 30, 293 P.3d 1206 (2013). “An appellate court reviews de novo the trial court’s interpretation of a will.” *Estate of Wright*, 147 Wn. App. 674, 680 ¶

14, 196 P.3d 1075 (2008), *rev. denied*, 166 Wn.2d 1005 (2009), quoting *Woodard v. Gramlow*, 123 Wn. App. 522, 526, 95 P.3d 1244 (2004), *rev. denied*, 153 Wn.2d 1029 (2005).

B. By Its Terms, Giuseppe’s Will Does Not Exclude Dale From The Class Of Income Beneficiaries Defined As His “Issue (My Grandchildren)”.

“[T]he paramount duty of a court in construing and interpreting the language of a will is to determine and implement the intent of the testator or testatrix.” *Estate of Wright*, 147 Wn. App. at 681 ¶ 16, quoting *Estate of Newbert*, 16 Wn. App. 327, 330, 555 P.2d 1189 (1976) (citing RCW 11.12.230; *Estate of Griffen*, 86 Wn.2d 223, 543 P.2d 245 (1975)). The court determines a testator’s intent based on the provisions of the will itself, giving effect to every part. *Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985); *Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994).

In *Estate of Wright*, this court held that the use of the term “lawful descendants” in a will excluded the settlor’s claimed illegitimate but unacknowledged child as a beneficiary. 147 Wn. App. at 684-85 ¶¶ 23-25. The *Wright* court relied heavily on the decision in *Will of Hoffman*, 53 A.D.2d 55, 66-67, 385 N.Y.S.2d 49 (N.Y. App. Div. 1976), which held that the use of the term “issue” should not be interpreted to exclude the children of unmarried

parents. The court in *Hoffman* reasoned that the term “‘issue’ . . . should have no meaning other than that ordinarily and customarily imputed to persons in its usage in the absence of any manifestation of an intent to the contrary.” 53 A.D.2d at 667, *quoted with emphasis in Estate of Wright*, 147 Wn. App. at 682 ¶ 18. *See also Annan v. Wilmington Trust Co.*, 559 A.2d 1289, 1290 (Del. 1989) (the terms “issue” and “lineal descendants” include illegitimates who can prove paternity).

A testator may be presumed to make his will knowing the law. *Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836 (1986). Just over a decade before Giuseppe made his will, our Supreme Court noted, without reference to the intestacy statutes, that “in its general sense, unconfined by any indication of intention to the contrary, the word ‘issue’ includes in its meaning all descendants.” *Bowles v. Denny*, 155 Wash. 535, 541, 285 Pac. 422 (1930).

Respondents, and the trial court, instead relied on the definition of “issue” in the real property intestacy statute in effect in 1943, Rem. Rev. § 1354, to mean “lawful lineal descendants,” to infer that Giuseppe intended to exclude illegitimates as beneficiaries. (CP 125) In *Estate of Wright*, however, this court observed “of course, that the laws of intestacy are by definition

inapplicable when the decedent leaves a will.” 147 Wn. App. at 683 ¶ 21.² Nothing in Giuseppe’s will suggests he intended to incorporate the intestacy statutes, and their definition does nothing to prove Giuseppe’s intent.

What is clear from Giuseppe’s will is that he intended the Desimone trust to benefit descendants that he would never know, with a trust that extended to the limits of the rule against perpetuities. Regardless of the claimed “technical” meaning of “issue,” Giuseppe also defined his beneficiaries, by generation, as “my grandchildren” “great grandchildren,” and “great great grandchildren.” None of these terms were defined by statute when he executed his will, or now. Dale is indisputably Giuseppe’s grandchild. Yet respondents’ argument, and the trial court’s interpretation, writes those terms out of the will.

² Rem. Rev. § 1354 itself expressly provided that its definition of “issue” was for the purposes of “this chapter,” which governed the descent of real property of an individual who died without a will. The statute read in its entirety:

Words “Issue” and “Real Estate” defined. The word “issue,” *as used in this chapter*, includes all the lawful lineal descendants of the ancestor, and the words “real estate,” include all bonds, tenements, and hereditaments, and all rights thereto, and all interest therein possessed and claimed in fee simple, or for the life of a third person.

Rem. Rev. §1354 (emphasis added).

As this court held in *Estate of Wright*, the use of the term “lawful descendants” in a trust instrument excludes an illegitimate, unacknowledged child as a beneficiary. “Simply disregarding the presence of modifying language in a will provision is . . . directly contradictory to Washington law.” *Estate of Wright*, 147 Wn. App. at 685 ¶ 24, citing *Estate of Bergau*, 103 Wn.2d at 435. The converse is also true. Giuseppe’s use of the term “issue (my grandchildren)” to define the income beneficiaries of the Desimone trust includes his grandchild Dale within the class of income beneficiaries.

C. If The Intestacy Laws Are Relevant To Interpretation Of Giuseppe’s Will, The Court Must Look To The Law Applicable When The Class Of Income Beneficiaries Is Ascertained.

When a testator creates a trust that will continue far into the future, to benefit individuals who cannot be ascertained when the trust is created, the testator is presumed to understand that the law governing who will be a beneficiary could change. *Matter of Sollid*, 32 Wn. App. 349, 647 p.2d 1033 (1982). In *Matter of Sollid*, the adopted children of a settlor’s child became beneficiaries of a trust that had been created before they were adopted, and at a time when their adoption would not have made them beneficiaries of the trust.

The *Sollid* court applied the law in effect when the adopted children's claims to benefit from the trust were made, because "the settlor of the trust was presumed to understand that a statute fixing the rights of an adopted child would be subject to change; thus a statute requiring adopted children be treated as trust beneficiaries was retroactively applied." *Matter of Sollid*, 32 Wn. App. at 357, *relying upon Wilmington Trust Co. v. Huber*, 311 A.2d 892 (Del. Ch. 1973).

The reasoning in *Matter of Sollid* applies equally to changes in the law governing the inheritance rights of children born out of wedlock. The decision in *Sollid* reflects the "modern rule" that "the applicable law to the determining of a class following the termination of a life interest is the law as it exists on the date of ascertainment, unless the documents themselves demonstrate a clear intent on the part of the creator to limit the class as it was defined by law on the date of execution of the trusts." *Annan v. Wilmington Trust Co.*, 559 A.2d at 1292, *quoting Haskell v. Wilmington Trust Co.*, 304 A.2d 53, 54 (Del. 1973).

In *Annan*, the Supreme Court of Delaware applied the current law governing inheritance, and not that in effect when a trust was created in 1932, to determine whether a settlor's

illegitimate children were “issue” who would take at the conclusion of the life income estate created by the trust. As with Giuseppe’s will, the *Annan* “trust instruments [did] not indicate whether illegitimate children fall under the definition of ‘issue’. The term [was] not defined in the documents.” 559 A.2d at 1292 (footnote omitted). The *Annan* Court therefore relied on same rule of construction that governed the decision in *Matter of Sollid*: “that a settlor, unless he indicates otherwise, expects that the laws governing trusts will change and that the trust he created will be subject to those changes.” 559 A.2d at 1293.

Mondo died in 1996. (CP 289) His life interest in the Desimone trust terminated only then. Dale became aware of his paternity, and his potential ascertainment as a member of the remainder life interest class of Giuseppe’s grandchildren, only in 2008.³ By either date, illegitimates inherited under the intestacy statutes that respondents and the trial court relied upon to foreclose Dale’s claims. To the extent these statutes are relevant, they

³ Below, respondents asserted that Dale could not prove his paternity because the statute of limitations had run under the Uniform Parentage Act, RCW ch. 26.26. That is incorrect. RCW 26.26.630(2); *Parentage of C.S.*, 134 Wn. App. 141, 152 n. 25, 139 P.3d 366 (2006) (UPA time limits do not apply to child’s proceeding to adjudicate parentage).

support Dale's claims that he should be included in the class of income beneficiaries of the Desimone trust.

In 1976, twenty years before Mondo died, the Legislature amended the intestate succession laws to provide that "for the purposes of inheritance to, through, and from any child, the effects and treatment of the parent-child relationship shall not depend upon whether or not the parties have been married." RCW 11.04.081, *as amended by* Laws 1975-76, 2d Ex. Session, ch. 42, § 24.⁴ This statute has been freely applied to persons born before its enactment. *Estate of Cook*, 40 Wn. App. 326, 698 P.2d 1076 (1985). The court in *Estate of Cook* applied RCW 11.04.081 to determine the consequence of illegitimacy to inheritance from a woman born out of wedlock in Ohio in 1909. 40 Wn. App. at 328. In doing so, the *Cook* court rejected the application of Ohio's more stringent requirements, which required (as did Washington's statute, before its amendment in 1976), written acknowledgement by the father of an illegitimate child's paternity. 40 Wn. App. at 328 n. 3, 329.

⁴ Three years before Dale knew that Mondo was his father and Giuseppe was his grandfather, Laws 2005, ch. 97, § 1, formally removed "lawful" from the definition of "issue" as "lineal descendants" in RCW 11.02.005(8).

If the intestacy statutes are relevant to interpretation of Giuseppe's will, as respondents contend and the trial court concluded, the court must look to the law applicable when the class of income beneficiaries is ascertained. Those laws confirm that Dale is within the class of income beneficiaries of the Desimone trust.

D. This Court Should Award Dale His Fees On Appeal.

This court should award Dale his attorneys' fees under TEDRA. "RCW 11.96A.150 expressly authorizes the Court of Appeals to make an independent decision on the question of fees to any party." *Estate of Black*, 116 Wn. App. 476, 492, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). This court should exercise its discretion and award attorneys' fees to Dale on appeal pursuant to RAP 18.1 and RCW 11.96A.150(1).

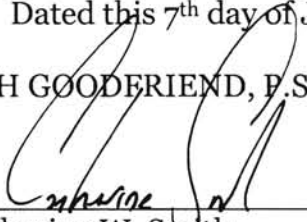
V. CONCLUSION

Giuseppe's will looked at least three generations into the future in creating the Desimone trust. His use of the undefined term "issue," in conjunction with the express intent to benefit his "grandchildren," means his grandson Dale is an income beneficiary of the Desimone trust. This court should reverse the trial court's

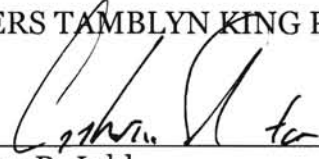
summary judgment dismissing Dale's claims and remand for proceedings consistent with Dale's status as an income beneficiary of the Desimone trust.

Dated this 7th day of June, 2013.

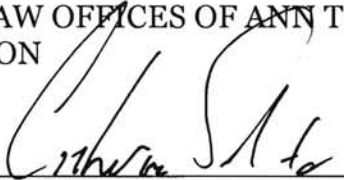
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 7, 2013, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 7th day of June, 2013.



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