69929-6 69929-6

No. 69929-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the Testamentary Trust of Giuseppe Desimone

DALE COLLINS, a married man,

Appellant/Cross-Respondent,

v.

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

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS CO-TRUSTEES BNY MELLON, N.A., JOSEPH R. DESIMONE AND RICHARD L. DESIMONE, JR.

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I. INTRODUCTION

Giuseppe Desimone executed his Will in 1943. The Trust created under Giuseppe's Will for the benefit of his children (their "issue" and the "issue" of their "issue") has been in existence since Giuseppe died in 1946. More than 60 years later, Dale Collins filed a TEDRA petition claiming that Giuseppe's son, Mondo, is his biological father and, therefore, that he is a beneficiary of his Trust.

Washington law requires the court to give effect to Giuseppe's intent as expressed in his Will, and to interpret the terms in his Will according to their meaning at the time the Will was executed. The clear Washington statutory meaning of the term "issue" in 1943 was "all lawful lineal descendants." Giuseppe purposefully used the term "issue" in his Will more than twenty times to demonstrate his intent to benefit descendants born to married parents. If Dale Collins is the son of Mondo Desimone, he was admittedly not born to parents who were married. Consequently, Mr. Collins is not and cannot be an intended beneficiary of Giuseppe's Trust.

Giuseppe's right to dispose of his property as he intended, as evidenced by his Will, is a valuable right, assured by law, and this Court is obligated to effect his intent. Giuseppe clearly intended for his Trust to provide for his children, their issue, and their issue's issue. Because the term "issue" unambiguously excluded a child born out of wedlock when Giuseppe executed his Will in 1943, Dale Collins is not an intended

beneficiary of Giuseppe Desimone. To conclude otherwise would frustrate Giuseppe's clear intent.

II. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court correctly dismissed Dale Collins' claim on summary judgment because Washington law in 1943, when Giusesppe's Will was executed, defined the terms "issue" and "child" as descendants born to married parents, and Giuseppe's Will unambiguously -- through its careful and repeated use of those defined terms -- demonstrates his intent to benefit only his lawful lineal descendants to the exclusion of descendants born to unmarried parents, including Dale Collins. RP 49-51; CP (69929-6) 359-63.

III. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the intent of a testator must be determined based on the testator's understanding of the law at the time the will was executed?

2. Whether the term "issue" in Giuseppe's Will, as it was defined in 1943 by Washington statute, excludes children born out of wedlock as intended beneficiaries?

IV. THE CO-TRUSTEES' ASSIGNMENT OF ERROR

1. The trial court erred in failing to award attorney's fees and costs to the Co-Trustees under RCW 11.96A.150. CP (70094-4) 247-52.

V. ISSUES PERTAINING TO THE CO-TRUSTEES' ASSIGNMENTS OF ERROR

Whether the trial court abused its discretion in denying the Co-Trustees' request for an award of their attorney's fees under RCW 11.96A.150 when there is no basis under Washington law for Dale Collins' claim against the Trust?

VI. STATEMENT OF THE CASE

A. Facts.

Joseph R. Desimone and Richard L. Desimone, Jr. are the grandsons of Giuseppe Desimone and the current Co-Trustees, along with BNY Mellon, of the Trust established under his 1943 Will. CP (69929-6) 135. Giuseppe Desimone died on January 4, 1946. *Id.* In his Will, Giuseppe provided that his four sons and one daughter would share in a testamentary trust, and further provided that if any of his 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 (69929-6) 146 (emphasis added). All of Giuseppe's children have died and are survived by Joseph and Richard Jr., Suzanne Hittman and six great-grandchildren, who are the surviving children of Jacqueline Danieli and the grandchildren of Giuseppe's son, Mondo Desimone. CP (69929-6) 135.

Sixty-six years after Giuseppe's death, Dale Collins now claims that Mondo Desimone was his biological father, and therefore, that he is a

beneficiary of the Trust. CP (69929-6) 1-10. However, Mr. Collins was not the product of Mondo's marriage, and in fact, never knew Mondo. CP (69929-6) 3-5. When Dale Collins was born on April 13, 1949, his mother was married to Orville Collins, who is listed on Mr. Collins' birth certificate as his father. CP (69929-6) 135.

Mr. Collins claims to have known since 2001 that Orville Collins may not be his father. CP (69929-6) 5. He alleges that in 2001, Orville told him that he was not his biological father, but is the result of a "physical relationship" with a "tall, handsome man" and "older man," who worked in a flower shop at the Pike Place Market in the summer of 1948 while Dale Collins' mother was married to Orville. CP (69929-6) 4.

B. Procedural History.

On July 3, 2012, Dale Collins filed a TEDRA petition alleging he is the grandson of Giuseppe Desimone and therefore a beneficiary of the Trust. CP (69929-6) 1-10. Mr. Collins, the Co-Trustees of the Giuseppe Desimone Trust, and several beneficiaries of the Trust filed cross-motions for summary judgment seeking a determination of Giuseppe's intended beneficiaries based on the provisions of his Will. CP (69929-6) 11-29; 121-41.

In 1943, when Giuseppe's Will was executed, a Washington statute defined the term "issue" as "all lawful lineal descendants." Consequently, Mr. Collins, who undisputably is not a lawful lineal descendant of Giuseppe, is not and cannot be a beneficiary of his Trust. Mr. Collins asked the trial court to ignore the statutory definition of

"issue" in effect in 1943 when Giuseppe executed his Will, and instead to apply a statutory definition of "issue" not adopted until decades later. CP (69929-6) 24.

The trial court denied Mr. Collins' motion and granted the Co-Trustees' and beneficiaries' motions for summary judgment. CP (69929-6) 359-63. The trial court noted that under Washington law, "the intent of the testator is of primary importance," based on "the testator's ... understanding of the law at the time the Will is executed." RP 46-48. The trial court concluded that the "clear understanding of the law at the time that the Will was executed was that children born out of wedlock were not issue within the meaning of the Will." RP 49. The trial court rejected Mr. Collins' argument that the parenthetical use of "grandchildren" modified the term "issue" and stated that it does not broaden the scope of "issue" beyond the understanding at the time. RP 50. Mr. Collins appealed the trial court's decision. The Co-Trustees and beneficiaries appealed the trial court's denial of their request for an award of attorney's fees under RCW 11.96A.150. CP (70094-4) 253-57. The appeals were consolidated.

VII. ARGUMENT

A. The Standard of Review for the Interpretation of Wills.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004). The appellate court reviews an order granting summary judgment de novo, engaging in the same inquiry as the trial court. *Id.* Likewise, an appellate

court reviews de novo the trial court's interpretation of a will. *In re Estate of Wright,* 147 Wn. App. 674, 680, 196 P.3d 1075 (2008).

B. The Trial Court Properly Gave Effect to Giuseppe's Intent as Expressed in His Will.

"It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and punctually observed so far as it is consistent with the established rules of law." *In re Elliott's Estate*, 22 Wn.2d 334, 350-351, 156 P.2d 427, 435 (1945). "The right to dispose of one's property by will is not only a valuable right but is one assured by law, and will be sustained whenever possible." *Id.*, citing *In re Peters' Estate*, 101 Wash. 572, 172 P. 870 (1918).

To ensure this valuable right, the courts rely not only upon the common law, but also a statute which instructs the judiciary as follows: "All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them." RCW 11.12.230. Ultimately, the Court's "paramount duty in construing wills is to give effect to the testator's intent." *In re Riemcke's Estate*, 80 Wn.2d 722, 728, 497 P.2d 1319, 1323 (1972). Intent is determined by the provisions of the will itself. *In re Estate of Wright,* 147 Wn. App. 674, 196 P.3d 1075 (2008) citing *In re Estate of Bergau,* 103 Wn.2d 431, 435, 693 P.2d 703 (1985).

C. Washington's Intestacy Statute Defines the Term "Issue" as it Was Used in Giuseppe's Will in 1943.

Mr. Collins urges this Court to ignore the meaning of "issue," as defined by Washington's intestacy statute that was in effect when Giuseppe executed his Will, simply because Giuseppe had a Will, and therefore, died testate. The intestacy statute, however, is the best source for this Court to look to determine the meaning of the term "issue" as it was used when Giuseppe executed his Will in 1943. Washington courts consistently rely upon the laws of intestacy to determine who will inherit when a court must construe a will and technical terms. *In re Estate of Elmer*, 91 Wn. App. 785, 791-92, 959 P.2d 701 (1998).

Mr. Collins concedes that the laws of intestacy would bar him from being a beneficiary of the Trust. Ironically, Mr. Collins argues that the laws of intestacy do not apply because Giuseppe understood he was making a Will, and therefore, he must have known the Will would prevent him from dying intestate. But it defies logic to argue that the statutory definition of "issue," which excludes illegitimate descendants, does not apply to the interpretation of the term "issue" as used in a will. For nearly a century, Washington has distinguished between legitimate and illegitimate children and their right to inherit from their biological parent. During that time, including when Giuseppe's Will was drafted, the term "issue" was consistently used to express the testator's intent to limit bequests to descendants of married parents.

Mr. Collins would like this Court to believe that Giuseppe was not aware of the statutory definition of "issue." But Giuseppe's Will was not

an amateur draft. It was prepared in Seattle by the law firm of Weter, Roberts & Shefelman. CP (69929-6) 136. It was prepared by a lawyer, who is presumed to know, and undoubtedly did know the law, and who would have expressed the testator's intent with language of recognized meaning in the cases and the law then currently in effect.

Mr. Collins' attempt to circumvent the clear statutory definition of "issue," by claiming that Giuseppe's parenthetical reference to his grandchildren and great-grandchildren somehow modified the term "issue," is not supported by Washington law. At the time Giuseppe executed his Will, the term "child" was also limited to children born in wedlock. In *Goldmeyer v. Van Bibber*, 130 Wash. 8, 10, 225 P. 821 (1924), the court recognized the word "child . . . means 'legitimate child' only."

D. The Trial Court Correctly Ruled the Term "Issue" Excludes Dale Collins as an Intended Beneficiary.

Applying the principles of testamentary construction to Giuseppe's Will, the trial court properly found that Giuseppe did not intend any child who was born out of wedlock to be a beneficiary of his Trust. The Court must consider and give effect to every part of the Will and construe Giuseppe's Will in light of the circumstances at the time he executed it. *In re Estate of Price*, 73 Wn. App. 745, 886, 871 P.2d 1079 (1994). Washington law requires the Court to interpret the testator's intent based on statutes and other applicable law at the time the Will was executed. *Matter of Estate of Mell,* 105 Wn.2d 518, 524, 716 P.2d 836 (1986) ("The

testator is presumed to have known the law at the time of execution of his will.") It is indisputable that when Giuseppe executed his Will, Washington law interpreted the term "issue" to include only "lawful lineal descendants" and therefore excluded grandchildren born to unmarried parents, including Mr. Collins.

"The court, in construing a will is faced with the situation as it existed when the will was drawn, and must consider all the surrounding circumstances, the objects sought to be obtained, and endeavor to determine what was in the testator's mind when he made the bequests, and the court must not make a new will for him, or warp his language in order to obtain a result which the court might feel to be just." *In re Estate of Price*, 73 Wn. App. at 886. The surrounding circumstances include the statutes in effect at the time the Will was executed. *Erickson v. Reinbold*, 6 Wn. App. 407, 421, 493 P.2d 794 (1972). The technical legal terms in Giuseppe's Will must be interpreted using the legal definitions that existed when his Will was executed in 1943. *Id.* at 420.

In 1943, the term "issue" was a term of art defined by statute to mean "all the *lawful* lineal descendants of the ancestor." Rem. Rev. Stat § 1354. It was not until decades after Giuseppe executed his Will that the definition of "issue" under Washington law was changed to include all lineal descendants of an individual. RCW 11.02.005(8) (enacted in 2005).

Mr. Collins cites *Bowles v. Denny*, 155 Wash. 535, 541, 285 P. 422 (1930), in which the court stated, "in its general sense, unconfined by any

indication of intention, to the contrary, the word 'issue' includes in its meaning all descendants." But, as the trial court properly noted, *Bowles v. Denny* is not determinative in this case. RP 50. The *Bowles* court's reference to "all descendants" was only a reference to the number of succeeding generations (i.e., all) implied by the term "issue." In *Bowles*, the appellant argued that the use of the word "issue" in one paragraph of the will implied that the testator intended for an extra generation, i.e., her great-greatgrandchildren, to be included as beneficiaries. *Bowles*, 155 Wash. at 541. But the court in *Bowles* disagreed and concluded that the provisions of the will unambiguously did not extend to great-greatgrandchildren. *Id.* at 543. The *Bowles* decision has nothing whatsoever to do with children born out of wedlock, it does not define the word "issue," and it does not hold that the term "issue" includes all lineal descendants of an individual.

Giuseppe's Will unambiguously states that only "issue" are intended beneficiaries. CP (69929-6) 144-169. In his Will, Giuseppe provided for his "issue" at the death of his children, and further defined the successors to Giuseppe's children's "issue" as any of my grandchildren who die "leaving **issue** (my great-grandchildren)." CP (69929-6) 146, 159. Just as only the "issue" of Giuseppe's children were entitled to a share of the Trust income, "the share to which such deceased grandchild would have been entitled if then alive shall go to and be paid annually to its **issue**." *Id.* Accordingly, under the Will, Giuseppe intended only his "issue" as beneficiaries.

In determining the testator's intent with respect to the meaning of a technical term, the court in *In re Estate of Price*, 73 Wn. App. at 887, viewed the circumstances as they existed at the time the will was executed and held that there was no reason to suppose the testator did not know the meaning of a particular word that he used several times throughout the document. Likewise, there is no reason to believe that Giuseppe did not understand the legal meaning of "issue," which is consistently used no less than 20 times in the distributive provisions of his Will. CP (69929-6) 144-69.

E. Mr. Collins's Interpretation of Giuseppe's Will Ignores Washington Rules of Construction.

Many of the arguments set forth by Mr. Collins would improperly require this Court to ignore the fundamental rules Washington courts employ to interpret wills. Mr. Collins asks the Court to ignore the statutory meaning of "issue" as defined by Washington's intestacy statute in 1943, and instead, apply the current intestate statute, which would include descendants born to unmarried parents. But Washington law requires courts to determine a testator's intent by applying the law in effect when the will was executed. *Estate of Mell*, 105 Wn.2d at 524. When Giuseppe executed his Will in 1943, Washington law clearly defined "issue" to mean only descendants born to married parents.

Despite all the knowledge Mr. Collins attributes to Giuseppe regarding the fact that the laws of intestacy would not apply to him, Mr. Collins would have this Court believe that Giuseppe did not understand

the statutory and common law meaning of the word "issue," which is used multiple times throughout his Will. Under Washington law, however, an individual who leaves a will is presumed to be aware of the applicable law at the time the will was executed. *Estate of Henke*, 117 Wn.2d 631, 818 P.2d 1324 (1991). *See also, Estate of Bergau,* 103 Wn.2d 431, 436, 693 P.2d 703 (1985) (testator is presumed to be familiar with surrounding circumstance which could affect construction of his Will materially). Because Giuseppe is presumed to know that Washington law defined "issue" as "lawful lineal descendants" only, his use of the term "issue" to define his descendants must be interpreted as a matter of law to mean that he intended only those descendants born to married parents to inherit from his estate. Accordingly, Dale Collins cannot be an intended beneficiary of Giuseppe's Trust.

Mr. Collins relies on *In re Estate of Wright,* 147 Wn. App. 674, for the proposition that the term "issue" should have its ordinary meaning. But even Black's Law Dictionary has stated that "the word 'issue' in a will is generally a word of limitation" and "the term is commonly held to include only legitimate issue." Black's Law Dictionary, 5th Ed., West Publishing Co. (1979).

Moreover, the court in *Wright* interpreted the term "lawful" and held that when used to modify words like "children," "issue," or "descendants" in a will, the term "lawful" further confines the meaning of words that include only people born to married parents. *Wright*, 147 Wn. App. at 684-85. Consequently, the court ruled that the will at issue in

Wright intended to exclude persons born out of wedlock as beneficiaries. *Id.* The ruling in *Wright* supports limiting the class of beneficiaries to individuals born in wedlock when a will, like Giuseppe's Will, manifests that intent.

Mr. Collins, however, attempts to turn the ruling in *Wright* on its head by arguing that, because the court held that "lawful issue" refers only to people born to married parents, the word "issue" must refer to all children, whether born to married or unmarried parents. Neither the opinion's holding nor common sense support this argument.

First, the *Wright* opinion examines cases interpreting the definition of "lawful" and focuses on what "lawful" means in the relevant will. The case does not attempt to interpret the word "issue."

Second, Mr. Collins' conclusion is illogical and an inaccurate interpretation of *Wright*. As a matter of legal interpretation, it is nonsensical to argue that because a 1992 will used the adjective" lawful" in conjunction with "issue" to describe the class of beneficiaries, the use of the term "issue" alone in a different will written nearly forty years earlier must mean "all" descendants, whether born in or out of wedlock. Because Washington law in 1943 defined the term "issue" as someone born from lawfully married parents, the term "lawful issue" would have been entirely redundant when the will was written.

Mr. Collins also contends that the *Wright* decision requires that the Court adopt the holding in *Will of Hoffman,* 53 A.D.2d 55 (N.Y. App. Div. 1976). But the *Wright* court only looked to decisions in other jurisdictions

to help it construe the adjective "lawful," and the reasoning in *Hoffman* supports the conclusion that the use of "lawful" in a will emphatically supports a definition of beneficiaries that is limited to descendants born in wedlock. Nothing in *Wright* suggests that the court intended to adopt the ruling in *Hoffman* in its entirety or that the decision should be binding in Washington. In over 30 years since *Hoffman* was decided, no Washington court has adopted the approach taken by the New York court and no Washington court has retroactively changed the law applicable to a will executed decades earlier.

F. The Adoption Cases Cited by Mr. Collins Only Support the Co-Trustees' Interpretation of Giuseppe's Intent to Exclude Children Born Out of Wedlock.

Mr. Collins asks this Court to ignore the law as it existed when Giuseppe executed his Will and for more than 30 years thereafter. Mr. Collins cites to *In re Trusts of Sollid*, 32 Wn. App. 349, 647 P.2d 1033 (1982), as support for the retroactive application of the current (since 2005) statutory definition of "issue," which includes all lineal descendants. *See* RCW 11.02.005(8). According to Mr. Collins, the term "issue" in Giuseppe's Will should have its current statutory meaning because *Sollid* applied a statute requiring adopted children to be treated as beneficiaries retroactively, and therefore the more recent law governing the rights of children born out of wedlock should likewise be retroactive. But, as the *Sollid* court explained, it was familial ties, not blood relations that motivated the liberalization of the rules governing inheritance by adopted children. 32 Wn. App. at 352-53. No similar policy applies to people

born out of wedlock. Thus, the reason for applying the statute retroactively in *Sollid* does not apply here.

To the extent *Sollid* applies to the present case, it only supports the Co-Trustees' interpretation. The reasoning applied in *Sollid* — that testators intend to include adopted children as beneficiaries because they have emotional ties and bonds to the family — does not apply to a stranger like Mr. Collins, who has had no emotional ties or bonds to the family. *Id.* Nothing about the opinion in *Sollid* supports a finding that Giuseppe intended to include complete strangers born out of wedlock as beneficiaries of his Will.

Mr. Collins contends that the adoption cases instruct this Court to conclude, without support, that the testator's intent must have been to benefit Mr. Collins and to ignore the statutory definition of the term "issue" when the Will was executed. Here, Giuseppe's intent and the Washington statutory definition of "issue" are not inconsistent. Giuseppe's language shows he intended to benefit only his "issue" which, in 1943, was defined by statute as children born to legally married parents.

G. The Delaware Decisions Cited by Mr. Collins Are Distinguishable from the Present Case.

Mr. Collins urges this Court to retroactively apply the definition of the term "issue" in effect in 1996, when Mondo Desimone died. His argument (which ignores the fact that the statutory definition of "issue" in Washington was not changed until 2005) is based upon *Annan v. Wilmington Trust Co.*, 559 A.2d 1289 (1989), a Delaware case, which held

that the laws of intestacy in effect at the time a class of beneficiaries is ascertained are controlling for purposes of defining the term "issue." The trusts in *Annan* used both "issue" and "lineal descendants" to refer to beneficiaries and the testator specifically excluded persons claiming to be his child born prior to 1924 from benefiting under the trust. *Id.* at 1292. The testator did not apply the same exclusion to persons born after 1924. *Id.* Although the *Annan* court held that "issue" would be defined based on the laws of intestacy in effect at the time of ascertainment, the *Annan* court articulated an important exception to this rule: If "the document demonstrates 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 trust," then the term "issue" would be defined by the law in effect at the time the document was executed. *Id. Annan* therefore presents a very different set of facts from the present case because (1) Giuseppe's Will unambiguously states, more than 20 times, that only "issue" are intended beneficiaries, and (2) when Giuseppe executed his Will in 1943, Washington law clearly defined "issue" to mean only descendants born to married parents.

Pitzer v. Union Bank of California, 141 Wn.2d 539, 9 P.3d 805 (2000), is directly on point and is dispositive of this "retroactive application" argument. In *Pitzer*, as here, the plaintiffs alleged they were the illegitimate children of the testator and claimed they were entitled to a share of his estate. *Id.* at 543. The testator died in 1965 and it was decades later when plaintiffs claimed the testator was actually their biological father. *Id.* at 543-44. Plaintiffs did not dispute that the former intestacy

statute, which was the law in effect when the testator died, precluded them from being heirs. Instead, plaintiffs urged the court to apply the new statute, which would recognize them as heirs whether or not their parents had been married. *Id.* at 547. In rejecting their claims, the court applied the law in effect when the will was written, which required that they be acknowledged by their father in order to inherit. *Id.* at 553.

Mr. Collins also attempts to draw parallels between the ruling in *Sollid* and certain Delaware adoption cases for the proposition that a testator's intent is not determined by what the testator is presumed to know or understand at the time the will is executed. The Delaware cases discussed by Mr. Collins presume that the testator knew that statutes were subject to change and conclude that the laws of intestacy in effect at the time a class of beneficiaries is ascertained are controlling. But unlike Delaware, Washington case law (as discussed above) requires a determination of the law at the time the will is executed. If Mr. Collins' rationale was followed, the trustees would be required to determine the law every time a beneficiary dies and apply a different meaning to the term in Giuseppe's Will, potentially adding new beneficiaries. The uncertainty this policy would create is precisely why Washington courts require the terms in a will to be interpreted according to their meaning at the time the will was executed.

Furthermore, Washington courts have explicitly differentiated the rights of an adopted child from the rights of an illegitimate child. *In re Estate of Wright*, 147 Wn. App. at 681. In determining whether a

purported heir was a beneficiary, the *Wright* court reasoned that the rights of adopted children is an "entirely different issue" from the rights of children of unmarried parents. *Id.* at 683. The court explicitly noted that "nothing in the opinion is based on, or should be construed as commenting on, the term as it applies to adoptive relationships as opposed to the marital status of a person's parents." *Id.* at 681. In fact, no Washington court has applied the Delaware rationale for concluding that an adopted child has a right to inherit based on the rights of illegitimate children to inherit.

Interestingly, the adoption statute at issue in *Wilmington Trust Co. v. Huber*, 311 A.2d 892 (1973), a Delaware adoption case cited by Mr. Collins, presumes that an adopted child is legitimate and specifically provides that "[u]pon the issuance of a decree of adoption, the adopted child shall be considered the child of the adopting parent or parents as if he had been born in wedlock to the adopting parent or parents." *Id.* at 893, *citing* 13 Del. C. 919(a). The Delaware cases are thus based on entirely different statutory and common laws than the laws in Washington.

H. The Trial Court Correctly Followed Washington's Long History of Defining "Issue" as Limited to Children Born in Wedlock.

Mr. Collins concedes, in 1943, that Washington law defined "issue" to be limited to children "born in lawful wedlock." CP (69929-6) 24. He attempts to avoid this statutory definition by arguing that the statute addresses intestate succession and therefore has no relevance in determining what the testator intended by using the term "issue" in a will.

Not only would it be nonsensical to assume that the statutory definition of "issue" only applied to intestate estates and that some other definition applied in testate estates, but it would ignore the impact illegitimacy has had on inheritance under Washington law, which required formal acknowledgment by a father in order for an illegitimate child to inherit from his estate. Washington courts have consistently imposed these statutory requirements on illegitimate children. *Estate of Baker*, 49 Wn.2d 609, 304 P.2d 1051 (1957) (illegitimate child argued he was pretermitted and therefore should take under intestate succession; claim rejected for failure to comply with statutory requirements to establish right to inheritance); *In re Beekman's Estate*, 160 Wash. 669, 295 P.2d 942 (1931) (illegitimate child claimed right to inherit under intestacy; claim rejected for failure to comply with statutory requirements); *Wasmund v. Wasmund*, 90 Wash. 274, 156 P. 3 (1916) (community property under intestate laws went entirely to surviving spouse; illegitimate child of deceased mother could only inherit from her separate property); *In re Rohrer*, 22 Wash. 151, 60 P. 122 (1900) (pleadings from seduction case established paternity; daughter inherited from father's estate); *see also Estate of Gand*, 61 Wn.2d 135, 377 P.2d 262 (1963) (illegitimate daughter could not inherit from mother's sister).

Washington has consistently distinguished between legitimate and illegitimate children and their rights involving inheritance. The use of the term "issue" was one clear way to express the intention that only those children born in wedlock would inherit.

VIII. CROSS-APPEAL

A. The Trial Court Abused Its Discretion by Not Awarding the Co-Trustees Their Attorneys' Fees.

Mr. Collins filed the TEDRA petition commencing this lawsuit after being advised by the Co-Trustees that his claim to Trust beneficiary status was denied, based upon the language of Giuseppe's Will and controlling Washington law. CP (69929-6) 1-10. The Co-Trustees made their decision to deny Mr. Collins' claim only after giving the claim respectful consideration and obtaining a thorough analysis and opinion from respected counsel expert in the field. CP (70094-4) 160. The basis for the Co-Trustees' decision was communicated to Mr. Collins, who nevertheless obdurately continued his pursuit by instituting expensive litigation, which was unsuccessful in the court below. *Id.*, CP (69929-6) 359-63.

RCW 11.96A.150 squarely recognizes that trial judges have discretion in their authority to act equitably. Accordingly, the appellate courts consistently have reviewed TEDRA attorney fee awards under the abuse of discretion standard and "will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion." *In re Estate of Black,* 116 Wn. App. 476, 489, 66 P.3d 670 (2003), *affirmed,* 153 Wn.2d 152, 173, 102 P.3d 796 (2004). Here, the trial court abused its discretion.

"Washington favors the protection of estates through the award of attorney fees." *Laue v. Elder*, 106 Wn. App. 699, 713, 25 P.3d 1032 (2001) (affirming award to estate under predecessor statute RCW

11.96.140). In particular, Washington courts favor attorney's fee awards where the result is to make the trust or estate whole and preserve the same for the intended beneficiaries. Courts have consistently found that equity requires a party who unsuccessfully brings a suit that does not benefit the estate to pay the attorneys' fees of others involved in the litigation. For example, in *In re Irrevocable Trust of McKean,* 144 Wn. App. 333, 345, 183 P.3d 317 (2008), the Court of Appeals awarded the trustee its attorney's fees against the party acting in bad faith because "the trust assets should not be further depleted by [the trustor's] continuing efforts to frustrate the trust's purposes." In *In re Estate of Jones*, 152 Wn. 2d 1, 20, 93 P.3d 147 (2004), the party whose conduct necessitated litigation was ordered to pay the other parties' attorney's fees. S*ee also, In re Korry Testamentary Marital Deduction Trust for Wife*, 56 Wn. App. 749, 756, 785 P.2d 484 (1990) (holding that unsuccessful litigation against an estate, prosecuted for personal benefit, is not a "substantial benefit" to the estate). Similar to *McKean*, equity here demands that Dale Collins compensate the Trust for the legal costs incurred to defend his claim. Mr. Collins' actions forced the Trust to incur attorney's fees it would not otherwise have incurred but for his unfounded claims.

Unlike the present case, the court in *In re Estates of Jones*, 170 Wn. App. 594, 612, 287 P.3d 610 (2012), found that although the estates were forced to defend the creditors' claims brought by the decedents' daughters who pursued prolonged litigation with the hope of increasing their share of the estates, the estates "were not blameless in the instigation

of the action." Accordingly, the Court of Appeals held that the trial court did not abuse its discretion by denying the estates' request for attorney's fees. In contrast, the Trust in this case is entirely blameless in defending against the Mr. Collins' meritless claims and prevailed on all issues in the trial court.

The ruling in *Villegas v. McBride*, 112 Wn. App. 689, 696-97, 50 P.3d 678 (2002) also required the trial court to award the Co-Trustees their attorney's fees. In *Villegas*, the decedent's sister filed a creditor's claim against her brother's estate for loans she allegedly made to him during his lifetime. *Id.* at 692. The estate moved for summary judgment, which was granted and then affirmed. *Id.* The estate requested attorneys' fees and costs incurred at the trial court level because the litigation deprived the beneficiaries of part of their inheritance. *Id.* at 696-97. The Court of Appeals agreed that diminution was an equitable ground for an award of attorneys' fees under RCW 11.96A.150 and awarded not only fees and costs on appeal, but remanded for attorneys' fees and costs incurred below. *Id.* at 697.

Similar to *Villegas*, equity here demands that Mr. Collins compensate the Co-Trustees for the legal costs incurred to defend his claim. Washington favors fee awards where the result is to make the trust or estate whole and preserve the same for decedent's intended beneficiaries. The beneficiaries should not be forced to fund litigation to defend the Trust against Mr. Collins' claims. Moreover, an award of fees appropriately places the financial responsibility for Mr. Collins' pursuit of

baseless and stale claim, brought without regard for the financial consequences, on the appropriate party: Dale Collins. The Court should remand for an award of attorney fees in favor of the Trust.

B. This Court Should Award the Co-Trustees Their Attorney Fees on Appeal.

The Court should also award the Co-Trustees their appellate attorney fees under RCW 11.96A.150 and RAP 18.1. This Court has discretion to award attorney fees on appeal. RCW 11.96A.150 (1); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 500-01, 176 P. 3d 510 (2008).

IX. CONCLUSION

Giuseppe Desimone clearly intended to benefit his children, their "issue" and the "issue" of their "issue." Under Washington law in 1943, when Giuseppe executed his Will, the legal definition of "issue" excluded illegitimate children born out of wedlock. There is no doubt that Giuseppe purposefully used the term "issue" in his Will to demonstrate his intent to benefit descendants born to married parents.

The trial court properly dismissed Mr. Collins' claims on summary judgment and this Court should affirm and allow attorneys' fees on appeal and below.

RESPECTFULLY SUBMITTED this 19th day of August, 2013.

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