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33613-1-III; 34048-1-III

SUPREME COURT
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF
LESTER J. KILE, Deceased

CODY KENDALL,

Respondent,

v.

JEANNIE KILE,

Petitioner.

PETITION FOR REVIEW
(with appendix)

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A. IDENTITY OF PETITIONER

Jeannie Kile asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Division III of the Court of Appeals filed its decision March 7, 2017. A motion for reconsideration was timely filed and denied in an order filed April 20, 2017. A copy of the decision is in the Appendix at pages A-1 through A-19. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-20.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals Err When It Failed to Determine Whether any Allegedly Inconsistent Positions by Petitioner Actually Benefitted Her or Were Actually Accepted by the Court?

2. Did the Court of Appeals Err When It Affirmed the Trial Court's Conclusion that Petitioner's Prior Positions in Her Marriage Dissolution Action Were Clearly Inconsistent with Her Positions in the Present Action?

3. Did the Court of Appeals Err When It Affirmed the Trial Court's Reliance on Extrinsic Evidence to Determine Who Should Operate a Farm Pursuant to a Will Where There Was No Relevant Ambiguity to the Issue of Who Was Entitled to Operate the Farm and the

Extrinsic Evidence Post-Dated the Execution of the Will and Did not Refer to the Execution of the Will?

4. Did the Court of Appeals Err when It Affirmed the Trial Court's Removal of Petitioner as Trustee and Personal Representative of the State Where the Alleged Bases for Those Removals Were the Result of the Errors Identified Above?

5. Did the Court of Appeals Err When It Affirmed the Trial Court's Damages Calculation Where the Trial Court's Decision Failed to Account for Costs Actually Incurred by the Petitioner, Which Lead to a Windfall by the Respondent?

6. Did the Court of Appeals Err When It Affirmed the Trial Court's Fee and Cost Award, and Awarded Additional Fees, Where All Fee Awards Were Based on the Errors Identified Above?

7. Did the Court of Appeals Err When It Summarily Affirmed Without Discussion the Thirteen Specifically Challenged Findings of Fact to Which Error Was Assigned?

8. Did the Court of Appeals Err When It Denied Petitioner's Motion for Reconsideration?

D. STATEMENT OF THE CASE

This matter arises from a Trust and Estate Dispute Resolution Act ("TEDRA") petition regarding the Last Will and Testament of Lester J.

Kile (the "Will"). Ex. P1. Lester[1] was a dryland wheat farmer. 2 RP at 112. Petitioner Jeannie Kile is his daughter. Clerk's Papers ("CP") at 205. Respondent Cody Kendall is Jeannie's son. CP at 205.

The first three paragraphs of section E of the Will are at issue. The first paragraph awarded Jeannie the farm as a trustee in trust:

> I give, devise and bequeath to my daughter, Jeannie Kile, as Trustee in trust, all of my interest in Kile Farms, Inc., including any real property included in the assets of that corporation, and any real property and personal property held in my name this is leased or managed, or otherwise utilized by Kile Farms, Inc. (all of which together is referred to below as "the Farm").

Ex. P1 at 4.

The second paragraph empowered the trustee to manage the farm:

> The Trustee shall manage the Farm pursuant to common practices of farming, making arrangements or contracts for appropriate payment to persons responsible for farming activity, including persons related to the Trustee. It is my desire that this property be held in trust as long as there are family members willing and able to farm or manage the farming activity.

Ex. P1 at 4.

The third paragraph directs the income of the trust:

> The income from the trust, after the payment of expenses, including reasonable reserves for taxes, insurance, equipment and improvement needs, and a reasonable period of operating costs, shall be distributed on a periodic bases, as least annually to Jeannie Kile. If however, Cody

[1]First names are used to avoid ambiguity. No offense is intended.

> Kendall operates the farm at any time herein, then he shall be entitled to two-thirds of such income and Jeannie Kile shall be entitled to one-third. In the event that Jeannie Kile does not survive me, or upon her death while the Trust is still in effect, her share of the income herein, shall pass to Cody Kendall, and if Cody Kendall is not surviving or upon his death, such interest in the trust income shall pass to Carly Kendall.

Ex. P1 at 4-5. Of note, the third paragraph provides that Jeannie Kile is to get all of the trust income unless Cody Kendall is operating the farm, then he gets two-thirds of the income. *Id.*

Cody filed a TEDRA petition on February 21, 2013, seeking to interpret the Will. CP 467-71. Each party filed summary judgment motions seeking to determine, among other things: (1) who had authority to choose the operator of the farm, and (2) whether Cody had at any time been the operator of the farm and was entitled to two-thirds of the income. CP at 489-509, 726-746. The trial court granted summary judgment with regard to the first issue, holding that Jeannie, as trustee, unambiguously had the power to choose who operated the farm. CP at 112-13. The trial court refused to grant summary judgment regarding whether Cody had at any time operated the farm because it found the word "operates" ambiguous in the Will. CP at 113. It left that issue for trial.

Between the entry of summary judgment and trial, there was a change of judges. The parties proceeded to trial on March 2-4, 2015. On

April 13, 2015, the trial court entered its Findings of Fact and Conclusions of Law. CP at 204-225. Despite the fact that the earlier judge granted summary judgment, finding that Jeannie had the right to choose any operator of the farm, the trial court concluded to the contrary and found that Cody had the right to operate the farm. CP at 210. In reaching that conclusion, the court went beyond the four corners of the Will and relied on other documents to interpret the Will. Specifically, the trial court's finding explicitly references a declaration signed by Lester shortly before his death that was filed in Jeannie's marriage dissolution from her then-husband Gordon Kendall.

. Lester's declaration explained that he was the owner of most of the ground "currently being farmed by [his] daughter" Jeannie. Ex. P31 at at 1. Lester stated in the declaration that he had become dissatisfied with the work being performed by Gordon at the farm. *Id.* at 2. Lester threatened to terminate his lease to Jeannie unless Gordon was "removed from performing any further farming operations on [Lester's] ground." *Id.* Lester noted that Cody had moved back to the farm and was already doing work on the farm. *Id.* Specifically, Lester stated:

> Approximately three years ago, my grandson, Cody Kendall, moved with his family into my former residence on the farm. I now live in Spokane with my wife. Cody had worked part-time on the farm prior to moving into the

> old farm house, and has now worked full-time on the farm for the past three years.

Id. at 2. Along with Gordon's removal, Lester expressed that he would like Cody to take over for his father and that he would renew the lease to Jeannie if Cody took over farming. *Id.* Specifically, Lester stated:

> I am essentially requesting that my daughter turn over the farming operation to my grandson, Cody Kendall . . . I absolutely must be assured that the farm is operating and managed in accord with good farming practices, and I have come to the conclusion that [Gordon] is either unwilling or unable, or both, to perform these practices himself. I believe that Cody Kendall is ready, willing, and able to perform all of the farming responsibilities, and I am willing to renew the lease to Jeannie Kile on the basis that Cody becomes the primary operator of all farming operations involving my farm.

Id.

Despite the fact that the declaration was not witnessed by two witnesses and does not purport to be a testamentary document, and despite the fact that the declaration makes clear that Jeannie would be the leaseholder of the land, the trial court relied on the declaration explicitly to hold that Cody had the right to operate the farm, and consequently the right to two-thirds of its income. Nowhere in the trial court's findings and conclusions does it identify any ambiguity in the Will regarding who should operate the farm that would warrant resort to extrinsic evidence.

In addition to using the declaration to interpret the Will, the trial court also held, based on the declaration, that Jeannie was judicially estopped from arguing that Cody was not the intended operator of the farm. CP at 216.

The trial court's findings and conclusions do not resolve whether Cody was operating the farm at any time. *See* CP at 204-25. Instead the trial court set a separate damages hearing based on the idea that Cody had the right to operate the farm (and receive two-thirds of its income) from the moment of Lester's death forward.

Jeannie moved for discretionary review of the trial court's post-trial order. That motion was ultimately converted into a notice of appeal by the appellate court.

While that order was on appeal, the trial court held its damages hearing. It heard evidence from three experts, Renee Grandinetti, Todd Carlson, and Allen Hatley. Despite the fact that Ms. Grandinetti's report (unlike the other two) unambiguously failed to account for costs like seeds, fertilizer, and gas, the court adopted it without further comment and entered an award of damages.

The damages award was appealed by notice of appeal and the two appeals were consolidated by order of the Court of Appeals.

The court of appeals affirmed in an unpublished opinion dated March 7, 2017. Petitioner filed a motion for reconsideration and both parties filed motions to publish. All motions were summarily denied on April 20, 2017. This Petition follows.

E. ARGUMENT WHY REVIEW SHOULD BE EXCEPTED

1. The Court of Appeals' Abandoned—Without Citation Or Discussion—Settled Precedent Regarding Judicial Estoppel that has been Adopted by All Three Divisions of the Court of Appeals

All three divisions of the Court of Appeals have held that for the doctrine of judicial estoppel to apply, the litigant who asserted the allegedly inconsistent positions must have actually benefited from the earlier position or that earlier position must have been actually adopted by the court. *Taylor v. Bell*, 185 Wn. App. 270, 282, 340 P.3d 951 (2014) (collecting cases from all three divisions applying this doctrine) *review denied* 183 Wn.2d 1012 (July 8, 2015). This rule is the majority rule in the United States. *Johnson v. Si-Cor Inc.*, 107 Wn. App. 902 (2001) (citing *Milgard Tempering, Inc. v. Selas Corps.*, 902 F.2d 703, 716 (9th Cir. 1990)).

Without citation to authority, and in two sentences, the Court of Appeals modified the standard to require only that a party "would" benefit from the testimony, not whether there was an "actual benefit." *In re Estate of Kile*, No. 33613-1-III, slip op. at 12 (Wn. App. 2016). In the

court's own words: "Stated differently, this factor looks to whether the inconsistency was about an important feature of the case." *Id.* at 12. This misinterpretation expands application of judicial estoppel to bar litigants from changing arguments even where their first argument has lost.

"Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Taylor*, 185 Wn. App. at 281 (quoting *Arkison v. Athan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (internal quotations omitted). Three factors guide a court's application of judicial estoppel:

> (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Taylor, 185 Wn. App. at 282 (citing *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012)).

There are two bases for the doctrine's existence: (1) "preservation of respect for judicial proceedings;" and (2) "avoidance of inconsistency, duplicity, and waste of time." *Id.* (quoting *Anfinson,* 174 Wn.2d at 861).

Judicial estoppel is different from other estoppel doctrines. Because the doctrine is designed to protect the court and not litigants, the

doctrine has been held by a majority of courts to apply even where the traditional requirements of estoppel—privity, reliance, and prejudice—are absent. *Johnson*, 107 Wn. App. at 907-08.

In light of the fact that the limitations of normal estoppel cases are removed, the doctrine risks being too broadly applied. Accordingly, the doctrine must be appropriately cabined in a way related to its purpose. That is why the majority of courts have required "prior success" or "judicial acceptance." *See Johnson*, 107 Wn. App. at 908-09. Not only does this limit application of the doctrine, it does so in a way that tracks the policy basis for the doctrine: avoidance of inconsistency and duplicity while maintaining respect for judicial proceedings.

The cases citing the doctrine have required actual benefit or acceptance. *Taylor*, 185 Wn. App. at 284-85 (judicial estoppel did not apply where factual position advanced in earlier proceedings was actually rejected by the court); *Deveny v. Hadaller*, 139 Wn. App. 065, 620-22, 161 P.3d 1059 (2007) (judicial estoppel did not bar breach of contract claim for bankruptcy litigant who failed to disclose existence of contract because evidence established no benefit); C*unningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230-31, 108 P.3d 147 (2005) (judicial estoppel applied because bankruptcy litigant failed to schedule legal claim he was required to schedule and court accepted his position by

resolving his case as a "no asset" case); *see also Lee ex rel. Office of Grant County Prosecuting Attorney v. Jasman*, 183 Wn. App. 27, 69-70, 332 P.3d 1106 (2014) ("The party taking the [inconsistent] positions must have been successful in maintaining the first position.").

The *Johnson* case, which originally adopted this rule, and the *Taylor* case both heavily rely on the Ninth Circuit's opinion of *Milgard Tempering, Inc. v. Selas Corp.*, 902 F.2d 703, 716 (9th Cir. 1990), which explicitly states that the majority view requires that "the inconsistent assertion was actually adopted by the court in the prior litigation" because "absent judicial adoption of the prior position, there is no risk of inconsistent results." *Id.* at 716.

There is good reason for this. If the rule applied where there was only a risk of inconsistent positions as opposed to actual adoption of inconsistent positions, the judicial estoppel rule becomes a sword to be used by litigants. For instance, suppose a party takes a position in a breach of contract action that a contract was not formed, yet after losing that position seeks to enforce its own rights under the contract. Under the plain meaning of the appellate court's opinion, the party that sought, and failed, to challenge the validity of the contract would be barred from later enforcing its rights to a contract that has been ruled valid. That simply does not make sense.

Although the opinion below is unpublished, it still risks being applied in the Superior Courts. GR 14.1 was amended last year to allow the citation of unpublished opinions dated after 2013. While the rule makes clear that the cases are persuasive authority, given the clarity with which the court states its rule, this case could be applied to dramatic effect in the lower courts.

Also, it should be noted that while all three divisions of the court of appeals have applied the majority rule, and that the rule was first adopted in 2001, this Court has not yet provided its guidance as to the applicability of the rule. Most recently, this court denied review of the *Taylor* case. Accordingly, acceptance of this case can provide needed clarity regarding the application of judicial estoppel in Washington, an issue of public importance.

2. The Court of Appeals' Opinion Effectively Holds that When One Ambiguity Exists in a Will (Thereby Warranting Resort to Extrinsic Information to Resolve that Ambiguity), the Extrinsic Information Can Be Used to Change Unambiguous or Silent Provisions in the Will, Even Where that Information Post-Dates the Execution of the Will. This Contradicts Existing Precedent

The intent of a testator "should, if possible, be garnered from the language of the will itself." *In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994) (citing *In re Estate of Bergau*, 103 Wn.2d 431, 435-36, 693 P.2d 703 (1985)). "[C]ourts must give effect to the testator's

intent as of the time of the will's execution." *Id.* (citing *Bergau*, 103 Wn.2d at 436). "If, after reading the entire will, the court finds ambiguity as to the testator's intent, extrinsic facts and circumstances can be admitted to explain the language of the will." *Id.* at 755 (citing *Bergau*, 103 Wn.2d at 436). However, the extrinsic evidence must be helpful in clarifying the language of the will or the testator's intent in drafting the will. *Id.*

Here, the trial court explicitly relied on extrinsic information that was created after the execution of the Will and for a non-testamentary purpose, to wit, a declaration executed in a dissolution proceeding. CP at 210. The court used that document to read into the Will an obligation for the trustee to appoint Cody as operator of the farm. In its findings and conclusions, the trial court never found an ambiguity warranting resort to extrinsic evidence. *See* CP at 204-225.

In affirming the trial court, the Court of Appeals found that resort to extrinsic evidence was warranted because the word "operates" in the Will was ambiguous. *Kile*, slip. op. at 4, 7. It relied on the summary judgment order from the previous trial court judge. *See id.* Recall, however, that the summary judgment order was the same order that concluded that Jeannie, as trustee, could "make contracts and arrangements for its operation." As the trial court's oral ruling on

summary judgment shows, that included choosing an operator. 1 RP at 9-10. In other words, the Court of Appeals used an ambiguity found in an earlier order holding that Jeannie could unambiguously choose an operator for the farm to open the Will to extrinsic evidence, to affirm a holding that Jeannie had to choose Cody as operator.

Taken at face value, the Court's opinion, therefore, stands for the proposition that an ambiguity anywhere is an ambiguity everywhere. Not only does this contradict the caselaw identified above, but it violates the key principle that the intent of the testator is what should control and parol evidence should not be used to rewrite a will.

Not only does the court's opinion rely on extrinsic evidence, the evidence it relies upon post-dates the execution of the Will and was prepared for the purposes of a dissolution, not for testamentary purposes. A probate court's goal is limited to determining the testator's intent at the time of the Will's execution. *Bergau*, 103 Wn.2d at 435-36. Here, the Court of Appeals not only considered post-execution materials that did not purporting to identify Lester's testamentary intent at the time of the Will's execution, the opinion declares such evidence to be optimal: "It is difficult to imagine there could be better evidence of a testator's intent than to have the testator testify under oath on that topic." *Kile*, slip op. at 8.

By both expanding the issues that may be resolved by extrinsic evidence and the type of extrinsic evidence that may be consulted, the Court of Appeals' decision erodes protections put in place to ensure that the words of a Will control the distribution of assets. The danger inherent in the Court of Appeals' decision is evidenced by the facts of this very case.

Jeannie had been the tenant on Lester's farm continuously since 1988. CP at 776-77. Jeannie had always been entitled to two-thirds of the farm income as the lessee under the lease agreement. CP at 776-77. It was the unambiguous intent of Lester that Jeannie be the lessee alone, and that her husband have no interest. *Id.* The Will gives the farm to Jeannie as trustee for her benefit and only provides that Cody is entitled to anything if he operates the farm or if Jeannie is unwilling to act as trustee. Ex. P1 at 4-5. The declaration that ostensibly shows Lester's intent to give everything to his grandson, in fact is a promise to renew the lease to Jeannie. Ex. P31. Somehow, from all of this, the courts below found that Lester favored his grandson as opposed to his daughter.

Given the contradictions between the court's opinion and the existing caselaw, review is appropriate.

3. The Opinion Contradicts Well-Settled Landlord / Tenant Law By Providing that the Landlord, as Opposed to the Tenant, Has First Right to Crops Grown on Farm Land.

As the trial court noted, and as is uncontested in the record, farms that are operated on a landlord tenant basis are "[a]lmost universally" leased in a manner providing that two-thirds of the crop is the tenant's to keep and one-third of the crop goes to the landlord. CP at 720. The general rule in Washington is that the lessee of the land has title to the crops as possessor of the land until the crops are severed and delivered to the lessor as rent. *Benhart v. Gorham*, 14 Wn. App. 723, 724, 544 P.2d 141 (1976). This rule may be varied by contract. *Id.* at 724-25.

Without comment, the Court of Appeals' opinion assumes the opposite to be true. In construing that the Will anticipates a family member tenant, the opinion notes that if Cody were merely the manager of the farm and not the operator "the will would still distribute all of the farm proceeds to Cody and Jeannie without consideration of any share for the actual farmer." *Kile*, slip op. at 9, n.3. This conclusion assumes that the trust (as landlord) has the right to all of the crop before the tenant does. Given a dearth of caselaw on this issue in the last several decades, the opinion below carries a risk of altering the landlord / tenant relationship in farms. Accordingly, review is appropriate.

4. The Opinion Contradicts the Law of Damages By Failing to Put the Parties Into the Positions They Would Have Been In Had the Injury Not Occurred

The purpose of a damages award is not to provide a windfall to another party but to place the damaged party in the position he or she would have occupied had the injury not occurred. *Pepper v. J.J. Welcome Const. Co.*, 73 Wn. App. 523, 544, 871 P.2d 601 (1994). The Court of Appeals both failed to cite this standard and to apply it.

After her father's death, Jeannie continued to operate the farm as it had been for years: with her as Trustee/Landlord as well as her personally as the tenant. As such, she paid costs as a tenant would. Irrespective of whether the trust should have borne the costs or not, the reality is that Jeannie paid the costs. 3 RP at 293, 6 RP at 103-04.

The expert for the Respondent, Renee Grandinetti, looked only to the costs incurred by the trust. *See* Ex P81. She did not review Jeannie's tax returns to see the business costs she bore personally. *See id.* If Cody had operated the farm then either the trust or Cody would have borne the costs. By failing to account for those costs, the trial court's damages award represents a windfall to Cody.

5. The Court of Appeals' Affirmance of Petitioner's Removal as Trustee and Personal Representative, as well as the Court of Appeals' Affirmance of and Award of Attorney Fees are Based on Alleged Breaches of Fiduciary Duties Born of the Errors of Law Identified Above

If the Court accepts review and reverses the Court of Appeals and the trial court on the issues identified above, the Court should reverse the removal of Jeannie as Trustee and Personal Representative as those removals were based on the errors identified above.

6. The Court of Appeals Erred When It Summarily Affirmed All of the Challenged Findings of Fact Without Comment

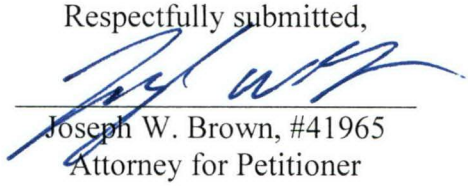
Petitioner hereby renews all of her challenged findings of fact that were summarily denied by the Court of Appeals.

F. CONCLUSION

Petitioner asks this Court to accept review and enter an opinion doing the following: (1) hold that Jeannie Kile had the authority under the Will, as trustee, to choose the operator of the farm, including choosing herself; (2) hold that judicial estoppel does not apply; (3) vacate the damages award; (4) reinstate Ms. Kile as Trustee and Personal Representative; (5) vacate the attorney fee awards and instead awards fees to Ms. Kile; and (6) remand the matter for further proceedings.

May 22, 2017.

Respectfully submitted,



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Appendix

FILED
MARCH 7, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

In the Matter of the Estate of	)	
	)	No. 33613-1-III
LESTER J. KILE,	)	(Consolidated with
	)	34048-1-III)
	)	
Deceased.	)	UNPUBLISHED OPINION
	)	

KORSMO, J. — Jeannie Kile appeals from superior court rulings construing her late father's will and removing her as personal representative of his estate. We affirm.

FACTS

This is the second appeal to reach this court concerning the Kile Farm Trust established by the late Lester Kile. The previous action involved the dissolution of the marriage between Jeannie Kile and Gordon Kendall. *In re Marriage of Kile*, 186 Wn. App. 864, 347 P.3d 894 (2015). The primary contestants in this action are Lester's daughter, Jeannie Kile, and her son, Cody Kendall. Evidence from the dissolution trial figured prominently in both the trial and appeal of this TEDRA[1] action.

Lester died in March 2012, two months after being deposed for the dissolution case. The Farm Trust, created by the terms of Lester's will, gave all interest in Kile

[1] Trust and Estate Dispute Resolution Act, chapter 11.96A RCW.

Farms, Inc. to Jeannie Kile as trustee. Cody Kendall was appointed as successor trustee if Jeannie did not serve. The trust was to last "as long as there are family members willing and able to farm or manage the farming activity." Clerk's Papers (CP) at 8. Income from the farm trust was to be distributed to Jeannie Kile, subject to one important proviso: "If however, Cody Kendall operates the farm at any time herein, then he shall be entitled to two-thirds of such income and Jeannie Kile shall be entitled to one-third." CP at 8-9. The trust was also responsible for paying all expenses of the farming operation. CP at 8.

Lester Kile had leased the farm properties to Jeannie Kile since 1988. She held a retail job and, from 1990 on, had her husband Gordon farm the land. The characterization as community or separate property of that leasehold, as well as adjoining farm lands that Jeannie Kile purchased at her father's suggestion and with his assistance, was the primary issue in the appeal from the dissolution trial. *Kile*, 186 Wn. App. at 875-885.[2] Lester Kile's deposition stated his intent that the land stay in his family and, for that purpose, he only would lease to his daughter and assist her. He threatened to cancel the lease with his daughter if Gordon Kendall continued to farm the land and requested

[2] This court ultimately concluded that (1) the profits from the farming operation should have been characterized as community property, (2) equipment purchased from Mr. Kile was community property subject to Ms. Kile's right to reimbursement for separate property contributions, and (3) the land purchased by Ms. Kile was her separate property, but was subject to a community right of reimbursement. 186 Wn. App. at 880-885.

that Jeannie Kile "turn over the farming operation to my grandson, Cody Kendall . . . I am willing to renew the lease to Jeannie Kile on the basis that Cody becomes the primary operator of all farming operations involving my farm." CP at 795.

Ms. Kile submitted a declaration prior to the dissolution trial in which she indicated that Cody had taken over the farming operation and that it was her father's intent that Cody farm the property. CP at 815. She testified during the trial that she considered herself the "operator" of the farm and that Cody was currently farming the land. Exhibit 223 at 93, 255.

The will also appointed Ms. Kile to serve as personal representative of her father's estate and expressly named her as trustee of much of the property within that estate. Although Cody farmed the land in 2012, Ms. Kile declined to pay him any share of the profits while the estate was being settled. She requested on January 10, 2013, that her son sign an "At-Will Employment Contract"[2] in order to continue farming. He refused to do so and Jeannie removed him from the farm operation and brought an unlawful detainer action to forcibly evict Cody and his family from the farmhouse. In separate transactions, Ms. Kile then leased the farmhouse and the farmland to third parties.

The following month, Cody filed this TEDRA action. After lengthy discovery, Judge Harold Clarke largely denied competing motions for summary judgment. He did grant Ms. Kile partial summary judgment, finding that the clause of the will granting Ms. Kile the power to manage the farm as trustee was not ambiguous, but he also concluded

that the term "operate" was ambiguous. The case was tried to Judge Michael Price five months later.

Trial testimony showed convoluted record keeping for the farm during Ms. Kile's tenure as leaseholder and as trustee. She testified that there were 18 bank accounts associated with the farming operations. Ms. Kile also testified that she had always "operated" the farm during the years she held the lease and that both her son and her former husband had essentially served as employees when farming the land. Judge Price noted in his oral ruling that there was not a single word of Ms. Kile's testimony that was complimentary of her son, "not a word." He described her testimony "as a wholesale attack on every aspect of Cody Kendall's person." Report of Proceedings at 461. He determined that Jeannie was estopped from claiming to be the sole "operator" of the farm because she had taken the position in the dissolution trial that Cody had jointly operated the farm with her in accordance with her father's wishes.

Judge Price also concluded that by failing to pay Cody and failing to allow him to operate the farm, Ms. Kile was violating her father's wishes and thereby breached her fiduciary duty as both personal representative of the estate and as trustee of the farm trust. Judge Price removed Ms. Kile from her roles as personal representative and trustee, substituting Cody Kendall as successor for each role. A forensic accounting was ordered to determine damages, and Ms. Kile was ordered to personally pay attorney fees.

Three experts submitted differing valuations for Judge Price's consideration. He rejected two of the accountings that failed to follow the parameters of Mr. Kile's will. He accepted the valuation of Certified Public Accountant Renee Grandinetti, with some minor adjustments involving rent and attorney fee costs. Subsequently, judgment was entered for Mr. Kendall against his mother in the sum of $340,928.

Ms. Kile timely appealed to this court. A panel considered the matter without argument.

ANALYSIS

Ms. Kile raises several contentions that can be grouped into five areas. She contends that the trial court erred in considering extrinsic evidence, and particularly in considering Mr. Kile's deposition, when construing the will. She also argues that the court erred in applying judicial estoppel, removing her as both personal representative and trustee, assessing attorney fees against her personally, and in calculating damages. She also assigns error to twelve findings of fact and one conclusion of law that she believes contains factual elements. We believe all of the findings were supported by the evidence and do not individually address those claims except to the extent necessary to address associated legal arguments. We address the legal arguments in the group order suggested by our statement.

Construction of the Will

Ms. Kile contends that the trial court erred both in construing the will and in considering Lester Kile's deposition to do so. We agree that the word "operates" was ambiguous and, therefore, subject to judicial construction. The trial court properly considered extrinsic evidence of the term's meaning.

The interpretation of a will or trust instrument, including the determination of whether a will contains an ambiguity, is a question of law subject to de novo review. *In re Estate of Bernard*, 182 Wn. App. 692, 704, 332 P.3d 480, *review denied*, 181 Wn.2d 1027 (2014). The purpose of construing a will is to give effect to the testator's intent. *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972). Such intention must, if possible, be ascertained from the language of the will itself and the will must be considered in its entirety and effect must be given every part thereof. *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985). If there is ambiguity as to the testator's intent, extrinsic facts are admissible to explain the language in the will. *In re Estate of Sherry*, 158 Wn. App. 69, 82, 240 P.3d 1182 (2010). There is no requirement that the extrinsic evidence be testamentary in nature; courts will utilize the testimony of those persons involved in drafting the will in determining testator intent. *Bergau*, 103 Wn.2d at 439.

TEDRA encompasses nearly all possible disputes touching on wills or trusts, and grants trial courts exceptionally broad authority to craft appropriate resolutions to those

disputes. *See* RCW 11.96A.020; RCW 11.96A.060. The statute has been recognized as providing a "grant of plenary powers to the trial court." *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P.3d 317 (2008). *Accord In re Estates of Jones*, 170 Wn. App. 594, 604, 287 P.3d 610 (2012). In view of the broad powers to remedy a problem, we review a trial court's exercise of its plenary authority for abuse of discretion. Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

These basic principles resolve Ms. Kile's first two contentions against her position. The term "operates" is ambiguous. Ms. Kile asserts a definition that equates with "to manage." To that end, she asserted that she was the operator of the farm due to her trustee status even though she did not personally till the soil. Mr. Kendall asserted that "operates" equated with "to farm." Both interpretations are reasonable meanings for the word "operates" in the context of running a farm.

Accordingly, the trial court correctly concluded that "operates" was ambiguous. It was therefore free to consider extrinsic evidence bearing on the question. *Bergau*, 103 Wn.2d at 436. In *Bergau*, the attorney who drafted the will testified to the testator's purpose in choosing a method for valuing the family farm. *Id.* at 438. In view of the ambiguity, taking testimony from the attorney was proper. *Id.* Similarly here, the trial court was free to consider extrinsic evidence of the testator's intent.

Unlike most instances where the trial court is reduced to considering hearsay testimony concerning the intent of the testator, this case involved the unusual circumstance where the testator had expressed his intent under oath for a court proceeding. It is difficult to imagine there could be better evidence of a testator's intent than to have the testator testify under oath on that topic. This evidence was highly relevant. The trial court understandably admitted the testimony.

Ms. Kile thus is forced to make a secondary argument contending that the deposition testimony fails because it is not a valid testamentary document. While we agree with the observation that the testimony would be ineffectual as a testamentary document, the argument fails because the evidence was not required to be in that form. The deposition testimony did not purport to make a bequest or create a trust. Instead, it explained the purpose that Mr. Kile was trying to achieve in his dealings with his daughter. He sought to have the farm remain in the family and end up with his grandson if he chose to farm the land. What better way existed than to transfer the land once Cody Kendall had accepted the mantle and farmed the land as his grandfather hoped?

Even without the deposition testimony, the structure of the will supported the same interpretation of "operates." Ms. Kile was a beneficiary of the farm trust; her right to income was not dependent on whether she conducted any part of the farm operation or not. Instead, the word "operates" applied only to Cody Kendall who was to get 2/3 of the farm income in the event he operated the farm. There was significant evidence in the

record that the 2/3 to 1/3 share of the crop was the most common payment arrangement between landowners (1/3 share) who lease land to tenants who farm it (2/3 share). It seems very likely that this traditional share was written into the will with the expectation that Cody would earn the traditional 2/3 share if he farmed the land.[3]

This interpretation is strengthened by the will provision calling for the trust to pay for the expenses of the farming operation (seeds, insurance, etc.) off the top, even though traditional arrangements typically left most or all of the costs of farming with the tenant farmer. Judge Price astutely analyzed this provision in his memorandum decision concerning damages. CP at 720-721. It was, he recognized, a way for a young farmer with no credit (such as a grandson starting out in the business) and no ability to secure loans against the land to have a chance to succeed financially in the difficult business of agriculture. It is highly unlikely that such a tenant-friendly arrangement would be written into a trust if the farm land was to be leased to a nonfamily member.

The trial court correctly concluded that the word "operates" was ambiguous and that the testator intended, both through the will and in his court testimony, that grandson Cody Kendall receive 2/3 of the crop proceeds if he "operated" the family farm by

[3] In the (admittedly unlikely) circumstance that Cody "operated" the land solely by managing it in Jeannie's stead, the will would still distribute all of the farm proceeds to Cody and Jeannie without consideration of any share for the actual farmer. That would seem to account only for the (even unlikelier) circumstance that Jeannie was actively farming the land under her son's management, but doing so for half of the going rate.

farming it. Lester Kile intended that Cody Kendall receive 2/3 of the proceeds of a crop, after expenses paid for by the trust, if he farmed the land. The trial court correctly discerned the intent of the will.

Judicial Estoppel

The trial court applied judicial estoppel against Ms. Kile, ruling that she could not pursue different interpretations of what her father intended in different legal proceedings. We agree that the trial court correctly estopped Ms. Kile's efforts to pursue conflicting factual theories in different lawsuits.

Judicial estoppel is an equitable doctrine designed to prevent a party from gaining an advantage by asserting one factual position in court and later taking a clearly inconsistent position. *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-225, 108 P.3d 147 (2005). "The purpose of judicial estoppel is to bar as evidence statements and declarations by a party which would be contrary to sworn testimony the party has given in the same or prior judicial proceedings." *King v. Clodfelter*, 10 Wn. App. 514, 519, 518 P.2d 206 (1974). A second purpose of the doctrine is to "preserve respect for judicial proceedings." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (internal quotations omitted). Courts focus on three factors when deciding the applicability of judicial estoppel: (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether accepting the new position would create the perception that a court was misled, and (3) whether a party

would gain an unfair advantage from the change. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (citing *Arkison*, 160 Wn.2d at 538-539). Application of judicial estoppel is reviewed for abuse of discretion. *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006).

The trial court did not abuse its discretion in applying judicial estoppel here. Ms. Kile filed a declaration in the dissolution case asserting that Cody, not Gordon, was operating the farm and that her father wanted Cody to farm the land. In the TEDRA action, she contended that she, alone, operated the farm. On appeal, she contends that she consistently claimed to be the operator by virtue of her management of the operation. Although she may have consistently maintained her view that "operates" equates to "manages," her argument misses the bigger picture. She told the dissolution court that her father wanted Cody to farm the land and that he was doing so. She could not then contend in the TEDRA action that her son served as nothing more than an employee who could be fired at her discretion because that position was totally at odds with what she had previously told the dissolution court about her father's intent. The factual positions were inconsistent, even if her legal argument about the meaning of the word "operates" was the same in both proceedings. The first factor of the *Miller* test weighs in favor of applying judicial estoppel.

The second factor also favors the trial court's position. If both courts had believed her, the perception would be that one of them had been misled. At the dissolution trial

Ms. Kile was contending that her son, not her husband, was the person farming the land, an important factual piece of her argument that the marital community did not operate the farm. She also posited there that her father wanted grandson Cody to farm the land. When her father's intent became the primary contested issue in the TEDRA action, she changed her view, claiming that her father's actual intent was that she manage the farm. Although Lester Kile's intent was the critical issue in the second case and was only a supporting piece of evidence in the first, acceptance of the conflicting statements could lead to the perception that a court had been misled in one proceeding or the other.

The final factor is whether Ms. Kile would have derived an unfair advantage from the inconsistent positions. Ms. Kile argues here that this court's intervening reversal in the dissolution case deprived her of any benefit from the inconsistent testimony. One problem with that argument, however, is that the reversal came after Judge Price had applied judicial estoppel in the TEDRA trial. More fundamentally, the factor looks to whether a party *would* benefit, not whether she actually did, from the inconsistent positions. Stated differently, this factor looks to whether the inconsistency was about an important feature of the case. While perhaps not that important to the dissolution case, the intent of Lester Kile was the most critical issue in this case. Accordingly, Ms. Kile could have benefited in this action from the change in factual position.

Accordingly, all of the factors weigh in favor of the trial court's ruling and we cannot say that it abused its discretion. The declaration in the dissolution trial was

exceptionally significant in the TEDRA case once the trial court determined that the will was ambiguous and opened the door for extrinsic evidence. It was proper for the trial court to hold Ms. Kile to the factual view of her father's intent expressed in the dissolution trial. She was still free to argue, as she did, that the will had a different legal meaning than that asserted by her son. But, she could not claim that her father's intent was different than what she told Judge Moreno in the dissolution case.

The trial court did not abuse its discretion.

Removal as Personal Representative and Trustee

Ms. Kile next argues that the trial court had neither a legal basis, nor a sufficient factual basis, for removing her as personal representative and trustee. Given our resolution of the previous contentions, this claim must fail.

A personal representative must administer the estate in the best interest of the beneficiaries. *In re Estate of Jones*, 152 Wn.2d 1, 19 n.14, 93 P.3d 147 (2004). RCW 11.68.070 provides that should the personal representative of an estate become subject to removal for any reason specified in RCW 11.28.250, the court may, within its discretion, remove the personal representative and appoint a successor. RCW 11.28.250 authorizes the court to remove the personal representative where it has reason to believe she has wasted, embezzled, or mismanaged property of the estate, or where for other cause or reason the court finds such action is necessary, if the conduct was similar to other grounds listed in the statute. *Jones*, 152 Wn.2d at 9-10. One of the unspecified causes or

reasons for removing the personal representative is "where a conflict of interest exists which would contravene the rights of the beneficiaries and result in waste of the estate." *Id.* at 19.

"Although the trial judge is given broad discretion as to the grounds upon which he may remove an executor, the grounds must be valid and supported by the record." *In re Estates of Aaberg*, 25 Wn. App. 336, 339, 607 P.2d 1227 (1980). If, however, any of the trial court's several grounds for removal is valid, its decision will not be disturbed on appeal. *Id.*

Similar standards apply to the removal of a trustee. The decision to remove a trustee will seldom be reversed absent a manifest abuse of discretion. *In re Estate of Ehlers*, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996). A court has a large amount of discretion to remove the trustee when there is sufficient reason to do so in order to protect the best interests of the trust and its beneficiaries. *In re Estate of Cooper*, 81 Wn. App. 79, 94-95, 913 P.2d 393 (1996).

A trustee is a fiduciary who owes the highest degree of good faith, diligence, and undivided loyalty to the beneficiaries. *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 502, 844 P.2d 403 (1993). A trustee's duties and powers are determined by the terms of the trust, by common law, and by statute. *Ehlers*, 80 Wn. App. at 757. A trustee who breaches her duties may be removed by petition of a beneficiary. RCW 11.98.039(4); *Ehlers*, 80 Wn. App. at 761. The trustee may only

remove a trustee for "reasonable cause." RCW 11.98.039(4). A court may find reasonable cause in situations involving conflict of interest between the trustee beneficiary and the other trust beneficiaries and bad will generated by litigation. *Bartlett v. Betlach*, 136 Wn. App. 8, 20, 146 P.3d 1235 (2006); *Waits v. Hamlin*, 55 Wn. App. 193, 198, 776 P.2d 1003 (1989). The petitioning beneficiary must demonstrate that removal is clearly necessary to save the trust property. *Ehlers*, 80 Wn. App. at 761.

Since the record supports the determination that Ms. Kile deprived Mr. Cody Kendall of his 2/3 share of the 2012 farm crop, there was a validly supported and legally sufficient basis for removing her from both positions. Her fiduciary duty as both personal representative and as trustee of the farm trust was to carry out the intentions of her father and act for the benefit of the beneficiaries of the will and trust. The evidence revealed that she failed to meet those obligations.

As noted, she failed to carry out her father's intent that Cody Kendall farm the land. She did not pay Cody his share of the 2012 crop proceeds. Her financial record keeping was a mess, with at least 18 different bank accounts and such poor accounting that several different experts could not completely unravel it. These failures alone were very amply supported by evidence in the trial record and were even partially supported by her own testimony. Substantial evidence supported the determination.

These established failures also provided legally sufficient reasons to remove Ms. Kile from both positions. She was not managing the estate and the trust in accordance

with her father's intentions, she was not acting in the best interests of all of the beneficiaries, particularly the interests of the son, and her mismanagement of the finances prevented experts from sorting out the problems. Her actions engendered bad will between herself as trustee and her son, one of the beneficiaries. Even viewing her actions in the most charitable light, she mismanaged the estate.[4] This was an adequate basis at law to remove her.

The trial court did not abuse its discretion by removing Ms. Kile as personal representative and trustee. The actions were supported both factually and legally.

Imposition of Fees and Costs against Ms. Kile

Ms. Kile next argues that the court erred in imposing costs and attorney fees against her personally instead of against the trust and estate. In light of our resolution of the previous arguments, there was no error.

RCW 11.96A.150 permits the probate court, in its discretion, to impose reasonable attorney fees and costs in an estate proceeding. A trust beneficiary who establishes a breach of fiduciary duty by the trustee is entitled to recover reasonable attorney fees against the trustee personally. *Estate of Cooper*, 81 Wn. App. at 92.

Ms. Kile does not contest the amount of costs and fees imposed. Since the record amply supports her mismanagement of the estate to the detriment of one of the

[4] There is strong evidence that her actions with respect to Cody Kendall were more malicious than negligent.

beneficiaries, Cody Kendall, the trial court did not err in requiring Ms. Kile to personally pay those costs and fees to him. *Id.* The estate did not even arguably benefit from her actions and there was no basis for assessing costs and fees against the estate.

Under these facts, there was no error in assessing the fees against Ms. Kile personally.

Damages Award

Ms. Kile next contends that the damages award was not supported by substantial evidence. To the contrary, the trial court's careful and detailed assessment in its memorandum opinion on damages demonstrates the contrary position.

As with many of the other arguments raised in this appeal, our review of the damages decision is for clear abuse of discretion. *Johnson v. Cash Store*, 116 Wn. App. 833, 849, 68 P.3d 1099 (2003). The trial court had very tenable reasons for ruling as it did.

We need not lengthen this opinion unnecessarily by reciting all of the evidence in support of the trial court's ruling. Judge Price very nicely did that in his memorandum decision and accompanying order. *See* CP at 718-724. In summary form, those documents discussed the competing views of three experts and showed why only one of them, Ms. Grandinetti, properly applied farm accounting standards to the scheme set up by the will of Lester Kile. The other experts largely assessed the damages from the standard landlord-tenant relationship common to leased farm land instead of to the Kile

farm trust. The trust was required to bear the costs of farm production prior to splitting the proceeds. Ms. Grandinetti's accounting most closely followed the trust's requirements. Judge Price adjusted the figures where necessary to account for trial rulings regarding rent, fees paid to Ms. Kile, and costs owed for the Grandinetti accounting.

The carefully written ruling concerning damages showed both an ample factual basis for the judgment and very tenable reasons for the award. There was no abuse of discretion.

Attorney Fees on Appeal

Finally, both parties seek attorney fees on appeal. Under TEDRA, this court has great discretion in awarding fees and may "consider any relevant factor, including whether a case presents novel or unique issues." *In re Guardianship of Lamb*, 173 Wn.2d 173, 198, 265 P.3d 876 (2011). Where the beneficiaries to an estate are involved in a dispute, the court may award both sides fees from the estate because the litigation resolves the rights of all. *In re Estate of Watlack*, 88 Wn. App. 603, 612-613, 945 P.2d 1154 (1997). Therefore, where both sides advance reasonable, good faith arguments in support of their respective positions, the court may assess fees to neither party or against the estate so that all contesting parties bear the costs of the dispute. *In re Estate of Evans*, 181 Wn. App. 436, 452, 326 P.3d 755 (2014).

We decline to award any fees or costs to Ms. Kile. Not only did she not prevail at all in this appeal, her failure to live up to her fiduciary obligations brought about this entire lawsuit.

Mr. Kendall does not contend that Ms. Kile's appeal was frivolous or motivated by bad faith, but seeks attorney fees on the basis of the statute. Since the ambiguity in the will created the legal basis for Ms. Kile's legal fight, we deem it appropriate to award Mr. Kendall his reasonable attorney fees in this action payable from the estate.

The judgment is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, C.J.

Lawrence-Berrey, J. (result only)

FILED
APRIL 20, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Estate of, LESTER J. KILE, Deceased.	)	No. 33613-1-III (Consolidated with 34048-1-III) ORDER DENYING MOTION FOR RECONSIDERATION AND DENYING MOTIONS TO PUBLISH

THE COURT has considered appellant's motion for reconsideration and motion to publish opinion, as well as respondent's motion to publish opinion and is of the opinion the motions should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration and the motions to publish opinion of this court's decision of March 7, 2017, are hereby denied.

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

FOR THE COURT:

George Fearing
GEORGE FEARING, Chief Judge

SUPREME COURT
OF THE STATE OF WASHINGTON

IN THE MATTER OF THE ESTATE OF: ESTATE OF KILE, LESTER J. Deceased CODY KENDALL, Respondent, v. JEANNIE KILE, Petitioner.	Nos. 33613-1-III; 34048-1-III **DECLARATION OF SERVICE ON ATTORNEY**

I, Joseph W. Brown, declare under penalty of perjury under the laws of the State of Washington that on the 22 day of May, 2017, I handed a true and correct copy of the Petition for Review directly to Steven W. Hughes, attorney for the Respondent

Signed this 23 day of May, 2017, in Spokane, WA.

JOSEPH W. BROWN

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