

No. 68354-3-I

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WASHINGTON STATE COURT OF APPEALS  
DIVISION I

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In the Matter of the Estate of Leora M. Givens, Deceased,

ROY ANTHONY GIVENS,

Appellant,

vs.

RHONDA MARY BROWN, as Personal Representative  
of the Estate of Leora M. Givens, Deceased,

Respondent.

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 COURT OF APPEALS DIV I  
 STATE OF WASHINGTON

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APPELLANT'S BRIEF

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## INTRODUCTION

Leora and Rocelius Givens had seven children, one of whom was Roy Anthony.<sup>1</sup> The senior Givenses started a company called Pantrol, Inc.; Roy Anthony was the only one of their children who worked at Pantrol, and he ultimately became president and 51% owner of the stock. This case concerns the interpretation of Leora Givens' estate planning documents, and whether the documents, when properly read, demonstrated an intent to leave her remaining interest in Pantrol to Roy Anthony upon her death, or disinherit him completely and have him pay \$1 million for distribution to his siblings. It also concerns her competency to sign a "Transfer on Death" designation on an Ameriprise account which required that the account be distributed upon her death to all seven of her children, including Roy Anthony.

There are three key documents to the Pantrol dispute: a Stock Cross-Purchase Agreement, Leora's Will/Living Trust, and a Stock Redemption Agreement. In 2000, Rocelius, Leora, and Roy Anthony signed a "Stock Cross-Purchase" Agreement, which gave the first option to Roy Anthony to buy the senior Givenses' 49% of stock in Pantrol for

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<sup>1</sup> Roy Anthony is also referred to as Tony in various documents, a nickname to prevent confusion with his father.

\$1 million upon the death of **both** Rocelius and Leora. Rocelius died in June 2001. In 2003-2004, Leora and Roy Anthony began to negotiate a Stock Redemption Agreement, which would operate to transfer all of Leora's remaining Pantrol stock for a \$1 million purchase price, based on a Promissory Note secured by the stock; this would then give Leora a steady \$4,000 per month income.

Unbeknownst to Roy Anthony, at that same time, Leora was also developing a Will and Living Trust; the Will "poured over" all her assets to the Trust, which contained the following clause(s):

Having spoken with [the other children], I wish for the following to occur at my death:

If at the time of my death, the Stock Redemption Agreement between PANTROL, Inc. and myself has not been finalized, thereby invoking the 2000 Stock Cross-Purchase Agreement, I leave any interest in PANTROL, Inc. that I may own, or that may be distributed to my estate assets to ROY ANTHONY GIVENS.

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I intentionally...do not leave any portion of the rest, remainder and residue of my estate to ROY ANTHONY GIVENS due to his interest in PANTROL, Inc.

This Trust was signed by Leora on July 7, 2003, and expressed her desire to relieve Roy Anthony of his obligation under the Stock Cross-Purchase Agreement to pay the \$1 million, and leave him her interest in Pantrol (including that which may be distributed to her estate). However, on January 1, 2004, the Stock Redemption Agreement was signed, which

imposed a \$1 million purchase price, similar to the Stock Cross-Purchase Agreement.

As to the Ameriprise account, it is undisputed that Ameriprise had on file a "Transfer on Death" beneficiary designation with Leora's signature dated February 14, 2006. That designation specifically distributed Leora's account to all seven of her children, including Roy Anthony.

Leora died in May 2010, and the Personal Representative of Leora's Estate, Rhonda Brown ("the Estate"), intended to ignore both Leora's express intent to leave Roy Anthony her interest in Pantrol, and to equally divide the Ameriprise account based on the "Transfer on Death" designation. Roy Anthony filed a petition under the Trusts and Estates Disputes Resolution Act ("TEDRA"). After a single motion hearing, the trial court ruled that the Trust was unambiguous, and that Roy Anthony was entitled to nothing from the Estate; it also ruled that Leora was not competent to sign the "Transfer on Death" form.

The trial court did not rule on the objections Petitioner made to the extrinsic evidence submitted on both the Trust and Ameriprise issues, although it noted some of the challenged evidence was inadmissible. The court further conducted independent medical research to determine that it believed Leora was incompetent to sign the Transfer on Death

designation, and failed to address the Estate's high burden to establish testamentary incapacity, also leaving the entirety of that account to Roy Anthony's six siblings.

In so ruling, the trial court erred in its interpretation of the Trust, and ignored Leora's stated intent to leave Roy Anthony the Pantrol interest; if the trial court could not give proper effect to the terms of the Trust leaving the remainder of Leora's interest in Pantrol to Roy Anthony, it should have conducted a full evidentiary trial under TEDRA to determine the intent of the terms of the Trust and Will. Moreover, the trial court's *sua sponte* use of medical treatises to determine Leora's incapacity, its failure to identify or address the Estate's burden to prove incompetence, and its failure to rule on Roy Anthony's objections to extrinsic evidence establish that the Estate did not overcome the presumption of competence with clear and convincing evidence; alternatively, just as with the Trust, the issue demanded a full evidentiary hearing for resolution.

#### **ASSIGNMENTS OF ERROR**

1. The trial court erred in interpreting Leora Givens' Living Trust as a matter of law to disinherit Roy Anthony Givens and not leave him her interest in Pantrol, Inc.

2. The trial court erred in ruling on the interpretation of the Leora Givens Living Trust as a matter of law without a trial to make necessary findings of fact and credibility determinations.

3. The trial court erred when it found that Leora Givens was incompetent to sign the Transfer on Death directive, without ruling on objections to extrinsic evidence, without identifying or applying the high burden of proof on the Estate, and by relying on independent medical treatise research.

#### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did Leora Givens' Living Trust express an intent to relieve Roy Anthony Givens of the obligation to pay for Leora's remaining interest in Pantrol, Inc. and leave it to him upon her death?

2. To the extent the Trust contained clauses that could not be read in harmony, should the Trust have been interpreted to give effect to the dispositional scheme and repugnant terms ignored?

3. If the terms of the Trust could not be read in harmony to effectuate some of its stated purposes, was there an ambiguity that required an evidentiary hearing or trial?

4. Did the trial court err by failing to identify and exclude inadmissible evidence on Leora Givens' competency?

5. Did the trial court err by failing to identify the high burden on a party challenging competency, and in ruling that the Respondents meet that burden?

6. Did the trial court err in independently researching a medical diagnostic treatise to determine Leora Givens' competency?

### **STATEMENT OF THE CASE**

Rocelius and Leora Givens were a married couple who had seven children. (CP 69) In approximately 1974, Rocelius and a business partner founded Pantrol, Inc.; the business was initially and primarily focused upon the design and manufacturing of electrical components. (CP 69) One of Leora and Rocelius' children, Roy Anthony, began full employment with Pantrol in 1983 after graduating from college; he had worked at Pantrol throughout his high school and college years both part-time and seasonally. (CP 69-70)

In 1988, Rocelius retired from Pantrol, and despite the retirement of a company founder, and financial difficulties, which included discussing potential bankruptcy, Roy Anthony stayed, and in 1989, purchased 49% interest in Pantrol owned by Rocelius' business partner. (CP 70) Pantrol began to prosper after Rocelius' retirement, primarily because Roy Anthony personally designed and developed an electronic

control system for pellet stoves which resulted in financial success.  
(CP 71)

In 1997, Roy Anthony also placed Pantrol into the telecommunications market, and it began designing and manufacturing products for the wireless industry. (CP 71) Roy Anthony worked 80 plus hour weeks with minimal compensation to insure Patrol's continuing financial success. (CP 71) Rocelius and Leora gifted a portion of their stock equal to 2% in the company to Roy Anthony in August of 1998, so that he owned 51% of Pantrol with his parents owning the remaining 49%.  
(CP 70)

From his retirement in 1988 until his death in 2001, Pantrol provided Rocelius with a paycheck as a "consultant." (CP 70) In addition to this compensation, significant additional monies were paid to Rocelius and Leora by Pantrol in the form of loans totaling slightly less than \$400,000 as of December 31, 2000. (CP 70) Between compensation and loans, Pantrol paid Rocelius and Leora over \$1.2 million between 1988 and January of 2004. (CP 70)

By the late 1990s, as Pantrol became more and more successful, Roy Anthony became concerned regarding the future disposition of his parents' 49% interest, which then had an inflated value based on the success of the company after Rocelius' retirement, largely attributable to

Roy Anthony's efforts. (CP 71) As a consequence, Rocelius, Leora, and Roy Anthony executed a Stock Cross-Purchase Agreement on October 1, 2000, which would cap the market value of his parents' interest in Pantrol at the time of their deaths (CP 50-55, 71), and give Roy Anthony or Pantrol the right to purchase his parents' interest on both of their deaths at a maximum price of \$1 million. (CP Id.)

Less than a year later, on June 13, 2001, Rocelius died. (CP 47) However, Leora continued to receive the monthly income stream from Pantrol that had been designated as consultant payments to Rocelius. (CP 72) Roy Anthony was eventually advised that the IRS would likely not identify the payments to Leora as income as a consultant, since she had never worked at Pantrol. (CP 85) As a result, Leora and Roy Anthony began to explore ways to insure a steady income stream to Leora by negotiating a buyout. (CP 72)

In this negotiation process, attorney Al Rubens represented Roy Anthony, and Leora retained the services of attorney Jeffrey Werthan.<sup>2</sup>

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<sup>2</sup> Mr. Rubens had previously represented Rocelius, Leora and Pantrol, and the parties agreed to waive any conflicts which could arise in the course of the matter. (CP 63-64)

Ultimately, the terms of the Stock Redemption Agreement provided that Pantrol would purchase Leora's stock interest (49%) for a total purchase price of \$1 million. (CP 60) The amount of the outstanding loans owed by Leora and Rocelius to Pantrol was credited against the purchase price, with the balance, approximately \$621,000, to be paid through a Promissory Note secured against the stock sold, providing for monthly payments to Leora of \$4,000, including interest. (CP 60-61) Roy Anthony signed the Promissory Note on January 1, 2004. (CP 65-66)

Unbeknownst to Roy Anthony or his attorney Rubens, Leora was also developing a Will and Living Trust during the negotiations for the Stock Redemption Agreement. (CP 440-441) During the negotiations, Mr. Rubens reminded Leora of her and Rocelius' previously stated intention to insure that Roy Anthony was properly compensated for his "sweat equity" in the business, considering the company's success after Rocelius had retired, and acknowledging the continued source of income that it had provided Rocelius on his retirement, and would continue to provide Leora. (CP 47, 58, 439)

In fact, just prior to Leora's execution of her estate planning documents, her attorney wrote her a letter including drafts of the updated Will and Revocable Living Trust, which stated:

Please note that I still have not added a sentence regarding the proceeds going to Tony [Roy Anthony] if the ultimate sale of the business is not completed by a certain stage. I still want to speak with you about this, as I am not certain that this paragraph is actually necessary.

(CP 97)

On July 7, 2003, Leora executed her Will and Living Trust.

(CP 9-12) The Will divided her personal property, and left all of the residue to the Trust. (CP 7-11)<sup>3</sup> The relevant language in the Trust is as follows:

Having spoken with [the other children], I wish for the following to occur at my death:

If at the time of my death, the Stock Redemption Agreement between PANTROL, Inc. and myself has not been finalized, thereby invoking the 2000 Stock Cross-Purchase Agreement, I leave any interest in PANTROL, Inc. that I may own or that may be distributed to my estate to ROY ANTHONY GIVENS.

•••

I intentionally...do not leave any portion of the rest, remainder, and residue of my estate to ROY ANTHONY GIVENS, due to his interest in PANTROL, Inc.

(CP 400-401)

Six months later, the Stock Redemption Agreement was executed

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<sup>3</sup> The Will originally admitted to probate was one dated July 7, 2003; Leora had signed an updated version, which was virtually identical, on January 12, 2006. (CP 152-157)

in which Leora agreed to sell her 49% shares back to Pantrol for \$1 million (\$379,000 in loan forgiveness, and \$621,000 paid via a Note). (CP 60-64) The Stock Redemption Agreement provided that the Note would continue on Leora's death prior to a full payment, with the payments being made to Leora's Estate. (CP 61) The Promissory Note was secured by the stock. (CP 61, 66) This was the method by which Leora continued to obtain the income stream necessary for her lifestyle, and she was paid \$4,000 per month for the next six years until her death on May 1, 2010. (CP 72)

In August of 2005, Leora suffered a stroke while residing in Arizona; some of Leora's daughters helped her move closer to them in the Puget Sound area. (CP 72) Leora resided at The Gardens at Townsquare, an assisted living facility in Bellevue, Washington. (CP 168) On January 24, 2006, Leora was admitted to the Northwest Hospital and Medical Center in Seattle, Washington because she had become confused and was exhibiting some hallucinations and paranoia. (CP 164-167) She was seen in the Geropsychiatric Center, with the plan that she would be able to return to The Gardens at Townsquare. (CP 169) Leora was released from the hospital on February 13, 2006 and returned to her prior living facility, The Gardens at Townsquare. (CP 185)

Leora executed a "Transfer on Death" form on February 14, 2006, in relation to the Ameriprise account, which stated that she intended to leave that account equally to her seven children, including Roy Anthony. (CP 135-137) Michael Payne, her broker on the Ameriprise account, testified that while he was not specifically aware of how the form reached Leora, or was returned to him, he would not have sent it out without a request. (CP 129, 134) Leora died four years after signing the TOD designation.

After Leora's death, Rhonda Brown, one of Leora's daughters, and the Personal Representative in Leora's Will,<sup>4</sup> filed a probate proceeding in the Superior Court, State of Washington, County of King. (CP 1-3) Roy Anthony learned that Ms. Brown intended to take the position that Leora lacked capacity to update her beneficiary designation on the Ameriprise account, and not distribute any of that account to Roy Anthony. (CP 14) Similarly, her interpretation of the Trust Agreement was to refuse to leave Leora's interest in Pantrol to Roy Anthony, such that the amounts owed on the Promissory Note to pay for the stock would be distributed solely to the other six children. (CP 15-16)

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<sup>4</sup> Rhonda Brown is also the Successor Trustee on Leora's Living Trust. (CP 405)

As a result, Roy Anthony filed a petition under RCW 11.96A, the Trusts and Estates Dispute Resolution Act (TEDRA) seeking to resolve these two issues. (CP 13-17) In support of his TEDRA petition, Roy Anthony filed the Declaration of Al Rubens and the Declaration of Roy Anthony Givens, as well as records obtained from Leora's attorney Jeffrey Werthan, deposition excerpts from the depositions of Michael Payne and Rhonda Brown, as well as certified records from Northwest Hospital and Medical Center for Leora's hospitalization, and from The Gardens where she resided. (CP 46-290)

In response, the Estate filed Declarations from Roy Anthony's siblings Rhonda Brown, Marsha Marsh, Terry Givens, Sharon Givens, and Craig Givens, and Leora's attorney, Jeffrey Werthan, which purported to describe Leora's intent to disinherit Roy Anthony, as well as document her incompetence. (CP 307-325, 334-352) The Estate also filed Declarations from an RN at The Gardens and a psychiatrist who treated Leora while hospitalized at NW Hospital and the medical director at The Gardens on the competency issue. (CP 326-329, 331-332)

Roy Anthony formally objected to the information submitted by the Estate, detailing inadmissible portions of the Declarations of Rhonda Brown, Karen Ingrassia, Marsha Marsh, Terry Givens, Sharon Givens, and Craig Givens. (CP 371-388) He also filed supplemental affidavits of

Attorney Rubens, and a detailed opinion from gerontological expert Dr. Tran on Leora's competency to sign the Transfer on Death designation. (CP 339-342, 436-438)

A hearing was held on the matter on November 18, 2011, and on November 30, 2011, the trial court issued an order construing the Trust and non-probate Ameriprise beneficiary designation. (CP 420-423) While the court agreed that the affidavits concerning various witnesses' observations of Leora Givens were properly objected to because they violated the deadman's statute, it did not specifically rule on the admissibility of any of the evidence, nor did it strike any of the objectionable evidence. (CP 421) The court also relied on its own analysis of the medical records by its independent review of a medical treatise and diagnostic aids to determine that Leora Givens was not legally competent on February 14, 2006 to sign the TOD Form. (CP 421-422)

The court further ruled that the Trust was unambiguous, finding:

If the stock Redemption Agreement had not been finalized, Mrs. Given's interest in Pantrol should be distributed to her son Roy Anthony Givens. Her other children would not have an ownership interest in the company. However, the Stock Redemption Agreement had been finalized. Accordingly, Mrs. Givens was no longer a shareholder; she was a creditor of Pantrol and the income stream to which she was entitled passes under paragraph 5.1(b), as part of the residue of the estate.

(CP 422)

Roy Anthony moved for reconsideration because the trial court had failed to specifically address the Estate's burden of proof to establish the incapacity of Leora Givens on the day she signed the TOD document, and because the court conducted independent research on a medical diagnosis under the Diagnostic Statistical Manual (DSM-IV) to determine the capacity of Leora Givens to execute the TOD. (CP 424-435) Further, he asked for reconsideration on the interpretation of the Living Trust, because the court improperly decided the issue based on Leora Givens' status as no longer a shareholder, ignoring her secured creditor position with a reversionary interest in Pantrol, and improperly interpreted Section 5.1(b) to disinherit Roy Anthony despite its clear language to leave him either her stock shares or any amount that may be distributed to her estate. Id. The reconsideration was denied and this appeal followed. (CP 468-469, 551-560)

Moreover, because the trial court failed to rule on the effect and/or consideration of the inadmissible extrinsic evidence, its final determination could have been based in some part on those portions of declarations that were inadmissible.

Thus, Roy Anthony is either entitled to rulings entitling him to Leora's interest in Pantrol and a share of the Amerprise account, or

alternatively is entitled to a trial for accurate and clear factual findings and rulings as a matter of law under TEDRA.

### **ARGUMENT**

The trial court erred in ruling as a matter of law that the Living Trust at issue could be unambiguously interpreted to ignore the stated intent to leave Leora Givens' interest in Pantrol to her son Roy Anthony. At a minimum, such a ruling raises significant issues of fact, and the matter should be remanded for trial or further evidentiary hearing under the TEDRA scheme.

The trial court also erred in finding that Leora Givens was incompetent to sign the Transfer on Death beneficiary designation on February 14, 2006, apparently based on its independent medical research, without identifying or ruling on objections to the extrinsic evidence presented by the parties, and without acknowledging the high burden of proof on the Estate to establish incapacity to contract.

**A. When read as a whole, Leora Givens' Revocable Living Trust stated a clear intent to leave her interest in Pantrol to Roy Anthony.**

If a trial court makes findings as a matter of law on the interpretation of a trust, such as in a summary judgment, the Court of Appeals reviews de novo the trial court's interpretation, including whether or not there is an ambiguity. In re Estate of Kuest, 2009 WL 1317484

(Wash. App. 2009) [citing Woodward v. Gramlow, 123 Wn.App. 522, 526, 95 P.3d 1244 (2004)].

The duty of the court is to ascertain the intent and purpose of the trust, and such intent and purpose must be derived primarily from the terms of the instrument, construing all the provisions together. Old National Bank v. Campbell, 1 Wn.App. 773, 463 P.2d 656 (1970). Courts must determine a settlor's intent in a trust document by construing the document as a whole. Bartlett v. Betlach, 136 Wn.App. 8, 146 P.3d 1235 (2006). Courts reject construction of trust language that would defeat the settlor's expressed intention. C.J.S. Trusts §209.

In interpreting a trust, consideration should not be given merely to disjointed parts or fragments, or isolated words or phrases; each paragraph, provision, or phrase must be read in light of the whole instrument and its general dispositional scheme, and not in isolation, and a particular clause should not be given undue preference or emphasis. C.J.S. Trusts §214; Foulston Siefkin, LLP v. Wells Fargo Bank, 465 F.3d 211 (5<sup>th</sup> Cir. 2006) (all provisions of a trust must be read in harmony rather than by critical analysis of an isolated provision); Roberts v. Sarros, 920 So.2d 193 (Fla. App. 2006) (the court should construe a trust by taking into account the dispositional scheme, and should not resort to isolated phrases). See also, Cook v. Brateng, 158 Wn.App. 777, 262 P.3d 1228 (2010) (a trust is to be

interpreted by construing all provisions together). There is a “strong” and well-recognized constructional preference that accords with the general dispositive plan. In application, this constructional preference favors the construction that produces an overall result that is more consistent with the donor’s general disposition plan than might be produced by an attempt to resolve the ambiguity by a narrow examination of punctuation or of isolated words, phrases, sentences, or other portions of the document. Restatement (Third) of Property: Wills & Other Donative Transfers, §11.3, com. (h).

Here, in relation to the interpretation of the Trust, when read as a whole, the Trust makes sense only if it effectuates Leora's intent and dispositional scheme to leave her interest in Pantrol to Roy Anthony. The interpretation of a trust must embody common sense canons of contract interpretation. DeSieno v. American Home Products, 26 F.Supp.2d 209 (D. Mass. 1998). The Trust indicates Leora spoke with her other children about what she intended to do, and a common sense interpretation of that is that she wanted them to understand her bequest to Roy Anthony; it would make little sense that she needed them to understand or approve his disinheritance.

The Trust provision then states that if at the time of her death the Stock Redemption Agreement is not finalized, "thereby invoking the 2000

Stock Cross-Purchase Agreement," she leaves her interest in Pantrol (including that which may be distributed to her estate) to Roy Anthony. (CP 400) The 2000 Stock Cross-Purchase Agreement would have required Roy Anthony to pay \$1 million for the remaining interest in Pantrol. It is undisputed that Leora's intent was to do something **different** than invoke the Stock Cross-Purchase Agreement and impose on Roy Anthony the obligation to pay \$1 million to her estate.

Thus, if that obligation were invoked, she made clear she wanted to leave any interest she had in Pantrol, or that could be payable to her estate (such as payments due under the Promissory Note) to Roy Anthony. The Estate argues that the somewhat troublesome phrase "if at the time of death, the Stock Redemption Agreement is not finalized" means that if the Stock Redemption Agreement was signed, which it was less than six months later, then Leora intended to reimpose the obligation on Roy Anthony to pay the \$1 million for the stock. However, that interpretation renders meaningless Leora's intent to **relieve** Roy Anthony of the similar obligation under the 2000 Stock Cross-Purchase Agreement, and fails to recognize the overall dispositional scheme. Moreover, it ignores common sense.

Taken to its logical conclusion, the Estate argues that if on one hand, Leora has not signed one document she relieves Roy of the

obligation to pay the \$1 million and distributes to him all of her interest in Pantrol, and if she has signed another document, she instead leaves him nothing and requires him to pay the \$1 million to his siblings. Interpreting Leora's intent cannot ignore her desire and expressed intent to leave Roy Anthony her interest in Pantrol under some circumstances. This express intent is bolstered by the later clause in which she describes that she intentionally leaves nothing of the balance of her Estate to Roy Anthony due to the interest she is leaving him in Pantrol.

While problematic, the clause "if at the time of my death, the Stock Redemption Agreement...has not finalized" cannot control and be read in isolation to eliminate the later expressed intent to leave Roy Anthony her interest in Pantrol without requiring Roy Anthony to purchase the stock for \$1 million.

And if that clause cannot be given a common sense interpretation to establish Leora's intent, it must be avoided. While a trust agreement must be construed to avoid if possible all repugnancy in clauses or provisions, if reconciliation of inconsistencies is impossible, and conflicting provisions cannot be read in a manner to give effect to both, parts that are inconsistent with the settlor's intent may be rejected. C.J.S. Trusts §217. When the manifest purpose sought to be accomplished by the Trust is ascertained, it takes precedence over all other canons of

construction. C.J.S. Trusts §222. In fact, if necessary to effectuate a testator's intent, the court may correct defects, and if necessary supply, reject or transpose words. C.J.S. Trusts §209. See also, Restatement (Third) of Property: Wills & Other Donative Transfers, §21.1.

Ultimately, if interpreting the Trust Agreement to comply with the ultimate intent of Leora to insure that the 2000 Stock Cross-Purchase Agreement is not imposed upon Roy Anthony requires that the phrase "if at the time of my death the Stock Redemption Agreement...has not been finalized" be ignored, the court should do so as necessary to insure that the overall intent is not destroyed.

Alternatively, to avoid the repugnancy, the court must find an interpretation that effectuates Leora's intent in relation to leaving Roy Anthony her interest in Pantrol. For example, Leora could have meant that if at the time her death, the Stock Redemption Agreement had not been **completed**, meaning that Roy had not paid the entire price for the stock, she would then leave the remaining interest to Roy Anthony (i.e. forgive further payment). In fact, Leora did live another six years, drawing money from Pantrol under the Stock Redemption Agreement, and the letter from her attorney Werthan confirms she wanted some provision leaving Roy Anthony the proceeds if the sale had not been "completed by a certain stage," which Mr. Werthan indicated was unnecessary under the

already included terms of the Trust. (CP 97) The Trust could thus be interpreted that Leora intended that if she died shortly after signing her Will and Trust, Pantrol would go to Roy, and she would not impose the 2000 Stock Cross-Purchase Agreement on him. However, if she had signed the Stock Redemption Agreement, she would utilize it as her source of income while she lived thereafter, but upon her death, if the Stock Redemption Agreement had not been **completed**, i.e. there was still a balance owing, then Roy would at that point be entitled to the remaining interest either she or her estate had in Pantrol.

Irrespective of how it is read, however, the ultimate intent by Leora must prevail, and the Trust be given a common sense interpretation. As a result, the trial court's ruling that Leora unambiguously intended to give Roy stock worth \$1 million, unless she had signed an agreement requiring him to pay \$1 million, produces an absurd result, and must be reversed.

**B. To the extent that Leora's intent to leave her interest in Pantrol was ambiguous, there exist issues of fact which must be tried.**

Pursuant to Washington's TEDRA scheme, an initial hearing is held in which the testimony of witnesses can be by affidavit; if the initial hearing cannot resolve the matter on the merits, the court is to set a schedule for further proceedings. RCW 96A.100(7)(10). A party is

entitled to a trial if the issues are not sufficiently made up by the written pleadings on file; in that instance, the trial court will frame the issues, which can be heard before a jury or the court, who must enter written findings. RCW 11.96A.170.

The interpretation of Leora's Living Trust by the trial court fails to resolve ambiguities and necessitates a full fact finding. The interpretation that Roy Anthony receive nothing necessarily ignores the primary clause that Leora left her interest in Pantrol to Roy Anthony. Moreover, while the trial court indicated that it was interpreting the Trust as an unambiguous document from its four corners, it did not specifically rule on the admissibility of the evidence that was objected to by the Appellant, much of which related primarily to Leora's intent to disinherit Roy Anthony. The parties were not given an opportunity to identify what extrinsic evidence remained in the record because the court did not exclude or strike any of that evidence. As a result, to the extent such evidence is part of the record, issues of fact were raised that necessitate an evidentiary trial to resolve.

And that evidence underscores the ambiguity here. For example, the testimony of some of Roy Anthony's siblings is that their mother was unhappy with Roy Anthony and that her intent was that he receive **nothing** from her estate. (See e.g., Decl. of Terri Givens, ¶4, CP 345;

Decl. of Sharon Givens, ¶4, CP 349) However, that intent was clearly not true from the terms of the Living Trust; even the Estate admits that Leora would indeed have left all of Pantrol to Roy Anthony by its terms, if the Stock Redemption Agreement was not signed. And other sibling testimony is similarly ambiguous; Marsha Marsh testified that “mom was clear about her intentions of leaving her assets to six of her children and **Roy would receive the Pantrol Stock.**” (Decl. of M. Marsh, ¶7) (Emphasis added) (CP 341-342)

Similarly, while attorney Jeffrey Werthan testified that Leora told him that her son Roy Anthony was not to receive anything from the estate after the Redemption Agreement was signed, he wrote to Leora **five days before the Trust was executed**, noting he had not yet added a provision: “regarding the proceeds going to Tony if the ultimate sale of the business is not completed by a certain stage.” (CP 97) These issues raise factual disputes about Leora’s intent that must be resolved by fact finding.

Finally, the trial court's holding also raised issues of fact, because it ruled that Leora was no longer a stockholder, and thus, under the terms of the Trust, she must have intended that Pantrol/Roy Anthony pay for the amount on the Promissory Note. However, the Trust itself indicates that not only her interest in Pantrol, but also any interest that may be distributed to her estate should be left to Roy Anthony, which would have

included the amounts owed under the Promissory Note which was secured by the Pantrol stock. (CP 400) And as noted in Petitioner's motion for reconsideration, Leora had a reversionary interest in the stock at all times until payment in full on the Promissory Note, and the trial court's ruling that she had no interest in Pantrol as a result of the Stock Redemption Agreement was incorrect. (CP 61, 66)

As a consequence, a full fact finding, including credibility determinations, is necessary to interpret the Trust. Such findings are made upon live evidentiary hearings or trials under TEDRA. See e.g., In re Melter, 167 Wn.App. 285, 273 P.3d 991 (2012); In re Estate of Washburn, 2012 WL 2159404 (Wash. App. 2012).

**C. The Estate did not meet its high burden to overcome the presumption of Leora's capacity to sign the Transfer on Death designation.**

When testamentary capacity is challenged under a TEDRA petition, this Court reviews summary judgment orders de novo. In re Estate of Rippee, 2009 WL 502400 (Wash. App. 2009). When a trial court has weighed evidence under a TEDRA proceeding, this Court's review is limited to determining whether findings are supported by

substantial evidence. See, In re Melter, 167 Wn.App. at 301.<sup>5</sup> Substantial evidence is evidence in sufficient quantum to persuade a fair minded person of the truth of the declared premise. Petters v. Williamson & Associates, Inc., 151 Wn.App. 154, 210 P.3d 1048 (2009). While it is unclear whether the trial court ruled on Leora Givens' competence as a matter of law or based on review of the evidence, its ruling fails under either standard of review.

It is undisputed that the law provides that an individual is presumed to have the capacity to effectuate testamentary documents, and a person challenging that capacity bears the burden to show its invalidity. Pederson v. Bibioff, 64 Wn.App. 710, 828 P.2d 1113 (1992). A will that is rational on its face and legal in form creates a presumption of testamentary capacity. In re Estate of Nelson, 85 Wn.2d 602, 537 P.2d 765 (1975). A party challenging that capacity overcomes this presumption only with clear, cogent and convincing evidence. In re Johnson's Estate, 20 Wn.2d 628, 148 P.2d 962 (1944).

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<sup>5</sup> When a fact must be proven by clear, cogent and convincing evidence, the appellate court incorporates that standard of proof in conducting substantial evidence review. In re Melter, 167 Wn.App. at 301.

Here, the Estate submitted several affidavits to establish Leora's incompetency to sign the Ameriprise Transfer on Death designation, but much of it was inadmissible or failed to meet the high burden on the Estate. Because the trial court failed to specifically rule on what extrinsic evidence was admissible or comment on the burden necessitated by law on the Estate to prove incapacity, instead reaching its own conclusions under medical treatise research, the trial court erred in finding that Leora had no capacity to sign the Transfer on Death designation on February 14, 2006.

**1. The trial court did not identify nor apply the "clear, cogent and convincing" standard of proof.**

One basis of error that the appellate court will review is whether the trial court failed to apply the correct burden of proof. Petters, 151 Wn.App. at 164. Here, the trial court failed to identify the burden of proof or identify the evidence which met the burden of proof. The burden on the Estate was high:

The clear, cogent, and convincing burden of proof contains two components: the burden of production and the burden of persuasion. [cite omitted] To meet the burden of production, there must be substantial evidence, i.e., evidence sufficient to merit submitting the question to the trier of fact. [cite omitted] The burden of persuasion is met if the trier of fact is convinced that the fact in issue is "highly probable." (cites omitted) In determining whether the evidence meets the clear, cogent, and convincing standard of persuasion, the trial court must make credibility determinations and weigh and evaluate the evidence.

Estate of Bussler, 160 Wn.App. 449, 465-466, 247 P.3d 821 (2011).

Because the trial court failed to articulate or apply the clear, cogent and convincing burden of proof standard that the Estate carried, it improperly ruled that the Estate established the incompetency of Leora Givens.

**2. The trial court did not rule on objections to extrinsic evidence or identify any evidence on which it relied.**

Moreover, the court did not identify factual evidence submitted by the parties on which it relied, instead noting vaguely that many of the affidavits "were properly objected to" because they violated the deadman's statute. (CP 421) The court did not, however, specifically rule on the petitioner's many objections, nor make the necessary findings of fact based on any evidence, again erring in finding that Leora Givens was incompetent at the time she signed the Transfer on Death designation.

**3. The trial court relied on improper independent research.**

Instead, the court apparently undertook its own independent research and analysis by referring to the DSM-IV-TR, in determining Leora Givens' mental diagnoses. The trial court cannot conduct independent expert or medical treatise research on which to rely to determine capacity. "A court must restrain itself to consider only those facts presented to it by the parties; it may not make an independent

investigation off the record and base its holding on the resulting information." State v. Hart, 911 S.W.2d 371 (Tenn. 1995) (trial court conducted research on pyromania to determine the mental condition of defendant to be sentenced for arson).

Ultimately then, the factual and legal basis on which the trial court found that Leora Givens lacked capacity to sign the TOD document were in error because the DSM-IV was not introduced into evidence, briefed, nor argued at the hearing. Only outside research that does **not** prejudice a party is permissible. Lockwood v. AC & S, Inc., 44 Wn.App. 330, 359-60, 722 P.2d 826 (1986), *aff'd* 109 Wn.2d 235 (1987). In fact, a court may only take judicial notice of adjudicative facts, which must be indisputable and relevant to the cause, or otherwise capable of accurate and ready determination involving matters of the senses and obvious documentation. ER 201. It is error for the fact finder to make findings based on matters not admitted as evidence, or take judicial notice of medical diagnostic tools to reach its conclusion. "A judge may not dispense with the requirement of formal proof simply because he or she already knows that something is true." Tegland, Evidence Law & Practice, Vol. 5, §201.3. The trial court cannot take judicial notice or consider any aspect of a learned treatise until proper foundation and submittal has been made by counsel. See, ER 803(a)(18).

Relying on a learned treatise without foundation or allowing alternate argument and briefing deprived Roy Anthony of an appropriate hearing. Moreover, the trial court's conclusions were directly contrary to Dr. Tran's medical expert opinion based on Leora Givens' medical records, and constitute error.

**4. The only admissible evidence of Leora's capacity was by Dr. Tran, and no substantial evidence was submitted to meet the Estate's burden of proof.**

The trial court's finding of capacity will be reviewed to determine whether substantial evidence existed to support it. In re Moulton's Estate, 1 Wn.App. 993, 465 P.2d 419 (1970) (upholding trial court's ruling on testamentary capacity because he had the opportunity to see and hear the witnesses and judge the weight and credibility of their testimony). Here, no such evidentiary hearing was held, and substantial evidence does not support the trial court's ruling.

In fact, the only admissible evidence of Leora's capacity was by Dr. Tran. Dr. Tran's credentials as chief of geriatric psychiatry for Spokane Mental Health, his detailed review of her hospital records, and his conclusion on the available evidence of her competency on the day before her discharge on February 12, 2006, and the day of her discharge on February 13, 2006, provide the court with the only substantial evidence here. Dr. Tran determined that there was no sufficient clinical information

or documentation for anyone to opine that Leora Givens did not have the capacity to understand the general nature of her assets or disposition of those assets for signature of a TOD on February 14, 2006. (CP 365-370)

The Declaration of Dr. Eric Schendel submitted by the Estate admitted he had no independent recollection of treating Leora Givens, and simply testified that she had been admitted with delusions and behavior disorder and in conclusory fashion testified that he had a professional opinion she was unable to manage her affairs. (CP 331-332) Dr. Schendel's declaration fails to identify a time frame on his opinion, or specify the basis of her release on February 13, 2006, or her potential mental status on February 14, 2006. (Id.) Dr. Schendel also fails to address any periods of lucidity Ms. Givens could and did have. The mere fact of a diagnosis of mental instability does not destroy testamentary or contractual capacity. Page v. Prudential Life Ins. Co., 12 Wn.2d 101, 108-109, 120 P.2d 527 (1942) (contract will not be invalidated solely because party was "eccentric," or "aged and mentally weak or insane"). The evidence instead must establish that capacity at the time the documents were signed. Id. That medical evidence hardly rises to the level of the clear, cogent and convincing burden overcoming the presumption of capacity.

Similarly, the Declaration of Karen Ingrassia, a nurse at The Gardens, does not meet any clear and convincing standard. Ms. Ingrassia basically suggests that Leora Givens could neither read or comprehend any concepts upon her admission to the dementia unit on January 11, 2006. (CP 327-328) Such testimony ignores the fact that Ms. Givens continued to sign her name to medical treatment records after that date, and in fact it is important to note that Leora Givens signed a new Will on January 12, 2006, with two witnesses agreeing to her testamentary competency. (CP 152-157, 173, 174, 175, 176, 177). Ms. Ingrassia's testimony is obviously not based on sufficient medical training to understand periods of lucidity or the burden to show incapacity.

As a result, only Dr. Tran's testimony details an analysis of what Leora's medical records show or do not show as far as her mental competency. As a result, the Estate failed to meet its burden to show Leora's lack of capacity, and the TOD document should be upheld.

**5. Thus, this Court should either find that Leora Givens had the capacity to sign the TOD document or remand for full evidentiary hearing.**

Under TEDRA, an initial hearing must be a hearing on the merits to resolve issues of fact and all issues of law. RCW 11.96A.100(8). However, if the initial hearing is not a hearing on the merits or does not

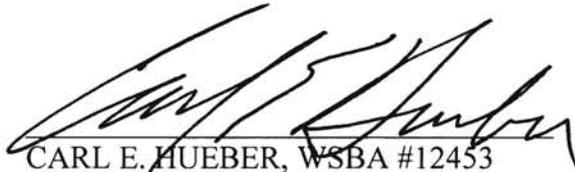
result in resolution of all the issues of fact and law, the court must schedule further evidentiary proceedings. RCW 11.96A.100(10).

Here, the court's findings of fact were not detailed, it took no live testimony, and conclusions of law based on findings of fact and substantial evidence did not exist. As a result, this Court must reverse the trial court's ruling on Leora's capacity, and either find as a matter of law she was competent, or remand for a full evidentiary hearing on the issues, to properly allow for fact finding and appropriate conclusions of law based on those facts. The appellate court can only defer to the findings on credibility made by the trial court if the trial court held a live hearing or trial in a TEDRA petition. See e.g., In re Melter, 167 Wn.App. at 301-302.

### CONCLUSION

For the foregoing reasons, Appellant request that this Court reverse the trial court's decision and enter judgment in favor of appellant, or remand for trial.

DATED this 23rd day of July, 2012.

  
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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of that on July 23, 2012, I caused a true and correct copy of the foregoing document to be served on the following counsel via first class US Mail postage prepaid and via email:

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*Cheryl Hansen*