

NO. 36044-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PETERMAN REVOCABLE LIVING TRUST

RANDEL PETERMAN,

Appellant,

vs.

SHIRLEY ELLIS,

Respondent.

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STATE OF WASHINGTON
BY _____
COURT OF APPEALS
DIVISION II

BRIEF OF RESPONDENT

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I. STATEMENT OF CASE

Shirley R. Ellis is the daughter of Roger A. Peterman and Joyce Peterman. The appellant, Randel J. Peterman, is the son of Roger A. Peterman and Joyce Peterman. RP 19

On March 30, 1992, Roger and Joyce Peterman executed a Revocable Living Trust Agreement. The trust agreement designated Mr. and Mrs. Peterman to act as trustees of their own trust and to be the primary beneficiaries of the trust estate for so long as either one of them was living. RP 19

On June 20, 1999, Roger A. Peterman died, leaving Joyce Peterman as the sole trustee and primary beneficiary of the trust estate. RP 20 - 21

On May 5, 2000, Joyce Peterman executed a Trust Modification Agreement, which designated Randel J. Peterman to serve as the trustee of the trust during the lifetime of Joyce Peterman. The Trust Modification Agreement further provided that, upon the death of Joyce Peterman, Randel J. Peterman and Shirley R. Ellis would act as co-successor trustees of the trust. RP 20

Joyce Peterman died on March 27, 2005. RP 23

In August, 2000, Randel Peterman and his mother moved from Aberdeen, Washington, to Sparks, Nevada and purchased a home at 6519 Jamon Drive in Sparks. RP 22

After moving with his mother to Sparks, Nevada, Mr. Peterman opened bank accounts at a Wells Fargo branch in Sparks. The main checking account was titled "Randel J. Peterman and Joyce Peterman". RP 24

The primary source of funds in the checking account was trust funds. RP 24 Mr. Peterman commingled some of his personal funds with the trust funds in the checking account. RP 24, 58-59.

Between February, 2002 and the end of 2005, Randel Peterman misappropriated to his personal use more than \$350,000 of funds belonging to the Peterman Family revocable trust. RP 58-59; CP 438. Mr. Peterman misappropriated and converted these assets by several methods, including:

1. he wrote checks payable to "Cash" and negotiated the checks; RP 117-123;
2. he withdrew money from ATM machines in casinos, using a bank card issued upon the checking account containing primarily trust funds; CP 435; and
3. he paid for all of his personal living, recreational and social expenses from the checking account containing primarily trust funds. CP 435; Exhibits 1 - 6.

On June 20, 2006, Judge Gordon Godfrey issued an order removing Randel Peterman as trustee of the Peterman Family Revocable Trust and appointed Shirley Ellis to act as sole trustee of the trust. CP 122-123 At the time this order was entered, the Wingfield Hills house had been under construction for nearly 2 ½ years and was not completed. RP 24 - 29

Mr. Peterman testified at his deposition, which was made part of the trial record, that he had taken no steps to account for any of the trust funds which had been expended by him, that he had commingled his personal funds with the trust funds and that all of the cash belonging to the trust was deposited into accounts in the name of "Joyce Peterman and Randel Peterman, as joint owners". RP 126.

Following her appointment as sole trustee in June, 2006, Mrs. Ellis went to Sparks with her husband and adult son and completed construction of the house. RP 24 - 25

Following a bench trial on January 24 - 25, 2007, Judge Michael Sullivan concluded that Mr. Peterman had committed multiple breaches of his fiduciary duties to the trust, resulting in damages to the trust as follows:

1. \$358,249.34 for trust funds misappropriated by Mr. Peterman for his personal use; CP 438
2. \$48,120.25 for trust funds unreasonably expended for the construction of the house at Wingfield Hills; CP 438
3. \$5,056.71 for improperly withholding trust funds owing to Shirley Ellis. CP 438

The court concluded that the damages were liquidated in nature and awarded prejudgment interest in the sum of \$121,312.38. CP 438

Finally, the court awarded attorney fees to the trust for fees incurred both by Mrs. Ellis and Mr. Peterman in the sums of \$54,680.01 and \$10,315.21, respectively. CP 439

II. ARGUMENT OF RESPONDENT

Appellant's Assignment of Error No. 1

The appellant contends that the trial court failed to take steps necessary to ensure that the trial was conducted with an appearance of fairness. The appellant has waived this issue for appeal by failing to move for disqualification of the judge during the trial. In re Marriage of Wallace, 111 Wn.App. 697, 45 P. 3d 1131, (Div. 2 2002)

In support of his contention, appellant asserts that the trial court acted unfairly in the following specifics:

1. Allowing petitioner to admit hearsay evidence and to admit expert testimony from a lay witness; (The appellant made no objections during the trial based upon hearsay or upon the qualifications of petitioner's expert);
2. Excluding appellant's evidence as hearsay; (The petitioner objected to substantial portions of appellant's documentary evidence as hearsay);
3. The trial court granted the petitioner's request for judgment against the appellant and entered Findings of Fact & Conclusions of Law as proposed by petitioner; (The appellant did not object to any of the Findings of Fact or Conclusions of Law as being inconsistent with the trial court's oral ruling upon conclusion of the trial).

The standard for reviewing a claim that a trial lacked an appearance of fairness is whether the trial would seem fair to a reasonably prudent and disinterested person. In re Marriage of Wallace, supra, at page 706. Further, the appellant must present more than bare assertions that he did not receive a fair trial. He is under a duty to produce evidence of the trial judge's actual or

potential bias, as prejudice is not presumed. In re Marriage of Wallace, supra, at page 706.

The appellant makes no citations to the record to support his assertion that the petitioner was allowed "to base her case entirely on inadmissible hearsay evidence". It is impossible to respond to such an unsupported assertion. Certainly, the failure to make timely objections at trial to the admissibility of evidence precludes appellant from raising such objections for the first time on appeal to this court. RAP 2.5(a); Drake v. Ross, 3 Wn.App. 884, 478 P.2d 251 (Div.1 1970)

While it is correct that several documents offered as evidence by appellant were excluded after the petitioner made timely objections based upon the hearsay nature of the documents, the record is clear that the trial court provided the appellant an opportunity to respond to petitioner's objections and to make an argument in support of the admissibility of the documents. RP 136-137.

The appellant presented several folders of documents at trial. A review of the record clearly demonstrates that the trial court patiently reviewed the appellant's documents, listened to the objections of petitioner, afforded appellant the opportunity to respond and then admitted into evidence those documents which did not violate hearsay rules. RP 131 - 143.

Appellant's contention that the appearance of fairness was violated when Findings of Fact and Conclusions of Law were entered

without edit or revision by the court is spurious, especially in light of the failure of appellant to object to any of the Findings or Conclusions as being inconsistent with the trial court's rulings.

There is no evidence in the record to even remotely support the appellant's claim that he did not receive a fair trial.

Appellant's Assignment of Error No. 2

Appellant contends that the trial court should have continued the trial for the following reasons:

- a. counsel for appellant withdrew four weeks before trial; (it was actually six weeks);
- b. appellant lacked the skills of a trial attorney and had some difficulty hearing; and
- c. appellant was surprised by petitioner's objections to the hearsay nature of his documentary evidence.

The argument on (a) above is incomplete in the Brief of Appellant, ending in mid-sentence at page 22. Nevertheless, the argument is without merit. The appellant had six weeks (December 12, 2006 to January 24, 2007) to retain new counsel after withdrawal of his original counsel.

When the court called the case for trial on the morning of January 24, 2007, the appellant did not request a continuance. RP 2. The appellant requested a continuance only after the petitioner had rested her case-in-chief and after the trial court ruled that two documents offered by appellant regarding the value of the Wingfield

house were not admissible. The motion was denied and the appellant never renewed his motion. RP 147-148.

This ruling of the trial court is reviewable only for abuse of discretion and should not be disturbed on appeal unless it is manifestly unreasonable or based on untenable grounds. Paradiso v. Drake, 135 Wn. App 329, 143 P.3d 859 (Div.2 2006)

Appellant's argument that he was not a skilled litigator and, thus, entitled to a continuance is unsupported by citation to case law or other authority. Further, it is clear from the record that the appellant never requested a continuance for this reason.

The law is clear in Washington that pro se litigants are bound by the same rules of procedure and substantive law as attorneys. Holder v. City of Vancouver, 136 Wn.App. 104, 147 P.3d 641, (Div.2 2006).

Appellant argues that he was unfairly surprised because the court did not allow him to use objectionable, hearsay evidence to prove his case. This argument does not warrant a response beyond the citation to the Holder case in the preceding paragraph.

Appellants's Assignment of Error No. 3

Appellant contends that he did not receive copies of the proposed findings of fact, conclusions of law and judgment at least five days before the hearing on February 9, 2007, that the findings and conclusions varied with court's oral ruling at trial and that

appellant should have been granted a continuance of the hearing on February 9, 2007.

Petitioner's counsel represented to the court that the proposed findings of fact and conclusions of law were served upon appellant by regular mail sent on January 31, 2007. RP II 3 - 4.

A few days later, petitioner's counsel served an amended notice of hearing upon appellant by certified mail. RP II 4.

The appellant did not request a continuance of the hearing on February 9, 2007, except to argue for a continuance of the trial so as to be able to present additional evidence. RP II 10-11.

The trial court denied this request, stating:

The Court: Mr. Peterman, I need to interrupt you because your motion for a continuance is just not timely .

Mr. Peterman: Okay.

The Court: The trial's over. If you wish to file – or to hire an attorney and file some other motions post trial, that's certainly your right but I – it's on the record what you said but it's just not properly before the court.

RP II 11 - 12.

Appellant's argument that the findings and conclusions were inconsistent with the court's oral ruling is belied by the following statement of the trial judge:

I find that every one of these facts conform completely a hundred percent with what I either directly ruled or what the intent of the ruling was. I believe I specifically said I wasn't limiting counsel to just those Findings of Fact I had and I think there's a few other ones here that were added but that's just fine, I agree with them.

RP II 17.

Appellant's Assignment of Error No. 4

The appellant asserts that the trial court "summarily excluded from evidence the majority of documents" offered by him. This assignment of error is spurious.

The respondent objected to the admission of several documents offered by appellant upon grounds of hearsay. The trial court heard the objections, reviewed the documents and provided the appellant with an opportunity to respond to the objections. RP 131-143. There was nothing "summary" about this process. The objections made were specific as to the documents being offered and the court ruled as to the admissibility of each document. Many of the offered documents were admitted as Exhibit 22. RP 139-143.

The documents which were excluded as hearsay are not part of the record on this appeal, making it impossible for this court to review the rulings of the trial court as to the hearsay nature of those documents.

Appellant's Assignment of Error No. 5

The appellant raises objections on appeal for the first time regarding the use of a deposition from Robert Martin, an expert witness presented by respondent. Such objections are not timely and should not be considered by this court. CR 32 (b) and (d)(3) and (4).

RAP 2.5(a) provides that the appellate court may refuse to review any claim of error which was not raised in the trial court.

Claimed errors regarding the admissibility of evidence generally cannot be presented for review by an appellate court in the absence of a timely objection at trial. Allen v. Asbestos Corp., Ltd., ___ Wn.App.____, 152 P.3d 1038 (Div.1 2007).

It would be manifestly unfair to the respondent to allow this claimed error to be raised on appeal.

The appellant contends in his opening brief that he was not provided notice of the deposition of Robert Martin. The appellant was, in fact, provided notice of the deposition. However, since he failed to object to the use of the deposition at trial, the petitioner did not make the written notice of deposition and certificate of service a part of the trial record.

The appellant further asserts that a videotape of the deposition was played at trial, but, that the deposition was not made a part of the trial record. This assertion is contradicted by the record. The transcript of the Martin deposition was published and made part of the record in this case. RP 172. While the appellant chose not to include the transcript in his Designation of Clerk's Papers, the respondent has supplemented the record on appeal with that transcript.

Appellant's Assignment of Error No. 6

The appellant asserts that the trial erred when it sustained on objection to the following testimony of the appellant:

RP 146. "And then I have my estimate of what I figure that Wingfield is worth, that's about \$900,000."

The petitioner objected to the testimony upon the ground that it lacked any foundation. RP 146 -147.

The court sustained the objection for lack of foundation, but, indicated its willingness to reconsider the opinion testimony if a foundation could be established. The appellant then informed the court that the testimony was based upon information from a builder and from an insurance appraiser. The trial court advised the appellant that such information was hearsay.

The appellant cites a 1936 case which provides that an owner may testify as to the value of his own property. The rule discussed in the 1936 case was further explained in a 1995 decision of the Washington Supreme Court, in which the court held that the right of an owner to testify concerning the fair market value of their property is not absolute. Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 898 P.2d 275 (1995). Such testimony may be excluded if the owner does not provide an adequate foundation for his testimony to establish that his opinion is not based upon an improper formula. 127 Wn.2d at 212, citing State v. Larson, 54 Wn.2d 86, 338 P.2d 135 (1959).

In the present case, the appellant was not the owner of the Wingfield house. The house is the property of the Peterman Family Revocable Trust. While he had previously been the trustee, he had been removed from that position nine months prior to the trial and at a time when the house was not completed. There was no evidence

offered by appellant to establish that he had intimate experience with the property or that his testimony was based upon such experience.

Appellant's Assignments of Error Nos. 7 and 8

The appellant asserts that his own deposition testimony and the deposition testimony of his son, Phil Peterman, was improperly placed into evidence. The appellant made no objection to the use of these depositions, or to the manner of their use, at the time of trial. For the same reasons set forth in the response to appellant's Assignment of Error No. 5, these assignments are completely without merit and are being raised in an untimely manner.

Appellant's Assignment of Error No. 9

The appellant contends that several of the court's findings of fact are not supported by substantial evidence:

Finding of Fact No.9.

Exhibit 8 supports this finding of fact and was admitted as an exhibit without objection by the appellant. RP 21.

Findings of Fact Nos. 11, 14, 16, 17, 18, 19, 30, 31, 32, 37, 38, 39, 40, 42, 43 and 45.

The court's findings that the appellant improperly expended and failed to account for trust funds is supported by Exhibits 1 - 7 and 18 - 21, which are spreadsheets prepared by James Ellis from bank records for the accounts at Wells Fargo Bank into which trust money

was deposited. Mr. Ellis testified that he had education and thirty years of experience as an accountant. RP 47-48.

Of these eleven exhibits, nine were admitted without objection. In fact, the appellant specifically agreed to the admission of Exhibits 6, 7 and 20. He objected only to Exhibits 2 (on the unfounded objection that the bank records had not been properly subpoenaed) and 19 (on the basis that he didn't agree with the substance of the exhibit). RP 63, 98.

When viewed in a light most favorable to the petitioner, these exhibits and the testimony of Mr. Ellis clearly support the challenged findings of fact.

Findings of Fact Nos. 27, 28 and 29

The appellant admits that these findings are supported by the deposition testimony of Phil Peterman. His sole argument is that the deposition testimony was not properly admitted, an argument previously asserted by appellant in Assignment of Error No. 7.

Finding of Fact No. 35

The challenge to this finding of fact lacks any basis, as this finding is supported by the testimony of Mrs. Ellis at RP 21 - 31.

Finding of Fact No. 39

The only evidence presented to the court regarding the reasonable cost of construction for the Wingfield house supports the challenged finding of fact. Such testimony was substantial and, when

viewed in a light most favorable to the petitioner, supports the challenged finding.

Appellant's Assignment of Error No. 10

Appellant argues that Conclusions of Law Nos. 2, 3, 4, 6, and 7 are not supported by the evidence. The appellant's argument in his brief are bare assertions, essentially restating his position that the Findings of Fact are not supported by substantial evidence.

The conclusions of law challenged by the appellant are supported by specific findings of fact, as follows:

Conclusion of Law No. 2 -----	Findings of Fact Nos. 36 and 37.
Conclusion of Law No. 3 -----	Findings of Fact Nos. 30, 31 and 32
Conclusion of Law No. 4 -----	Findings of Fact Nos. 15, 16, 18 and 25
Conclusion of Law No. 6 -----	Findings of Fact Nos. 13 and 14
Conclusion of Law No. 7 -----	Findings of Fact Nos. 17, 40 and 43

Appellant next argues that it was error for the trial court to award prejudgment interest and relies upon cases which declined prejudgment interest in cases involving quantum meruit claims, which have no application to the facts of this case.

The trial court concluded that the appellant converted cash from the trust to his personal use in the sum of \$358,249.34 and that he improperly expended an additional \$48,120.25 of cash from the

trust during the construction of the Wingfield house. Such sums are without any doubt a liquidated claim against the appellant.

The Washington Supreme Court has consistently (and recently) held that a liquidated claim is one for which the amount of damages can be determined from the evidence adduced at trial with exactness. Bostain v. Food Express, Inc., WL 611259 (March 1, 2007).

The decision of a trial court to award or deny prejudgment interest is reviewed for an abuse of discretion. Cosmopolitan Engineering Group, Inc. v. Ondeo Degremont, Inc., 128 Wn.App. 885, 117 P.3d 1147 (Div. 2 2005).

The damages awarded to the trust in this case were precise calculations based primarily upon bank records for the award of \$358,249.34 and a mathematical computation of actual construction costs for the Wingfield house, less the reasonable cost of construction as provided by petitioner's expert witness, whose testimony was uncontroverted and unchallenged.

The appellant next argues that Conclusions of Law Nos. 10 and 11 are not supported by any findings of fact. These conclusions direct payment from the trust of the attorney fees incurred by the appellant and the petitioner during this litigation.

RCW 11.96A.150 provides that the trial court or the court of appeals may, in its discretion, award attorney fees to any party in a TEDRA proceeding to be paid either by an opposing party, from the

assets of the trust, or from other assets which may be subject to the proceedings.

In this case, the trial court made multiple findings of fact and corresponding conclusions of law that the appellant had breached his fiduciary duties as trustee. The appellant cannot under these facts establish that the court's award of attorney fees constitutes an abuse of discretion.

Appellant's Assignment of Error No. 11

The appellant asserts that the trial court lacked authority to award attorney fees and did not have an adequate basis for determining the reasonable sum of fees to be awarded.

RCW 11.96A.150 grants the trial court broad discretion to award attorney fees to any party in a TEDRA proceeding and similarly broad discretion to direct the source of payment for the fees awarded.

As for the basis of the award, the court was provided with a motion and supporting affidavit for an award of attorney fees. The appellant failed to object to or oppose the motion for attorney fees at the hearing in which the judgment was entered.

This alleged error cannot be raised for the first time on appeal. RAP 2.5 (a).

Appellant's Assignment of Error No. 12

This assignment is a restatement of the appellant's Assignment of Error No. 3 and does not require further response.

III. RESPONDENT'S REQUEST FOR ATTORNEY FEES

Pursuant to RAP 18.1, the respondent hereby requests that the appellant be ordered to pay attorney fees and expenses incurred by the trust in responding to this appeal. Such an award of fees is within the discretion of this court, as provided by RCW 11.96A.150.

IV. CONCLUSION

The judgment of the trial court should be affirmed and the respondent should be awarded attorney fees and expenses incurred in responding to this appeal.

RESPECTFULLY SUBMITTED:

EDWARDS & HAGEN, P.S.
Attorneys for Respondent

by: 
DAVID L. EDWARDS

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STATE OF WASHINGTON
BY [Signature]
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

In Re:)	
THE PETERMAN FAMILY REVOCABLE)	NO. 360446
LIVING TRUST,)	
Randel J. Peterman,)	AFFIDAVIT OF MAILING
Appellant,)	

STATE OF WASHINGTON)
:ss
GRAYS HARBOR COUNTY)

Philip Leavenworth, being first duly sworn on oath, deposes and says: That he is an assistant in the offices of Edwards & Hagen, Attorneys at Law, 110 W. Market, Ste. 202, Aberdeen, Washington; that on June 26, 2007, he placed in the United States Mail at the Post Office in Aberdeen, Washington, postage prepaid, an envelope by first class mail, addressed to:

Court of Appeals Division II
David C. Ponzoha
Clerk/Administrator
950 Broadway, Suite 300
Tacoma, WA 98402-4454

and to:

C. Scott Kee
Ditlevson Rodgers Dixon, P.S.
324 West Bay Drive, NW, Suite 201
Olympia, WA 98502

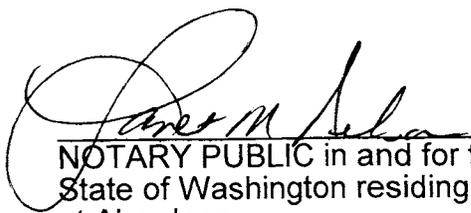
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which envelopes contained the Brief of Respondent.


PHILIP LEAVENWORTH

SUBSCRIBED AND SWORN to before me this 26th day of June, 2007.


NOTARY PUBLIC in and for the
State of Washington residing
at Aberdeen.