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BY cmh

NO. 36638-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE ESTATE OF:

BERNICE M KARNATH,

Deceased

JULIA A. RIDER,

Appellant

v.

SUSAN K. SAMPSON and
LARRY G. SAMPSON,

Respondents

THE HONORABLE JUDGE ROBERT LEWIS
JUDGE OF THE SUPERIOR COURT
OF CLARK COUNTY, STATE OF WASHINGTON

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

A. Assignment of Error Number One : The trial court erred in entering Conclusion of Law Number 4: The Estate has failed to prove that Bernice Karnath's execution of the Quit Claim Deed, and her gift of her residence to Susan and Larry Sampson, was the result of undue influence, or the result of a breach of fiduciary duties by Susan and Larry Sampson. The evidence presented by the Estate does not establish the type of relationship between Susan and Larry Sampson and Bernice Karnath, in April, 2000, which would require Susan and Larry Sampson to prove that the execution of the Quit Claim Deed was not the result of undue influence. Further, the evidence does not support a finding that Bernice Karnath lacked the capacity to transfer her own property in April, 2000, at the time she executed the Quit Claim Deed in the presence of a notary.

B. Assignment of Error Number Two: The trial court erred in failing to void the transfer of property.

C. Assignment of Error Number Three: The trial court erred in failing to recuse itself.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Was Ms.. Karnath a vulnerable adult under RCW 74.34?**
- B. Did the Sampsons have a fiduciary duty in the management of Ms. Karnath's estate?**
- C. Did the inter vivos transfer constitute a breach of fiduciary?**
- D. Did the trial judge's refusal to recuse himself from the case constitute an abuse of discretion?**

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

On September 5, 1995 Bernice Karnath executed a Last Will and Testament leaving one-third of her estate to each of three beneficiaries, Julia Anne Rider, Susan K. Sampson and James J. Margeson. Ms. Karnath had no children and was the maternal great aunt of the three named beneficiaries. (CP-1, RP-49) Parties sharing a common surname will be referred to by the first name for ease of reference hereinafter.

In September of 1995, Ms. Karnath executed a Durable Power of Attorney, naming her great-nieces Susan K. Sampson as her attorney-in-fact, and Julia Rider as the alternate attorney-in-fact. (EXHIBIT-1) Following the execution of the Power of Attorney, Ms. Karnath added Susan Sampson's name to her checking account so that Ms. Sampson could assist her in paying monthly bills. (RP-53) Susan had unfettered access to Ms. Karnath's account after the

Summer of 1995. (RP-54) Susan and her husband, Larry Sampson assumed a caretaking role with Ms. Karnath, helping her with upkeep and repairs of Ms. Karnath's home and property and assisting her with shopping. (RP-53 to 57)

During this time, Susan fully managed Ms. Karnath's finances for her, at the request of Ms. Karnath.(RP-53 to 57) Although the power to manage Ms. Karnath's finances derived solely from the power granted to Susan under the Durable Power of Attorney(Exhibit -1) ; Susan ignored the mandate that the attorney-in-fact provide an accounting of how Ms. Karnath's funds were spent, failing to keep any records whatsoever. (RP-53)

Larry and Susan never lived with Ms. Karnath. (RP-57) Susan checked on Ms. Karnath on nearly a daily basis. (RP-60) By April of 2000, Susan checked on Ms. Karnath daily at or around each meal time to check to make sure she was eating and that Ms. Karnath did not need anything. (RP-60)

Julia Rider testified that Larry referred to Ms. Karnath as "That old bat" on more than one occasion and did he did not along well with Ms. Karnath(RP-123) She and James Margeson heard Larry boast that Ms. Karnath "did not even know what she was signing" when he placed a check in front of her to sign for the purchase of a tractor on June 16, 2000 (RP-119 and 124)

Ms. Rider observed Ms. Karnath's mental acuity deteriorate in 2000 to the point that she repeated herself because she forgot statements she had made just minutes before. (RP-127) After Ms. Karnath moved into foster care, Susan discouraged Ms. Rider from visiting her aunt, indicating that visitors just upset her and that Ms. Karnath would not remember Ms. Rider anyway. (RP-129 to

131) As personal representative of Ms. Karnath's estate, Ms. Rider determined that \$99,030.38 expended by Susan had no supporting documentation to attribute the expenses to Ms. Karnath's care and upkeep. (RP-134, EXHIBIT-13) Ms. Rider did not recognize Ms. Karnath's signature on any checks written on Ms. Karnath's account after March 1, 2000. (RP-137) Larry commented several times that he was keeping the state from getting Ms. Karnath's estate. (RP-139)

Ms. Rider did not learn of the transfer of Ms. Karnath's home to Larry and Susan until the latter part of 2004 or the early months of 2005 when she researched ownership of the property through the courts.. (RP-139) No one, including Larry or Susan, ever told her that Ms. Karnath signed the quit claim deed to the residence. (RP-140) She recalls Larry and Susan moving into Ms. Karnath's residence a few months after Ms. Karnath went in to foster care. (RP-149) She started researching ownership of the residence in 2004 because Larry and Susan had made statements to her that they had bought the house from Ms. Karnath. (RP-149)

Patricia Smith, Ms. Rider's daughter had a conversation with Ms. Karnath in 1999 wherein Ms. Karnath adamantly and firmly indicated to her that " No one is getting my house." (RP-152) Ms. Smith indicated that shortly thereafter, Larry came through the sliding glass door of Ms. Karnath's residence and Ms. Karnath introduced Ms. Smith to Larry as though she had never met her uncle before. (RP152)

On June 30, 2000 Susan stopped by Ms. Karnath's house on her way to work and spoke to Ms. Karnath at that time. (RP-65) Susan stopped by the house after work and found Ms. Karnath on the floor in front of her bathroom and Susan called an ambulance to take Ms. Karnath to the emergency room.(RP-65 to 66) Ms. Karnath fractured her pelvis in the fall.(EXHIBIT-2) According to the medical records from the emergency room visit and the ensuing hospital stay, Susan provide history to the emergency room staff indicating that Ms. Karnath had suffered four falls in the previous six months, suffered from lower back pain, a history of scoliosis, hypertension and dementia. (RP-69 and EXHIBIT-2)

The physician indicated Ms. Karnath was not oriented as to time and the physician described her as "somewhat confused." Additionally, Ms. Karnath was not able to stand or walk well due to poor balance and she had a number of bruises on her body causing the physician to believe that she may have suffered from a stroke at some point, and a "small lesion" was revealed on her Head CT scan, which the physician noted could have been what caused her to fall.(EXHIBIT-2)

During the days of evaluation after the ER visit while still in the hospital, the reports further document her disorientation and confusion, her erroneous belief that the year was 1998, her putting on the call light every few minutes and being forgetful with staff. (EXHIBIT-2) Ms. Karnath spent two or three days in the hospital and then went to a care facility for approximately 10 more days for further evaluation and monitoring of the pelvic fracture. (RP-69)

Shortly thereafter, Ms. Karnath was placed in an adult foster care facility because she could no longer live alone and required physical therapy. (RP-71) Ms. Karnath remained in facility care until her death in February, 2005. Susan and Larry Sampson continued to manage Ms. Karnath's estate on her behalf, and had exclusive control of the estate from the year 2000 until at least April, 2006.

Two months prior to Ms. Karnath's hospital stay, on April 9, 2000, (and then being recorded on June 23, 2000), Larry Sampson prepared a quitclaim deed which conveyed Ms. Karnath's house and property, located at 805 NE Perry Road in Washougal, Washington, to himself and Susan Sampson, in exchange for \$1.00 and "love and affection." (RP-77, EXHIBIT-3) Larry also prepared an excise tax affidavit indicating that the transfer was a "gift" from Ms. Karnath to he and Susan. (RP-104, EXHIBIT-3) Ms. Karnath did not receive advice from an attorney prior to signing the quitclaim deed. (RP-77) After Larry and Susan lost their residence in a foreclosure action and after Ms. Karnath was moved to a care facility, Susan and Larry Sampson moved into Ms. Karnath's house (RP-77 to 78). At the time of foreclosure they were in default on their mortgage and owed over \$27,000. (RP-78) Larry and Susan did not report the "gift" from Ms. Karnath on their tax return. (RP-112) Larry admitted that Ms. Karnath trusted him and that he and Susan used her money for personal purposes. (RP-114 to 116)

B. STATEMENT OF PROCEDURAL HISTORY

This matter went to trial before the Honorable Robert Lewis on June 7, 2007. The court entered findings of fact and conclusions of law on June 27, 2007. From the entry of findings of fact conclusions of law and judgement, this appeal timely follows.

IV. ARGUMENT

A. Was Ms.. Karnath a vulnerable adult under RCW 74.34?

The facts set forth in the Statement of Facts, *infra* demonstrate unequivocally that as of the year 2000, Bernice Karnath was a vulnerable adult within the definition of RCW 74.34.020(13)(a) in that she was over the age of sixty and both functionally and physically unable to take care of herself. Focusing on the time period surrounding April 9, 2000, when Larry prepared a quitclaim deed which conveyed Ms. Karnath's house and property, located at 805 NE Perry Road in Washougal, Washington, to himself and Susan, in exchange for \$1.00 and "love and affection." (RP-77, EXHIBIT-3), the facts clearly demonstrate that Ms. Karnath relied on Larry and Susan for assistance with her finances, upkeep of her residence and meeting of her personal needs in preparing meals and taking her to doctors appointments.

From September 5, 1995 Susan undisputedly managed Ms. Karnath's finances and did so continually until Ms. Karnath's death in 2005. (RP-53 to

57) The uncontroverted testimony at trial indicates that Ms. Rider and Mr. Margeson heard Larry boast that Ms. Karnath "did not even know what she was signing" when he placed a check in front of her to sign for the purchase of a tractor on June 16, 2000 (RP-119 and 124) Ms. Karnath never signed a check on her account after March 1, 2000. (RP-137)

By April of 2000 Ms. Karnath's ability to live alone had deteriorated to the point that , Susan checked on her daily at or around each meal time to check to make sure she was eating and that Ms. Karnath did not need anything. (RP-60)

Ms. Karnath's emergency room records generated from her treatment on June 30, 2000 further substantiate and corroborate the deterioration in her mental and physical condition during the early months of the year 2000. (EXHIBIT-2) Susan herself provided history to the emergency room staff indicating that Ms. Karnath had suffered four falls in the previous six months, suffered from lower back pain, a history of scoliosis, hypertension and dementia. (RP-69 and EXHIBIT-2) The emergency room physician's physical findings likewise document her deterioration over a period of months or even years. (EXHIBIT-2)

The quantum of evidence clearly demonstrates that Ms. Karnath was a vulnerable adult within the definition of RCW 74.34.020(13)(a). Because Ms. Karnath was a vulnerable adult, the management of her property and estate by Susan and Larry Sampson resulted in a fiduciary relationship between Ms. Karnath and both parties.

B. Did the Sampsons have a fiduciary duty in the management of Ms. Karnath's estate?

A fiduciary is a person who assumes expressly or impliedly, by words or action, a position of trust over another person. A fiduciary or confidential relationship exists where confidence is reposed on one side and superiority and influence results on the other. Any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former occupies a fiduciary position. Tucker v. Brown, 199 Wash. 320, 321 (Wash. 1939); Slater v. Heiser, 36 Wn.2d 536, 551 (Wash. 1950); Liebergessell v. Evans, 93 Wn.2d 881, 889-890 (Wash. 1980).

Susan's familial relationship to Ms. Karnath as one of her closest blood relatives led to Ms. Karnath vesting Susan with her Durable Power of Attorney. The combination of a close familial relationship and the powers granted to her under the Durable Power of Attorney placed the Sampsons in a position of trust and confidence above and beyond the stature of any of the other heir's relationship to Ms. Karnath.

Susan's actions in the management of her great aunt's estate were pursuant to the 1995 Durable Power of Attorney that explicitly identified the fiduciary obligation owed – specifically, the duty to keep and provide an accounting both to Ms. Karnath and thereafter to the Personal Representative of her Estate. (EXHIBIT-1) Additionally, Susan and Larry

created a fiduciary obligation by virtue of the management of Ms. Karnath's Estate for a period of seven years.

Ms. Karnath "justifiably expected her welfare to be cared for" by both Susan and Larry, both before and after she entered the care facility. Beginning in 1995, Ms. Karnath depended and relied upon both Susan and Larry to keep her house and property in good repair so that she could continue to live there alone. (RP-53 to 57) By the year 2000, Susan checked on Ms. Karnath at every mealtime in order to make sure that she ate food daily. (RP-60) Ms. Karnath gave Susan and Larry unfettered access to her property and her money in order to facilitate repairs to the house and so they could help her with paying her monthly bills. (RP-53 to 57) In so doing, Ms. Karnath placed her trust and confidence in Susan and Larry to use her money wisely and solely for her benefit. Both Susan and Larry unquestionably owed a fiduciary duty to Ms. Karnath in regards to the management of her property and financial affairs.

C. Did the inter vivos transfer constitute a breach of fiduciary duty?

A fiduciary owes "the highest degree of good faith, care, loyalty and integrity" to the person under their charge. Esmieu v. Schrag, 88 Wn.2d 490, 563 P.2d 203 (1977). When a fiduciary relationship exists, the law is clear that the fiduciary is under a duty to act solely in the interest of the beneficiary and is not permitted to make a profit out of the estate or trust. In Re Estate of Drinkwater, 22 Wn.App. 26, 587 P.2d 606 (1978); In Re

Estate of Montgomery, 140 Wash. 51, 53, 448 P. 64 (1926). Further, a fiduciary may not exert undue influence over the other party in the fiduciary relationship in order to obtain a gift. Doty v. Anderson, 17 Wn.App. 464, 471, 563 P.2d 1307 (1977); Pederson v. Bibioff, 64 Wn.App. 710, 828 P.2d 1113 (1992) (recipient of a gift from a person with whom donee has a confidential relationship bears burden of proving gift was not the product of undue influence).

Because of the necessary and fundamental nature of the fiduciary relationship, Washington courts impose the burden of proving that a breach of fiduciary duty did not occur on the party who was acting in a fiduciary capacity:

The burden of proof is on the fiduciary to demonstrate no breach of loyalty has been committed. In an accounting, the burden of proving the propriety of challenged transactions rests with the trustee. Obscurities and doubts in the accounting will be resolved against the trustee. (Internal citations omitted) ... self-serving testimony is insufficient to meet what we view is the increased burden of proof he bears as a fiduciary. Without documentary evidence, in the form of the underlying bills and other records, he has not met his burden of disproving that he [did not breach his fiduciary duty].

Wilkins v. Lasater, 46 Wn.App. 766, 777-78, 733 P.2d (1987)(emphasis added).

The Court further stated that even if the fiduciary was acting in “good faith,” that alone is not a defense to a breach of trust. Supra

Susan and Larry bear the heavy burden of demonstrating that Ms. Karnath’s money and property was not misappropriated and was in fact used solely for her care and benefit. .

Failure to demonstrate that a fiduciary duty was not breached results in the conclusion that it was in fact breached. Wilkins, supra at 777-78. The lack of accounting and transfer of real property thus raises the presumption of financial exploitation, defined in RCW 74.34.020(6) as “the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person’s property or advantage.” As such, Susan and Larry are liable to the estate for ALL monies spent that cannot be accounted for as having been spent for the benefit and care of Ms. Karnath.

C. Was the inter vivos Transfer Of Ms. Karnath’s Property By Quitclaim Deed The Result Of Undue Influence?

Generally, one seeking to set aside an inter vivos gift has the burden of showing the invalidity thereof. Pedersen v. Bibioff, supra at , 718 (1992). However, if a confidential relationship existed between the parties, the burden shifts to the defendant to prove the absence of undue influence. supra. The criteria for the establishment of a confidential relationship and that of a fiduciary relationship are substantially identical under Washington law, and courts often use the terms interchangeably. See Estate of Knowles, 135 Wn.App. 351, 143 P.3rd 867 (2006)

A confidential relationship exists between two persons “when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relation[ship] is particularly likely to exist where there is a family relationship....” McCutcheon v. Brownfield, 2 Wn.App. 348, 357, 467 P.2d 868 (1970) (quoting Restatement of Restitution

§ 166 d. (1937)). While parentage frequently establishes the existence of a confidential relationship, something more is required. *supra* Where the parent is dependent on the child, “either for support and maintenance, or for care or protection in business matters ... and the assumption of the role of adviser [is] accepted by the parent,” this may establish a confidential relationship. *supra*

The essential elements of a confidential relationship are that the parent reposes some special confidence in the child's advice and the child purports to advise with the parent's interest in mind. McCutcheon, *Supra*. at 357. Such a relationship is more likely to exist between a parent and child, but parentage alone does not create such a relationship. *supra* However, when a child “substantially manages” the family assets, a confidential relationship can be deemed to exist. White v. White, 33 Wn.App. 364, 655 P.2d 1153 (1982).

In that case Daisy White signed a quitclaim deed conveying the family home to her eldest son, Leo. *Supra* at 365. Daisy later brought an action to cancel the deed and quiet title in herself, alleging the transfer was a result of undue influence. The court of appeals held that Daisy and Leo were in a confidential relationship because not only were the parties mother and son, but they had a close and long standing business relationship, and Leo substantially managed the family assets, as well as Daisy's business affairs. *supra* at 369.

Although not natural the children of Ms. Karnath, Susan and Larry were her closest living relatives. Ms. Karnath left her entire estate to her sister's three children, as she had no children of her own. In addition, the Sampsons provided regular care for Ms. Karnath for a significant period of time. Beginning in 1995, Susan and Larry assisted Ms. Karnath in the maintenance of her property, and in 1999 began to substantially manage her financial affairs by regularly paying monthly bills, authorizing repairs to her house, and making major purchases on her behalf. Ms. Karnath clearly relied on the advise and assistance of Larry and Susan as to the appropriate repairs needed on the house, some of which were quite extensive. As such, a confidential relationship legally existed between both Larry and Susan and Ms. Karnath.

The existence of a confidential relationship Larry and Susan and Ms. Karnath imposes the burden upon Larry and Susan of demonstrating the absence of undue influence present at the time they had Ms. Karnath sign a quitclaim deed giving them title to her house in exchange for the "consideration of love and affection."

Because the law treats undue influence as a species of fraud, the standard for this burden is clear, cogent and convincing evidence. McCutcheon, supra. at 358, Pedersen, supra at 718, Doty, , supra (1977). The important factors for determining whether there has been undue influence include:

- (1) that the [grantee] occupied a fiduciary or confidential relation[ship] to the [grantor];

- (2) that the [grantee] actively participated in the preparation or procurement of the [deed];
- (3) that the [grantee] received an unusually or unnaturally large part of the estate;
- (4) the age or condition of health and mental vigor of the [grantor],
- (5) the nature or degree of relationship between the [grantor] and the [grantee],
- (6) the opportunity for exerting undue influence, and
- (7) the naturalness or unnaturalness of the [deed].

Supra. at 467-68.

The weight accorded to each these factors depends upon the totality of the circumstances of each particular case. Supra.

1. The Grantee Occupied A Fiduciary Or Confidential Relationship To The Grantor

The fact that both Larry and Susan occupied a fiduciary and a confidential relationship with the grantor, Ms. Karnath, has been discussed and established infra.

2. The Grantee Actively Participated In The Preparation And Procurement of The Deed

Larry admits preparing the quitclaim deed which conveyed Ms. Karnath's house and property, located at 805 NE Perry Road in Washougal, Washington, to himself and Susan, in exchange for \$1.00 and "love and affection." (RP-77, EXHIBIT-3) Larry also prepared an excise tax affidavit

indicating that the transfer was a "gift" from Ms. Karnath to he and Susan. (RP-104, EXHIBIT-3) Ms. Karnath received no legal advice prior to signing the quitclaim deed. (RP-77)

3. The Grantee Received An Unusually Large Part of The Estate

The property at issue is the only major asset of the estate. (EXHIBIT-1)

4. The Age or Condition of Health And Mental Vigor of The Grantor

Ms. Karnath was 84 years old at the time the property was conveyed. As early as 1995 Ms. Karnath started to need the assistance of Larry and Susan when she signed the Durable Power of Attorney to obtain assistance with managing her financial affairs. (RP- 53 to 57) Susan's testimony indicates a steady decline in Ms. Karnath's independence to the point that by April of 2000, Susan checked on Ms. Karnath daily at or around each meal time to check to make sure she was eating and that Ms. Karnath did not need anything. (RP-60)

On April 9, 2000 Larry prepared the quitclaim deed and tax affidavit and presented it to Ms. Karnath for signature approximately two months prior to her hospitalization. (RP-77, EXHIBIT-3) The evidence at trial demonstrates that Ms. Karnath's health had begun to deteriorate from 1995 forward, but took a particular turn for the worse in the early part of 2000 as evidenced by the history Susan gave the emergency room physician and his observations of her physical and mental

health at that time. (EXHIBIT-2) Upon her admission to the hospital, her medical records further document her disorientation and confusion, her erroneous belief that the year was 1998, her putting on the call light every few minutes and being forgetful with staff. (EXHIBIT-2)

The medical records and the history reported by Susan to the emergency room doctor are consistent with the observations of other family members during that time. Ms. Rider observed Ms. Karnath's mental acuity deteriorate in 2000 to the point that she repeated herself because she forgot statements she had made just minutes before. (RP-127) Ms. Rider and James Margeson heard Larry boast that Ms. Karnath "did not even know what she was signing" when he placed a check in front of her to sign for the purchase of a tractor on June 16, 2000. (RP-119 and 124) Patricia Smith, Ms. Rider's daughter had a conversation with Ms. Karnath in 1999 wherein Ms. Karnath adamantly and firmly indicated to her that "No one is getting my house." (RP-152) Ms. Smith indicated that shortly thereafter, Larry came through the sliding glass door of Ms. Karnath's residence and Ms. Karnath introduced Ms. Smith to Larry as though she had never met her uncle before. (RP152)

The totality of the evidence clearly demonstrates that Ms. Karnath's mental and physical health deteriorated severely prior to the signing of the quitclaim deed.

5. The Nature And Degree of The Relationship Between The Grantor And The Grantee

The testimony and facts reiterated above clearly show the close and substantial familial nature and degree of the relationship between the Sampsons and

Ms. Karnath. Her dependence on Larry and Susan to help meet her daily needs created ample opportunity for the effective exercise of undue influence.

6. The Opportunity For Exerting Undue Influence

Given the extent of regular contact the Sampsons had with Ms. Karnath in the year 2000 and the fact that Ms. Karnath otherwise lived alone, there was sufficient opportunity for the exertion of undue influence with respect to the transfer of property. Further, by the date of the property transfer, Ms. Karnath had placed significant trust and responsibility with the Sampsons in regards to the management of her financial affairs.

7. The Naturalness or Unnaturalness of The Deed

The Deed is unnatural to the extent that the entire property was conveyed in exchange for \$1.00 and "love and affection." Larry and Susan never lived with Ms. Karnath. (RP-53 to 57) They hid the fact of the conveyance from relatives and made statements that they had purchased the property from Ms. Karnath. (RP-149) Ms. Rider determined that \$99,030.38 expended by Susan from the estate had no supporting documentation to attribute the expenses to Ms. Karnath's care and upkeep. (RP-134, EXHIBIT-13) The conveyance is at odds with Ms. Karnath's clear expressions in her Will that all three of her sister's children share equally in her estate upon her death.

The evidence supporting each of these seven factors demonstrates the inescapable conclusion that Larry and Susan exerted undue influence over

Ms. Karnath, thus necessitating a determination that the trial court erroneously failed to void transfer of the property in question.

D. DID THE TRIAL JUDGE'S REFUSAL TO RECUSE HIMSELF FROM THE CASE CONSTITUTE AN ABUSE OF DISCRETION?

Subsequent to the trial in this matter and prior to entry of the findings of fact in this matter, Ms. Rider became aware that the trial judge had represented Susan's daughter in a hotly contested parentage action in 2000, before he was appointed to the bench. (RP-189) Mr. Senescu, counsel for the estate, was unable to review the court file in that matter because the majority of the file was sealed. (RP-189) Mr. Senescu asked for leave of the court to unseal the Skamania County file to be able to potentially pursue an affidavit of prejudice. (RP-192) The trial judge denied Mr. Senescu's motion and refused to recuse himself citing CJC 3(D)(1)

A judge should disqualify himself from proceedings in which his "impartiality might reasonably be questioned." CJC 3(D)(1). This includes instances where "the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." CJC 3(D)(1)(a)

Recusal lies within the sound discretion of the trial judge, whose decision will not be disturbed absent a clear showing of abuse of that discretion. In re Marriage of Farr, 87 Wn. App. 177, 188, 940 P.2d 679 (1997). The court abuses its discretion only when its decision is manifestly

unreasonable or 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).

A judge's impartiality might reasonably be questioned if a reasonable person with knowledge of the relevant facts would not conclude that all parties obtained a fair, impartial, and neutral hearing. Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

The Appellant acknowledges that they bear the burden of demonstrating prejudice on the part of the judge because the motion to recuse the trial judge came after rulings have been made. State v. Cameron, 47 Wn. App. 878, 884, 737 P.2d 688 (1987). The trial court denied the Appellant the opportunity to pursue the unsealing of the court file, to conduct further review of the in court record of the Skamania County trial and to pursue further discovery. The Appellant would respectfully submit that these actions of the trial court resulted in actual prejudice and that the trial judge's decision not to recuse himself constitutes an abuse of discretion.

E. ATTORNEY FEES

Pursuant to RCW 1196A150(1)(a) and RCW 74.34.200(3), the Appellant requests an award of reasonable attorney fees for pursuing this appeal.

V. CONCLUSION

For the reasons stated above, the Appellant respectfully requests that the court void the inter vivos transfer of property and order that any further proceedings on remand to the trial court be conducted before a different judge.

Respectfully submitted this 17th day of December, 2007.



SUZAN L. CLARK, WSBA #17476
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07 DEC 17 09:11:05
STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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In re the Estate of:

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NO. 36638-0-II

CLARK COUNTY SUPERIOR COURT
CAUSE NO. 06-4-00291-2

DECLARATION OF MAILING

I, Judy Adams declare:

That I am a citizen of the United States of America; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that on the 17th of December, 2007 declarant deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the following named individuals, to-wit:

Mr. David Ponzoha
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said envelope containing a copy of this declaration and a copy of the Brief of the Appellant in this matter.



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Declaration of Mailing