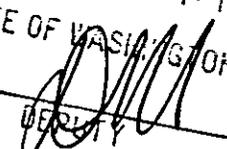


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COURT OF APPEALS
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NO. 45729-6-1 STATE OF WASHINGTON

BY 
DEPUTY

IN THE WASHINGTON COURT OF APPEALS, DIVISION TWO

In re the matter of the Estate of CHARLES CRESS EICKHOFF,
Deceased

BRIAN CHARLES EICKHOFF and
CATHY NEGELSPACH
Petitioners, and
DAVID BUSTAMANTE

v.

DIANE EICKHOFF,
As Executrix and Personal
Representative of the Estate; and

DIANE EICKHOFF,
Individually,
Respondent

APPELLANTS' OPENING BRIEF

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TABLE OF AUTHORITIES

Cases

549 N.C.A pp. 2009	30
<i>Balise v. Underwood</i> , 62 Wash.2d 195, 381 P.2d 966 (1963).....	44, 45
<i>Barci v. Intalco Aluminum Corp.</i> , 11 Wn.App. 342, 522 P.2d 1159 (1974)	35
<i>Barrie v. Hosts of Am., Inc.</i> , 94 Wash.2d 640, 618 P.2d 96 (1980).....	45
<i>Bentzen v. Demmons</i> , 68 Wash.App. 339, 842 P.2d 1015 (1993)	43, 44
<i>Bentzen v. Demmons</i> , 69 Wash.App. at 345.....	43
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	47
<i>Bodeneck v. Cater's Motor Freight Sys.</i> , 198 Wash. 21, 86 P.2d 766 (1939).....	37, 39, 41
<i>Botka v. Estate of Hoerr</i> , 105 Wash.App. 974, 21 P.3d 723 (2001).....	43
<i>Bryant v. Joseph Tree, Inc.</i> , 119 Wn. 2d 210, 829 P.2d 1099 (1992).....	34
<i>Choate v. Swanson</i> , 54 Wn.2d 710	30
<i>City of Tacoma v. City of Bonney Lake</i> , 173 Wn.2d 584, 269 P.3d 1017 (2012).....	48
<i>Corbray v. Stevenson</i> , 98 Wash.2d 410, 656 P.2d 473 (1982)	48
<i>Denny's Rests., Inc. v. Sec. Union Title Ins. Co.</i> , 71 Wn.App. 194, 859 P.2d 619 (1993).....	48
<i>Douglass v. Stachecki</i> , 13 Wn. App. 922, 537 P.2d 1044 (1975).....	48
<i>Ellis v. Wadleigh</i> , 27 Wash.2d 941, 182 P.2d 49 (1947).....	43
<i>Florence Fish Co. v. Everett Packing Co.</i> , 111 Wash. 1, 188 P. 792 (1920)	48
<i>Galladora v. Richter</i> , 52 Wn. App. 778, 764 P.2d 647 (1988).....	24
<i>Garbell v. Tall's Travel Shop, Inc.</i> , 17 Wn. App. 352, 563 P.2d 211 (1977)	45
<i>Gingrich v. Unigard Sec. Ins. Co.</i> , 57 Wn. App. 424, 788 P.2d 1096 (1990).....	45
<i>Hensev v. Hennessy</i> , 201 N.C. App. 56	30
<i>In re Adoption of B.T.</i> , 150 Wn.2d 409, 78 P.3d 634 (2003).....	37
<i>In re Botimer</i> , 214 P.3d 133 (2009)	25, 28
<i>Johnston v. Medina Imp. Club</i> , 10 Wash.2d 44 –60, 116 P.2d 272 (1941)	43
<i>LaPlante v. State</i> , 85 Wash.2d 154, 531 P.2d 299 (1975).....	44
<i>McGugart v. Brumback</i> , 77 Wash.2d 441, 463 P.2d 140 (1969).....	43
<i>Nelson v. State</i> , 792 N.E. 2d, 588 (Ind. Ct. App. 2003).....	35
<i>Pan American Stone Co., Inc. v. Meister</i> 527 So.2d 275 (Fla. App. 4 Dist. 1988).....	31, 32
<i>People v. Harris</i> 57 Ill. 2d 228	30
<i>People v. Wallenberg</i> 24 Ill. 2d 350	30

<i>Percy v. Miller</i> , 115 Wash. 440—45, 197 P. 638 (1921)	43
<i>Perkins v. Brown</i> , 179 Wash. 597, 38 P.2d 253 (1934).....	48
<i>Powell v. Viking Ins. Co.</i> , 44 Wash.App. 495, 722 P.2d 1343 (1986)45, 46	
<i>Schultz v. Simmons Fur Co.</i> , 46 Wash. 555, 90 P. 917 (1907).....	48
<i>Snohomish County v. Rugg</i> , 115 Wash.App. 218, 61 P.3d 1184 (2002) ..	45
<i>Sons of Norway v. Boomer</i> , 10 Wash.App. 618, 519 P.2d 28 (1974).....	48
<i>Spokane Research & Def. Fund v. City of Spokane</i> , 155 Wn.2d 89, 117 P.3d 1117 (2005).....	37, 43
<i>State v. Barry</i> , 179 Wn. App. 175, 317 P.3d 528 (2014).....	29
<i>State v. Hunsaker</i> , 74 Wash.App. at 44, 873 P.2d 540 (1986) 18, 19, 21, 23	
<i>Stender v. Twin City Foods, Inc.</i> , 82 Wash.2d 250, 510 P.2d 221 (1973) 48	
<i>Stranberg v. Lasz</i> , 115 Wash.App. 396, 63 P.3d 809 (2003).....	43
<i>Swak v. Dep't of Labor & Indus.</i> , 40 Wn.2d 51, 240 P.2d 560 (1952).....	37
<i>Thor v. McDearmid</i> , 63 Wash.App. 193, 817 P.2d 1380 (1991).....	43
<i>Trone v. Smith</i> , 621 F.2d 994 (9th Cir, 1980).....	23
<i>Vandercook v. Reese</i> , 120 Wn. App. 647, 86 P.3d 206 (2004).....	30
<i>Westinghouse Electric Corp. v. Gulf Oil Corp.</i> , 588 F.2d at 224.....	23
<i>Williams v. Ninemire</i> , 23 Wash. 393, 63 P. 534 (1900).....	48

Statutes

RCW 11.96.150	34
RCW 26.26.200	26, 38
RCW 26.26.500 through 26.26.605 and 26.26.615 through 26.26.630....	26
RCW 26.26.610(b).....	26
RCW 4.24	27
RCW 71.05.020(1).....	47
RCW 71.05.020(2).....	47
RCW 71.05.020(26).....	47

Rules

CR 11	passim
CR 15(c)(4).....	27
CR 26(j)	27
CR 56(c).....	44
CR 56(e).....	45
ER 201	30
ER 201(b).....	31
ER 605	31
GR 15(b)(4).....	26
GR 15(e)(3).....	27

TABLE OF CONTENTS

Table of Authorities.....2

Introduction.....5

Assignments of Error.....5

Issues Relating to Assignments of Error.....7

Statement of the Case.....8

Argument.....18

 A. The court erred in ruling that the motion to disqualify counsel was frivolous.....18

 B. The court erred in failing to take into account the conduct of Respondent and her attorney.....29

 C. The court erred in taking judicial notice of "the demeanor of the parties".....30

 D. The court erred in finding that Petitioners had an improper purpose in bringing this cause of action.....33

 E. Judge Godfrey erred in not recusing himself34

 F. The court erred in finding that Respondent did not waive the protections of the Deadman's Statute.....43

 G. The court ignored the requirement to accept nonmoving parties' affidavits as true.....45

 H. The court erred by ordering Petitioners to pay the same costs twice.....50

Conclusion.....50

Certificate of Service.....53

I. INTRODUCTION

Appellants Brian Eickhoff and Cathy Negelspach appeal the trial court's decision granting summary judgment as to their TEDRA petition; CR 11 sanctions; and the refusal of the trial judge to recuse himself.

Appellant David Bustamante appeals the court's ruling that the motion to disqualify Curtis Janhunen was frivolous and brought in bad faith; and the court's order that he personally pay sanctions for bringing the motion.

Petitioners seek the remedy of reversing the trial court's summary judgment ruling; reversing the trial courts order on the question of CR 11 sanctions; vacating the monetary judgment for attorney fees and costs, and remanding the case for trial in front of a different judge on the remaining contested issues in the case; and awarding reasonable costs and attorneys fees to Petitioners and their attorney on appeal.

I. ASSIGNMENTS OF ERROR

1. The Court erred in ruling that Petitioners' motion to disqualify Curtis Janhunen was frivolous, and in ordering Petitioners and their attorney to pay sanctions.

2. When ordering sanctions, the Court erred for failing to take into account the conduct of Respondent and her attorney which contributed to the costs and the delays in the case and which showed either negligence or bad faith.

3. The court erred in taking judicial notice of “the demeanor of all of the parties” throughout the proceedings in deciding that Petitioners had acted in bad faith and that the action had been brought solely for purposes of harassment.
4. Judge Godfrey erred in not recusing himself from hearing the case, after it was pointed out that he conducted independent fact-finding, was biased in favor of the Respondent and her attorney, and that he had violated the appearance of fairness doctrine.
5. The court erred in finding that Respondent Diane Eickhoff had not waived the protections of the Deadman’s statute.
6. The court erred in making credibility determinations at the summary judgment hearing, giving more credence to Respondent’s witnesses and less or no credence to Petitioners’ witnesses, and in not following the rule of law which requires the court to accept nonmoving parties affidavits as true, unless it would be unreasonable to do so.
7. At the Summary Judgment hearing, the court erred in failing to view all evidence presented, and drawing all reasonable inferences, in favor of the nonmoving parties.
8. At the summary judgment hearing, the court erred in finding that there was no evidence that the estate was in possession of firearms and other personal property belonging to the Petitioners.
9. At the summary judgment hearing, the court erred in finding that there was no evidence that the decedent lacked testamentary capacity at the time of the 2010 community property agreement, and in finding that

there was no evidence that the 2010 community property agreement was the product of undue influence.

10. At the summary judgment hearing, the court erred in finding that the decedent was not “institutionalized” in the final days of his life within the meaning of the community property agreement.

11. The court erred in finding that Petitioners had an improper purpose in bringing this cause of action; to wit, that Petitioners were greedy, selfish, vengeful, or vindictive, or attempting to harass the Respondent by bringing this action.

12. The court erred in ordering Petitioners to pay the same costs twice.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Petitioners’ motion to disqualify Curtis Janhunen a frivolous motion within the meaning of CR 11?

2. Did Judge Godfrey violate the judicial canons by reviewing a sealed court file in camera without prior notice, and did he violate the appearance of fairness doctrine by openly disfavoring Petitioners and their attorney and by expressing sympathy for Respondent and her attorney?

3. Did the court abuse its discretion by taking judicial notice of the demeanor of the parties throughout the proceedings in deciding that Petitioners had acted in bad faith?

4. Did Diane Eickhoff waive the protections of the Deadman's Statutes when she filed sworn declarations in which she disputed Petitioners claims and factual assertions pertaining to the Will contest?
5. Did the court improperly make credibility determinations when deciding Respondent's motion for summary judgment?
6. Did the court err in concluding that there were no material issues in the case, where Petitioners presented evidence that Charles Eickhoff had been in possession of various items of personal property belonging to Petitioners; that Charles Eickhoff lacked testamentary capacity at the time he executed the community property agreement; and that Charles Eickhoff was "institutionalized" and the time of his death?

III. STATEMENT OF THE CASE

Appellants Brian Eickhoff and Cathy Negelspach are the children of Charles Cress Eickhoff, who passed away on July 12, 2011. *See* Petition for Contest of Will, filed on October 25, 2011, CP 5-17. The primary "immediate cause of death" listed on the death certificate was Alzheimers disease. *Id.*, Appendix A.

The respondent in this case is Diane Eickhoff, the wife of the decedent and step mother to Brian and Cathy. On August 5, 2011, Diane filed a Last Will and Testament executed in Oregon on February 25,

1988¹. CP 1-4. Under the terms of the Will, Diane stood to inherit Charles' entire estate in the event he should predecease her. *Id.* The Will left nothing to Brian or Cathy except in the event Diane should predecease Charles. *Id.* The Will that was filed with the court did not have a cover page, nor did it bear any indication that an attorney had drafted it. *Id.* It appeared to have been signed by the testator on every page, and witnessed by two witnesses, whose names do not appear in printed text on the document. *Id.* The document also included an attachment, Affidavit of Attesting Witnesses to Will. *Id.* This affidavit also bore the signatures of two purported witnesses as well as a notary's signature; but as in the case of the subjoined Will, the names are not printed, and the signatures are not entirely legible. *Id.* The Affidavit did not bear an ink notary stamp. *Id.*

Appellants Brian and Cathy filed a Will Contest on October 25, 2011. CP 5-17. In their Petition, they requested that the court (1) grant an order of adjudication of intestacy; (2) appoint a personal representative; (3) direct the personal representative to conduct an accounting of the estate; and (4) return a .300 magnum rifle belonging to Brian that was alleged to be in the custody of the estate by virtue of the fact that Charles had been holding it for safekeeping. *Id.*

¹ First names are used for clarity. No disrespect is intended.

On December 15, 2011, attorney Frank Franciscovich filed a notice of appearance on behalf of Diane. CP 25-26. Around this time, Petitioners learned from Mr. Franciscovich that Charles and Diane had entered into a community property agreement in 2010. This community property agreement, like the Will, effectively left all of Charles' assets and personal property to Diane in the event he should predecease her. CP 47.

Petitioners filed an Amended Petition for relief on April 3, 2012. CP 42-50. In the Amended Petition, Brian and Cathy asked the court to make a determination as to the validity of the Will filed on August 5, 2011; to make a determination as to the validity of the Community Property Agreement filed on November 18, 2010; to enter an order appointing a temporary personal representative to administer the estate; to conduct a full accounting of the estate; to entertain claims against the estate to be made by Brian and Cathy; to make appropriate determinations as to probate versus non-probate assets of the estate; to settle the estate pursuant to applicable law; to make determinations and to settle matters relating to powers of attorney; and to grant other relief as may be appropriate. CP 43.

In their grounds for relief, Petitioners cited the facts of the purported Will, noting that it had every appearance of a document that was professionally drafted, but having certain irregularities. CP 44. In

addition to contesting the Will, Petitioners challenged the community property agreement and requested an accounting of the disposition of various items of personal property that had belonged to the decedent. CP 46-50. Petitioners also challenged the ability of Mr. Franciscovich to represent Diane on the grounds that he had drafted and witnessed the community property agreement in dispute. *Id.*

On April 2, 2012, attorney Curtis Janhunen filed a Notice of Appearance on behalf of Diane. CP 40-41. On April 3, 2012, Petitioners filed a motion to disqualify attorney Janhunen on the grounds that he had previously represented Brian in a family related matter. CP 51-58. Attorney Frank Franciscovich withdrew from the case on April 6, 2012. CP 64-66.

Petitioners then brought motions to consolidate claims, CP 68-70, and to obtain the health care records of Charles, CP 76-78. These motions were noted to be heard on May 21, 2014. CP 170-171. On May 4, 2012, Respondent filed a motion for a protective order to block Petitioners from gaining access to Charles' health records. CP 86-88.

On May 21, 2014, a hearing was held before the Honorable Gordon Godfrey. VRP 5/21/12. At the hearing, the court denied the Petitioners' motion to disqualify counsel stating that it was "frivolous and offensive." VRP 5/21/12 at 12. Counsel for the Petitioners next brought

up the motion to consolidate claims. *Id.* Attorney for the Respondent did not object. VRP 5/21/12 at 13. He then went into the merits of the will contest, noting that both Diane and the attorney who drafted the 1988 Will had submitted declarations stating that the 1988 Will was valid and that no other will had ever been in existence. VRP 13-16. Respondent's counsel also pointed out that Diane denied knowing anything about the firearms Brian was seeking to have returned. VRP 15.

The court granted the motion to consolidate claims. *Id.* The court also announced that it would order sanctions pursuant to CR 11 and ruled that the sanction in this matter would be the amount of time necessary for Respondent's attorney to appear in court and argue the motion, and that the sanctions would be against Mr. Eickhoff [Brian]. VRP 16. The court never addressed the motion to subpoena the health records of the decedent and never addressed Respondent's motion for a protective order.

On May 29, 2012, Respondent's attorney noted the matter for entry of orders, and submitted proposed orders for sanctions. *See* Declaration of David Bustamante and attachments, CP 549-576. The proposed conclusions of law would have had the court declare the 1988 Will to be valid, and would have the court deny the amended petition for relief. CP 565. Mr. Janhunen also submitted what purported to be his total billings for the entire representation, in an amount totaling \$3,848.46. CP 575-

576. The itemized billing makes clear that the bill he submitted was far in excess of what Judge Godfrey had ordered. *Id.*

On May 30, 2014, Petitioner's filed written objections to the court's order denying the motion to disqualify Curtis Janhunnen and to the *sua sponte* order granting sanctions, arguing that the court violated the Petitioner's due process rights. CP 128-146. The same day, Petitioners filed a notice of motion for discretionary review. CP 111-127. On May 31, 2014, Petitioners filed a motion for reconsideration, after learning that Curtis Janhunnen was still the attorney of record in Brian Eickhoff's paternity action. CP 149-169.

A hearing was held on June 21, 2012, to address presentation of proposed orders and Petitioners' motion for consideration, as well as Petitioners' motion for subpoena duces tecum. VRP 6/21/2012. At that hearing, Judge Godfrey announced that he had decided to conduct his own "research" and review the files from the paternity action. VRP 6/21/2012 at 9-14. Based in part on his review of the paternity file, Judge Godfrey concluded that Mr. Janhunnen should not be disqualified from representing Diane Eickhoff. *Id.* Judge Godfrey also concluded, based on his review of the paternity file, that counsel for the Petitioners had not made a reasonable inquiry into the paternity file. CRP 6/21/2012 at 19. Judge Godfrey went on to suggest that both counsel take a look at the paternity

file, stating, "...there is a lot of documentation in here that goes to the issue of why there may have been a falling out between the father and son, and I would suggest that it be reviewed. I could go through quite a bit of it, and I am not going to elaborate on the record, but by your client shaking his head, he knows exactly what I am saying. There is a lot of documents in here." VRP 6/21/2012 at 20.

Petitioners' counsel then raised the issue of the subpoena duces tecum for medical records, which had been noted to be heard that same day. *Id.* at 21. The court refused to consider that matter, however, stating, "Well, I have to make a ruling first on whether I am going to allow the amendment to the pleadings before I can hear the request for the records, counsel. So it's the chicken and the—cart and the horse, or however they put that." *Id.* It should be noted that there was no motion to amend the pleadings scheduled to be heard that day. The court had already granted Petitioners' motion to consolidate claims at the previous hearing. *See* VRP 5/21/12 at 15.

After June 21, 2012, no hearings were held for approximately one year because of the Petitioners' motion for discretionary review on the question of whether Mr. Janhunen should be disqualified. Ultimately, the Court of Appeals denied review, and a certificate of finality was entered on May 2, 2013. CP 202-209.

The Respondent filed a motion for summary judgment on May 20, 2013. CP 59-60. Diane Eickhoff filed another declaration in support of the motion for summary judgment. CP 196-200. The Respondent also filed a motion to find Petitioners and their attorney in violation of CR 11. CP 320-323. This motion was originally noted to be heard on June 28, 2013. CP 341. It was re-noted for July 25, 2013, however, because Petitioners' attorney has changed his address and did not receive notice. CP 366.

On June 28, 2013, Petitioners filed a motion for continuance, explaining that discovery was not yet complete, in part because Petitioners had been prevented from obtaining Charles' medical records. CP 338-340. Petitioners also moved to dismiss their claim as to the execution of the 1988 Will, conceding that the Will had been properly executed. *Id.*

On July 15, 2013, the court held a hearing. VRP 7/15/13. The court indicated that Petitioners' motion for continuance was not in the court file. VRP 7/15/13 at 21. The court ultimately granted the continuance, but stated that it would consider sanctions, not only for the continuance, but also for the delay caused by Petitioner's motion for discretionary review. *Id.* at 21-22. Judge Godfrey stated, "And I believe it's also appropriate under the circumstances at this point in time the costs

of attorney fees for the delay of going up to the Court of Appeals and for the higher courts to properly reserve these matters.” *Id.* at 22.

At the same hearing, Respondent renewed her opposition to the taking the deposition of Dr. Dueber (Charles’ physician). VRP 30. Petitioners’ objected to the proposed order to pay costs. *Id.* at 30-31. Another hearing was held on July 29, 2012, to further address the matter of sanctions and for entry of orders on the deposition of Charles’ physician. VRP 7/29/13. The Petitioners also brought a motion asking Judge Godfrey to recuse himself, alleging the appearance of unfairness and apparent bias, and citing Judge Godfrey’s decision to review the sealed paternity file without prior notice to counsel. CP 356-365. At the July 25th hearing, Judge Godfrey stated that he was not biased and denied the motion for recusal. VRP 7/29/13 29-33. He also stated that he would limit the amount of the terms to what it cost for Respondent’s attorney to have to show up in court for an additional hearing. *Id.* at 33. The court entered an order permitting the Petitioners to depose Charles’ physician, Dr. Dueber. CP 388. The final hearing on the motion for summary judgment was continued to September 25, 2013.

In the Response to the motion for summary judgment, Petitioners essentially conceded that the 1988 will was valid in its execution. CP 392-423. However, since Respondent had moved for CR 11 sanctions,

asserting that the entire action was frivolous, Petitioners defended the Will contest by pointing out that the 1988 Will was not valid on its face. CP 394. Petitioners also argued that Brian's claim for return of personal property presented a genuine material issue that could only be resolved at trial. CP 403. Petitioners also argued that there was a material issue as to whether the 1988 Will had been supplanted by a later Will which was subsequently lost. CP 407. Both Cathy and Charles stated that their father had mentioned a new will some time around the year 2000 and that they had actually seen copies of the new will, which contained provisions revoking the 1988 will. CP 183-187; CP 193-195; CP 432-439.

Petitioners also maintained that there was a material issue as to whether the community property agreement was valid, since Charles arguably lacked testamentary capacity at the time it was entered into. CP 414. Finally, Petitioners argued that Diane had waived the protections of the Deadman's Statute by submitting sworn declarations which disputed Petitioners' claims. CP 416-418.

Petitioners maintained that Respondent's motion for sanctions was itself frivolous and that both Respondent and her attorney should be sanctioned for bringing a frivolous motion for sanctions. CP 418.

At the summary judgment hearing of September 25, 2013, the court held that the 1988 will was valid; that there was no evidence of a

newer will; that Diane Eickhoff had not waived the protections of the Deadman's Statute; that there was no evidence that the estate held any property belonging to petitioners; that the community property agreement was not the product of undue influence; that Charles had not been "institutionalized" at the time of his death; and that the entire action had been brought in bad faith. VRP 9/25/14 at 69-82.

IV. ARGUMENT

A. The Court erred in ruling that Petitioners' motion to disqualify Curtis Janhunen was frivolous, and in ordering Petitioners and their attorney to pay sanctions under CR 11.

1. The court erred in finding that Petitioners' motion to disqualify attorney Janhunen was frivolous.

RPC 1.9 prohibits an attorney who has formerly represented a client from subsequently representing another person whose interests are adverse to the former client when there is a "substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *See* Comment #3 to RPC 1.9. In his response, attorney Janhunen maintained that, while he did indeed represent the Petitioner Brian Eickhoff in a child custody dispute in 2003 and 2004, he never received any confidential information about Brian Eickhoff during this representation. CP 82-85. This position did not address the correct legal standard for disqualification. The proper inquiry is not whether the attorney actually received any confidential information, but rather,

whether there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. *See* Comment 3 to RPC 1.9.

In answering this question, the court is not to consider any sworn statement from the former attorney as to whether he did or did not receive any confidential information during the former representation, as Mr. Janhunen argued in his Declaration. Instead, the court is to make a three-pronged inquiry consisting of the following:

First, the court reconstructs the scope of the facts involved in the former representation and projects the scope of the facts that will be involved in the second representation. Second, the court assumes that the lawyer obtained confidential client information about all facts within the scope of the former representation. Third, the court then determines whether any factual matter in the former representation is so similar to any material factual matter in the latter representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation. *State v. Hunsaker*, 74 Wash.App. at 44, 873 P.2d 540 (1986)).

2. STEP (1)(a) of the analysis consists of determining the scope of the facts involved in the former representation.

In 2003, Brian was the respondent in a paternity action filed by his former long-time domestic partner, Linda Tolliver, with whom Brian had fathered three children. CP 53. The issues included the parenting plan, visitation, and the amount of the parties' financial contribution. *Id.*

Litigation ensued, prompting Diane Eickhoff to enlist the services of attorney Curtis Janhunen on behalf of Brian Eickhoff. *Id.* This is the “former representation” which was the subject of the Petitioner’s motion to disqualify counsel. While Brian Eickhoff was at sea, Diane handled the initial consultations with Mr. Janhunen wherein she provided the factual background information regarding the issues in the case. *Id.*

In 2003 and 2004, both Diane Eickhoff and Charles Eickhoff were essentially on the same side as Brian Eickhoff. *Id.* Their interests were aligned with his. They actively assisted him in his legal battles with Linda Tolliver. *Id.* They assisted him in securing legal representation and in financing it. *Id.* They provided information and assistance to Brian’s attorney, Curtis Janhunen, with the goal of helping Brian in his litigation and sometimes acted as a conduit of information between Brian Eickhoff and his attorney, Curtis Janhunen.

As documented in Curtis Janhunen’s Declaration in Opposition to Petitioner’s Motion to Disqualify, Mr. Janhunen spoke with Diane Eickhoff and with Charles Eickhoff several times during the course of this representation. CP 82-85. A meeting was held with Brian Eickhoff, Diane Eickhoff and Charles Eickhoff on December 5, 2003, which lasted approximately 90 minutes. CP 83. According to Brian Eickhoff, this conference included a candid exchange of information surrounding the background and history of the entire relationship between himself and Linda Tolliver including their various legal disputes. CP 58. Mr. Janhunen subsequently travelled to South Bend to appear for court hearings at which Brian Eickhoff was present.

Mr. Janhunen held a private conference with Brian Eickhoff on March 1, 2004. CP 83. According to Janhunen's own Declaration, the purpose of this meeting was to discuss the Financial Declaration. *Id.* Brian Eickhoff denies this claim. CP 58. But even if the court were to accept Mr. Janhunen's assertion that nothing except finances was discussed during the 45-minute conversation, the purpose of this meeting was to draft a Financial Declaration. At the very least, Mr. Janhunen gained confidential information from Brian Eickhoff regarding his finances.

On May 26, 2004, Mr. Janhunen's firm received a fee payment in the amount of \$3623.51. In his Declaration, Mr. Janhunen states that Diane and Charles paid his fee. CP 83. The payment of the fee by Diane and Charles does not alter the nature of the duty to the client, who is the person being represented and not the person paying the attorney fee.

Included in the scope of the facts of the former representation is all information pertaining to the finances of Brian Eickhoff; all information that could reasonably be used to refute Petitioners' claims about the evolution of interfamilial relationships, and all information about Brian Eickhoff which could reasonably be expected to be used against him in the event he were to testify at the fact-finding hearing. Included in the scope of the facts of the former representation is information regarding Brian Eickhoff's children, whose interests were held in the highest regard by the decedent, Charles Cress Eickhoff, and information regarding Charles Cress Eickhoff's affection both for his son and for his grandchildren.

As mentioned above, Judge Godfrey personally reviewed the sealed files of the paternity matter, which Mr. Janhunen, as the attorney of record, would have unrestricted access to. Judge Godfrey noted that the paternity file contained a great deal of materials, including documents that would explain why the relationship between Brian and his father may have deteriorated. Thus the court admitted that there was indeed a relationship between the paternity case and the will contest, because Petitioners were alleging that Diane caused the schism between Brian and his father, whereas, according to Judge Godfrey, the documents in the sealed paternity file indicated that there were other reasons for the falling out.

An attorney who had never represented Brian in the paternity matter would not have had access to the materials in the sealed paternity file and probably would never have learned that they existed. Because of the fact that Janhunen was still the attorney of record in the paternity case, he would have had unfettered access to the file.

3. STEP (1)(b) consists of determining the scope of the facts of the second representation.

In this probate litigation, Petitioners alleged, among other things, that Diane Eickhoff was instrumental in driving a wedge between the deceased, Charles Eickhoff, and themselves, during the years 2005 through 2010. CP 42-50. As part of this evolution in family dynamics, Diane took advantage of Charles Eickhoff's declining health and advancing dementia to isolate him from his family, children, and grandchildren. *Id.* The Petitioners alleged that Charles Eickhoff was initially close to his son, Brian Eickhoff, and his daughter, Cathy

Negelspach Eickhoff in 2003-2004, and that Diane Eickhoff later isolated Charles; and that she exerted undue influence over him at a time when he suffered from advance stages of Alzheimer's disease.

Because Brian Eickhoff could testify about these matters, any information about him of a negative nature may have been used against him in attacking his credibility as a witness and in contradicting his testimony. Information held by attorney Janhunen regarding Brian Eickhoff's finances could also have been used against Brian Eickhoff to show pecuniary motive for testifying a certain way. Information known by attorney Janhunen regarding Brian Eickhoff's alleged alcohol abuse, together with the documents in the paternity file, could have been used against Brian Eickhoff to supply an explanation for why Brian may have fallen out of favor with his father. The Petitioners maintained that, at the time of Charles Eickhoff's death, the decedent was in possession of firearms belonging to Brian Eickhoff. These firearms included a Winchester rifle and a Remington rifle, both of which were acquired by Brian Eickhoff when he lived in Kodiak, Alaska. Brian may reasonably have been expected to testify as to ownership of these rifles at trial.

At a trial in the Will Contest and related TEDRA claims, Petitioners anticipated that the motives of Diane Eickhoff would be highly relevant, as will be her personal disliking for Petitioner Brian Eickhoff as it developed in the years after 2004. In addition, all information regarding the decedent's affection for his son and his grandchildren would have been relevant in supporting Petitioner's claim that the decedent made a new will

sometime in the late 1990's or early 2000's, which revoked any prior wills that he may have made.

The relationships between the decedent and his various family members, including his grandchildren, between the Respondent and those same family members, and between Brian Eickhoff and his father, would all have been highly relevant issues at trial.

4. STEP TWO of the analysis entails that the Court must assume that the lawyer obtained confidential client information about all facts within the scope of the former representation.

Despite Mr. Janhunen's protestations that he never received any confidential information about Brian Eickhoff during the entire representation, the case law states that the Court must assume that Mr. Janhunen obtained confidential information about all facts within the scope of the former representation. *Hunsaker*, 74 Wash.App. at 44, 873 P.2d 540 (1986)).

As articulated in *Trone v. Smith*, 621 F.2d 994 (9th Cir, 1980):

As we have stated, the underlying concern is the possibility, or appearance of the possibility, that the attorney may have received confidential information during the prior representation that would be relevant to the subsequent matter in which disqualification is sought. The test does not require the former client to show that actual confidences were disclosed. That inquiry would be improper as requiring the very disclosure the rule is intended to protect. See *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d at 224 and n.3. The inquiry is for this reason restricted to the scope of the representation engaged in by the attorney. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification.

5. STEP THREE requires that the court then determine whether any factual matter in the former representation is so similar to any

material factual matter in the latter representation that a lawyer would consider it useful in advancing the interests of the client in the latter representation.

The rule of law only requires one factual matter in the two representations that is so similar that an attorney representing the Respondent in this case would find it useful in advancing the interests of the Respondent, and in helping her to defend against the various claims of the Petitioners.

6. Under these facts, the trial court could reasonably have concluded that the matters were “substantially related” within the meaning of RPC 1.9.

A motion is not frivolous when it presents a good faith argument based on the facts and the law, and presents issues upon which reasonable minds could differ. *Galladora v. Richter*, 52 Wn. App. 778, 788, 764 P.2d 647, 653 (1988).

7. Confidential information gained by an attorney during a representation is far broader than information covered by attorney-client privilege.

In his Declaration in opposition to Petitioners’ motion to disqualify him, Janhunnen writes, “In fact, as my own records reflect, copies of which are attached, I met with BRIAN and his father, and our client DIANE EICKHOFF, on December 5, 2003, for an hour and a half. Anything I learned was said in the presence of his father and DIANE. Obviously, there was no attorney-client communication because of the presence of the other two people. I learned nothing of a confidential nature, nor anything of an intimate nature. Anything I did learn was shared with the decedent

and our client.” CP 83. This argument erroneously assumes that the only confidential information received by an attorney during a representation is that information covered by attorney-client privilege.

Comment 3 to RPC 1.6 establishes that “confidentiality” covers far more than information covered by the attorney-client privilege. The comment states: “The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”

This principle is borne out by applicable case law. A “court’s determination that particular information is not covered by the attorney-client privilege is not the same as a determination that the lawyer has no ethical obligation to protect the information from disclosure in other contexts.” *In re Botimer*, 214 P.3d 133 (2009).

A reasonable court might have concluded Mr. Janhunen likely received confidences and secrets during his prior representation of Brian Eickhoff which precluded him from later representing Diane Eickhoff against Brian Eickhoff’s interests. The motion for disqualification was not frivolous.

8. An attorney has a duty to safeguard his client’s confidences and secrets.

The comments to RPC 1.6 imply that an attorney has a duty to try and safeguard the client’s confidences, even if that means appealing a ruling by the trial court that the attorney disclose confidential information. Comment 13, states in relevant part, “Absent informed consent

of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4.”

9. The court erred in finding that the motion to disqualify Curtis Janhunen had not been properly researched because Petitioners’ attorney failed to review the sealed filed from the paternity action for evidence that the two matters were related or not related.

Paternity records are confidential. RCW 26.26.200 provides:

Notwithstanding any other rule of law concerning public hearings and records, any hearing or trial held under this chapter shall be held in closed court without admittance of any person other than those necessary to the action or proceeding or for the orderly administration of justice. All papers and records, other than the final judgment and matters relating to the enforcement of the final judgment pertaining to the action or proceeding whether part of the permanent record of the court or of a file in the Department of Social and Health Services, are subject to inspection by a nonparty only upon an order of the court for good cause shown following reasonable notice to all parties of the hearing where such order is to be sought.

RCW 26.26.610(b) provides in part:

Records entered prior to the entry of a final order determining parentage in a proceeding under this section and RCW 26.26.500 through 26.26.605 and 26.26.615 through 26.26.630 are accessible only to the parties or on order of the court for good cause.

Paternity records in Washington are thus required by law to be sealed. There are valid reasons why a party to litigation would not want sensitive information in a paternity case to be made public. Indeed, the court rules prohibit the disclosure of information from a sealed paternity to non-parties except by special motion. GR 15(b)(4) provides, “To seal means to protect from examination by the public and unauthorized court personnel.” Because Judge Godfrey was not assigned to hear the paternity case, he was not “authorized personnel” and should not have inspected the records absent a motion and opportunity for a hearing. CR 15(c)(4) provides:

When the clerk receives a court order to seal the entire court file, the clerk shall seal the court file and secure it from public access. All court records filed thereafter shall also be sealed unless otherwise ordered. The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices.

The court may unseal portions of the file pursuant to the procedures set forth in GR 15(e)(3), which provides, “A sealed court record in a civil case shall be ordered unsealed only upon stipulation of all parties or upon motion and written notice to all parties and proof that identified compelling circumstances for continued sealing no longer exist, or pursuant to RCW 4.24 or CR 26(j).

Because Brian Eickhoff was reasonably entitled to privacy in the confidential paternity file, his attorney was not remiss in not seeking to have the file unsealed and made public. To require an attorney bringing a motion to disqualify counsel to reveal confidential information would

have an absurd result. The client, in order to prove his former lawyer has a conflict of interest, would be forced to expose the very information he seeks to protect.

10. There were insufficient grounds for the court's finding, pursuant to CR 11, that the motion to disqualify attorney Janhunen was frivolous.

The court improperly found that Petitioners and their attorney acted in bad faith in filing the motion to disqualify Janhunen. Petitioners objected to the court's conclusions that the motion to disqualify counsel was frivolous. "Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions." *Id.* at 219-220.

B. When ordering sanctions, the Court erred for failing to take into account the conduct of Respondent and her attorney which contributed to the costs and the delays in the case and which showed either negligence or bad faith.

Respondent and her attorneys engaged in substantial conduct that contributed to the delays in the case. To begin with, the 1988 last will and testament was filed in Superior Court without the cover page that clearly identified the law firm and the attorney who drafted it. Then, when Petitioner Brian Eickhoff attempted to contact Diane to obtain his firearms, she responded by cutting off communication with him. CP 428.

Additionally, when Petitioners, believing that their father may have lacked testamentary capacity due to advanced Alzheimers disease, attempted to subpoena his medical records, Respondent filed a motion for

a protective order, not to prevent re-disclosure of the information to third parties, but rather, to shut off access completely. RP 86-88. Yet the only reason proffered was the allegation that Petitioners were on a fishing expedition.

Then, when the court denied the motion to disqualify counsel and ordered sanctions, the court was very specific that the sanctions were to be against Petitioner Brian Eickhoff for the time needed to respond to the motion. Yet Respondent's attorney submitted a cost bill for what amounted to the entire sum expended in defending the litigation to date.

Respondent persisted in resisting Petitioners' efforts to obtain Charles' medical records for over a year, resulting in unnecessary delay of the proceedings, yet never presented a valid argument for why Petitioners should not be permitted to have access to the records.

C. The court erred in taking judicial notice of “the demeanor of all of the parties” throughout the proceedings in deciding that Petitioners had acted in bad faith and that the action had been brought solely for purposes of harassment.

The demeanor of the Petitioners at various court hearings was not “evidence” and the court's consideration of it was improper. *State v. Barry*, 179 Wn. App. 175, 178, 317 P.3d 528, 530 (2014) *review granted*, 180 Wn.2d 1021, 328 P.3d 903 (2014). Furthermore, the court's vague claims about demeanor were insufficient to permit meaningful review, since no record was ever made describing in detail what types of demeanor the court observed.

In relying on his own personal observations as the basis of his award of sanctions, Judge Godfrey essentially made himself a witness in the case. This was reversible error.

Trial judges sitting as triers of fact are not allowed to rely on personal knowledge to compensate for missing evidence. *Dep't of Licensing v. Sheeks*, 47 Wn. App. 65, 72, 734 P.2d 24, *rev. denied* 108 Wn.2d 1021 (1987); cf. *Choate v. Swanson*, 54 Wn.2d 710, 716 -17, 344 P.2d 502 (1959) (rejecting contention that trial judge unfairly allowed personal knowledge and experience to influence his decision in part because the judge expressly disclaimed reliance on personal knowledge); *See also Hensev v. Hennessy*, 201 N.C. App. 56, 685 2SEd. .541, 549 N.C.A pp. 2009) (“[A] judges' own personal memory is not evidence.”)

Moreover, a court cannot take judicial notice of a disputed question of fact. *Vandercook v. Reese*, 120 Wn. App. 647, 651-52, 86 P.3d 206 (2004). “A judge's memory of oral testimony is not a proper subject of judicial notice under ER 201.” *Reese* 120 Wn. App. at 651.

This is because the judge offering his own recollection of evidence from a separate trial “must testify as a witness he or she is not permitted to do that in a proceeding over which he or she is then presiding.” *Reese* 120 Wn. App. at 651-52 (citing ER 605). These prohibitions are based on the recognition that a trial judge in his deliberations is limited to the record made before him at trial, and to draw conclusions based on facts outside the record denies a party constitutional due process of law. *People v. Harris* 57 Ill. 2d 228, 231, 314 2NEd. .465 (Ill. 1974) citing *People v. Wallenberg* 24 Ill. 2d 350, 354, 181 2NEd. .143 (Ill. 1962) (determination

made by the trial judge based on private knowledge, untested by cross-examination or any of the rules of evidence, constitutes a denial of due process of law); See also *State v. Dorsey*, 701 N2.dW.238, 249-500 (Minn. 2005) (“An impartial trial requires that conclusions reached by the trier of fact be based upon the facts in evidence . . . and prohibits the trier of fact from reaching conclusions based on evidence sought or obtained beyond that adduced in court”).

ER 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

ER 605 provides: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point."

Furthermore, a trial judge relying on evidence not presented or calling upon his memory frustrates appellate review, because the appellate court is restricted to the record before it to reach its determination of the soundness of the decision below. *Pan American Stone Co., Inc. v. Meister* 527 So.2d 275, 276 (Fla. App. 4 Dist. 1988).

Judge Godfrey explained his views regarding the demeanor of the parties as evidence the court should use in deciding which party should prevail:

You know something, when you've been sitting up here for about 22 years you can pretty well figure out what's going on when the lawyers start arguing. And you can pretty well figure out in cases

like—you know—when witnesses are testifying and clients start turning red in the face, because we have the best seat in the house. They start fidgeting, they get nervous et cetera, et cetera. The lawyers, you can tell by lawyers and their demeanor what's going on.

CP December 9, 2013, at 97. Thus the court made very clear its rationale regarding the usefulness of “demeanor” in deciding the merits of a case. Judge Godfrey later observed, “You know, it didn't take long to figure this case out.” *Id.*

D. The court erred in finding that Petitioners had an improper purpose in bringing this cause of action; to wit, that Petitioners were greedy, selfish, vengeful, or vindictive, or attempting to harass the Respondent in bringing this action.

There is no evidence in the record showing that Petitioners had an improper motive in bringing the lawsuit other than their natural desire to recover property to which they believed they were entitled. They were no more greedy or selfish than the Respondent, who also strove to retain possession and control over the entire estate, keeping everything for herself. Yet the court noted, “This lawsuit, in my opinion, and having observed the demeanor of everyone in this matter, and having researched this matter, and gone through it, there's nothing more than harassment on this widow. It's vindictive and there was no basis for it....” VRP 9/25/14 at 78.

The court offered nothing more than its own opinion to support the conclusion that Petitioners demonstrated vindictiveness. Furthermore, the

court's admission that it had researched the matter and gone into it recalls the incident wherein the court decided *sua sponte* and without prior notice to review the paternity files involving Brian Eickhoff in camera in deciding both the motion to disqualify Curtis Janhuen and the issue of frivolousness. Judicial Canons, Rule 2.9 (C) provides, "A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law."

E. Judge Godfrey erred in not recusing himself from hearing the case, after it was pointed out that he conducted independent fact-finding, was biased in favor of the Respondent and her attorney and that he had violated the appearance of fairness doctrine.

Evidence of Judge Godfrey's bias and prejudice is abundant throughout the record, and this bias was exacerbated by his decision to conduct independent research into the sealed paternity files in order to decide the issue of whether Curtis Janhunen should be disqualified.

The very first hearing before Judge Godfrey took place on May 21, 2012. The hearing was noted up to decide three questions: (1) the motion to disqualify Curtis Janhunen; (2) Petitioners' motion to consolidate their claims; and (3) Petitioner's motion for an order authorizing the taking of Dr. Dueber's deposition after Respondent filed her motion to deny Petitioners access to those records.

During the portion of the hearing devoted to the motion to disqualify Mr. Janhunen, Judge Godfrey turned Petitioners' motion into a matter of personal interest: "And candidly, as a judge, I find it offensive to come in here and drag a gentleman and claim that because a will was drafted in 2—excuse me—1988 and he represented a family member 15 years later, irregardless of what kind it is that he should be disqualified from the case. That's what I wall CR 11, frivolous motion." VRP 5/21/2012 at 10-11. Judge Godfrey repeated again, "This is offensive, it has nothing to do with a will contest. And if you don't like it and your client doesn't like it, take it to a higher court."

Judges have a duty, not only to be fair and impartial, but to avoid the appearance of unfairness. By repeatedly saying that he was offended by the motion for recusal, Judge Godfrey created the impression that he had a personal stake in the controversy.

When counsel for the Petitioners attempted to make an offer of proof, Judge Godfrey abruptly cut him off, saying, "I have ruled counsel. If you don't like it, file your declaration and appeal." VRP 6/21/14 12.

Judge Godfrey's rulings granting Rule 11 sanctions and or reasonable attorney fees under RCW 11.96.150, at the May 21, 2012, hearing violated Petitioners' constitutional right to due process of law. The court could not constitutionally order Petitioner Brian Eickhoff to pay

attorney fees or Rule 11 sanctions without prior notice and a meaningful opportunity to be heard. *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 829 P.2d 1099 (1992). Here, neither the court nor attorney Janhunen provided advance notice to Petitioners that sanctions or attorney fees would be sought.

Furthermore, Petitioners were not given any meaningful opportunity to respond to the motion for sanctions at the hearing. The outright refusal to allow Petitioners to make an offer of proof violated their right to make a record in the case that would allow their case to be heard on appeal. Historically, courts have recognized the rights of parties of make offers of proof to preserve issues on appeal. “We hold that it is reversible error for a trial court to deny a party the opportunity to explain the substance, relevance, and admissibility of excluded evidence with an offer of proof.” *Nelson v. State*, 792 N.E. 2d, 588, 594-595 (Ind. Ct. App. 2003).

The trial lawyer has a right to make the record for appeal. *Barci v. Intalco Aluminum Corp.*, 11 Wn.App. 342, footnote 1, 522 P.2d 1159 (1974). An offer of proof stands in the same position as a pleading and must be made so the trial court may rule advisedly and so an exception to the exclusion of the offered evidence may be preserved. *Id.*, citing *Lannan v. Garrett*, 23 Cal.App.2d 367, 73 P.2d 620 (1937); *In re Estate of Vallish*,

431 Pa. 88, 244 A.2d 745 (1968); *Jones v. Clark*, 418 P.2d 792 (Wyo.1966); 88 C.J.S. Trial § 73 (1955).

Judge Godfrey has been on the bench for a great many years, and should certainly have known that denying Petitioners' request to make an offer of proof could be problematic. VPR 9/25/2013 at 82. Furthermore, Judge Godfrey's actions violated due process of law and showed bias against the Petitioners and their attorney.

The next hearing took place on June 21, 2014, and in it, the court addressed Petitioners' motion for reconsideration. Petitioners summarized their theory of the case beginning at VPR 6/21/12 at 2-3. Counsel explained that Brian and Cathy claimed that Charles had devised a new will either in late 1999 or 2000, and that the family relationships were relevant to the question of whether Charles did in fact intend to revoke the older Will. VPR 6/21/14 at 4. Counsel concluded by stating, "Mr. Janhunen would have been in a position to learn a lot of confidential information about . . . his relationship with his father, about his relationship with Diane Eickhoff, and also a lot of confidential information about the decedent, that, all of which would be useful in attacking petitioners' case to challenge the will, and for those reasons, Mr. Janhunen, I believe, should be disqualified, your Honor." *Id.* at 4-5.

Judge Godfrey announced that he had taken the liberty of getting the paternity files. *Id.* at 9. He indicated that he had reviewed the file in detail and concluded that counsel for the petitioners was remiss in not

doing so himself. *Id.* at 10-19. And then he started talking about sanctions again, even though sanctions had not yet been requested by the Respondent. *Id.*

A court cannot take judicial notice of its own records in another case than that before it, though trial judge knows or remembers contents thereof. *Bodeneck v. Cater's Motor Freight Sys.*, 198 Wash. 21, 86 P.2d 766 (1939). “Courts of this state cannot, while trying one cause, take judicial notice of records of other independent and separate judicial proceedings even though they be between the same parties.” *Swak v. Dep't of Labor & Indus.*, 40 Wn.2d 51, 54, 240 P.2d 560, 562 (1952). “We cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties. *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634, 637 (2003) citing *Swak* 40 Wn.2d at 54, 240 P.2d 560; *accord*, *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 98, 117 P.3d 1117, 1122 (2005).

Judge Godfrey told the attorneys, “Because again, I will give you gentlemen access to this court file; had you asked, Mr. Bustamante, you would have easily gained it, easily, but that did not happen. And so therefore based upon this, and based upon my analysis, under the standards required under the rule, I cannot find that there is a basis to

disqualify Mr. Janhunen from representing the lady in this case.” VRP 6/21/14 at 14. The problem with this statement, of course, is that Judge Godfrey indicates how he would have ruled had someone brought a motion; and yet RCW 26.26.200 provides that records pertaining to a paternity action are to remain sealed and “are subject to inspection by a nonparty only upon an order of the court for good cause shown following reasonable notice to all parties of the hearing where such order is to be sought.” Thus, Judge Godfrey could not have granted such a motion (to grant access to the paternity files) unless and until all parties had been provided reasonable notice and an opportunity for a hearing, and only after the court had found “good cause” to grant access.

Washington Canons of Judicial Conduct, Rule 2.9 (C) provides, “A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.” Judge Godfrey investigated facts in a matter pending before him *ex parte* and thereby improperly considered evidence not presented in court.

Rule 2.6 of the Washington Canons of Judicial Conduct provides, “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” Yet Judge Godfrey indicated how he would have ruled on a hypothetical motion from Petitioners to have access to the paternity files, even though the other parties to the paternity suit had never been given notice or an opportunity to be heard on the matter. Rule 2.10(B) provides “A judge shall not, in connection with cases, controversies, or issues that

are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” Again, by stating that a motion for access to the paternity file would “easily” have been granted, Judge Godfrey, in effect, made a commitment as to how he would rule on a hypothetical motion before it was actually brought.

After a long discussion about the contents of the paternity file, Judge Godfrey concluded that “there was no reasonable inquiry into this file. VRP 6/21/12 at 19.

The next hearing took place shortly after the certificate of finality had been issued on Petitioners motion for discretionary review on July 15, 2013. Seventeen days prior to the hearing, Petitioners filed a motion for a continuance in order to allow them more time to prepare for the summary judgment hearing. CP 338-340. It was the only motion for continuance requested in the case other than a previous motion that had been agreed to by all of the parties. Judge Godfrey did not receive a bench copy. VRP 7/15/14 at 23. Judge Godfrey indicated *sua sponte* that he would order impose terms for the continuance and asked Respondent’s attorney for some idea of the amount of money Respondent had expended in going up to the Court of Appeals and Supreme Court. VRP 7/15/13 at 26. Judge Godfrey added, “And I believe it’s also appropriate under the circumstances at this point in time, the costs of attorney fees for the delay of going up to the Court of Appeals and for the higher courts to properly resolve these matters.” VRP 7/15/13 at 27. The court also took Petitioners’ attorney to task for “failing to properly document the file.” *Id.*

at 26; 28. At one point in the hearing, Petitioners' attorney apparently indicated to the court that he wished to be heard, although nothing was actually said. Judge Godfrey responded:

Go ahead, Mr. Bustamante. You've continually interrupted me in this proceeding and I don't want the higher court to believe that I've cut you off. Go ahead, what do you wish to say, sir?

VRP 7/15/13 at 24. The record reflects no such pattern of interruption as was alleged. Judge Godfrey's comments were discourteous and indicative of bias because Petitioner's attorney had not "continually interrupted" Judge Godfrey.

At the same hearing, Judge Godfrey expressed his disdain for Petitioners' counsel and his sympathy for the Respondent: "I have no doubt, Mr. Bustamante, that you and your client have—are more than pushing the patience of this court and you're pushing the patience of this poor lady who is incurring the attorney's fees and costs in this matter."

VRP 7/15/13 at 36-37. At no time during the entire proceedings did Judge Godfrey ever voice similar concern for the "patience" of the Petitioners, despite the fact that Respondent had attempted for over a year to block Petitioners from gaining access to the decedent's medical records—a strategy that clearly created needless delay and expense.

Judge Godfrey also apologized to Diane: "And I apologize to you, ma'am that you've incurred all of this delay at this point in time." VRP 7/15/13 at 37. Such expressions of sympathy would naturally be expected to create the appearance of partiality and bias.

At the summary judgment hearing, Judge Godfrey again talked about his feelings regarding Petitioners' motion to disqualify Curtis Janhunen:

The issue of frivolity and sanctions was over the motion to have him removed and I'm going to sanction it. I want to know the cost of that specific response to that specific motion and the hearing for that date, and that sanction. There was absolutely no basis for bringing that matter. It was, in my opinion, nothing more than harassment in this litigation. There was no reason to do it. It merely ran up the cost of this estate matter. It merely caused great antagonism to the parties, and there was no reason for it, factually or legally. And I believe it's rather demeaning under that type of a situation to make those types of claims regarding the conduct of an attorney, their professional reputation under rules of professional conduct. There was no basis for it. And if Mr. Janhunen had made that claim against Mr. Bustamante for the same thing, I would be ruling the same way. There's no basis for it and I'm still offended as I indicated earlier.

VRP 9/25/13 at 78. This passage clearly indicates that the order for sanctions was based on an improper basis, to wit, that Judge Godfrey felt personally offended by Petitioner's motion because he viewed it as a demeaning attack on Mr. Janhunen's professional reputation.

Finally, as indicated *supra* at page 24, Judge Godfrey made comments at the final hearing of December 9, 2013, indicating that he had "figured out this case" early on. ("You know, it didn't take long to figure this case out.") CP December 9, 2013, at 97. He stated, "You can tell by the lawyers and their demeanor what's going on." In short, Judge Godfrey revealed, by his own admission, that he had the case "figured out" and didn't need to keep an open mind, and base his decision solely on the

evidence presented in court, because the attorneys' demeanor told him everything that he needed to know. This, of course, is an overly simplistic analysis of all that Judge Godfrey said; but the statement is strong evidence that he formed a negative opinion of the merits of the Petitioners' cause of action by taking into account improper considerations, thereby depriving the Petitioners' and their attorney of due process of law.

Having formed that opinion, it would be unrealistic to expect Judge Godfrey to be fair and impartial in the event the case were remanded for trial. The case should be remanded to the Superior Court with instructions that the matter be reassigned to a different judge.

F. The court erred in finding that Respondent had not waived the protections of the Deadman's statute.

Diane Eickhoff filed Declarations in which she contested various claims brought by Petitioners. CP 196-200; CP 282-293. For example, in her Declaration of November 1, 2012, she states, "He [Brian] now claims there are 2 other firearms that I am in possession of that are in the safe. This is not true and all of the firearms in the safe belonged to Charles and now belong to me." CP 198. In the same Declaration, she stated, "There is only one Will in existence and that it the Will of 1988. Frank Franciscovich did draft a Community Property Agreement for us, which we did in fact execute. There were no other Wills prepared." CP 199.

In her declaration in support of the motion for summary judgment, Diane states that she was present when Charles executed the Oregon will

in 1988, and also describes Charles as “competent” when he signed the community property agreement in 2010. CP 283. With regards to the 1988 Will, Diane goes on to say, “This Will is the only Will to my knowledge that Charles ever executed.” *Id.*

The deadman’s statute is waived by an interested respondent who presents testimony favorable to the estate. *Stranberg v. Lasz*, 115 Wash.App. 396, 406, 63 P.3d 809 (2003), citing *Botka v. Estate of Hoerr*, 105 Wash.App. 974, 980, 21 P.3d 723 (2001). See also *Bentzen v. Demmons*, 68 Wash.App. 339, 345, 842 P.2d 1015 (1993), citing *McGugart v. Brumback*, 77 Wash.2d 441, 450, 463 P.2d 140 (1969); *Ellis v. Wadleigh*, 27 Wash.2d 941, 952, 182 P.2d 49 (1947); *Percy v. Miller*, 115 Wash. 440, 444–45, 197 P. 638 (1921); *Thor v. McDearmid*, 63 Wash.App. 193, 202, 817 P.2d 1380 (1991). Once the protected party has opened the door, the interested party is entitled to rebuttal. *Bentzen v. Demmons*, 69 Wash.App. at 345, citing *Johnston v. Medina Imp. Club*, 10 Wash.2d 44, 59–60, 116 P.2d 272 (1941). And evidence concerning a transaction with the deceased presented as part of a summary judgment motion may also constitute a waiver for purposes of a subsequent trial. *Bentzen v. Demmons at 345.*

Waiver of the Deadman's Statute can be in the form of an affidavit. In *Bentzen v. Demmons*, the court concluded that Demmons' statements, contained in an affidavit, constituted a waiver of the Deadman's statute sufficient to overcome the bar imposed by the statute. Bentzen v. Demmons, 68 Wn. App. 339, 345, 842 P.2d 1015, 1019 (1993).

Because Diane filed sworn declarations in which she contested Petitioners claims, she waived the protection of the Deadman's Statute.

G. The court erred in ignoring the rule of law requiring the court to accept nonmoving parties affidavits as true, unless it would be unreasonable to do so, and in making credibility determinations at the summary judgment hearing, giving more credence to Respondent's witnesses and less or no credence to Petitioners' witnesses.

Summary judgment is not appropriate where there are material issues of fact in the case. In a summary judgment motion, the court does not resolve factual issues, but rather must determine if a genuine issue as to any material fact exists. *Balise v. Underwood*, 62 Wash.2d 195, 199, 381 P.2d 966 (1963). The moving party has the burden of proving there is no genuine issue of material fact and all inferences are construed in the light most favorable to the nonmoving party. *Id.*; see also CR 56(c). If and only if the moving party meets its burden, must the nonmoving party then "set forth specific facts showing that there is a genuine issue for trial." *LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975);

Snohomish County v. Rugg, 115 Wash.App. 218, 224, 61 P.3d 1184 (2002) (stating that a nonmoving party must set forth evidentiary facts, not suppositions, opinions, or conclusions); *see also* CR 56(e). It is only where there is no genuine issue of material fact, and reasonable people could reach “but one conclusion” from all of the evidence, that summary judgment becomes appropriate. *Barrie v. Hosts of Am., Inc.*, 94 Wash.2d 640, 642, 618 P.2d 96 (1980); *Balise*, 62 Wash.2d at 199, 381 P.2d 966.

The credibility of the witnesses are matters in dispute and must be resolved by trial. *Garbell v. Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 355, 563 P.2d 211, 212 (1977). Summary judgment should not be granted when the credibility of a material witness is at issue. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 428-29, 788 P.2d 1096, 1099 (1990), citing *Balise v. Underwood*, 62 Wash.2d 195, 200, 381 P.2d 966 (1963); *Powell v. Viking Ins. Co.*, 44 Wash.App. 495, 503, 722 P.2d 1343 (1986).

1. At the Summary Judgment hearing, the court erred in failing to view all evidence presented, and drawing all reasonable inferences, in favor of the nonmoving parties, without regard for credibility determinations.

Petitioners had filed the Declarations of three witnesses, Brian Eickhoff, George Shipman, and James O’Hagan, all of whom presented significant information tending to show that Charles suffered declining mental abilities long before his death in 2011. CP 190-192; CP 429-431; CP 185-187. All three of these witnesses personally observed Charles’

failing memory, disorientation, and isolation. *Id.* Yet the court pointed out that the Respondent's witness stated otherwise: "And guess what. In the court file there is an affidavit in the court file by the lawyer who drafted the community property agreement that says he was competent. If you don't believe it, look in the court file, signed Mr. Frank Franciscovich, the lawyer who drafted it. And then, well—so that was on the day that they signed it and the rest of the stuff, he was competent according to the lawyer, *who's an officer of the court.*" VRP 9/25/13 at 73. [emphasis supplied]. The fact that the affiant was an officer of the court could only be relevant if the court was making a credibility determination, which the court should not do. And the court virtually ignored all of Petitioners' witnesses whose declarations indicated that Charles was not competent.

Then the court called into question the motives of Petitioners in making their declarations, again, a credibility consideration: "There is no will. All we know is two people who have an interest in some property stand up and they're the kids saying there's a will. Because you know what, if we can't get the first one which we say isn't valid revoked and we claim he wasn't incompetent (sic) on this community property agreement, then it's intestate and we can make a claim on some of this property." VPR 9/25/13 at 75-76. It should be noted that Diane Eickhoff also had an interest in property, yet her declarations were never similarly called into question by the court.

The court went on to say:

Is the community property agreement drafted November of 2010? Was it drafted, and was the gentlemen competent when it was drafted and signed? Answer, yes. The evidence is undisputed that

he was competent, except the disputation by the two people claiming that he was incompetent. There is no medical evidence to disprove it. In fact, the medical evidence is to the contrary and the legal evidence is undisputed. The lawyer who drafted it states the gentlemen was competent.

VRP 9/25/14 at 76. Again, the court completely overlooked the declarations of George Shipman and James O'Hagan, who had portrayed Charles as incompetent. And the court appears to indicate that the "legal evidence" is undisputed because the lawyer who drafted it states the testator was competent; suggesting that the declarations of the Petitioners' witnesses are somehow not "legal evidence."

2. At the summary judgment hearing, the court erred in finding that the decedent was not "institutionalized" in the final days of his life within the meaning of the community property agreement.

On November 9, 2010, Diane and Charles entered into a community property agreement. CP 220-224. The agreement contained an automatic revocation clause stating that the agreement which caused all of the community property of the dying spouse to vest in the surviving spouse upon certain specified occurrences, including "upon institutionalization of either party for a mental disorder as defined in RCW 71.05.020(2) or grave disability as defined in RCW 71.05.020(1)." CP 222-223. The term "mental disorder" means any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions. RCW 71.05.020(26).

Interpreting a contract involves giving meaning to the words used by the parties. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222

(1990). ‘Interpretation is a determination of fact; it is the process that ascertains the meaning of a term by examining objective manifestations of the parties’ intent.’ *Denny’s Rests., Inc. v. Sec. Union Title Ins. Co.*, 71 Wn.App. 194, 201, 859 P.2d 619 (1993).

When interpreting a contract, courts give ordinary meaning to the words in the contract and try to give effect to the parties’ mutual intent. *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 590, 269 P.3d 1017 (2012) *Corbray v. Stevenson*, 98 Wash.2d 410, 415, 656 P.2d 473 (1982). It is clear that, where words in a contract are ambiguous, parol evidence is admissible to explain their meaning. *Douglass v. Stachecki*, 13 Wn. App. 922, 925, 537 P.2d 1044, 1047 (1975), citing *Stender v. Twin City Foods, Inc.*, 82 Wash.2d 250, 255-56, 510 P.2d 221 (1973); *Perkins v. Brown*, 179 Wash. 597, 38 P.2d 253 (1934); *Florence Fish Co. v. Everett Packing Co.*, 111 Wash. 1, 188 P. 792 (1920); *Schultz v. Simmons Fur Co.*, 46 Wash. 555, 90 P. 917 (1907); *Williams v. Ninemire*, 23 Wash. 393, 63 P. 534 (1900); *Sons of Norway v. Boomer*, 10 Wash.App. 618, 622, 519 P.2d 28 (1974).

Thus, in order to settle the question of whether Charles was “institutionalized” within the meaning of the community property agreement, the court needed to give ordinary meaning to the words used and determine the parties’ intent. If “institutionalized” was deemed to be ambiguous, the court would have to resolve the issue by means of parol evidence that would shed light on the parties’ intent. The question therefore involved a genuine issue of disputed fact and was not the proper subject of summary judgment.

H. The court erred by ordering Petitioners to pay the same costs twice.

At the July 25, 2013, hearing, the court ordered Petitioners to pay costs equivalent to the fees incurred for Respondent's attorney to appear at the hearing of July 25, 2013. That sum came to \$1,365.00. VRP 7/29/13 at 35. This amount was paid by Petitioners as ordered. CP 462-465.

Prior to the entry of orders on summary judgment of December 9, 2013, the Respondent's attorney submitted an affidavit regarding attorney fees. CP 522-529. In his itemized cost bill, he included the same charges in the requested cost award. CP 526-527. That cost bill was granted in its entirety, even though Petitioners objected. VRP 12/9/13 at 87. Petitioners ask the Court to remand the case with instructions that the cost award be adjusted accordingly.

V. CONCLUSION

Petitioners ask that his Court remand the case for trial on the remaining disputed claims; that the Court also instruct the Superior Court to reassign the case to a different judge; and that the Court award reasonable costs and attorney fees to Petitioners for this appeal.

The trial Court erred in ruling that Petitioners' motion to disqualify Curtis Janhunnen was frivolous, and in ordering Petitioners and Petitioners' attorney to pay sanctions. The order granting CR 11 sanctions should be vacated.

When ordering attorney fees, the Court erred for failing to take into account the conduct of Respondent and her attorney which contributed to the costs and the delays in the case and which showed either negligence or bad faith. The Court should remand the case with instructions to recalculate the cost award, taking into account the degree to which Respondent and her attorney contributed to the delays in the case.

The court erred in taking judicial notice of “the demeanor of all of the parties” throughout the proceedings in deciding that Petitioners had acted in bad faith and that the action had been brought solely for purposes of harassment. Courtroom demeanor is not evidence and should not have been considered in deciding the summary judgment motion.

Judge Godfrey erred in not recusing himself from hearing the case. Because he conducted independent fact-finding, his impartiality has been tainted; and furthermore, his conduct on several occasions violated the appearance of fairness doctrine.

The court erred in finding that Respondent had not waived the protections of the Deadman’s statute. The case should be remanded for trial with findings that Diane Eickhoff waived the Deadman’s Statute as to those matters discussed in her declarations.

The court erred in making credibility determinations at the summary judgment, giving more credence to Respondent’s witnesses and less or no credence to Petitioners’ witnesses, and in not following the rule of law which requires the court to accept nonmoving parties affidavits as true, unless it would be unreasonable to do so. At the Summary Judgment

hearing, the court erred in failing to view all evidence presented, and drawing all reasonable inferences, in favor of the nonmoving parties. At the summary judgment hearing, the court erred in finding that there was no evidence that the estate was in possession of firearms or other personal property belonging to the Petitioners. At the summary judgment hearing, the court erred in finding that there was no evidence that the decedent lacked testamentary capacity at the time of the 2010 community property agreement, and in finding that there was no evidence that the 2010 community property agreement was the product of undue influence. The court erred in finding that the decedent was not “institutionalized” in the final days of his life within the meaning of the community property agreement. This was not an appropriate subject for summary judgment, since the meaning of the word “institutionalized” involves a question of fact to be determined at trial.

The court erred in finding that Petitioners had an improper purpose in bringing this cause of action; to wit, that Petitioners were greedy, selfish, vengeful, or vindictive, or attempting to harass the Respondent in bringing this action. There was no evidence in the record to support such findings. The CR 11 sanctions should be vacated.

DATED this 23rd day of September, 2014.

A handwritten signature in black ink that reads "David Bustamante". The signature is written in a cursive, flowing style with a horizontal line underlining the name.

David Bustamante, WSBA #30668
Attorney for Petitioners

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CERTIFICATE OF SERVICE

I, David Bustamante, do solemnly swear and affirm under penalty of perjury, under the laws of the State of Washington, that the following is true:

I served the attached Appellant's Opening Brief, by mailing a true copy to the offices of the attorney of record for the Respondent, Mr. Curtis M. Janhunnen, Brown, Lewis, Janhunnen & Spencer, at 101 South Main Street, P.O. Box 111, Montesano, WA 98563.

Signed at Ephrata, Washington, this 23rd day of September, 2014.


David Bustamante
Declarant