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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

33613-1-III

Consolidated with

No. 340481

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COURT OF APPEALS, DIVISION III,  
OF THE STATE OF WASHINGTON

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

CODY KENDALL,

Respondent,

v.

JEANNIE KILE,

Petitioner.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

The core error of this action under the Trusts and Estates Dispute Resolution Act (“TEDRA”) was the abandonment of the testamentary requirements in interpreting a will. The probate court below went beyond the four corners of a will without first finding a relevant ambiguity. The probate court relied on a declaration filed in another matter along with live testimony to actively contradict the plain terms of a Will. The court’s interpretation imposed a duty under the Will that did not exist. Based on alleged violations of this non-existent duty, the probate court removed Appellant Jeannie Kile as Personal Representative of the Estate of Lester J. Kile and as Trustee of the Kile Farm Trust. The probate court leveraged this same alleged breach to award attorney fees and damages totaling more than half a million dollars. The end result is the frustration of the decedent, Lester J. Kile’s, intention that his daughter run the family farm. Instead, his daughter is now effectively removed from all farming operations in favor of her son, Respondent Cody Kendall.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

- 1: The probate court erred in concluding that Cody Kendall has the right under the Last Will and Testament of Lester J. Kile to “operate” the family farm held in trust under the Will and ordering that

Cody Kendall commence farming on or before September 15, 2015.

2. The probate court erred in concluding that Cody Kendall had the right to receive two-thirds of the income from the trust, after certain payments and reserves are taken.
- 3: The probate court erred in concluding that Cody Kendall has the right to possess the farm house located on the family farm.
- 4: The probate court erred by removing Jeannie Kile as Personal Representative of the Estate of Lester J. Kile, substituting Cody Kendall as Successor Personal Representative, and ordering Jeannie Kile to turn over all related documents and accounts.
- 5: The probate court erred by removing Jeannie Kile as Trustee of the Kile Farm Trust, substituting Cody Kendall as Successor Trustee, and ordering Jeannie Kile to turn over all related documents and accounts.
- 6: The probate court erred by awarding costs and fees to Cody Kendall, and by ordering that the costs of forensic accounting be borne by Jeannie Kile.
- 7: The probate court erred by removing Jeannie Kile's choice of counsel for the estate.
- 8: The court erred by ordering damages in favor of Cody Kendall and against Jeannie Kile.
- 9: The court erred by not granting Jeannie Kile's motion for reconsideration.
- 10: The court erred by entering finding of fact number ten.

- 11: The court erred by entering finding of fact number twelve.
- 12: The court erred by entering finding of fact number thirteen.
- 13: The court erred by entering finding of fact number fourteen.
- 14: The court erred by entering finding of fact number fifteen.
- 15: The court erred by entering finding of fact number sixteen.
- 16: The court erred by entering finding of fact number seventeen.
- 17: The court erred by entering finding of fact number eighteen.
- 18: The court erred by entering finding of fact number nineteen.
- 19: The court erred by entering finding of fact number twenty.
- 20: The court erred by entering conclusion of law number six.
- 21: The court erred by entering finding of fact number two.
- 22: The court erred by entering finding of fact number eight.

#### B. Issues Related to Assignments of Error

- 1: Does a court err when it goes beyond the four corners of a will by consulting a declaration from a different court case to determine the meaning of a

will when the court finds no relevant ambiguity in the will? (Assignments of Error 1, 2 and 3.)

2. Does a court violate RCW 11.12.020(1) when it establishes the testamentary intent of a decedent from a document that is not attested by any witnesses? (Assignments of Error 1, 2, and 3.)
3. Does a court err when it applies the doctrine of judicial estoppel where the record evidences no inconsistency in statements and there is no evidence of acceptance any inconsistent statements by a court or benefit conferred by a court as a result of the allegedly inconsistent statement? (Assignments of Error 1, 2, and 3.)
4. Whether the court stated a valid basis, supported by substantial evidence, to remove Jeannie Kile as Personal Representative of the Estate of Lester J. Kile? (Assignments of Error 4 and 7.)
5. Whether the court's decision to remove Jeannie Kile as Trustee of the Kile Farm Trust is supported by reasonable cause? (Assignment of Error 5.)
6. Whether the court stated a proper basis, supported by substantial evidence, to support an award of fees and costs under RCW 11.96A.150? (Assignment of Error 6.)
7. Whether the court's damages are supported by substantial evidence in the record. (Assignment of Error 8.)
8. Whether finding of fact number ten is supported by substantial evidence? (Assignment of Error 10.)
9. Whether finding of fact number twelve is supported by substantial evidence? (Assignment of Error 11.)

10. Whether finding of fact number thirteen is supported by substantial evidence? (Assignment of Error 12.)
11. Whether finding of fact number fourteen is supported by substantial evidence? (Assignment of Error 13.)
12. Whether finding of fact number fifteen is supported by substantial evidence? (Assignment of Error 14.)
13. Whether finding of fact number sixteen is supported by substantial evidence? (Assignment of Error 15.)
14. Whether finding of fact number seventeen is supported by substantial evidence? (Assignment of Error 16.)
15. Whether finding of fact number eighteen is supported by substantial evidence? (Assignment of Error 17.)
16. Whether finding of fact number nineteen is supported by substantial evidence? (Assignment of Error 18.)
17. Whether finding of fact number twenty is supported by substantial evidence? (Assignment of Error 19.)
18. To the degree that conclusion of law number six makes any factual assertions, or would be treated as a finding of fact, is it supported by substantial evidence? (Assignment of Error 20.)
19. Whether finding of fact number two is supported by substantial evidence? (Assignment of Error 21.)
20. Whether finding of fact number eight is supported by substantial evidence? (Assignment of Error 22.)

### III. STATEMENT OF THE CASE

This case turns on the language of the The Last Will and Testament of Lester J. Kile (“the Will”), which was executed on March 4, 2010. Ex. P1. The relevant language to this case is contained in Article II, Section E, which reads:

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

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

The income from the trust, after the payment of expenses, including reasonable reserves for taxes, insurance, equipment and improvement needs, and a reasonable period of operating costs, shall be distributed on a periodic bases, as least annually to Jeannie Kile. If however, Cody Kendall operates the farm at any time herein, then he shall be entitled to two-thirds of such income and Jeannie Kile shall be entitled to one-third. In the event that Jeannie Kile does not survive me, or upon her death while the Trust is still in effect, her share of the income herein, shall pass to Cody Kendall, and if Cody Kendall is not surviving or upon his death, such interest in the trust income shall pass to Carly Kendall.

In the event Jeannie Kile is for any reason unable or unwilling to serve as Trustee, then I nominate and appoint Cody Kendall as Trustee.

Ex. P1 at 4-5.

Lester J. Kile was a dryland wheat farmer. 2 RP at 40-42. Appellant Jeannie Kile is the daughter of Lester J. Kile. Clerk's Papers ("CP") at 205. Respondent Cody Kendall is the son of Jeannie Kile. CP at 205.

From 1988 until 2013, Jeannie<sup>1</sup> operated Lester's farm. 2 RP at 112. She leased the land from him. Exs. P19, R208. She paid the costs for seed, fertilizer and chemicals. 2 RP at 134. In return, she would receive two-thirds of the crop harvest and Lester would receive one-third. 2 RP at 168, 181.

Jeannie did not physically farm the land. *See* 2 RP at 107. For the bulk of the time since 1988, the day-to-day work of farming was performed by her then-husband, Gordon Kendall. 2 RP at 35. Gordon received a wage for performance of these duties. 2 RP at 175.

In 2009, Cody moved to the farm and began working for the farm. 2 RP at 59. Cody began taking over many of his father's responsibilities on the farm. 2 RP at 62.

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<sup>1</sup>First names are used to avoid ambiguity. No offense is intended.

On December 13, 2011, Jeannie filed for dissolution from Gordon Kendall under Spokane County Superior Cause No. 11-3-02969-5. CP at 3. Shortly thereafter, on January 4, 2012, Lester sent a letter to Jeannie threatening to terminate the lease of the farm. Ex. P31 at 4. Along with that letter, Lester executed a declaration explaining that he was the owner of most of the ground “currently being farmed by [his] daughter” Jeannie. *Id.* at 1. Lester stated in the declaration that he had become dissatisfied with the work being performed by Gordon at the farm. *Id.* at 2. Lester threatened to terminate his lease to Jeannie unless Gordon was “removed from performing any further farming operations on [Lester’s] ground.” *Id.* Lester noted that Cody had moved back to the farm and was already doing work on the farm. *Id.* Specifically, Lester stated:

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

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

I am essentially requesting that my daughter turn over the farming operation to my grandson, Cody Kendall . . . I absolutely must be assured that the farm is operating and managed in accord with good farming practices, and I have

come to the conclusion that [Gordon] is either unwilling or unable, or both, to perform these practices himself. I believe that Cody Kendall is ready, willing, and able to perform all of the farming responsibilities, and I am willing to renew the lease to Jeannie Kile on the basis that Cody becomes the primary operator of all farming operations involving my farm.

*Id.*

On March 30, 2012, while the dissolution was pending, Lester Kile died. CP at 205. The Will was filed for probate on April 25, 2012. CP at 1-4. By operation of the Will, Jeannie became both personal representative of Lester's Estate and Trustee of the Kile Farm Trust. Ex. P1.

After Lester's death, a second declaration, dated July 5, 2012, was filed in the dissolution action, this time by Jeannie. Ex. P32. In that declaration, Jeannie reaffirmed her belief that her father had wanted Cody to work the farm instead of Gordon. Specifically she stated:

As administrator of my father's Last Will and Testament and as Trustee of the trust that he has established, it is clear that my father's wishes were to have Cody farm his property. That, in fact, is what is occurring.

The transfer of all farming responsibilities to Cody has been seamless. As the court can note from previous declarations, Cody was essentially operating the farm prior to this divorce.

Ex. P32 at 2. The declaration does not state that the desire for Cody to operate the farm is Lester's testamentary intent. *See* Ex. P32. Nor does the declaration state that Cody is to be preferred over Jeannie. *Id.*

Trial in the dissolution action commenced in September 2012. Jeannie testified at the dissolution trial about the effect of the Will on how the farm was to be operated. She testified that she was now trustee over the very same land that she had already been farming. Ex. R223 at 93.<sup>2</sup> She testified that she managed the farm and that if she chose not to designate Cody as an operator, she would receive the entire income from the farm. *Id.* She noted that "[i]f Cody becomes the operator, he would get two-thirds – two-thirds and I would get one third." *Id.*

Cody has a history of substance abuse that had strained relationships with his family. 2 RP at 57-58, 92, 157-58. In August 2010, Jeannie worked with Cody to get him into treatment, which was covered by Jeannie's insurance. 4 RP at 36. And while treatment appeared to work for a number of years, Cody ultimately relapsed, which culminated in a return to treatment in the fall of 2013. 2 RP at 92.

Despite some history of untrustworthiness, Jeannie wanted it to work with her son and supported him in taking over for Gordon. *See* 2 RP

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<sup>2</sup>All page numbers for Exhibit R223 refer to the page number in the upper right corner, which corresponds with the testimony in 5 RP at 406-407.

at 158. When Gordon worked the farm, he had never regularly paid Cody Kendall. 2 RP at 62. Cody started regularly receiving wages from Jeannie after Gordon left. 2 RP at 63. Jeannie gave Cody the use of a credit card so he could make payments for farm expenses. 2 RP at 156-57. However, Cody (or his wife) began using the card to purchase things like groceries, liquor, and cigarettes. 2 RP at 157. Similarly, Jeannie added Cody to her farming bank account, so he could write checks for farm expenses. 2 RP at 188. She added him on a Thursday in July 2012; however, by the following Monday he had transferred \$500 from the farm account to his personal account. 2 RP at 189.

After Lester's death, Cody became obstinate. 2 RP 155. He demanded that all operations be turned over to him right away. *Id.* Even after meeting with the probate attorney, Cody continued to demand more control over the farming. 2 RP at 156-57. Eventually, communication broke down completely, and Cody refused to talk to Jeannie. 2 RP at 160.

On January 10, 2013, Jeannie sent a contract to Cody to formalize his at-will employment relationship with the farm. 2 RP 160, Exs. P10, P11. Cody refused to sign the contract. 2 RP 161. In light of Cody's failure to sign the employment contract, counsel for Jeannie informed Cody that his employment relationship with the farm was terminated. Ex. P12. Cody refused to leave the farm house despite the fact that he was no

longer employed by the farm, and he was subsequently removed by unlawful detainer. Exs. P13, P14, P15.

After Cody's removal, Jeannie entered into a series of leases, culminating in a ten-year lease of the farm to Ken Kile, a cousin. Ex. P17; 2 RP at 121-22. She also found a tenant for the farm house, Tiffany Billigmeier. Ex. P16. However, the state of disrepair in which Cody left the farm house meant Jeannie could not secure a damage deposit. Ex. P16, 2 RP at 153.

On February 21, 2013, Cody filed a petition in Spokane County Superior Court under TEDRA. CP 467-71. An amended petition was filed on May 6, 2013. CP at 16-23. The amended petition sought, among other things, a declaration of the intent of Lester under the Will, the removal of Jeannie as Personal Representative, and the removal of Jeannie as trustee. CP at 21-22.

On September 23, 2014, Jeannie filed a motion for summary judgment, seeking, among other things, a determination that the Will unambiguously granted Jeannie the power to manage the farm, including choosing its operator. Resp. Mot. For Summ. J. at 1-2. Three days later, Cody filed a cross-motion for partial summary judgment, arguing that Jeannie was judicially estopped from contesting her prior testimony. CP at 489-90. On December 4, 2014, the probate court granted Jeannie's

motion in part and denied Cody's motion. CP at 111-13. The probate court ruled "the Last Will and Testament unambiguously grants Jeannie Kile, as trustee of the Testamentary Trust therein, the power to manage the farm and to make contracts and arrangements for its operation." CP at 112-13. The probate court found the provision granting this power to Jeannie was unambiguous. CP at 112. The probate court did find an ambiguity as to the meaning of "operates" with regard to a provision in the next paragraph. CP at 113.

As trial loomed, Jeannie moved in limine to exclude the January 9, 2012, declaration of Lester J. Kile on the grounds that the will unambiguously granted to Jeannie the power to choose an operator. Jeannie stipulated to the admissibility of the declaration only for the purposes of disambiguating the word "operates" as used in the third paragraph of Article II, Section E of the Will. (Respondent's Amended Motion in Limine.)

The parties proceeded to trial on this matter on March 2-4, 2015. On April 13, 2015, the probate court entered its Findings of Fact and Conclusions of Law. CP at 204-225. On May 21, 2015, the probate court entered Judgment but explicitly reserved damages to a future hearing. CP at 226-65. The probate court, explicitly relying on the January 9, 2012, declaration by Lester, found that it was Lester's testamentary intent that

Cody both operate the farm and receive two-thirds of the income generated by the farm. CP at 18. The probate court further found that Jeannie “breached her fiduciary duties as Trustee and Personal Representative by failing to carry out her father’s clear intent about the farming operation,” and used that finding to remove Jeannie Kile as Trustee and Personal Representative. CP at 210, 216-17. That finding also served as a basis to award attorney fees and costs totaling \$178,602.40. CP at 231.

Jeannie quickly moved the court to stay execution of judgment and for reconsideration, arguing, among other things, that (1) the court erred by considering extrinsic evidence to contradict the unambiguous provision of a will; (2) any benefit received by Jeannie based on allegedly conflicting testimony in the dissolution trial was wiped out on appeal when her dissolution decree was reversed. CP 265-69, 290. Both motions were denied by the probate court. CP at 413-16.

This appeal followed by way of Notice of Discretionary Review. CP at 417. However, while the appealability of this case was being determined, the court moved forward with the damages issue that had been reserved. The judgment entered on May 21, 2015, appointed Renee Gardinetti, CPA, to review certain records related to the farm to determine damages. CP at 229-30. A hearing was held on December 7, 2015.

Expert testimony was heard from Ms. Gardinetti, Todd Carlson, CPA, and Allen Hatley, a farm manager and consultant. 6<sup>3</sup> RP at 2. On January 22, 2016, the court entered an order on damages, awarding Cody \$340,928 based on Jeannie's failure to pay Cody two-thirds of the income from the farm, her failure to pay him a stipend for occupying the farm house, and for the costs of Ms. Grandinetti's damages analysis. CP at 724. A second notice of appeal was filed. The two cases were consolidated by this Court.

#### IV. ARGUMENT

##### A. The Probate court Erred by Considering Extrinsic Evidence to Contradict the Plain Terms of the Will

Interpretation of a will or trust instrument is a question of law subject to de novo review. *In re Washington Builders Ben. Trust*, 173 Wn. App. 34, 75, 293 P.3d 1206 (2013) (citing *In re Estate of Curry*, 98 Wn. App. 107, 112-13, 988 P.2d 505 (1999)). That includes the determination of whether a will is ambiguous. *Woodard v. Gramlow*, 123 Wn. App. 522, 95 P.3d 1244, 1246 (2004).

“In construing a will, the court must ascertain the testator's intent from the four corners of the document.” *Id.* (citing *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985)). “A court may admit extrinsic

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<sup>3</sup>Appellant will refer to the Report of Proceedings for the December 7, 2015, hearing as the “sixth” volume to disambiguate it from the previous five covering the trial and summary judgment proceedings.

evidence to explain the language of the will *only* if it finds that the testator's intent is ambiguous." *Id.* (emphasis added). Allowing a court to resort to extrinsic evidence to "cast doubt upon the meaning of a provision of a will, or to show that it means something different from the ordinary intendment of its words . . . is to permit it to be varied or added to by parol evidence." *In re Estate of France*, 64 Wn.2d 703, 706, 393 P.2d 940 (1964).

The Will unambiguously grants Jeannie Kile, as trustee, the full power to manage the farm, including her choice of operator. Specifically, the Will granted Jeannie the authority "to manage the Farm pursuant to common practices of farming, making arrangements or contracts for appropriate payment to persons responsible for farming activity, including persons related to the Trustee." Ex. P1 at 4; CP at 8. Nothing in the Will directs Jeannie to choose a particular operator. Indeed, Judge Clarke, in granting summary judgment, held explicitly that "the Last Will and Testament unambiguously grants Jeannie Kile, as trustee of the Testamentary Trust therein, the power to manage the farm and to make contracts and arrangements for its operation." CP at 112-113.

The will contains no terms directing Jeannie to choose a particular person to operate the farm or otherwise limiting her discretion in choosing an operator. *See* Ex. P1. In fact, the language of the will confirms that the

choice of operator was left open to Jeannie. For instance, the will empowers Jeannie to arrange payment to “persons responsible for farming activity, including persons related to the Trustee.” Ex. P1 at 4. The use of “including” implies that “persons responsible for farming activity” can also include persons not related to the trustee. With regard to the Respondent specifically, the will provides that “If however, Cody Kendall operates the farm at any time herein, then he shall be entitled to two-thirds of such income and Jeannie Kile shall be entitled to one-third.” *Id.* at 4-5. By conditioning the sentence with “If,” the Will anticipates the possibility that Cody would not operate the farm. Lester could have easily included a term explicitly appointing Cody as operator or limiting Jeannie’s choice of operator. He did not. In short, the Will grants to Jeannie, as trustee, a broad authority to manage the farm and declines to limit her choice of operator.

Despite the complete absence of language in the Will selecting a specific operator, the probate court found that Cody was the intended operator of the farm. CP at 210, 228. In doing so, the court relied on documents extrinsic to the Will. Specifically, the probate court’s finding of fact number eighteen overtly states that it is relying on Lester Kile’s Will “and his sworn Declaration filed in the dissolution action,” to conclude that Cody was the intended operator. CP at 210. To show how

far the probate court went in rewriting the Will, the probate court further concluded that Cody was entitled to possession of the farmhouse and a \$500 per month stipend, despite the fact that the Will never mentions the farmhouse or a stipend. *See* P1.

The probate court's Findings of Fact and Conclusions of Law do not identify an ambiguity warranting resort to extrinsic evidence. *See* CP at 204-220. In fact, the probate court's oral ruling makes plain that the court found no ambiguity. Specifically, the court noted that it did not think the Will "confusing or convoluted at all. It's very clear in my mind." 5 RP at 456. In short, the probate court found no relevant ambiguity yet relied on nontestamentary documents to determine the meaning of the will. Even worse, the probate court's interpretation undermines the unambiguous grant of authority to Jeannie Kile to manage the farm as she sees fit.

Recognizing that no ambiguity has been found to support the probate court's decision, and that the only possible basis of support for the proposition that Cody had the right to be operator of the farm are nontestamentary documents, Cody has repeatedly attempted to press into service an ambiguity that had been found months prior on summary judgment. This is ironic. While the summary judgment order entered by Judge Clarke did find an ambiguity as to what the word "operates" means,

that order is the same order that held that Jeannie Kile unambiguously had the authority to choose an operator. As Judge Clarke stated in his oral ruling:

[W]hat is the common-sense reading of this clause? Is it that I have to drag something in -- and I don't mean that in a bad way -- but bring something in to help clear this up?

I'm going to hold today that I don't; that it's unambiguous. I'm going to hold that the line that says, the trustee shall manage [sic] the farm pursuant to the common practice of the farm, making arrangements for contracts or contracts that are going on, **gives the trustee the authority to run the farm; to place whoever he or she -- because it could be Cody at some point -- wishes to be there and do whatever they direct that person to do; and whatever contract they wish.**

Now, I can appreciate -- and I'm sure you know -- I can appreciate the other side to that; that that somehow is -- that there is more to that statement because of what was occurring back in 2010, 2011 and 2012, that Cody was actually farming the property. But, again, **without something in the will that says the person is to manage subject to Cody operating the farm, if you just read this, you can I think come to an interpretation that is plain on its face without having to go to outside information.**

I'm a little frustrated I suppose, as I have expressed. If I took away all the outside information you gave me, and somebody just handed me this and said, read that, this is who [sic] I would read. **I would read that Jeannie Kile has the ability to manage -- and what the common-sense word means -- and that she has got the ability to place somebody on that farm, or not, or let it go to fallow, or not, or any other way to manage it.**

1 RP at 9-10 (emphasis added). In other words, Cody is attempting to leverage an alleged ambiguity from another part of the will (paragraph

three of section E) to contradict the unambiguous terms of paragraph two of section E of the Will. Accordingly, his argument should be rejected.

B. The Court Erred by Treating Lester Kile's Declaration Filed in the Dissolution Action as a Testamentary Document.

There is another way to view the court's error in referring to Lester's declaration to contradict the will: the court is treating the declaration as a testamentary document. To be enforceable, a will must (1) be in writing; (2) be signed by the testator or at the testator's direction, and (3) be attested by two or more competent witnesses. RCW 11.12.020. Even where evidence is unrebutted as to a testator's wishes regarding the disposition of his or her property, failure to meet the requirements of RCW 11.12.020 precludes enforcement of those wishes.

The recent decision of *Estate of Burton v. Didricksen*, 189 Wn. App. 630, 358 P.3d 1222 (2015), is instructive. Ray Burton died intestate. *Id.* at 632. The record alleged that Mr. Burton was estranged from his family and considered himself without family. *Id.* at 633. At the end of his life, Mr. Burton was cared for by Victor White. *Id.* Mr. Burton trained Mr. White to take over Mr. Burton's business affairs. *Id.* On two occasions, Mr. Burton prepared holographic documents in the hopes of awarding all of his property to Mr. White. *Id.* Each document was signed by Mr. Burton and one other person. *Id.* While the first document was

lost, the second document was before the court and clearly indicated an intent that Mr. White receive all of Mr. Burton's property. *Id.* Despite the fact that it was clear what Mr. Burton's intent was, Mr. Burton's failure to produce a single document signed by two witnesses doomed his attempt. *Id.* at 636-37, 639. Accordingly, Mr. White's nearest relative, a cousin, took his estate under intestacy. *See id.* at 634.

Here, the January 9, 2012, declaration by Lester does not even purport to be a testamentary document nor to express Lester's testamentary intent. Even if it did express a testamentary intent, it is not signed by any witnesses. Accordingly, the probate court's explicit reliance on that document to divine Lester's testamentary intent is error.

C. The Probate court Erred in Applying the Doctrine of Judicial Estoppel

"Judicial Estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Taylor v. Bell*, 185 Wn. App. 270, 281, 340 P.3d 951 (2014) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 113 (2007) (internal quotations omitted) *review denied* 183 Wn.2d 1012 (July 8, 2015)). There are two primary purposes behind the doctrine: preservation of respect for judicial proceedings and avoidance of inconsistency, duplicity, and waste of time.

*Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012) (citing *Arkison*, 160 Wn.2d at 538). “Three ‘core,’ nonexhaustive factors guide a probate court’s determination of whether to apply judicial estoppel: (1) whether the party’s later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.” *Id.* at 282 (citing *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012)). However, “judicial estoppel may be applied only in the event that a litigant’s prior inconsistent position benefited the litigant or was accepted by the court.” *Id.* (citing *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230-31, 108 P.3d 147 (2005)).

A court’s application of the judicial estoppel criteria is subject to de novo review. *Baldwin v. Silver*, 147 Wn. App. 531, 535, 196 P.3d 170 (2008). A lower court’s decision to apply judicial estoppel is reviewed for abuse of discretion. *Cunningham*, 126 Wn. App. at 227.

1. Petitioner’s position before the dissolution court and position before the probate court are consistent and the dissolution court was not misled.

To support application of judicial estoppel, the record must establish that the statements in the prior proceeding are “clearly inconsistent” with the present testimony and that the earlier court was misled. *Haslett v. Planck*, 140 Wn. App. 660, 666, 166 P.3d 866 (2007) (citing *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 113 (2007)). For example, a frequent application of judicial estoppel is to bar debtors who claim bankruptcy and fail to list any pending causes of action as assets and later seek to prosecute those causes of action. *E.g. Bartley-Williams v. Kendall*, 134 Wn. App. 95, 138 P.3d 1103 (2006). Similarly, judicial estoppel applies where a party argues in one case that a contract is invalid and then seeks damages in a different case for breach of the same contract. *Hardgrove v. Bowman*, 10 Wn.2d 136, 138-39, 116 P.2d 336 (1941). No such inconsistency exists in this case.

Jeannie’s position regarding the farm was the same in both the dissolution action and the probate case below: Jeannie put forward that she was the operator of the farm while Cody did the day-to-day labor on the farm, and she further put forward that Cody should take over any work that had historically been performed by Gordon on the farm. However, she never asserted that Cody had the right to operate the farm under the Will.

The January 9, 2012, declaration of Lester is explicit in its focus on removing Gordon. The declaration threatens to “terminate the lease unless Mr. Gordon is removed from performing any further farming operations on my ground.” Ex. P31 at 2. The declaration proposes replacing Gordon with Cody and states that Cody has already been doing much of Gordon’s work. *Id.* Note that Lester’s declaration never proposes replacing Jeannie with Cody. *See* Ex. P31. In fact, the declaration states unambiguously that any new lease would be signed to Jeannie. Ex. P31 at 2.

Jeannie’s reply declaration dated July 5, 2012, further confirms that Cody had already taken over many of the duties of his father and that further transition away from Gordon was “seamless” as of July 2012. Ex. P32 at 2.

Jeannie’s testimony in the dissolution action further confirms that she is the operator of the farm and Cody is an employee. For instance, Jeannie testified before the dissolution court on September 17, 2012, that she managed the farm and that if she chose not to have Cody as an operator, she would take the entire income from the farm. Ex. R223 at 93. She noted that “[i]f Cody becomes the operator, he would get two-thirds – two-thirds and I would get one third.” *Id.* Jeannie further explained to the dissolution court that Cody was farming the ground at the time of trial. Ex. R223 at 93-94. She informed the court that Cody was paid for his

work and received free rent, utilities, insurance on his vehicles, and food. Ex. R223 at 252. She clarified that while Cody was doing farm work on the land, she was the operator of the farm. Ex. R223 at 255. Specifically, she stated “right now I am the operator,” and that she was “the operator of the farm as far as the government is concerned.” Ex. R223 at 255, 266. In short, Jeannie’s testimony in the dissolution action was the same as her testimony before the probate court.

Neither of the declarations relied upon by Respondent purport to be testamentary documents or otherwise express Lester’s testamentary intent. For instance, Lester’s January 9, 2012, declaration in no way references who is to inherit the farm. *See* Ex. P31. Indeed, it would be strange for Lester to express his testamentary intent in a document specifically targeted at Jeannie’s dissolution.

While Jeannie’s July 5, 2012, declaration quotes from the Will, Jeannie does not assert that the Will designates that Cody operate the farm. Instead, she is asserting her father’s wishes, which were the same as six months prior when Lester expressed them as his living intent. Indeed, at the dissolution trial, Jeannie did talk about the Will and made clear that Cody would only receive two-thirds income “if” Cody farmed, but that if she chose not to have Cody farm, then Jeannie would receive all of it. Specifically, Jeannie testified as follows:

Q. All right. And is it your understanding that the 1200 acres is now in trust?

A. Yes.

Q. And you are both the trustee and the manager of that farm?

A. Yes.

Q. Okay. And relative to the income from that operation, if you don't use Cody, you get it all?

A. (Moved head up and down.)

Q. Is that right?

A. The trust, yes.

Q. The farm income from the trust?

A. Mm-hm.

Q. But if you use Cody, then you're effectively treated as a landlord and he's the farmer and he gets two-thirds and you get a third; is that correct?

A. Yeah. If Cody becomes the operator, he would get two-thirds – two-thirds and I would get one-third.

Ex. 223 at 93.

Respondent and the probate court ignored the above testimony and ignored the fact that nothing in the declarations provided to the dissolution court expressed a testamentary intent. Accordingly, the positions before the dissolution court and the probate court below were consistent. The probate court erred by applying the doctrine because to apply judicial

estoppel, positions must not only be inconsistent but “clearly inconsistent.” *Haslett v. Planck*, 140 Wn. App. at 666. Additionally, because the court was relying on pleadings—declarations in a prior proceeding—there is no reason to pay deference to the court’s decision, and review should be de novo. *See Baldwin v. Silver*, 147 Wn. App. at 535.

2. Jeannie Kile Did Not Benefit From Her Allegedly Inconsistent Testimony About the Trust in the Dissolution Proceeding

“Judicial estoppel may be applied only in the event that a litigant’s prior inconsistent position benefited the litigant or was accepted by the court.” *Taylor*, 185 Wn. App. at 282 (citing to cases from all three divisions). The probate court entered no finding that Jeannie’s dissolution testimony was accepted by the dissolution court. *See CP* at 204-225. Indeed, the record is devoid of any evidence that the dissolution court even believed that Cody was entitled to operate the farm under the Will.

The probate court did find that Jeannie was benefitted by her testimony. *CP* at 216. However, the probate court’s finding is conclusory and offers no clue as to how Jeannie was allegedly benefitted. *See CP* at 204-225. A review of the dissolution court’s findings of fact and conclusions of law reveal no benefit or reliance by the dissolution court. *See Ex. P35*. Indeed, the findings are consistent with Jeannie’s testimony

to the court below. The following findings were entered by the dissolution court:

1. Ms. Kile was listed as the operator of the farm with the federal regulating office, ASCS. There are no other findings that even reference an operator. Ex. P35 § 2.21(5); *See* Ex. P35.
2. “Mr. Lester Kile intended that his daughter alone would have the sole benefit of the leases on the farm ground. Mr. Lester Kile intended that his daughter alone would have the sole benefit of the lease/option on the farm equipment” Ex. P35 § 2.21(7).
3. “Mr. Lester Kile, who died prior to trial, provided in his Last Will and Testament that Ms. Kile would have the right to manage his farmland after his death. This evidenced his intent that the farmland stay in the Kile family and be passed on for generations, as it has been historically.” Ex. P35 § 2.21(8).
4. “In addition to the Flood ground, Ms. Kile has inherited an interest in her father’s farm ground, which is held in trust . . . “  
Ex. P35 § 2.21(19).

The following conclusions of law are also consistent with Jeannie’s position in the present action:

1. “The farm leases between Lester Kile and Kile Farms, Inc., as lessor, and Ms. Jeannie Kile, as lessee, are her separate property.” Ex. P35 § 3.8(1).
2. “The equipment leases, with option to purchase, between Lester Kile, as lessor, and Ms. Jeannie Kile, as lessee, as well as the equipment purchased pursuant to this contract, are Ms. Kile’s separate property.” Ex. P35 § 3.8(2).
3. “The farm revenue in the farm account, after paying to [Gordon] Kendall a reasonable wage, was Ms. Kile’s separate property.” Ex. P35 § 3.8(3).
4. “Any interest held by Ms. Jeannie Kile in the estate of Lester Kile and the trust established by Mr. Lester Kile, is Ms. Kile’s separate property.” Ex. P35 § 3.8(9).

In short, the findings and conclusions consistently support the position that Jeannie was the lessee of the farm, the operator of the farm, the beneficiary of her father’s will, the intended manager of the farm, and that income from the farm was hers. Nothing in the findings and conclusions even hints that the court considered anyone other than Jeannie Kile as entitled to operate the farm under the Will. Not only do the findings and conclusions fail to evidence that the dissolution court accepted as true that Cody was entitled to operate the farm under the Will,

but none of the findings or conclusions even mention Cody at all. The only mention of Cody comes in the attached “Exhibit A” under “LIABILITIES.” That sole mention confirms that Jeannie is still liable as a guarantor of Cody’s student loans. Ex. P35 Ex. A at 3. In short, the dissolution court was not under the impression that the Will provided Cody with the right to farm the farm or its income, nor did the court benefit Jeannie based on that misapprehension. Therefore, the court in this case erred by applying judicial estoppel.

If that were not enough, even if one were to assume for the sake of argument that there was some benefit conferred upon Jeannie or acceptance by the dissolution court, that benefit or acceptance was wiped out on appeal. Where the benefit or acceptance supporting a finding of judicial estoppel is reversed on appeal, judicial estoppel does not apply. *See Northwest Cascade, Inc. v. Unique Const., Inc.*, 187 Wn. App. 685, 701 n.9, 351 P.3d 172 (2015) (Party arguing that corporate veil could not be pierced at trial, where veil issue was reversed on appeal, were not barred by judicial estoppel from arguing on remand that veil could be pierced.) Here, the decree entered in the dissolution case was reversed by this court, and the matter was remanded to the probate court. *In re Marriage of Kile and Kendall*, 186 Wn. App. 864, 347 P.3d 894 (2015).

Accordingly, even had there been acceptance or benefit, it would have been nullified by the reversal and remand.

D. The Probate court's Removal of Jeannie Kile as Personal Representative of the Estate of Lester J. Kile is Not Supported by Valid Grounds

Removal of a personal representative of an estate is governed by RCW 11.28.250. "A superior court must have valid grounds for removal and [the] grounds must be supported in the record." *In re Estate of Jones*, 152 Wn.2d 1, 10, 93 P.3d 147 (2004) (citing *In re Estate of Beard*, 60 Wn.2d 127, 132, 372 P.2d 530 (1962)). If one of the grounds provided by the court is valid, then the removal should stand. *Beard*, 60 Wn.2d at 134-35. Where the findings do not support the removal of a personal representative, the removal is arbitrary and improper. *Jones*, 152 Wn.2d at 8 (citing *In re Estate of Coates*, 55 Wn.2d 250, 259-60, 347 P.2d 875 (1959)).

The probate court offers no findings of fraud, waste, embezzlement, mismanagement, or neglect to support removal of Jeannie as personal representative. RCW 11.28.250. Instead, the probate court removed Jeannie based on the fact that she did not turn over the farming operation to Cody and did not pay Cody two-thirds of the crop share from the farm. *See* CP at 210, 216. Specifically, findings of fact eighteen, nineteen, and twenty, when read in concert with conclusion of law six—

the only provision providing a justification for Jeannie's removal— establish that the court's basis was an alleged breach of fiduciary obligation by Jeannie's failure to appoint Cody as operator and pay him two-thirds of the trust income. *See* CP at 210, 216.

As previously discussed, the Will unambiguously granted Jeannie the authority to choose the farm's operator. Additionally, the Will provided that Cody would only receive two-thirds income if Jeannie installed him as operator. As that had not happened, there was no breach of any duty to Cody. Accordingly, the Court's basis for removing Jeannie as personal representative is invalid. Therefore, the probate court erred and Jeannie's removal should be reversed. Upon reinstatement, Jeannie should have her choice of counsel to represent the estate.

E. The Probate court's Removal of Jeannie Kile as Trustee of the Kile Farm Trust is Not Supported by Reasonable Cause

A trial court has discretion to remove a trustee upon the petition of a beneficiary when there is "reasonable cause." *In re Estate of Ehlers*, 80 Wn. App. 751, 761, 911 P.2d 1017 (1996). "Reasonable cause has generally been construed as requiring a breach of fiduciary duty, a conflict of interest, or bad will generated by litigation." *Bartlett v. Betlach*, 136 Wn. App. 8, 20, 146 P.3d 1235 (2007). "The petitioning beneficiary must, however, demonstrate that removal is clearly necessary to save the trust

property.” *Ehlers*, 80 Wn. App. at 761. The decision to remove a trustee is reviewed for abuse of discretion. *Id.*

As with the probate court’s removal of Jeannie as Personal Representative, the probate court’s conclusion that Jeannie breached a fiduciary obligation relies on the probate court’s flawed premise that Cody had a right to operate the farm and concomitantly receive two-thirds of the trust income. Again, because that conclusion is an incorrect reading of the Will, there was no duty for Jeannie to breach.

As to bad will, there is no evidence of bad will on Jeannie’s part. As explained below in Appellant’s challenge to finding of fact number sixteen, Jeannie’s criticisms of Cody are supported by the record as true statements. The fact that Jeannie has communicated true bases for removing Cody from employment cannot justify a finding of bad will. Furthermore, every case that has applied the bad will standard in Washington has limited the bad will determination to “bad will generated by litigation.” *Ehlers*, 80 Wn. App. at 761; *Waits v. Hamlin*, 55 Wn. App. 193, 199, 776 P.2d 1003 (1989); *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 716, 732 P.2d 974 (1987). Here, litigation did not begin until after Cody’s employment was terminated. *Compare* CP at 467-71 *with* Ex. P12. To the degree that the Court wishes to entertain bad will as a reason for removal, placing Cody as trustee does nothing to

ameliorate a breakdown in the parties' relationship. Jeannie is still a beneficiary under the Will. Ex. P1 at 5. Indeed, Cody is the party who has sent messages evidencing actual animus. Ex. R213. Accordingly, bad will cannot serve as a basis to favor Cody over Jeannie.

Finally, removal will only be upheld when removal is clearly necessary to save trust property. *Ehlers*, 80 Wn. App. at 761. No such showing was made to support Jeannie's removal. Accordingly, the court erred and abused its discretion when it removed Jeannie as trustee.

F. The Probate court's Award of Attorney Fees and Costs Against Jeannie Kile Personally is Not Supported by a Breach of Fiduciary Obligation

RCW 11.96A.150 allows for an award of fees for actions brought pursuant to TEDRA. The probate court explicitly couched its fee award as the result of a breach of fiduciary duty. CP at 218. Again, the only breach of fiduciary obligation found by the probate court was Jeannie's refusal to appoint Cody as the operator of the farm and concomitantly pay him two-thirds of the trust income. *See* CP at 210-11. As established above, the Will requires no such thing. Accordingly, there is no breach of fiduciary obligation on Jeannie's part and the award should be vacated. In light of the fact that the award has already been executed upon, the Court should enter judgment in favor of Jeannie for the return of the funds.

G. The Damages Entered by the Probate court are Not Supported by Substantial Evidence

The damages entered in the probate court's January 22, 2016, order follow exactly the opinion of Renee Grandinetti, CPA. The bulk of those damages—\$310,150—are for two-thirds of the farm income from 2012 – 2014. Ex. P81. An additional \$29,500 in damages is the combined damages allegedly attributed to Jeannie Kile's eviction of Cody from the farm house—\$12,000 from rent allegedly paid by Cody from the time he was evicted until the time he retook possession and \$17,500 for Jeannie's failure to pay the \$500 stipend to Cody. The remaining damages are for legal fees Jeannie is to reimburse to the estate, trust, and Kile Farms, Inc. pursuant to the court's may 21, 2015, judgment. In short, each measure of damages flows directly from the Court's ruling that Cody was entitled to occupy the farmhouse and entitled to the income of the farm. Given that those conclusions were made in error as outlined above, there should be no award of damages in this case.

Even if there were a basis for damages, Ms. Gardinetti's calculations are based on a flawed understanding of the farming arrangement that Lester Kile had while he was alive and that was continued by Jeannie Kile after his death. As a result of these flaws, Ms.

Gardinetti's opinion, which the court adopted wholeheartedly, is not supported by substantial evidence in the record.

First, it is important to remember that when Lester Kile was alive, he personally owned approximately 375 acres of farmland, and Kile Farms, Inc., of which he was the sole shareholder, owned the remaining approximately 870 or so acres. 3 RP at 292-93, 6 RP at 101. The land Lester owned personally was leased under a cash lease to Kile Farms, Inc. 3 RP at 292-93. In exchange, Lester personally received \$25,000 each year from Kile Farms, Inc. 3 RP at 293. As a result of this arrangement, Kile Farms, Inc. had all of the land—both owned and leased from Lester—available for its disposal. Jeannie entered into a lease with Kile Farms, Inc. on a standard two-thirds, one-third crop share. 3 RP at 292. After Lester's death, the \$25,000 went into estate. 3 RP at 294.

Ms. Grandinetti did not understand this arrangement because she thought farm leases were either cash leases or crop share leases but not both. CP at 643. Accordingly, she deducted the \$25,000 from expenses, which increased the damages by \$50,000.

Ms. Grandinetti's second error was even bigger. Stated at its simplest, Ms. Grandinetti failed to account for farm costs, including for the cost of such basic items as seeds and chemicals. Again, this failure betrays a misunderstanding of the tenancy relationship.

Under a two-thirds, one-third crop share arrangement, costs for things like seeding, chemicals, and fertilizer may be shared. 3 RP at 252-54. The operator, who takes two-thirds, is also responsible for labor costs, fuel, equipment, maintenance, etc . . . . 3 RP at 253-54. During 2012 and 2013, under the arrangement both when Lester was alive and after he died, Jeannie was the two-thirds leaseholder / operator. 3 RP at 293. 6 RP at 103-04. Accordingly, Jeannie had to pay the lion's share of the costs for operating the farm. Ms. Grandinetti's report and opinion never takes into account the costs borne by Jeannie as operator. *See* Ex. P81.

As described by both Allen Hatley and Todd Carlson, Ms. Grandinetti's report only accounted for partial costs reflected on Kile Farms, Inc.'s and the Trust/Estate Tax returns. Ms. Grandinetti did not account for costs reflected on Jeannie's personal tax returns, which contain her operating costs for the farm. 6 RP at 104-105, 121-22, 135-36. While one cannot farm without seeds, Ms. Grandinetti's analysis contains no costs for seeds. 6 RP at 122. While equipment cannot operate without fuel, Ms. Grandinetti's analysis contains no costs for fuel. 6 RP at 105. Similarly, Ms. Grandinetti's analysis fails to account for repairs, taxes, insurance, and depreciation on equipment. 6 RP at 105. Had Cody operated the farm during that time, he would have had to pay all of those costs. He did not because Jeannie did.

Mr. Hatley's and Mr. Carlson's analyses parroted Ms. Grandinetti's but adjusted for the cash rent lease expense and the farm expenses born by Jeannie. They both came to similar numbers as evidenced by their reports. Exs. R227, R228. In short, after expenses, Mr. Hatley calculates that Cody was owed \$66,738 as his share of the farm income, not \$310,150. However, that is not the end of the story.

After judgment was entered on May 21, 2015, the bank accounts associated with the trust, estate, and Kile Farms, Inc. were closed and the balances transferred to Cody Kendall. Ex. R224. The total balance of the funds in these accounts, which were the proceeds from earlier crop sales, were \$89,273.31. *Id.* Cody now has those funds. *Id.* Accordingly, Cody is net positive \$22,535.31 based on the 2012 to 2014 crop proceeds.

Additionally, proceeds from the sale of crops in 2015 have yet to be accounted for. *Id.* Even under the probate court's flawed interpretation of the Will, Jeannie Kile is entitled to one-third of the crop proceeds after expenses. CP at 230. Current records indicate that 2015 proceeds have been sold for \$94,076 and a further 15,832 bushels of wheat—approximately \$100,000—await sale. Ex. R224. The probate court took none of these issues into account in approving Ms. Grandinetti's calculations. *See* CP at 723-24. Accordingly, the probate court's order of damages is not supported by substantial evidence in the record.

H. Finding of Fact Number Ten is Not Supported By Substantial Evidence

Challenged findings of fact are reviewed for substantial supporting evidence, which is evidence sufficient to persuade a rational, fair-minded person of the factual finding. *In re Estate of Knowles*, 135 Wn. App. 351, 356, 143 P.3d 864 (2006). The probate court's finding contains quotation marks around the word "employment," implying that Cody was not employed by Jeannie. CP at 208. The record is uncontested that Cody received a wage from Jeannie. 2 RP at 63, 83. It is similarly uncontested that Cody received W2's through 2012. Ex. P39. To the degree the finding is implying that Cody was no an employee, it is not supported by substantial evidence.

I. Finding of Fact Number Twelve is Not Supported By Substantial Evidence

Finding of Fact Twelve provides that no rent was paid by the new tenants in the farm hours. However, Jeannie Kile testified that rent had been paid from Tiffany Billigmeier for being allowed to stay in the farm house. 2 RP at 121-22. This testimony is uncontroverted. It is important to note that Tiffany Billigmeier never testified in this action. Instead, her daughter, Kendra Hartman Billigmeier testified about an encounter involving Cody. 3 RP at 283-87. While Kendra Billigmeier lives at the farmhouse, she testified that she is an un-emancipated minor who lives

with her mother, brother, and older sister. 3 RP at 287. She testified that she herself did not pay rent or a deposit and had no knowledge of such things. 3 RP at 288. Accordingly, this finding is not supported by substantial evidence.

J. Finding of Fact Number Thirteen is Not Supported By Substantial Evidence

Finding of Fact Thirteen provides that Jeannie received all of the proceeds from the farm. However, at the time the May 21, 2015, judgment was entered, \$89,273.31 of the proceeds remained in accounts that were transferred to Cody. Ex. R224. Accordingly, this finding is not based on substantial evidence in the record.

K. Finding of Fact Number Fourteen is Not Supported By Substantial Evidence

Finding of Fact Fourteen provides that Jeannie possesses at least eighteen bank accounts containing funds from the trust or estate and that she has commingled funds. There is no evidence in the record to support a tracing analysis to establish that funds in at least eighteen accounts came from the Estate of Lester J. Kile or the Kile Farm Trust. Nothing in the record identifies the source of all funds in the various accounts identified.

Furthermore, there is absolutely no evidence of commingling of funds. Indeed, Petitioner's financial expert, Brian Madison admitted that he had no knowledge of any comingling. 3 RP at 233. Mr. Madison had

not reviewed Jeannie's personal bank accounts. 3 RP at 224. Indeed, Mr. Madison had simply reviewed tax returns. 3 RP at 224. Mr. Madison could only identify one irregular transaction, where \$76,000 had been placed in the wrong account. 3 RP at 239. However, that one mistake was corrected even before Mr. Madison had discovered it. 3 RP 313, 4 RP at 4-5. A discreet, one-time mistake that was quickly remedied is hardly comingling. Accordingly, this finding of fact is not supported by substantial evidence.

L. Finding of Fact Number Fifteen is Not Supported By Substantial Evidence

Finding of fact number fifteen proposes that "it is impossible to determine the amount of revenue and expenses of the Kile Testamentary Farm Trust farm properties." CP at 210. However, that finding directly contradicts the probate court's damages order, where it purports to establish damages based on revenue minus expenses for the trust farm properties. CP at 724; P81. Indeed, as shown in the damages section above, no less than three experts were able to opine as to the revenue and expenses of the farm properties. If this is true, then there is no basis to award damages.

M. Finding of Fact Number Sixteen is Not Supported By Substantial Evidence

Finding of Fact Sixteen provides that Jeannie “has consistently expressed nothing but ill will toward her son.” However, the record is consistent that Jeannie has presented a guarded optimism towards her son who has repeatedly engaged in destructive behavior. While it is true that in explaining why Cody was eventually removed from the farm and farm house, Jeannie described Cody’s (1) history of drug abuse 4 RP at 34-36, (2) history of theft from Jeannie, 2 RP at 148, 158, 5 RP at 37; (3) use of Jeannie’s credit card for personal items, 2 RP at 156-57; (4) use of the farm bank account to transfer money to himself, 2 RP at 188; and (5) destruction of the farm house, 2 RP at 154, the simple fact of the matter is that all of the events relayed by Jeannie are uncontested in the record.

Cody has admitted to his substance abuse problems. 2 RP at 57-58. Cody has never contested his theft in the record. While he denied being a drug dealer or that his substance abuse effected his job performance, 2 RP at 58, the record is devoid of any testimony denying taking money from his mother. Indeed, Cody admitted to transferring funds from the farm account to his personal account. 2 RP at 90-91. The record is devoid of any denial that he used the business credit card for personal purchases or that he left the farm house in disrepair, with dog feces on the carpet and garbage strewn about.

“Ill will” is the same thing as animus. BLACK’S LAW DICTIONARY (10<sup>th</sup> ed. 2014), animus. In other words, the court’s finding necessitates that Jeannie’s words were born of animosity. However, as is plain from the record, the statements are all true. And even with Jeannie’s ample basis for loss of trust in her son, Jeannie still wanted him to farm after Lester’s death and told him in August of 2012 that she was excited that he was on the farm and thought he was doing a good job at the time. 2 RP at 158. That statement alone renders the probate court’s finding literally untrue.

N. Finding of Fact Number Seventeen is Not Supported By Substantial Evidence and is Contrary to Law

Finding of Fact Seventeen is incorrect because Jeannie had a lease to her father’s farmland. The evidence in the record shows that Jeannie entered into two leases with Lester in 1988. Exs. P19, R208. Each year Jeannie remained in possession of the land sixty-days past the expiration of the previous lease term, she acquired a leasehold for another year. RCW 59.12.035. While Lester did provide a notice of termination in January of 2012, the record is consistent that Jeannie retained possession for more than sixty days after the expiration of the lease on January 15, 2012. Lester did not pass until March 30, 2012, CP at 205, so he was alive during her holdover. Accordingly, Jeannie retained another yearly lease.

Additionally, Lester expressed that the lease to Jeannie would be renewed should Gordon be replaced by Cody on the farm. Ex. P31 at 2. When that occurred, the lease term was renewed as an act of acceptance by performance. *See generally Knight v. Seattle First Nat. Bank*, 22 Wn. App. 493, 589 P.2d 1279 (1979). Finally, taken altogether, the conduct of the parties expresses an agreement to renew the lease term for a further year, given that Jeannie was never evicted by Lester and continued to operate the farm until she engaged Mr. Ken Kile to lease the farm property. *See Conlan v. Spokane Hardware Co.*, 117 Wash. 378 (1921).

O. Finding of Fact Number Eighteen is Not Supported by Substantial Evidence and is Contrary to Law.

Finding of Fact Eighteen is an interpretation of Lester's testamentary intent. Interpretation of a will or trust instrument is a question of law subject to de novo review. *Washington Builders*, 173 Wn. App. at 75. Accordingly, interpretation of a will is not a factual issue appropriate for a factual finding. For the reasons identified above, the Will unambiguously grants Jeannie the right manage the farm and choose an operator. Furthermore, to the degree this factual finding relates solely to the declaration of Lester Kile, the declaration fails to speak in testamentary terms or meet the testamentary formalities. *See Ex. P31*. Finally, as a declaration is the source of this factual finding, this Court

stands in the same position as the probate court in reviewing it and should pay no deference to the probate court's decision.

P. Finding of Fact Number Nineteen is Not Supported By Substantial Evidence and is Contrary to Law

Finding of Fact Nineteen identifies alleged fiduciary duties owed by Jeannie. "The existence of a duty is a question of law." *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998). Accordingly, it is not appropriate subject matter for a finding of fact. Furthermore, Cody Kendall is not a beneficiary under the Will. He is neither a devisee nor legatee under the Will as no personal or real property is given to him. *See* Ex. P1. He is not an heir. RCW 11.02.005(6).

Q. Finding of Fact Number Twenty is Not Supported By Substantial Evidence

As with the preceding challenge to a finding of fact, this finding contains a legal conclusion. Accordingly, it should not serve as a basis for a finding. Furthermore, as described at the beginning of the argument section, there is no requirement that Jeannie choose Cody to farm the farm; accordingly, there is no breach. Additionally, as described in Appellant's challenge to Finding of Fact Sixteen, there is no evidence to establish animus on Jeannie Kile's behalf because her accusations are uncontroverted in the record.

R. To the Extent that Conclusion of Law Number Six Makes Factual Claims, Those Claims Are Not Supported By Substantial Evidence

As described above, Jeannie's testimony before the dissolution court is consistent with her testimony before the probate court below. Accordingly, to the degree that this conclusion of law is acting as a finding of fact, it is without basis.

S. Finding of Fact Number Two is Not Supported By Substantial Evidence

Successor trustees and personal representatives are defined by statute. To the degree there is any distinction to be drawn between an alternate and successor trustee/personal representative, the Will plainly provides that Cody is a successor trustee/personal representative. Ex. P1 at 5, 8-9.

T. Finding of Fact Number Eight is Not Supported By Substantial Evidence

Finding of Fact Eight purports to quote portions of the Will. However, there are several differences in punctuation, including missing parenthesis at the end of the first quoted paragraph, several added commas, and several missing commas. *Compare* CP at 208 *with* Ex. P1 at 4-5. To the degree any of these distinctions become meaningful, the actual punctuation of the Will should control.

U. This Court Should Award Reasonable Attorney Fees and Costs for Having had to Defend this Petition and Bring this Appeal

RAP 18.1 allows for awards of fees and costs where allowed otherwise by substantive law. Fees are available here pursuant to RCW 11.96A.150. Appellant requests fees and costs for having had to defend these claims and bring this appeal.

V. CONCLUSION

Appellant respectfully asks this court to reverse the probate court, hold that the Will unambiguously grants Jeannie Kile the right to manage the farm property, appoint whomever she wishes as operator of the farm, and allow whomever she wishes to occupy the farm house without the requirement that any stipend be paid. Further, this court should hold that judicial estoppel is not applicable in this case. This court should reinstate Ms. Kile as Personal Representative of the Estate of Lester J. Kile and Trustee of the Kile Farm Trust. Further, this Court should vacate the judgments entered May 21, 2015, and January 22, 2016, including the awards of damages and attorney fees and order the return of all funds already paid, transferred, garnished, or otherwise executed upon. Finally, this court should award a reasonable attorney fees and costs pursuant to RCW 11.96A.150 and RAP 18.1.

June 16, 2016.

Respectfully submitted,



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