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NO. 63734-7

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

In re Estate of RODGER W. BENSON, JR, Deceased,

RODGER W. BENSON, III,

Appellant,

v.

JOAN BENSON,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Petitioner Rodger W. Benson III (“Rodger the Son”¹) is the eldest of decedent Rodger Benson, Jr.’s (“Rodger the Dad”) four children, and his namesake. Respondent Joan Benson is Rodger the Dad’s third wife. Joan Benson and Rodger the Dad had no children together. At the time of Rodger the Dad’s death, April 26 2007, Joan Benson and Rodger the Dad had been separated for over 20 years, according to Rodger the Dad’s Response in Dissolution proceedings in King County Cause No 06-3-08704-0 KNT. Exhibit 2, page 2.

On March 7, 1997, Rodger the Son left an 18 year career with Turner Construction on two weeks notice to start a mineral stock investment business with his father called Benson Ventures. CP 1067, 1072. Exhibit 90. Over the next ten years, until 2007, the year of Rodger the Dad’s death, Rodger the Son and Rodger the Dad worked at this common venture. At the time of Rodger the Dad’s death, the Benson Ventures securities portfolio of mineral stocks was valued at \$2.4 million and at \$2,413,999.60 on September 30, 2007. Joan Benson produced a 1977 Will and filed that Will for probate. The 1977 Will named Joan Benson as the beneficiary. She claimed that the

¹ This matter relates to the estate of Decedent Rodger Wells Benson, Jr. Petitioner is Rodger Wells Benson III. In trial, for ease of reference, Rodger, Jr. was referred to as “Rodger the Dad” and Rodger III was referred to as “Rodger the Son.” For ease of reference that convention is continued in this brief. Benson family members are referenced by their first names as a matter of convenience and no disrespect is intended by this informality.

entire Benson Ventures portfolio of mineral stocks was an asset of the Estate. Rodger the Son filed a Contradiction of Inventory Claim under RCW 11.44.035 claiming that he owned an interest in the partnership assets by reason of investing \$160,000 and working for ten years with his father to build up the portfolio.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to find by a preponderance of the evidence that Rodger the Dad and Rodger the Son formed a partnership called Benson Ventures in 1997 for the purpose of investing in gold mining stocks. Petitioner finds error with the trial court's Findings of Fact ("FF") Nos. 13, 15, 39, and 40, as well as the trial court's Conclusions of Law ("CL") Nos. 5, 6, 7, 8, and 13. (For the Court's convenience a copy of the trial court's Findings of Fact And Conclusions of Law at Trial are included as Addendum A.)

2. The trial court erred by sustaining 43 of the Estate's objections as violative of the Dead Man's Statute.

a. The trial court prohibited or limited fundamental questions by conflating the foundational question with the purpose of the lawsuit (see questions in Addendum B).

b. The court prohibited testimony given by a witness as to his or her own acts, by expanding the holding in *Lennon v. Estate of Lennon*

to prohibit testimony of any personal acts of a witness if Rodger the Dad was or could have been present at the time (see questions on Addendum C).

c. The trial court erred when it prohibited testimony of benign acts with the Rodger the Dad based upon an expansive interpretation of “transaction with the decedent”.

3. The trial court erred when it sustained Hearsay objections by the Personal Representative.

a. The witness statements that Rodger the Dad and Rodger the Son stated their intent to go into business. Their plan to go into business was an admissible exception under ER 803(a)(3).

b. To statements by Rodger the Dad that they were equal partners despite investing money on a 5/6 to 1 ratio as being a statement against pecuniary interests, an exception under ER 804(b)(3).

4. The trial court erred when it refused to admit certain exhibits.

a. Exhibit 8

b. Exhibit 202

5. The trial court erred when it curtailed testimony as violative of the Dead Man’s Statute.

a. It was error to curtail testimony regarding photographs taken by the witness; admitted as an exhibit; in an erroneous expansion of *Wildman v. Taylor*.

b. It was error to curtail testimony by Rodger the Son or his wife if they ever used the words “Benson Ventures”.

c. It was error to curtail testimony by Rodger the Son of any question “designed to get at a partnership with the deceased”.

6. The trial court erred when it found that the Rodger the Dad’s estate consisted only of community property when such a determination does not resolve any rights of the parties before the Court. Petitioner finds error with the trial court’s Conclusions of Law Nos. 14-19 to the extent that such conclusions constitute an advisory opinion.

7. The trial court erred when it found that “none of decedent’s assets were traced to separate (non-community) assets or funds. (FF No. 7 and related FF No. 21 that the Court would have been call upon to make equitable distribution of (separate) assets.)

8. The trial court erred when it found (in related FF Nos. 22, 27, 29, and 35) that:

a. “Decedent never said they were partners” and “petitioner did not have unilateral power of investment” (FF No. 22);

b. “Petitioner was never authorized to change title to any of decedent’s securities accounts” and “decedent made it clear to Mr. Decker that the ownership was to stay the same and show only decedent’s name and not petitioner’s name nor ‘Benson Ventures’.” (FF No. 27)

c. “Petitioner did not establish that he deposited any funds into the joint account or that he made any contributions to the alleged partnership.” (FF No. 29); and

d. “None of these witnesses had specific knowledge regarding decedent’s investments”. (FF No. 35.)

III. STATEMENT OF FACTS

1. Joan Benson is Rodger the Dad’s third wife. They were married in 1972. CP 83. In 1986, Rodger the Dad moved out of their common residence. Id. They never lived together after that and both were happy with that arrangement. CP 84, 236. 241. They lived separate lives after 1986. Joan Benson had no idea of Rodger the Dad’s financial assets; they were not involved in each other’s financial affairs; they did not provide each other financial support; neither made a gift of cash to each other; there were no mutual debts; Joan Benson was not named as a beneficiary on Rodger the Dad’s bank or brokerage accounts. CP 92, 113-115, 122-123, 180, 1024. Even though they filed joint tax returns, Rodger the Dad handled the taxes and never showed them to Joan Benson or had her sign any tax returns except one time when she demanded that she sign the tax return. Rodger the Dad was not entirely truthful with Joan Benson and even deceived her into signing a quit claim deed. CP 91, 180, 1023. Rodger the Dad was someone who did what he wanted. CP 874. Joan Benson never knew of the

existence of the partnership that Rodger the Dad had formed with Rodger the Son called Benson Ventures before Rodger the Dad's death because Rodger the Dad never told her about Benson Ventures. CP 176, 179.

2. Rodger the Dad passed away unexpectedly from a bike accident on April 26, 2007.

3. Rodger the Son asserts that he and Rodger the Dad were in a partnership commencing in 1997 and lasting until Rodger the Dad's death in April 2007.

4. In the early part of March 1997, Rodger the Son, his wife Karla and Rodger the Dad met in Rodger the Son's kitchen. CP 242.

Although Rodger the Son could not testify to the contents of the meeting due to the Dead Man's Statute, evidence was entered that Rodger the Son and his wife called a family meeting for their three children shortly after the meeting between Rodger the Son, Karla and Rodger the Dad. 245-52, 278-81, 965-966, 983-984, 1001. According to Rodger the Son's children, Jennifer Benson and Ryan Benson, who were 16 and 13 respectively at the time, they understood that their father was leaving his work at Turner to go work with his father, Rodger the Dad. The latter part was not admitted for the truth of the matter, but merely for the understanding of the children, however, the Turner resignation letter, Exhibit 90, confirmed it. Jennifer was concerned about how the family would manage her college expenses, and Ryan was

concerned, as a typical 13 year old might be, that the change would mean that they would no longer have the type of family vacations he was accustomed to.

They were both concerned the family would need to sell their house and move. The children and both their parents testified that such a family meeting had never been called before and, after that one occasion, had never been called again.

5. Within days of the meeting, Rodger the Son resigned from his 18 year career with Turner Construction to work with Rodger the Dad. CP 227, 1055. Rodger the Son was the second highest level executive in the Seattle office of Turner Construction. CP 236. At the time Rodger the Son had joined Turner, Turner's Seattle office was only 5 employees. CP 1046. When Rodger the Son resigned from Turner the Seattle office employed over 160 employees. CP 1046. At the time of Rodger the Son's resignation, Rodger the Son had numerous benefits including a 401k with matching contributions, an unlimited expense account, a new company car every three years, and health insurance for his family. CP 242, 257, 1050-52. All of which benefits Rodger the Son would not have while he worked with his father, Rodger the Dad.

6. Both Jennifer and Ryan testified that following Rodger the Son's resignation from Turner, Rodger the Son's schedule changed as well as the frequency of visits by their grandfather, Rodger the Dad. CP 968, 985-86.

Rodger the Son would go work with Rodger the Dad at Rodger the Dad's condominium. Rodger the Son left a little earlier from home and returned from Rodger the Dad's condominium a little earlier than when he had worked at Turner. Rodger the Dad would come to their home with greater frequency both during the week and on the weekend to work with Rodger the Son in the basement office. CP 967. Rodger the Son's children testified that when Rodger the Son and Rodger the Dad were together they invariably spoke about mining, and mineral resource securities. Rodger the Son developed a pattern, regardless of whether Rodger the Dad was present, to go to his home office in his basement in the evening to do research on the computer and to make telephone calls for about 2 to 3 hours. CP 972, 974, 988, 994-95. Rodger the Son's children would visit him daily in his home office, and due to the size of the office was able to hear and to observe what Rodger the Son was doing. Both Rodger the Son's children testified that they observed Rodger the Son doing research on mining and stocks, and talk to individuals on the phone regarding mining and stocks. The children also overheard conversations where Rodger the Son and Rodger the Dad would be on the phone to third parties, and Rodger the Son and Rodger the Dad mentioned Benson Ventures and referred to each other as "partners". CP 975. Although Rodger the Son returned to work with Mortenson Construction in 1998, Rodger the Son's evening schedule remained the same. Although each of the

children lived in the family home off-and-on from 1997 through 2007, they lived there for significant periods of time and testified that Rodger the Son's evening schedule did not change, nor did the focus of his research or the discussions with Rodger the Dad.

7. The children also testified that each of them had separate discussions with Rodger the Dad regarding their specific concerns as it related to Rodger the Son, their father, leaving his work at Turner. CP 976, 984. In those circumstances, Rodger the Dad assured them that neither had to worry about the future and that their father was working with him, Rodger the Dad. CP 977, 998.

8. The existence of Benson Ventures and Rodger the Son and Rodger the Dad's mutual involvement in Benson Ventures is established by documents which include business cards (Exhibit 4), checks, and, bank statements that bear the names of "Benson Ventures" "Rodger W. Benson Jr., dba" and "Rodger W. Benson III dba". The Benson Ventures checking account was with U.S. Bank. The checking account was opened in 1997. A checkbook register for the Benson Ventures account (Exhibit 29) show that from May 1997 through July 1997, checks are recorded, some in Rodger the Dad's handwriting and others in Rodger the Son's handwriting. Copies of checks show that Rodger the Son signed checks. The checkbook register indicates that checks were issued to both Rodger the Dad and Rodger the

Son. The checks to Rodger the Son and Rodger the Dad are not written on any regular interval and are for various amounts. The checkbook register indicates that certain checks are written as “draw[s]” and others are written for expenses. The checkbook register also records checks directed to mineral related publications such as “Northern Miner,” “Fagan Report,” and “Gold Stock Report.” CP 1120-21. The checkbook register also records four checks written to “Wedbush.” See Exhibit 29 check stubs 114, 115, 140, and 141. Of the 397 distinct notations in the check stubs for checks 101 through 172 the parties identified 238 in the father’s handwriting while 159 are in the son’s handwriting. The Estate has concurred in identifying the handwriting of Rodger the Son, who wrote draws to himself in the register totaling \$45,000. Exhibit 29, see stubs no101, 103, 108, 113, 117,148, 149, 1154, 160, 170, and 171.

9. Further documentary evidence supports the existence of Benson Ventures. Such documentary evidence includes a form business expense report (Exhibit 6), a form equity log page (Exhibit 9), a letterhead for Benson Ventures (Exhibit 80) and documents entitled “Benson Ventures Stock Transactions” (Exhibit 89), “Benson Ventures Chart Watch” (Exhibit 95), “Benson Ventures Portfolio Stock Values” (Exhibit 96), and “Benson Ventures Portfolio Value” (Exhibit 99), and numerous documents and two

computer accounts named “BENVEN” and “BV American” and “BV Canadian” (Exhibit 48).

10. Benson Ventures focused on research, analysis and investment in the mineral industry, primarily mineral securities (stocks). CP 284-85. The above documents confirm the nature of Benson Ventures business as many of the documents contain information regarding mineral securities. Other documents also confirm that Benson Ventures was focused on mineral securities. These documents include: a binder labeled “Benson Ventures” that contained sheets labeled “Portfolio Activity” and listed the names of companies that focused on the mineral industry as well as research materials on various mineral companies (Exhibit 46) ; trade magazines for the mineral industry that were addressed to Benson Ventures (Exhibit 103); correspondence to Brian Decker (Exhibit 90), a stock broker, that contained instructions for trades related to mineral securities. CP 356.

11. Rodger the Dad gave Brian Decker a written authorization that Rodger the Son could transact trades in the mineral securities account with Wedbush Securities. CP 768-71. The Wedbush Securities account containing the mineral securities was opened in August 1997. The written authorization did not contain any limitations with respect to the authority given to Rodger the Son to conduct trades. CP 820-30. The written authorization to conduct trades was never revoked. CP 775-78.

12. Although Mr. Decker was Rodger the Dad's stock broker, Mr. Decker did not assist Rodger the Dad or Rodger the Son in selecting which mineral securities to purchase or sell. Mr. Decker testified that the mineral securities field was a highly specialized field in which he was not knowledgeable. CP 765. Both Rodgers conducted the research on the fundamentals of the company, which included the companies prospects, management and financial information. CP 1215-16. Mr. Decker assisted both Rodgers on the technical analysis, at what price to purchase or sell the mineral securities selected by father and son. CP 794-95.

In 1997 and 1998, Mr. Decker received trade orders from Rodger the Son through phone calls, emails and facsimiles. CP 768, 784. Mr. Decker performed the trades in Rodger the Dad's mineral securities account as directed by Rodger the Son. Rodger the Son sent one correspondence to Mr. Decker with instructions related to trades and that letter stated: "The following outlines **our** near term strategy for **our** portfolio." Exhibit 81, (emphasis added). Mr. Decker stated that he understood "our portfolio" to refer to the mineral securities portfolio of Rodger the Dad and that a list of stocks on the letter reflected the mineral securities portfolio. CP 789. The letter also identified "stocks we want to own" and "stocks we may want to own." CP 789, Exhibit 81. Mr. Decker testified that he understood "we" to refer to Rodger the Dad and Rodger the Son.

13. Mr. Decker testified that Rodger the Dad stated that Benson Ventures was the name that he and Rodger the Son had given to the “time they spent together,” the latter being the manner in which Mr. Decker described Rodger the Dad and Rodger the Son’s association in Benson Ventures. CP 784, 788-89. However, this testimony is not in accord with the fact that Rodger the Dad identified his business as “self//Benson Ventures” on a brokerage account application. Exhibit 78. Mr. Decker testified that he filled out the form for Mr. Benson and that designation for “Type of Business” identified as “Inv. RE [investment Real Estate] was incorrect. CP 863-64. Benson Ventures traded in minerals and mineral companies. Benson Ventures had never been involved in real estate investment. CP 863. Also, Mr. Decker testified that he received several trade orders over the facsimile from Rodger the Son on letterhead for Benson Ventures. Mr. Decker’s broker was sent checks from Benson Ventures US Bank account that bore all three names “Benson Ventures//Rodger W. Benson II dba//Rodger W. Benson Jr., dba.” Mr. Decker understood that Rodger the Son had left his job to work with Rodger the Dad, and testified that he did not understand that the time Rodger the Son and Rodger the Dad would be working together was limited in duration. Mr. Decker’s characterization or recollection of a conversation ten years ago that Rodger the Son and Rodger the Dad were simply spending time together is inconsistent with the circumstances under

which Rodger the Son began his work with Rodger the Dad, and contradicted by the testimony of other witnesses. (See also Section G(2) below).

14. By mid-1998, the mineral securities market had experienced a significant downturn. CP 1234-37. Wedbush Securities records from August 1998 through July 1998, show a net influx of capital into the account. Four of the deposits made into the Wedbush account correspond in amount, and are contemporaneous to the checks written from the Benson Ventures U.S. Bank checking account. On whole, a greater dollar value of securities were bought than were sold. Despite this, the mineral securities portfolio decreased from approximately \$360,000 to approximately \$110,000 in that time period.

15. Up to and into July 1998, Rodger the Son worked full time for Benson Ventures. CP 1213-14. In July 1998, Rodger the Son began work at Mortenson Construction. Despite Rodger the Son's return to a salaried position in the construction field he continued his work with Rodger the Dad in the evenings and on the weekends. CP 972-95, 1237-38. Rodger the Son continued to do work related to Benson Ventures until the time of Rodger the Dad's death in April 2007. CP 1266-68, Exhibit 91, 1274, 1296.

16. The activities of Rodger the Son on behalf of Benson Ventures included research, analysis, maintaining and updating the stock portfolio information for Benson Ventures into computer accounts, directing trades in

Rodger the Dad's mineral securities account, traveling to conventions regarding the mineral industry, meeting with company executives and other individuals related to the mining industry, personally visiting mining sites, and physically staking a mining claim on Federal Bureau land for Benson Ventures. The bulk of Rodger the Son's travel occurred during the years 1997 and 1998, however, Rodger the Son did not stop traveling entirely after 1998. Rodger the Son dedicated more than 40 hours a week during the time period from March 1997 to July 1998 to work related to Benson Ventures. Following July 1998, Rodger the Son continued to work on Benson Ventures an average of two to three hours every day until the time of Rodger the Dad's death in April 2007. CP 274-75, 277-78.

17. Rodger the Dad and Rodger the Son had varying degrees of participation and involvement with Benson Ventures from 1997 to 2007. CP 265-66.

18. Joan Benson alleged that if a partnership existed it ended in July 1998, when Rodger the Son returned to work. No evidence was submitted to dispute the work done by Rodger the Son between 1997 and Rodger the Dad's date of death. No evidence was submitted that Rodger the Son ceased his work with Rodger the Dad after 1998.

19. A number of third party witnesses testified that they talked to Rodger the Dad and Rodger the Dad discussed with them during various

times from 1997 through 2007, Rodger the Dad's partnership with Rodger the Son. These witnesses include Wright Benson and Anthony Benson, who are the brothers of Rodger the Dad. Both had a close relationship with Rodger the Dad talking and visiting with him frequently during the relevant time period. CP 451-53. Wright testified that Rodger the Dad spoke frequently with him about the work that Rodger the Dad was doing with Rodger the Son and that Rodger the Dad stated that he and Rodger the Son were in a partnership or partners. CP 465, 470, 478, 480-81. Wright also accompanied Rodger the Son and Rodger the Dad to at least one convention on mining. He testified that both Rodger the Son and Rodger the Dad were active in meeting with other individuals at the conference. CP 461.

20. Similar testimony was provided by Anthony Benson. Anthony accompanied Rodger the Dad on numerous trips related to research of the mining industry. CP 533-36. On at least a few of these trips, Rodger the Son also accompanied them and the topic of conversation largely revolved around the mining industry and stocks. CP 545-46. Anthony also testified that he frequently stopped by Rodger the Dad's condominium during 1997 and 1998 when Rodger the Son was working with Rodger the Dad in Rodger the Dad's condominium. CP 572. Anthony testified that both Rodger the Son and Rodger the Dad conducted research and both were able to talk intelligently about mineral securities. CP 512-15. Anthony was also able to identify a

print out of a Yahoo! web page which listed numerous mineral securities as being similar to one of the computer screens that he looked at with Rodger the Son and Rodger the Dad. The Yahoo! web page print out contained the term “BENVEN”, which Anthony testified referred to Benson Ventures. CP 552 – 553.

21. Carolyn Barclay, Rodger the Dad’s second wife, also testified to her discussions with Rodger the Dad regarding his partnership with Rodger the Son. CP 403. Mrs. Barclay testified to a dinner attended by both Rodger the Son and Rodger the Dad and other members of the Benson extended family for the graduation of Stacey Rae Benson, the daughter of Rodger the Dad and Mrs. Barclay. This dinner occurred in 1997 shortly after Rodger the Son’s resignation from Turner Construction. During the dinner, Rodger the Son talked about his plans to work with his father. Following that dinner, Mrs. Barclay met with Rodger the Dad on numerous occasions until 2004. During that time period, Rodger the Dad frequently discussed his work with Rodger the Son, referred to each other as partners, and also gave Mrs. Barclay a Benson Ventures business card on numerous occasions. CP. 427, 433, 445, Exhibit 93, CP 422.

22. Other evidence also indicates that Benson Ventures continued its operations until the time of Rodger the Dad’s death. Several witnesses testified that up until the time of Rodger the Dad’s death, Rodger the Dad

answered his phone “Benson Ventures” and Rodger the Dad’s answering machine contained a message greeting incoming calls by informing the caller that the caller had reached Benson Ventures. CP 417, 453, 791. The recording was in the voice of Rodger the Son. Rodger the Dad continued to receive mining related publications addressed to Benson Ventures. Around the time of Rodger the Dad’s death, Rodger the Dad was mailed the May 2007 issue of ResourceWorld magazine. The addressee of the magazine is “Rodger Benson Benson//Benson Ventures.” CP 1347, Exhibit 103.

23. Apart from testifying to his activities, Rodger the Son testified extensively regarding his knowledge of mineral securities and mineral companies. Please see CP 1134-35, 1137-41, 1179-80, 1215-21, 1300. Based on his level of knowledge, and Mr. Decker’s testimony that the mineral industry is a highly specialized field, Rodger the Son demonstrated more than a casual understanding and knowledge of mineral securities and mineral companies.

24. Brian Decker was the only witness presented by Respondent to show that no partnership existed. The testimony of Mr. Decker was that sometime in 1997, Rodger the Son had stated to him that Rodger the Son had some financial stake in Rodger the Dad’s mineral securities portfolio. CP 785. Mr. Decker testified that following this conversation with Rodger the Son he asked Rodger the Dad whether he needed to change the ownership

designation of Rodger the Dad's mineral securities account. Rodger the Dad testified that the ownership information should stay the same and show only Rodger the Dad's name. CP 785-87, 789. In the conversation between Rodger the Dad and Mr. Decker on how Rodger the Dad's account should be titled, there was no mention at all of Benson Ventures. CP 862. However, Mr. Decker never asked the Rodger the Dad whether Rodger the Son had any money invested in Benson Ventures. CP 862, 866. The testimony of Mr. Decker raises no reasonable inferences regarding whether or not a partnership existed. Mr. Decker testified that he and Rodger the Dad never explicitly discussed whether Benson Ventures was a partnership. CP 829 Although Mr. Decker testified that he understood that Rodger the Son was no longer involved in Benson Ventures after 1998, this is speculation based on Mr. Decker's understanding that Rodger the Son had gone to work at Mortenson. CP 779, 866-67. Mr. Decker testified that he never discussed with Rodger the Dad following 1998 whether or not Rodger the Son was still working with Rodger the Dad. CP 866-67.

25. Account statements were admitted for the Wedbush Securities account and Charles Schwab account dated August 1997 through July 2007. In July 2007, Rodger the Dad's Charles Schwab account was transferred into a new account in the name of the Estate of Rodger W. Benson. From August 1997 until Rodger the Dad's death, there were contributions into the Rodger

the Dad's mineral securities account in the amount of \$1,722,997.65. During that same period there were withdrawals totaling \$816,952.09. The net contribution to the mineral securities was \$906,045.56. At month's end in April 2007, the month of Rodger the Dad's death, the mineral securities portfolio was worth \$2,377,698.34.

26. The mineral securities identified in documents labeled "Benson Ventures" largely correspond to the mineral securities owned by Rodger the Dad in the securities account held with Wedbush Securities. Differences were experienced by timing of trades and changes in stock names.

27. They maintained a number of files in a home office from which Benson Ventures operated. A file labeled "Stocks – Data" contained a number of handwritten lists of stocks, and other notations in both of their handwriting. Exhibit 49A. The file also contained a number of print outs from a Yahoo! account. The print outs contain the name "BENVEN" and below that a list of stocks. The stocks named on the handwritten lists of stocks and the Yahoo! account print outs largely match the stocks named on the Wedbush and Charles Schwab statements for the corresponding month. The Yahoo! print outs are from various days from 2002 to 2005. CP 311.

28. Michael Gillespie, Rodger the Son's expert witness, testified that the Charles Schwab account did not have any further contributions or

withdrawals following the date of Rodger the Dad's death until October 2007. Because there was activity in October 2007, unrelated to the partnership, Mr. Gillespie used the September 30, 2007, as the last clear value of the Benson Ventures' mineral securities portfolio. CP 880-81. This is appropriate given that by month end of September 2007, all mineral securities had been sold and the account reduced to cash. On September 30, 2007, the value of the Benson Ventures' mineral securities portfolio was \$2,413,999.60, which was rounded up to \$2,414,000. CP 880. Mr. Gillespie subtracted from that amount the net contributions, which were credited entirely to Rodger the Dad, to determine the profit made by Benson Ventures. Subtracting \$906,046, Mr. Gillespie determined that the profit to Benson Ventures was \$1,507,954. CP 1259. Mr. Gillespie made an additional credit transfer for the benefit of Rodger the Dad for capital gains taxes Rodger the Dad had paid for the sales of shares from 1997 to 2007. Mr. Gillespie calculated the amount of taxes as \$59,000. CP 885-86. The partnership profits after all adjustments is \$1,448,954 as of September 30, 2007. Based on the finding that Rodger the Dad and Rodger the Son were the two partners in Benson Ventures, Rodger the Son's share of the partnership profits is \$724,477. CP 1259. Mr. Gillespie's testimony was un rebutted.

29. Further evidence was submitted that Rodger the Son had made financial contributions to Benson Ventures. The amounts of financial

contributions made to Benson Ventures were \$102,000, \$41,000 and \$15,000. CP 258-61, 272-73, 351, Exhibits 12, 183. This evidence was not disputed and the testimony of Anthony Benson and Wright Benson related that Rodger the Dad acknowledged Rodger the Son had made financial contributions to Benson Ventures.

30. Joan Benson presented evidence that: (a) Benson Ventures was not registered with the State of Washington or the Office of the Secretary of State; (b) the Benson Ventures' mineral securities portfolio was held in a brokerage account in the name of Rodger the Dad; (c) no tax returns were filed for Benson Ventures; (d) and that Rodger the Dad reported all gain and loss from the Benson Ventures' mineral securities portfolio in his own tax returns.

IV. ARGUMENT

A. **The Trial Court's Finding That There Was Not A Partnership Between Rodger the Son And Rodger The Dad Is Not Supported By The Preponderance Of The Evidence**

In reviewing a trial court's determination as to whether a partnership existed, the Court of Appeals will not set aside the trial court's finding unless it finds that the trial court's finding is contrary to the preponderance of the evidence. *Curley Electric, Inc. v. Bills*, 130 Wn. App. 114, 121, 121 P.3d 106 (2005) citing *Minder v. Gurley*, 37 Wn.2d 123, 131, 222 P.2d 185 (1950).

The trial court held that Rodger the Dad's Wedbush Morgan and

Charles Schwab accounts were held individually and not as a partner. FF Nos. 13 and 15. See CL No. 8. This finding is in error and unsupported by the preponderance of the evidence. The trial court further found that that was no agreement to co-own securities. FF No. 39. To the extent that this finding of fact indicates that Rodger the Dad did not contribute his mineral securities holding to be managed by Benson Ventures, this too is in error. See CL No. 7. The trial court found that evidence indicated that the Rodgers did not have an agreement to share profit or losses. FF No. 40. This finding was in error because such finding is not indicative of a partnership. There must only be an agreement to form a partnership for profit. In the absence of an express agreement, statute governs the sharing of profit and loss.

The trial court held as a conclusion of law that a contract of partnership is essential to the creation of a partnership relation. CL No. 5. This is in error to the extent that the trial court meant a written contract. To the extent that the trial court concluded that Rodger the Son and Rodger the Dad did not have the intent to form a partnership and to share control of that partnership, the trial court is in error. The preponderance of the evidence indicates that Rodger the Son and Rodger the Dad intended to form a partnership. See CL No. 6, finding that the preponderance of evidence did not support the existence of a partnership. The trial court also found that the evidence preponderates that Rodger the Son ceased to be associated in the

carrying on of the alleged partnership in 1998. CL No. 13. The only fact upon which the trial court could have based this conclusion of law is that Rodger the Son returned to a salaried position in 1998. However, no evidence was submitted that Rodger the Son ceased his work with Benson Ventures and with mineral securities. All the evidence shows that Rodger the Son continued his work and involvement with Rodger the Dad in Benson Ventures.

B. Joan Benson Only Offered The Testimony Of One Witness, Brian Decker, That There Was No Partnership, But Mr. Decker Provided Testimony Regarding The Existence Of A Partnership

The only witness for the Estate was broker Brian Decker, who at the time of trial was handling the multimillion dollar estate investments controlled by Joan Benson as Personal Representative of the Estate. CP 820. Joan Benson's argument that there was no partnership relies solely on the testimony of Mr. Decker, who characterized Rodger the Son and Rodger the Dad's work together merely as "spending time together." CP 784, 788-89. But his observations belie his attempt to characterize father and son as just "spending time together".

Mr. Decker testified that the efforts that father and son were doing together was called "Benson Ventures". CP 782, 863. Mr. Decker testified that father and son worked together in accumulating mining stocks in the father's condo. He saw them working together at the condo . CP 787-88. He

knew that Rodger the Son was working at the condo/office even when his dad traveled on a mineral securities business. CP 795-96, 816, 861.

Although Mr. Decker repeatedly tried to downplay Rodger the Son's expertise by comparing him unfavorably with Rodger the Dad (CP 795, 815, 826), Mr. Decker finally acknowledged that the son was also knowledgeable about the industry (an area in which Mr. Decker a trained money manager was not knowledgeable) (CP 829) and about computers.

He testified that when Rodger the Dad was away at mining conferences and Mr. Decker would call dad's condo/office, that Rodger the Son would answer the telephone at the condo/office by saying "Benson Ventures". CP 791. The greeting "Benson Ventures" was on the answering machine until Rodger the Dad died. CP 791.

Mr. Decker was in possession of documents that showed the existence of Benson Ventures as a business enterprise. Mr. Decker also received a letter on Benson Ventures letterhead, which indicated an actual business venture unless Rodger the Son and Rodger the Dad were merely playing a part in a elaborate game of make-believe. Mr. Decker also received checks with "Benson Venture" and the names "Rodger W. Benson III dba" and "Rodger W. Benson, Jr. dba." The checks indicated that both Rodger the Son and Rodger the Dad were affiliated with Benson Ventures. In this regard, even Mr. Decker had to testify, as well as every other witness with knowledge

of Benson Ventures, that the business father and son were doing was Benson Ventures. CP 863.

Mr. Decker acknowledged that Rodger the Dad never said that Benson Ventures was what he called their “spending time together” – Rodger the Dad never used those words. CP 789. In fact, it was a phrase developed by the Estate attorneys with Mr. Decker in preparing for his deposition. CP 788-89 827, 860.

Rodger the Dad authorized orally and in writing Rodger the Son to buy and sell on his own authority in the mining stock portfolio. CP769-70. Rodger the Son had control over the assets of Benson Ventures. Rodger the Son traded in the account. CP 783, 784. His trading authority was unrestricted in time or amount. CP 829-30, 880. His authority to trade was never technically revoked. CP 784.

At a time when there was no dispute, Rodger the Son also told broker Mr. Decker that he “had some ownership or vested interest in the stocks that were being bought...” CP 786. Rodger the Son never used “skin in the game” although that was how Mr. Decker styled it. CP 785.

Rodger the Son wrote a complex letter of instruction to Mr. Decker telling him about 28 stocks in “our portfolio” and “We would be interested in your technical evaluation of these situations and advice...” and further in the exhibit refers to “stocks we want to own (Near Term on Weakness) and later

“stocks we may want to own later in the spring (WATCH)”. Exhibit 81 (emphasis added). Four times in the letter Rodger the Son indicates a mutuality of ownership. The recommendations in Exhibit 81 from Rodger the Son shows his familiarity and knowledge of mining securities. The technical discussion tells Mr. Decker that the seventeen stocks in “our portfolio” were going to be:

9 stocks	“Hold”
3 stocks	“Sell on strength (Near Term)”
2 stocks	“Sell one-half on strength (Near Term)”
1 stock	“Buy more on weakness (Near Term)”
1 stock	“Sell on Takeover (Spring 1998?)”
1 stock	“Sell on Court decision/JV/Takeover (maybe pleased)”

Seven (7) more stocks were to be purchased in the near term (“on weakness”) while four (4) others might be purchased “in the Spring”.

These are not the comments of a dilettante “spending time” with his father. They are sophisticated investment decisions in an arcane area of investing. It is more consistent with a partner with “skin in the game” than a son dropping by for coffee and chat with dear old dad. (See below).

Mr. Decker claims to have been close to Rodger the Dad, but the two never got together socially. The two got together only to discuss investments. Mr. Decker testified that he asked Rodger the Dad if the securities in Rodger the Dad’s portfolio needed to be put in a different name and Rodger the Dad stated that it was all his money. First, this statement by Rodger the Dad is a

statement of fact and is not a legal conclusion of the ownership of the stocks as it relates to a partnership. Second, while Rodger the Dad was an affable man, he did not let people know his business any more than they needed and would often mislead them. CP 84 (Rodger the Dad did what he wanted), 91 (he was not always truthful), 180 (deceived Joan Benson into signing a quit claim deed). Rodger the Dad never let Joan Benson see their joint tax returns and signed them on her behalf. Rodger the Dad used the losses on the mineral securities to obtain a tax deduction. It would not have served Rodger the Dad to have the ownership of the stocks changed. Rodger the Dad's dismissive response was intended to keep Mr. Decker out of his business. Third, the actual title of partnership property does not alter that some property is used for partnership purposes.

Yet this singular comment to Mr. Decker that all the money in the stock portfolio was Rodger the Dad's does not stand against the weight of evidence that Rodger the Dad and Rodger the Son were in a partnership. (See Section IV.C.2.)

The Estate's only theory about the nature of Benson Ventures was that it was what father and son called their "spending time together" as counsel admitted in closing. CP 1489. This is what is offered as an alternate explanation to the existence of a partnership.

The phrase implies a dilettantes' interest in the mining industry while

chatting over coffee or chardonnay. Apart from testifying to his activities, Rodger the Son testified extensively regarding his knowledge of mineral securities and mineral companies. Based on his level of knowledge, and Mr. Decker's testimony that the mineral industry is a highly specialized field, Rodger the Son demonstrated more than a casual understanding and knowledge of mineral securities and mineral companies. Please see his testimony at CP 1137-42; 1215-24; 1234-38; and 1274-77.

Against the two bits of testimony provided by Mr. Decker, that, one, Rodger the Dad and Rodger the Son were merely "spending time together" and, two, that Rodger the Dad stated all the money in the mineral stock portfolio was his, Rodger the Son presented numerous documentary evidence and the testimony of five other individuals, including Rodger the Dad's ex-wife, that Rodger the Dad stated to each of them that he was in a partnership with Rodger the Son.

Mr. Decker never talked to the decedent to determine if he was in a partnership with his son. CP 866. He never asked either Rodger the Dad or Rodger the Son whether Rodger the Son had contributed to the assets in the mineral securities account. CP 862, 863. He never asked Rodger the Dad if his son still worked with him after 1998. CP 818, 865, 866, 867.

Given all the documents and his interactions with Rodger the Dad and Rodger the Son, it is disingenuous to call Benson Ventures merely the name

given for the time they were spending together. Significantly, Rodger the Dad's account application, filled out by Mr. Decker himself shows Rodger the Dad's "Firm or Employer" as "Self//Benson Ventures." Exhibit 78. The firm address and telephone number is identified as being the same as Rodger the Dad's home address and telephone number. And the businesses of Benson Ventures, as Mr. Decker understood it, was in minerals and mineral securities. CP 863. All this would have led Mr. Decker or any reasonable person to understand that Rodger the Son and Rodger the Dad were in a mutual venture together called Benson Ventures, especially because Mr. Decker conducted the trades based on oral and written direction from both Rodger the Son and Rodger the Dad.

Joan Benson argued at trial that there was no partnership because of what did not exist. Benson Ventures did not issue K-1 forms to the partners, obtain a business license, or register a partnership with the Washington Secretary of State. Michael Gillespie CPA testified, however, that in his experience family partnerships are often less formal than when third parties are involved, CP 912-13. The lack of reporting must be considered as part of the totality of circumstances but is by no means dispositive and can be given little if any weight. See *Gleason v. Metropolitan Mortgage Co.*, 15 Wn. App. 481, 495, 551 P.2d 147 (1976) (trial court attached little significance to the

fact that parties personally reported no partnership income as such and no tax return was filed for the venture).

C. Overwhelming Evidence Showed That A Partnership Existed

1. The key to whether a partnership was formed is the parties intent; Rodger the Son and Rodger the Dad intended and did form a partnership.

In a case involving a disputed partnership between the parties, courts rely on the classic test of determining whether the parties intended a partnership to be formed. *Cruickshank v. Lich*, 158 Wn. 523, 531, 291 P. 485 (1930) (partnership is formed when the parties intend there to be partnership).

As with any contract, the intent of the parties is paramount. In deciding whether a partnership existed no single factor is dispositive. The intention of the parties is determined from the totality of the facts and circumstances.

In *Nicholson v. Kilbury*, 83 Wash. 196, 145 P. 189, 191 [1915], this court stated: 'There is no arbitrary rule by which it may be determined whether a partnership relation existed in a given instance or not. The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture, but is in the main inconsistent with any other theory. *Bridgman v. Winsness*, 34 Utah 383, 98 P. 186. It is well settled

that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill, and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established.’

Minder v. Gurley, 37 Wn.2d at 129-30 (emphasis added).²

The Supreme Court has long recognized that assets in a partnership may be titled 100% in the name of partner “A” but that equitable title might be owned by “A” and partner “B”. In *Lawrence v. Halvorson*, 41 Wn. 534, 83 P. 889 (1906) the land was purchased in the name of Halvorson while Lawrence, a “contractor and builder in the City of Seattle” (*Id.* at 535). would grade the property and erect a building – which agreement was oral. Halvorson, “expressed herself as well satisfied with the work; that on January 5, 1905 [Halvorson] took possession of the building and lot claiming absolute title and ownership therein...” *Id.* at 536. The Court sitting in equity affirmed the partnership.

A partnership with a decedent who had formed an oral contract between a girl and her dead aunt, was upheld in *Nicholson v. Kilbury*, 83 Wn. 196, 195, 145 P. 189 (1915). Circumstantial evidence proved that the girl

² For purposes of determining the rights of the parties, Rodger the Dad and Rodger the Son, whether the court determines that the two were engaged in a partnership or a joint venture amounts to the same finding. *Refrigeration Engineering Co. v. McKay*, 4 Wn. App. 963, 973, 486 P.2d 304 (1971). The essential elements of a joint venture are: (1) a contract, (2) a common purpose, (3) a community of interest, and (4) an equal right to a voice accompanied by an equal right of control. *Id.* The relationship of a joint venture may be

worked in various enterprises, all of which was in her aunt's name. *Id* at 189.

The trial court found no partnership, primarily because the assets were titled to the dead aunt. The Supreme Court stated:

“In view of all of the evidence in this case we give little weight to the fact that the business was conducted in the name of the aunt ... Whatever their relative interest in the business it seems only natural that it should be conducted in the name of the aunt. Since the aunt at all times admitted the partnership relationship, it is not strange that the business was continued in her name.”

Id. at 204 (emphasis added).

Just so, the ex-wife Caroline Barclay testified that Rodger the Dad referred to his son and Benson Ventures as his partner and partnership in every conversation between 1997 and 2004. CP 425. The testimony of Rodger the Dad referencing the partnership occurred in thousands of conversations with his brothers Wright and Anthony. See Section IV.G.2. When Rodger the Dad opened the mining securities account he indicated that his employer was “self//Benson Ventures” implying that he was taking title on behalf of the partnership. Exhibit 78. RCW 25.05.065(1)(b) (property is partnership property when acquired in the name of one partner on the instrument transferring title (the account application) indicates the name of the partnership.

continued . . .

inferred from the facts of a case and the contract may either be express or implied. *Id.*

Likewise, assets in the name of one party are partnership assets if acquired with partnership assets. RCW 25.05.065(3) (if purchased with partnership assets). See Exhibit 29, check stubs totaling \$61,315 (stubs 114, 115, 140, and 141) whereby the Benson Ventures checking account transferred money to the Wedbush mineral securities account. Money went the other way also, see Exhibit 36, 0546, requesting a \$10,000 transfer from the mineral securities account into the Benson Ventures checking account, which was written on “Benson Ventures” stationary. Compare account numbers on checking statement Exhibit 5 with account transfer letter Exhibit 36, 0546 (No. 422-7001-379). The titling of all the mineral stocks as partnership assets in the Rodger the Dad’s office; the office file, the Benson Ventures binder is seen explicitly in the “Benson Ventures Stock Portfolio Transactions”. Exhibit 46 (Benson Ventures Binder, specifically 0906, 0907, 0908 listing all of the Wedbush mineral stocks as belonging to “Benson Ventures”).

Without remand, the Supreme Court in *Nicholson* ruled that based upon the record as a whole “we are clear that a partnership was established.” *Id.* The judgment was reversed and remanded to enter a decree in favor of the girl for a one-half interest in the partnership assets. *Id.* at 205. The *Nicholson* court held that all the facts and circumstances indicated the

existence of a partnership, and was inconsistent with any other theory. *Id.* at 202.

The *Nicholson* court cited with approval an Illinois case, *Haug v. Haug*, 193 Ill. 645, 61 N.E. 1053 (1901). While facts were similar in *Haug* and *Nicholson*, and both cases found the existence of a partnership, there was an additional fact in *Haug* that weighed toward the finding of a partnership. The Illinois Supreme Court quoted with approval the appellate court, who stated, “The fact, that the business was conducted in the name of A. Haug & Son, coupled with the fact that Andrew Haug and his son Martin each personally gave his attention to the business, raises a strong presumption that they were copartners in fact; and, while such evidence alone is not conclusive, we are not able to say that it, with other strong evidence produced by appellee tending to establish the fact of a partnership, is overcome by appellant’s witnesses, though more numerous than the witnesses produced by appellee.” *Id.* at 648-49.

Partners can contribute assets, time, effort and knowledge in varying degrees, all from one side or the other, so long as the individuals intend to combine the sum of their contributions to form a business for profit. As the testimony of numerous witnesses show, Rodger the Dad and Rodger the Son brought different resources to Benson Ventures. Witnesses observed Rodger the Son and Rodger the Dad work together, heard Rodger the Dad discuss the

work that he was doing with his son, and most importantly heard from Rodger the Dad that he was in a partnership and was partners with his son.

2. All witness testimony established that Rodger the Son and Rodger the Dad worked together from 1997 to 2007 on mineral investments and nearly all witnesses testified they worked together as partners.

Even Joan Benson, from whom Rodger the Dad was separated for over twenty plus years (Exhibit 2, Divorce Answer, page 2) testified that Rodger the Dad told her that Rodger the Son had quit his job so they could work together in the buying and selling of mineral securities. CP 161, 164-63, 176-77, 181, 1027-28. This news was a surprise and she asked out of concern and curiosity how Rodger the Son would be paid for his work. Joan Benson knew that Rodger the Son couldn't merely leave his career of 18 years to simply "spend time together" with his dad. And as an example of how Rodger the Dad only revealed what he needed to reveal – Joan Benson had no idea how Rodger the Dad would pay Rodger the Son because he led her to believe that he survived on social security. CP 181-83. She did not know about the hundreds of thousands of dollars invested into mineral securities. In fact, Rodger the Dad never even told Joan Benson that "Benson Ventures" existed. CP 179

Yet other people in Rodger the Dad's life, people with whom he felt close and did not feel a concern revealing his work with his son, knew about

Rodger the Dad's partnership with Rodger the Son. Rodger the Dad's 79 year old ex-wife, Carolyn Barclay had a less than amicable divorce from him. CP 404. Yet they were able to develop a close relationship over time and after their grandson's birth. CP 413. Both Rodgers attended a party in Provo, Utah to celebrate the college graduation of Stacey Rae Benson in 1997. Mrs. Barclay described how Rodger the Dad was excited about going into business with his son. CP 413. She testified repeatedly that Rodger the Dad referred to their relationship in Benson Ventures as a "partnership". CP 410, 416, 425, 433, 434, 445. Rodger the Dad used the word "partner" or "partnership" in every conversation with her between 1997 and 2004. CP 425. And in every conversation when he referred to his "partnership" or his "partner", she understood him to be referring to Rodger the Son (CP 433) and no one else but Rodger the Son (CP 434, CP 445). Mrs. Barclay testified that her ex-husband answered his condominium telephone "Benson Ventures" between 2000 and 2004 (CP 417) and that until his death in 2007, his answering machine greeting was also "Benson Ventures" in Rodger the Son's voice. CP 417.

Mrs. Barclay who had no motive to fabricate, said her ex-husband, Rodger the Dad, was excited about going to gold mining conventions with Rodger the Son (CP 413) and gave her his Benson Ventures business card and discussed the gold mining securities business with her in April 2000,

proving that the partnership was continuing.

Rodger the Dad was closest in life to his family, especially his brothers Wright Benson, 76, and Anthony Benson, 52, who testified at trial.

Wright testified that he talked to his brother almost daily between 1997 and 2007 and sometimes two to three times per day (CP 452) (3,000 to 4,000 times); that Rodger the Dad visited him in San Diego two to four times per year during the ten year period, 1997 to 2007 (CP 451) (twenty to forty visits); that he traveled to gold mining conferences with his brother in San Francisco and Las Vegas, by town car (CP 457) and that Rodger the Son was with them in Las Vegas. CP 458. He testified that they discussed gold investments “all the time,” “thousands of hours.” CP 456, 458.

Wright stated twelve times, on the basis of this intense knowledge of his brother’s personal affairs, that Rodger the Dad and Rodger the Son were partners in Benson Ventures and that it was a partnership. CP 463, 465, 466, 470, 477, 479 (six times), 481. Wright said neither father nor son was the boss. CP 427. He testified that the name of the partnership was Benson Ventures (CP 466); that both father and son had their own money invested in Benson Ventures (CP 427) in a 5/6 to 1 ratio (CP 489) and that the partnership continued until his brother died in 2007 (CP 481).

Wright physically saw them working together in the office condo (CP 491) and testified that his brother’s only computer skill was that he could

“bring up the stocks” by turning it on (CP 492) and that Rodger the Son brought the computer skills to the partnership to track the “hundreds of stocks”. CP 427, 493.

Brother Anthony suffered a serious brain injury due to a fall off of a scaffold at Boeing. Daily, his eldest brother, Rodger the Dad, helped Anthony relearn how to eat, dress himself, etc. CP 506-508.

Anthony accompanied Rodger the Dad on numerous driving trips between 1993 and up until one week before his death in Spring 2007. CP 532. They drove so much they went through at least four Lincoln Town Cars belonging to Rodger the Dad. CP 535. Anthony visited the condo/office frequently for two years after 1997 and physically saw Rodger the Son and Rodger the Dad working together. CP 570.

Anthony drove with his brother, Rodger the Dad, to mines in Eastern Washington four to five times; three times to San Diego; and looked at mines in Baja, California. CP 532-533. He was sleeping in his brother’s condo to watch him the night he died. CP 537.

Anthony had his own investment in mineral securities. Anthony got the information he used for his separate gold investments “from Benson Ventures, the Rodgers”. CP 514. He tried to invest in Benson Ventures but was turned down. CP 515. He knew how Benson Ventures was funded and where Rodger the Son got his money to invest. CP 516, 517, 519, 521, 527,

530.

Anthony described a significant conversation with his brother when Rodger the Dad “put him on his butt” following a wise crack Anthony had made when Rodger the Dad told him that Rodger the Dad and Rodger the Son were “equally as rich due to Benson Ventures.” CP 528.

He testified that Rodger the Son answered the telephone in the condo/office “Benson Ventures” (CP 510) and that father and son were in a “full partnership” (CP 511). Anthony later testified that they were in a “partnership” in which neither one was the boss. CP 511, 545-46.

Wright Benson and Anthony Benson had detailed knowledge of decedent’s stocks, having had thousands of hours of conversations about it. CP 458. Both of them followed the Benson Ventures portfolio closely because each of them that over \$140,000 invested in the stocks recommended by “the Rodgers”. CP 489, 514.

Rodger the Dad saw Rodger the Son’s children regularly and was very close to them. Rodger the Son’s daughter Jennifer Benson was 16 years old in 1997. She remembers the family meeting when she learned that her father would be quitting his job at Turner Construction and how it made her anxious. CP 966-67. During that same period, she saw her father and grandfather working together in the condo/office; moving paper and talking about gold stocks. CP 969. She heard their stories about how they would

drive into deserted areas to investigate gold. CP 971.

After her dad began working full time for Mortenson Construction Company, he would work two to two and one-half hours per night in his basement office talking about Benson Ventures and talking to his father, Rodger the Dad. CP 974. She saw her grandfather in the basement office in their home working with her dad four to five times per month. CP 975.

Jennifer heard her father and grandfather on the telephone refer to each other as partners. CP 975. The “gold talk” was so constant that the family learned to tune them out. CP 979. See also Ryan Benson’s description of parallel dinner conversation (CP 993).

Rodger the Son’s son Ryan was helped by Rodger the Dad, Ryan’s grandfather, on his Eagle Scout project during the period in question. CP 992. Ryan also remembers his father in a “partnership” with his grandfather which made him worried about whether the family would be able to vacation at Disneyland again. CP 983-985.

Grandfather Rodger was downstairs in the family’s basement office working with his dad “not every night, but a lot”. CP 986. Young Ryan heard them talking on the telephone while he was watching television in the same basement area – talking about gold stocks, referring to each other as partners as in his example: “...I need to talk to my partner and call you back.” CP 988. He testified that after his dad began working for Mortenson and

before Ryan left for college at Western Washington University (mid 1998 to September 2002) he saw his dad working in the basement during or after dinner looking at stocks and talking on the telephone to his father. CP 993. Ryan also testified that Rodger the Dad came over to their house two to three times per week and once each weekend to work in the basement office with his dad (CP 993).

Everyone (excluding Jennifer and Ryan who were minors at the time) with intimate personal knowledge of Benson Ventures, such as decedent's brothers testified as to Rodger the Son's financial contributions, almost hitting the amount exactly. CP 427, 516, 517, 519, 521, 527, 530. Karla testified that the \$158,000 they took from the 401k and two refinances was not given to charity; to unknown persons; used for vacation or otherwise consumed by the family; and that it was given to a person they knew. CP 258 – 261. Likewise, Mr. Decker admitted that Rodger the Son told him that he had "ownership or vested interest in the stocks that were being bought". CP 786. This statement was made at a time when there was no dispute. Just so Exhibit 81, the letter to Mr. Decker referring to "our" portfolio and stocks that "we" want to own was written at a time of no dispute.

All the witnesses testified that Rodger the Dad and Rodger the Son were in a partnership. Rodger the Son's level of involvement was not merely casual, but was dedicated and extensive. The observations of the witnesses of

the interaction between Rodger the Son and Rodger the Dad showed that they were in a serious venture together – Benson Ventures.

3. Ample documentary evidence supports the existence of a partnership between Rodger the Son and Rodger the Dad called Benson Ventures.

When Rodger the Son quit Turner, he did so “to take a job with my father’s company”. Exhibit 90. When dad opened the Pacific West Securities Account on August 18, 1997 on the application next to employer, he wrote “Self//Benson Ventures”. Exhibit 78. The first time broker Brian Decker recalls seeing the name Benson Ventures was on a fax sent to the brokerage by Rodger the Son. CP 799. When Rodger the Dad talks to his deceased accountant, the accountant writes down “Benson Ventures” in his notes. Exhibit 194, CP 664-68. Rodger the Son and Rodger the Dad wrote checks that bore both their names and “Benson Ventures.” (Exhibit 28: 158 notations by son and 238 notations by dad in Benson Ventures checkbook).

Rodger the Son designed the Benson Ventures stationary and wrote the letter admitted as Exhibit 80, himself. CP 1309. Karla and Rodger designed the business cards for Benson Ventures. Exhibit 4, CP 278-79. Rodger the Son designed numerous accounting documents to record and document Benson Ventures mineral stock transactions. (See Statement of Fact no. 9.) However, Rodger the Dad favored writing things down, as shown by the volume of handwritten notes, which declined slightly after 1998

when they started using the Yahoo! computer webpage named “BENVEN,” “BV American” and “BV Canadian” that Rodger the Son set up. Are these activities, which also involved Rodger the Son’s wife, merely father and son playing the part of investors? Rodger the Son was a grown man with a family, mortgage and responsibilities, he was not merely spending time together with his father, but trying to establish long term financial security, just as his 1997 resignation letter said. CP 1054, Exhibit 90.

Benson Ventures focused on research, analysis and investment in the mineral industry, primarily mineral securities (stocks). The above documents confirm the nature of Benson Ventures business as many of the documents contain information regarding mineral securities. Rodger the Dad and Rodger the Son kept numerous notes for “Benson Ventures.” Other documents also confirm that Benson Ventures was focused on mineral securities. (See Statement of Fact no. 8, 10, 13, 20.)

The opening account application signed by Rodger the Dad is persuasive that mineral stocks held in the name of Rodger the Dad were partnership property. Exhibit 78. The application was filed out by Mr. Decker and listed Rodger the Dad’s business as Benson Ventures, and in accordance with the testimony of Rodger the Son, Ryan, Jenny, Wright, Anthony and even Mr. Decker, the home address and telephone number for Rodger the Dad was the same for Benson Ventures. The employer of

decendent on the account application was “self//Benson Ventures” implying that he was acting on behalf of Benson Ventures. Exhibit 78. Mr. Decker testified that he understood that Benson Ventures was in the business of investing in minerals and mineral companies. CP 863. Under the totality of the evidence presented, there was indication that stocks, even if not held specifically in the name of Benson Ventures, was property of the partnership.

The following documents admitted at trial are mineral stock documents that reference in whole or in part “Benson Ventures”: Exhibits **3**³; **4**; **5**; 6; 7; 9; 14; 15; **29**; Exhibit **36**, 0546; Exhibit **45**, 0906, 0907, 0908; Exhibit 45; 0913; Exhibit **46** Benson Ventures Binder, especially 0906, 0907, 0908; Exhibit 47, 1156, 1157, 1158; Exhibit **48** substitute: Stock Data file with handwriting markings and declaration regarding same from both parties all signed in as “RBENSON5!” with the screen view labeled “BENVEN” JB 0170, 0173, 0174, 0175, 0186, 0189, 0191, 0193, 0194, 0197, 0202, 0203, 0204, 0205, 0206, 0207, 0212, 0214; Exhibit **78** (2 pages); Exhibit **80**; Exhibit **81**, Exhibit 89; Exhibit 90; Exhibit **91**, Exhibit 92, Exhibit 93; Exhibit 94; Exhibit 95; Exhibit 96; Exhibit **98**; Exhibit 99; Exhibit 102; Exhibit 103; Exhibit 104; Exhibit 106; Exhibit 185.

3 Bolded exhibit numbers refer to exhibits of greater substance. Where helpful additional page numbers from the exhibits have been referenced for the Court’s ease.

Of particular significance in showing that Benson Ventures was a real business venture was the letter that Rodger the Son wrote on March 17, 1997 when he resigned from his successful job at Turner Construction. Exhibit 90.

He stated:

“My father has offered me a position in his company that affords my family and I the opportunity for substantial financial growth in a business that is extremely interesting and challenging.”

Rodger the Son was leaving an 18 year career with exceptional benefits not merely to “spend time together” with his father, as Mr. Decker characterized it, but to pursue a business opportunity. Benson Ventures during its existence created a mass of documents.

4. The mineral brokerage accounts is partnership property – control, not in whose name the property is held, being the hallmark.

It is not necessary that each party to a partnership share an ownership interest for a partnership to be found, nor is such an interest necessary to find an equal voice in the management and an equal right to control. *See Gleason v. Metropolitan Mortgage Company*, 15 Wn. App. 481, 493-94, 551 P.2d 147 (1976); *see also Bengston v. Shain*, 42 Wn.2d 404, 255 P.2d 892 (1953) (partnership requires a community of interest in, or a joint ownership of, the business itself, accompanied by a joint right of control of its affairs). Conversely, finding the existence of the right to an equal voice and the right

to equal control can lead to the conclusion, first that a partnership does exist, and secondly, that the parties have a proprietary interest in the property of the partnership in addition to a share of the profits. *Gleason*, 15 Wn. App. at 494. The current Washington's Uniform Partnership Act ("UPA") also statutorily provides that partnership property need not to be held in the names of all the partners. RCW 25.05.065 (3).

In 1997 when Benson Ventures was formed, partnership property was governed by RCW 25.04.080 and 25.04.100. In 1997, the year Benson Ventures was formed RCW 25.04.080(1) (1997) stated "all property originally brought into the partnership stock or otherwise, on account of the partnership, is partnership property."⁴ The laws in existence when the partnership was formed direct the intent of the partners. See *In Re Estate of Mell*, 105 Wn.2d 578, 524, 716 P.2d 836 (1986) (drafter of Will is presumed to know the law).

Records of Benson Ventures identified mineral securities as the partnership property. See "Benson Ventures Stock Portfolio Transactions", Exhibit 46, sub 0906, 0907 and 0908; the entire Benson Ventures Binder, Exhibit 46, for example, sub 0888 through 1061. The critical factor in

⁴ See also RCW 25.04.100(3) (1997) "where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title and such property of the partners' act does not bind the partnership under the provisions of subsection (1) of RCW 25.04.040,

deciding whether the securities is partnership property is whether Rodger the Son had equal control over the securities. Mr. Decker testified that Rodger the Dad gave Rodger the Son complete authorization to enact trades on the mineral securities account, unrestricted as to time or amount (CP 829, 830, 886) which authorization was never revoked. Mr. Decker, in fact, placed buy and sell orders at the direction of Rodger the Son. CP 783, 784.

Father and son had equal control of Benson Ventures' finances. As can be seen by the Benson Ventures Check Book Register handwriting as stipulated by the parties, Rodger the Son made 159 of the notations and signed various checks while Rodger the Dad made 238 of the notations and signed various checks. Exhibit 29.

5. A partnership must be formed for profit, but there is no requirement that the profit must be divided during the partnership.

The details as to the manner in which partners are to divide profits and losses are not an essential component for finding a partnership. *Potter v. Scheffsky*, 139 Wn. 238, 240, 246 P. 576 (1926); *see also Minder*, 37 Wn.2d at 130 (finding existence of a partnership notwithstanding that the evidence did not make it clear what the profit-sharing arrangement was). The Washington UPA provides for a statutory formula for the division of

continued . . .

unless the purchaser or his assignee, is a holder for values, without knowledge.

partnership profit and loss unless otherwise modified by agreement of the partners. RCW 25.05.150 (2) (“Each partner is entitled to an equal share of the partnership profits and chargeable with a share of the partnership losses in proportion to the partner’s share of the profits.” (emphasis added)); RCW 25.05.015 (partnership to be governed by RCW 25.05 unless modified by agreement of the partners). (The division of profits was in fact modified by Rodger the Son and Rodger the Dad, but Rodger the Son could not testify to that modification because of the Dead Man’s Statute.)

Since the UPA was adopted in 1945 there has been no requirement that profit and losses be realized by the partners during the partnership. Washington’s UPA follows the Model UPA, and under the Model UPA the definition of a partnership does not require the partnership to share profit and loss among the partners. RCW 25.05.150 (each partner deemed to have account recording share of profit and loss). The partners’ respective profit and loss can be distributed at the time of disassociation of the partnership, which can occur, as in this case, with the death of a partner. RCW 25.05.300 (death of partner causes disassociation and winding up of partnership); RCW 25.05.330 (2) (each partner entitled to settlement of partnership accounts upon winding up). The current definition of a partnership under RCW 25.05.055 (1) only requires that a partnership be for profit.

Anthony testified that father and son were equally as rich as a result of Benson Ventures (CP 528) and that neither of the Rodgers was the boss because it was a partnership (CP 545-546) and the Night Hawk Contract shows an equal division of Benson Ventures Profits (Exhibit 91) between father and son while acting on behalf of Benson Ventures. An agreement to share in profits and losses can be inferred from the undisputed facts and circumstances. If Rodger the Son had no expectation to share in profits and losses why he would devote so much of his time to Benson Ventures, why would he resign from 18 years with Turner Construction, and why would he liquidate his 401k?

6. Rodger the Son should be awarded damages based on the un rebutted profit computation of his expert.

The Estate did not deny that Rodger the Son worked in Benson Ventures starting in 1997 nor rebut his financial contribution of \$158,000 aside from pointing out an error on his tax return that cashing out the Turner 401k was not a rollover. Karla testified to investing \$158,213 (CP 258, 260, 261, 273, 351), despite expansive Dead Man rulings by the trial court.

The Court asked whether the Estate stood by its characterization of the time, work, and control exerted by Rodger the Son as just “spending time together”. The Estate responded that Rodger the Son had “fun” with his dad and “...were both certainly enjoying what they were doing...” and implied that

that should be reward enough. CP 1490.

The trial court found that Rodger the Son had ceased his association with Benson Ventures in 1998 and that his claim was barred by the statute of limitations. CL No. 13. The statute of limitations is an affirmative defense and Joan Benson carried the burden of proof. *Rivas v. Overlake Hosp. Medical Center*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008); CR 8(c).

Accrual of the statute of limitations does not occur until the dissolution of the partnership, or the exclusion of the complaining party from participating in the affairs of the partnership. *Malnar v. Carlson*, 128 Wn.2d 521, 530, 910 P.2d 455 (1996). Under the governing law in 1998, dissolution of a partnership was defined as “the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from winding up of the business.” RCW 25.04.290 (emphasis added). Under Washington law, a partnership is presumed to continue until evidence shows a dissolution has occurred. *Malnar*, 128 Wn.2d at 530.

In reviewing the totality of evidence, Joan Benson did not carry her burden to show that Rodger the Son ceased his association with Benson Ventures in 1998. The only evidence which only inferentially supports the finding is that Rodger the Son returned to salaried employment with Mortenson in 1998. That Rodger the Son ceased his association with Benson Ventures is contradicted by the oral testimony of all witnesses who knew of

Benson Ventures, except for Mr. Decker who never inquired about Rodger the Son's involvement in Benson Ventures after 1998.

Because the evidence does not support a finding that Rodger the Son ceased his involvement with Benson Ventures in 1998, and no evidence refutes his continued involvement with Benson Ventures until Rodger the Dad died. Rodger the Son should be awarded damages as if Benson Ventures ceased as a partnership in 2007.

The mineral securities identified in business records labeled "Benson Ventures" corresponded identically to the mineral securities held in the securities account held with Wedbush Securities at numerous points in time, e.g. May, 2006 Yahoo! Exhibit 185 is the same as Exhibit 118 (00026) (Wedbush) (adjusted for certificate shares), just before death (compare Exhibit 188, # 210, 211 (Wedbush) and Exhibit 47, 1158 (Yahoo!) in February 2007).

Michael Gillespie, Rodger the Son's expert witness, testified that the Rodger the Son's share of the partnership profits in Benson Ventures was \$743,227. (See Statement of Fact no. 29.) This amount was decreased by the amount of Rodger the Sons draws from the Benson Ventures account (\$45,000) and increased by \$158,000 to reflect the return of his capital contributions for a total of \$882,477.

Remand is not necessary given the overwhelming and un rebutted testimony and exhibits that Benson Ventures existed; that both father and son contributed time, money, and skills to it; exerted control over the checkbook and brokerage account; and that upon the father's death, it should be dissolved and the son's share (\$882,447) of the total portfolio (\$2,413,999) should be returned to him.

D. The Dead Man's Statute Erroneously Prevented The Admission Of Critical And Substantial Evidence by Conflating Foundational Questions with the Purpose of the Lawsuit.

Rodger and Karla Benson were severely interrupted by 171 and 93 (164) objections, respectively, of which 92 were sustained. In Addendum B, error is assigned to limitations on questions and to the sustaining of 19 questions that were foundational where the court conflated a naked bit of evidence with the inference of partnership even to the point of prohibiting questions with the words "Benson Ventures" (CP 1225) or that were "...designed to get at a partnership with the deceased." (CP 1228).

As a result of Exhibit 3, Rodger the Son testified:

"I quit my job; liquidated my 401k; I changed my entire career focus."

CP 1060.

RCW 5.60.030 (the "Dead Man's Statute") provides that:

in an action or proceeding where the adverse party sues or defends as . . . legal representative of any deceased person . . . then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement

made to him or her, or in his or her presence, by any such deceased . . . person

The leading case analyzing each element of testimony in Division I to determine how the Dead Man's Statute is applied is *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 29 P.3d 1258 (2001) which determined that each Dead Man's Statute transaction is considered on its own for purposes of exclusion. *Id.* at 176.

Karla Benson was asked what her husband's work hours were when he went to work after March 1997, the month he left Turner. CP 252. It was a foundational question. There was no gain or loss in the question or in the answer. It is circumstantial evidence. That is how cases are built in the absence of direct testimony. See *Nicholson*, 83 Wn. at 198. Because of the relevance of the question pertained to the inference that a partnership existed the trial court limited testimony and sustained objections erroneously to 19 questions in Addendum B. Petitioner and his wife Karla should have been able to build their case with benign actions and foundational bits of information from which, in closing argument, they could argue their case.

In *Nicholson*, the young girl testified about working in hotels. In *An How*, the cook testified about cooking. Mrs. Jacobs certainly testified as to giving Dr. Brock enemas and washing his laundry. *Jacobs v. Brock*, 73 Wn.2d 234, 235, 437 P.2d 920 (1968). Lastly, Rodger Lennon testified about providing support; sleeping on her couch, taking certificates to the bank to

cash them, etc., all of which are foundational. *Lennon*, 108 Wn. App. 167. In none of the cases did the appellate court find the question or answer to violate the Dead Man's Statute. Surely Karla could testify to her husband's work hours.

1. Rodger the Son's and Karla's Testimony Regarding Their Own Acts Should Not Have Been Excluded By the Dead Man's Statute.

The trial court improperly excluded testimony of acts done by decedent and acts done in conformity with documents and photographs. The trial court created two new criteria to exclude testimony beyond any prior case law, to wit: by requiring as a precondition that: (1) that the decedent could not have been present during the act; and (2) that the evidence can not be argued to support the contention for which it is relevant – in this case that a partnership existed. CP 1709 and colloquy of counsel. That limitation and the twenty-four sustained objections derived therefrom as set forth in Addendum C are assigned as error.

Estate of Lennon v. Lennon, 108 Wn. App. 167, 29 P.3d 1258 (2001) affirmed case law that a party may testify to his or her own acts. *Boettcher v. Busse*, 45 Wn.2d 579, 582, 277 P.2d 368 (1954) (“testimony by a party in interest as to the performance of labor or the rendition of services for the decedent is not prohibited under the statute as a transaction with the decedent.”); *Ah How v. Furth*, 13 Wn. 550, 554, 43 P. 639 (1896) (“The

testimony of respondent that he worked at the house of the intestate and the character of the work performed by him was not testimony in relation to a ‘transaction had by him with, or any statement made to him by,’ such intestate. Such testimony related solely to acts of the witness alone, and was, we think, entirely competent.”).

Roger Lennon was permitted to testify to a litany of acts that he had performed. *Lennon*, 108 Wn. App. at 171-73. Testimony regarding only a few acts was barred by the Dead Man’s Statute – to wit: that

“Roger brought. . .the stock certificates to Elsie at her home. Furthermore there is evidence that Elsie inventoried the materials and kept everything except the stock certificates, which Roger brought to his home.”

Id. at 178.

The other acts of Roger Lennon – going to banks; taking the stock certificates to Seafirst, then Washington Mutual; caring for Elsie; giving her money “from the late 1979s. . .he stopped in 1995. . .”; (*Id.* at 171) Elsie’s medical problems; visiting Elsie during work; sleeping on the couch; testimony that stocks were to be his inheritance; (*Id.*); that accounts were in joint names, etc. were all admitted statements of acts and were not found to be objectionable by the Lennon Court.

In *King v. Clodfelter*, 10 Wn. App. 514 (1974), the court discussed at length the reasons why a “claimant may testify about work performed which

benefited a decedent without thereby testifying about a contract which may have existed between himself and the decedent for the performance of those services.” *Id.* at 517, citing *Blair v. McKinnon*, 40 Wn.2d 492 (1952), and discussing how it is admissible under *Martin v. Shaen*, 26 Wn.2d 346 (1946), EVEN IF it “create(s) an inference” as to what transpired between himself and decedent. *Id.* at 517.

2. Documents Are Not Barred By The Dead Man’s Statute.

An interested party may identify a decedent’s handwriting (*Wildman v Taylor*, 46 Wn. App. 546, 553, 731 P.2d 541 (1997)) and that letters and lease agreements could be introduced but that the Dead Man’s Statute only barred parties’ “testimony about the meaning of the lease provisions or the letter.” *Wildman*, 46 Wn. App. at 553.

Just as Rodger the Son can testify as to his own acts and payments made and received he can also testify as to documents maintained in the ordinary course of business, e.g. the account book of An How. *Accord Sanborn v. Dentler*, 97 Wn. 149, 166 P. 102 (1917) where records were kept “in the ordinary course of business” and otherwise “properly qualified” it was admissible “under the rule annotated by this court in *An How v. Furth*, 13 Wn. 550, 43 P. 639.” *Sanborn*, 97 Wn. at 155. In *Slavin v Ackman*, 119 Wn. 48, 204 P. 816 (1922), the court admitted a letter:

She testified that she had received the letter herein as set out. We have held that such testimony is not a

testimony as to a transaction with a deceased person. (Cited cases omitted). “She also testified as to the acts which she did in conformity with the letter.” (emphasis added)

Slavin, 119 Wn. at 50-51, citing *An How*.

Rodger the Son presented a wealth of documentary evidence at trial. See Section IV.C.3 above. The evidence included handwritten notes of Rodger the Dad, as well as business cards, letter head, bank statements, check register, cancelled checks, industry mailings, and ample business records related to Benson Ventures. All these were admissible under the Dead Man’s Statute. Rodger the Son and his wife were prohibited from answering any question that even mentioned the words “Benson Ventures” (CP 281-286; 1278) although he could answer the same question about their efforts to accumulate stock in the gold mining industry. CP 1127-30. The former implying a partnership yet the latter somehow not implying one.

The Court’s erroneous limitations on Rodger the Son’s testimony was so overreaching that he was prevented from testifying as to an admitted letter that he typed (Exhibit 80) from identifying the date he created it. CP 1309. See discussion of *Wildman v. Taylor, infra*. The Court similarly prevented Karla from testifying about a photograph she had taken. When asked whether it was a reasonable representation of what it purported to be, the court and counsel engaged in lengthy discussion (CP 291-310) when the court admitted the photograph but refused to draw any inference of a partnership, but only

credibility. (CP 309-310).

Numerous portfolio updates between 1998 and 2007 on the Yahoo! website labeled “Ben Ven” were admitted wherein Rodger the Son updated the portfolio in real time. He was not even allowed to testify as to the changes that he himself made because it was possible that he might have obtained some of the information from decedent that could imply a business relationship. CP 1319-25. *Wildman* was never flexed so far.

E. The Trial Court Erred by Failing to Grant Rodger’s Motion to Dismiss Joan’s Claim of Community Property.

The trial court’s finding that the Estate of Rodger the Dad was composed entirely of community property did not adjudicate any issues between Rodger the Son and Joan Benson. As such, it was merely an advisory opinion and the issuance of Conclusions of Law Nos. 14-19 was error.

“For declaratory judgment purposes, a justiciable controversy is:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.”

Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994).

An action that does not meet the 4-part test for a justiciable controversy would require the Court to issue an advisory opinion. Courts in this state do not issue advisory opinions. *Id.* at 414.

Even if the assets held in Rodger the Dad's estate was community property, Rodger the Dad's estate could not avoid liability for the distribution of partnership assets. In other words, and viewed from the stand point of Joan Benson, if there is a finding that a portion of Rodger the Dad's estate is partnership property, Respondent would stand to inherit the same amount regardless of whether the remainder of Rodger the Dad's property is designated as community property or separate property because Rodger the Dad devised his entire estate to Respondent under his 1977 will. Also, one spouse cannot avoid the liability of the other spouse in a partnership by claiming that partnership assets are community property. There was no need for the trial court to rule on Joan Benson's claim of community property.

F. Decedent's Assets were Separate Property and Petitioner's Interest in the Partnership Would Not Have Been Before the Dissolution Court for Distribution.

In his response to Mrs. Benson's Dissolution Petition, Rodger the Dad denied all allegations of her allegations of community and affirmatively alleged:

“Deny that all the parties are not separated. Allege that my wife and I separated more than 20 years ago. Allege that our marriage was irretrievably broken at the time of separation. Allege that any ongoing relationship

was plutonic in nature and was based on mutual respect that we have for each other, but that each of us acknowledged for over 20 years that our marriage was defunct through our acts and deeds

Deny that there is any undivided community property. Allege that all community property was equitably divided at the time of separation. Allege that property in possession and control of the Petitioner should be awarded to Petition and that all property in the possession and control of Respondent should be awarded to Respondent.

Deny that there are any community liabilities. Allege that all liabilities in Petitioner's name are petitioner's separate liability and that all liabilities in Respondent's name are Respondent's separate liabilities.

Deny that my wife has need for maintenance. Allege that my wife has met her own needs during the 20 plus years that we have been separated."

Further Mrs. Benson testified that they never lived together after 1986. CP 84, 136. She had no idea of decedent's financial assets. CP 92. Neither was involved in the other's financial affairs; neither gave the other support, cash gifts; the incurred no mutual debt; he never showed her any of the tax returns; neither listed the other as a beneficiary of any accounts. CP 113 – 115; 122; 123; 180. They were happy living apart. CP 141.

She also testified that decedent did what he wanted (CP 84) was not always truthful with her (CP 91); deceived her into signing off the deed to his condominium (CP 180; and lead her to believe he was only living off his social security (CP 182).

The statute provides: "When spouses or domestic partners are living

separate and apart, their respective earnings and accumulations shall be the separate property of each.” RCW 26.16.140. *Togliatti v. Robertson*, 29 Wn.2d 844, 190 P.2d 575 (1948) (savings bonds acquired by the husband, after a long separation during which neither spouse relied on the efforts of the other were separate property.)

G. The Trial Court Erred When It Sustained Objections Based on Hearsay.

1. Intended To Go Into Business: ER 803(a)(3)

Carolyn Barclay should have been allowed to testify that Rodger the Dad intended to go into business with his son, and it was error to preclude same. CP 406-12. She testified that he was excited about the prospect. CP 410. The statement of an intent or plan is a recognized exception under ER 803 (a)(3) to prove that the declarant acted in accordance with the statements of future intent. *State v. Powell*, 126 W.2d 244, 893 P.2d 615 (1995).

2. When Evidence of Value are all in Decedent’s Name – to say that they are “Equal” is a statement against pecuniary interest: ER 804(b)(3).

Wright Benson should have been allowed to testify that the father and son were “equal” partners based upon statements to that effect by decedent as a statement against pecuniary interest. ER 804(b)(3). Wright testified that the ratio of the father to son investment was “5/6 to 1.” CP 488-89. For his brother to also tell Wright that they were equal partners was against his

interest. Also, because the mineral stock account was in dad's name only, stating that his son equally owned the mineral stock investments was against his pecuniary investment.

H. The Trial Court Erred When It Refused to Admit Exhibits 8 and 22.

Both Exhibits 8 (three pages of petitioner's handwriting from 1957 listing checks paid and deposits made) and Exhibit 202 (a Yahoo! screen printout of the mineral stocks similar to several other admitted) were identified as created and maintained in the ordinary course of business. CP 1348-52 and CP 1324-30. They should have been admitted. *Sanborn v. Dentler*, 97 Wash. 149, 152 (1917), and *McDonald v. McDonald*, 119 Wash. 396, 403 (1922).

V. CONCLUSION

The key issue before the Court is whether the facts and circumstances establish that Rodger the Dad and Rodger the Son intended to form a partnership. Rodger the Son's evidence was overwhelming. Rodger the Son's evidence included testimony of payment of money, ten years or work; writing checks and trading stocks on his own authority, as well as the testimony of an ex-wife and two of decedent's brothers regarding the partnership that Rodger the Son had with his father, the Rodger the Dad. Rodger the Son presented dozens and dozens of documents in the form of bank statements, business cards, letterhead, check register, cancelled check,

industry magazines, and the “Benson Ventures” binder and “Benson Ventures” check register and other business records that all establish the existence of a partnership. The testimony of the ex-wife, the two brothers and the acts of Petitioner and documents are all consistent with the way fathers and sons do business. In the end, no other conclusion than the existence of a partnership satisfactorily explains the facts and circumstances.

DATED this 4th day of January, 2010.

BETTS, PATTERSON & MINES, P.S.

By 
Michael L. Olver, WSBA No. 7031
Christopher C. Lee, WSBA No. 26516
Attorneys for Appellant

CERTIFICATE OF SERVICE

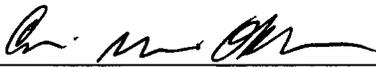
I, Erin Marie Olver, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Betts, Patterson & Mines, P.S. One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA 98101-3927; and did on January 4, 2010 (1) cause to be filed with this court; and (2) cause to be delivered via hand delivery to respondent's counsel, Suzanne Howle, Thompson & Howle, 701 Pike Street, Suite 1400, Seattle, Washington 98101-3927, the Appellant's Opening Brief.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: January 4, 2010.



Erin Marie Olver

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COURT OF APPEALS DIV #1
STATE OF WASHINGTON
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BETTS, PATTERSON & MINES, P.S.

SUPERIOR COURT CLERK
BY VICTOR A. BIGORNIA
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN RE THE ESTATE OF:

RODGER W. BENSON, JR.,

Decedent.

NO. 07-4-03264-6 SEA

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AT TRIAL

THIS MATTER came regularly before this court and was tried to the court without jury.

The Petitioner, Rodger Benson III, appeared at trial and was represented by his attorneys Michael Olver and Christopher Lee; the Respondent and Personal Representative Joan Benson appeared at trial and was represented by Carol Vaughn and Suzanne Howle.

The Petitioner filed an amended Petition to obtain interest in partnership asset and for appointment of a substitute personal representative, and a contradiction of inventory¹ claim for money damages. Voluntary non-suit was taken on the first day of trial on petitioner's claim for damages related to respondent's sale of certain securities. Respondent counterclaimed for a declaratory Order that the Decedent's estate is community property², and for an award of attorney fees.

¹ RCW 11.44.035. Respondent objected on statutory and/or procedural grounds. The Court considered all issues so as to make a "final determination of the whole controversy." See, *Lawrence v. Halverson*, 41 Wn.2d 534, 83 P. 889 (1906).

² Petitioner did not file a Reply pursuant CR 7(a) but argued that the (counter)claim was not justiciable. Civil Rules apply unless in conflict with TEDRA. RCW 11.96A.090.

ORIGINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

TIMOTHY BRADSHAW
JUDGE OF THE SUPERIOR COURT
KING COUNTY COURTHOUSE
516 Third Avenue, Seattle, WA 98104

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I. THE RECORD

1. **Testimony.** The Court heard, and personally observed, the testimony from the following witnesses: Petitioner Rodger Benson III; Karla Benson; Wright Benson; Anthony Benson; Jennifer Benson; Ryan Benson; Respondent Joan Benson; Susan Reed; Dennis Reed; Caroline Barclay; Ross McIvor CPA; Michael Gillespie CPA; and Brian Decker.
2. **Designated Discovery.** The Court admitted designated excerpts from the deposition of Joan Benson in evidence over the objections of the respondent. The Court refused to admit designated excerpts from the deposition of Wright Benson, who was permitted to testify by telephone. The Court admitted Petitioner's responses to Requests for Admission 6, 7, and 14.
3. **Exhibits.** The following exhibits were admitted into evidence and reviewed: 1-7, 9, 12-14, 29, 34, 35, 39, 44-49, 48A, 54, 55, 65, 66, 68-72, 75, 77, 78, 80-82, 88, 89, 91, 93, 95, 96, 98, 99, 101-103, 106, 107, 109-118, 121-123, 121A, 133-161, 164-170, 173, 175, 176, 178, 182-188, 194-197, 199, 200.
4. **Arguments.** The Court also benefitted from the briefing and closing arguments by learned counsel for both parties.

Having thoroughly considered the foregoing, the Court makes the following:

II. FINDINGS OF FACT

1. Rodger Benson Jr. ("Decedent") died April 26, 2007 at the age of 83.
2. Decedent married respondent Joan Benson ("Mrs. Benson") in 1974. It was Decedent's third marriage and Mrs. Benson's second marriage. Decedent and Mrs. Benson knew each other as children. Mrs. Benson was widowed in 1972. Decedent and Mrs. Benson had grown children from their prior marriages at the time they wed.

- 1 3. Decedent and Mrs. Benson lived together in the home that Mrs. Benson had inherited from
2 her first husband until approximately 1986. In 1986, Decedent moved into a condominium
3 that Decedent and Mrs. Benson owned. They maintained separate residences until
4 Decedent's death. Neither Decedent nor Mrs. Benson petitioned for dissolution or legal
5 separation prior to December 2006.
- 6 4. Mrs. Benson petitioned for dissolution of marriage in December 2006. Mrs. Benson, called
7 by Petitioner, testified that she considered herself married to Mr. Benson until his death and
8 that she continued to love him despite his infidelity. "If he was happy, I was happy." The
9 Court finds Mrs. Benson's testimony on these points credible.
- 10 5. Decedent and Mrs. Benson filed joint income tax returns until Decedent's death. The
11 "married filing joint" tax returns were prepared by Decedent's long-time accountant Derek
12 Nelson, who died close in time to Decedent.
- 13 6. Documentary evidence shows that Decedent and Mrs. Benson jointly insured their vehicles
14 and maintained at least one joint account through the year 2003.
- 15 7. The assets owned by Decedent on his date of death were acquired during his marriage to
16 Mrs. Benson. None of Decedent's assets were traced to separate (non-community) assets or
17 funds.
- 18 8. There was no written partnership agreement between Decedent and Petitioner.
- 19 9. There was no written partnership agreement for any entity called "Benson Ventures."
- 20 10. On Decedent's date of death he owned a stock portfolio account at Charles Schwab valued at
21 approximately \$2.3 million. Decedent also had a money market account at Schwab valued at
22 \$156,808.98 on his date of death. The stock portfolio was comprised of high risk volatile
23 mining and natural resources securities. The Charles Schwab accounts were opened in 2006
24 with direct transfers from Wedbush Morgan.
- 25 11. Decedent began trading natural resources securities in the early to mid 1990s. He opened a
26 securities account at Wedbush Morgan in 1997. The account balance in August 1997 was in

1 excess of \$350,000. By January 2000, the account balance was approximately \$44,000. The
2 value of natural resources securities declined sharply in 1998 and 1999, as reflected in the
3 value of Decedent's portfolio.

4 12. Decedent made large cash infusions into the Wedbush Morgan account between 2000 and his
5 date of death. In 2001, Decedent opened a second account at Wedbush Morgan, which held
6 other types of securities that were not related to natural resources or mining. In 2002,
7 Decedent transferred the second Wedbush Morgan account into the account that held his
8 natural resources and mining securities.

9 13. The two Wedbush Morgan accounts were titled to Decedent in his individual capacity, not as
10 partner. Petitioner never appeared on the title of these accounts. He was not identified on
11 account applications or account statements as a joint owner. Petitioner's name does not
12 appear on any of the Wedbush Morgan documents admitted in evidence.

13 14. In 2006, the remaining Wedbush Morgan account was transferred to Charles Schwab. After
14 the Charles Schwab account was opened, Decedent transferred additional securities into the
15 account.

16 15. The Charles Schwab accounts were titled solely to Decedent in his individual capacity, not as
17 partner. Petitioner never appeared on the title of these accounts. He was not identified on
18 account applications or account statements as a joint owner. Petitioner's name does not
19 appear on any of the Charles Schwab documents admitted in evidence.

20 16. The alleged partnership was not registered with the State of Washington, the Office of the
21 Secretary of State, or any government agency. There was no evidence that any City of
22 Seattle, State of Washington or other business taxes were paid by an entity called "Benson
23 Ventures."

24 17. Testimony from two accountants described the type of tax schedules and forms normally
25 associated with partnerships. The testimony from the accountants was consistent. Both
26 testified that partnerships usually produce Form 1065 pass-through returns and K-1

1 schedules. No such documents were prepared with regard to the partnership alleged by
2 Petitioner. CPA McIvor testified that he looked for any evidence of a partnership but could
3 find "no partnership information to report."

4 18. No tax ID number was obtained for the alleged partnership. No tax returns were filed for
5 "Benson Ventures."

6 19. All gains, losses and income from the Wedbush Morgan accounts and the Schwab accounts
7 were reported on the individual income tax returns filed for Mr. Benson and Mrs. Benson
8 from 1997 through Mr. Benson's date of death. None of the gains, losses or income from the
9 Wedbush Morgan accounts or the Schwab accounts was reported to the IRS as having been
10 generated by any partnership.

11 20. The 1099 Forms that were required by the IRS concerning the Wedbush Morgan accounts
12 and the Schwab accounts list all income and gains under the decedent's social security
13 number.

14 21. Petitioner's expert witness, Michael Gillespie, also testified that the Wedbush Morgan
15 account statements and the Charles Schwab account statements do not contain independent
16 data that would support the conclusion that Petitioner and Decedent had a partnership. Mr.
17 Gillespie

18 Petitioner's expert witness also testified that Decedent's tax records, the Wedbush Morgan
19 account statements and the Charles Schwab account statements do not contain any data that
20 would support the conclusion that Petitioner and Decedent were equal partners. Mr. Gillespie
21 was unable to attribute contributions to petitioner. The expert witness further testified that
22 Decedent's tax records, the Wedbush Morgan account statements and the Charles Schwab
23 account statements do not contain data that would support the conclusion that the Charles
24 Schwab accounts owned by Decedent on his date of death were partnership property.

25 22. Decedent's stock broker, Mr. Brian Decker, knew decedent well. Mr. Decker handled
26 decedent's investments and knew decedent was "passionate about minerals." Decker testified

1 that Decedent specifically denied that Petitioner had an ownership interest in his stock
2 portfolio. Mr. Decker testified that "Benson ventures" was the name that he and decedent had
3 given to the "time they spent together" and that decedent never said they were partners.
4 Decedent made clear to Mr. Decker that "this is all my money." Decker testified that
5 petitioner did not have unilateral power of investment. The Court finds Mr. Decker's
6 testimony credible.

7 23. Petitioner's tax records do not reflect a partnership. Petitioner's tax records do establish that
8 he invested his own funds into mining and natural resources securities during the same
9 timeframe as the alleged partnership.

10 24. Petitioner maintained that separate and individually-titled natural resources securities were
11 his individual assets; he simultaneously claimed that Decedent's individually-titled natural
12 resources securities were partnership property. The objective evidence relating to the
13 securities titled to Petitioner mirrors the objective evidence relating to the securities titled to
14 Decedent.

15 25. Petitioner left his stressful job in the construction industry, at Turner Construction, in March
16 1997. He had worked there for 18 years and had become an executive. He was a self-
17 described workaholic and the job caused him health problems. Decedent had expressed
18 concern about petitioner's heart health. Petitioner's daughter confirmed that her father was
19 never home. He left Turner with benefits that included a 401k account.

20 In July 1998, he returned to full time, salaried, work in the construction industry, as Manager
21 of Business development for Mortenson Construction. Brian Decker testified that decedent
22 told him that petitioner had gone back to work to his construction job and that would be his
23 focus. Decker had no contact with Petitioner after 1998. Petitioner still works for Mortenson
24 and it is not uncommon for him to do Mortenson-related work at home during the evenings
25 and weekends.

26 26. Between March 1997 and July 1998, Petitioner worked with his father researching natural

1 resource and mining securities. They spent mutually rewarding time together. Decedent
2 taught Petitioner about the natural resources industry, about which Decedent was very
3 successful and knowledgeable. Petitioner used his superior computer skills to assist his
4 father (though decedent also operated a computer) and set up a Yahoo web page. According
5 to the testimony of Decedent's stock broker, Mr. Benson appeared to be in charge, and
6 Petitioner appeared to be learning from his father.³

7 27. During the March 1997 to July 1998 period, Decedent authorized Petitioner to make stock
8 trades for him on the Wedbush Morgan account. Petitioner was never authorized to change
9 title to any of Decedent's securities accounts. The last time Petitioner made a stock trade on
10 Decedent's account was prior to July 1998. Decedent's stock broker testified that he did not
11 consider Petitioner to have ongoing authority to make trades on his father's account after
12 Petitioner returned to construction work in 1998. Decedent made it clear to Mr. Decker that
13 the ownership information was to stay the same and show only decedent's name, and not
14 petitioner's name nor "Benson Ventures."

15 28. A joint bank account was opened at U.S. Bank in 1997. It was titled to Rodger Benson III,
16 Rodger Benson Jr., and Benson Ventures.

17 29. Petitioner did not establish that he deposited any funds into the joint bank account or that he
18 made any financial contributions to the alleged partnership.

19 30. The documentary evidence indicates that the last activity in the joint U.S. Bank account was
20 in July 1998. The joint U.S. Bank account was closed prior to 2001.

21 31. Documents from two home refinances do not show that the refinance proceeds were given to
22 Decedent or contributed to the alleged partnership. Decedent's account records and bank
23 statements do not reflect deposits correlating to the timing or amounts of the home
24 refinances.

25 32. Documents relating to the cashing in of Petitioner's 401(k) at Turner Construction do not

26 ³ Though there was testimony that petitioner had wondered "why didn't my father like me," decedent told Brian Decker that he was indeed "proud of [his] son."

1 show that the proceeds were given to Decedent or contributed to the alleged partnership.
2 Petitioner's tax records show that the amount received from Turner in 2000 (\$13,556) was
3 rolled over into another tax exempt retirement investment. Petitioner, who was previously
4 employed writing software, testified that he was stunned by the tax form evidence and there
5 must have been a problem with the tax software he used; the "software for dummies"
6 program "spit it out." Petitioner's tax records also show that he purchased natural resources
7 securities in the same quarter of 1997 that he received the 401(k) proceeds.

8 33. Documentary evidence shows that Petitioner received more than \$40,000 in draws from the
9 joint U.S. Bank account between March 1997 and July 1998.

10 34. The evidence included business cards bearing the name "Benson Ventures." The business
11 cards were prepared by Petitioner and used by both Decedent and Petitioner. They do not
12 name Petitioner as a partner.

13 Petitioner offered other real items of limited probative value, including bank checks,
14 statements, checkbook register, letterhead, fax sheet letterhead, a binder with title, a
15 magazine mailing label. These items provided more form than substance. Similarly, there
16 was conflicting testimony about the voice greeting(s) on the answering machine.

17 35. Several of Petitioner's family members testified that they formed an impression from what
18 Decedent said that he had an equal partnership with his son. None of these witnesses had
19 specific personal knowledge regarding Decedent's investments. Decedent's brothers, Wright
20 Benson and Anthony Benson, had, like Petitioner, accompanied decedent to convention(s) on
21 mining. (Karla Benson had also accompanied her husband to such a convention). They
22 recalled decedent as "always teaching" and considered him a national expert in gold
23 ventures. Mining investments ("treasure hunters") was/is clearly a family interest. Wright
24 Benson testified to "a lot of money invested in gold ventures" and his belief that he has a
25 financial stake on the estate. Anthony Benson also invested his own money in gold and silver
26 stocks and testified to his desire for compensation from the estate and certain artwork.

1 Wright Benson and Anthony Benson did not present as objective or credible witnesses.

2 36. Joan Benson never heard of a partnership between her husband and Petitioner and had not
3 personally investigated it.

4 37. Decedent had previously established a Partnership (McDermott Group) and made his
5 intention to do so unambiguous.

6 38. There were no witnesses from the mining industry or from the companies that the alleged
7 partnership invested in.

8 39. The evidence does not establish that Petitioner co-owned any of Decedent's mining or
9 natural resources securities or that Petitioner and the Decedent had an agreement to co-own
10 any securities.

11 40. The evidence does not establish that the decedent and the petitioner had an agreement to
12 share profits or losses from Decedent's mining and natural resources securities. The
13 evidence shows that the decedent claimed all gains and losses from the securities as his own
14 on his joint tax returns with Respondent Mrs. Benson.

15 41. In December 2006, Decedent retained attorney Jacki Kirklin to prepare a new will for him.
16 The will was never executed. The unexecuted draft of the will did not mention Benson
17 Ventures or any partnership between Decedent and the petitioner.

18 42. Mrs. Benson filed for dissolution in December 2006 after learning that Mr. Benson had been
19 unfaithful. Decedent filed responsive pleadings through his counsel (Ms. Kirklin). If the
20 dissolution had proceeded, the court would have been called upon to make an equitable
21 distribution of Mr. and Mrs. Benson's assets, including any partnership interests either one of
22 them owned. None of the dissolution pleadings mention Benson Ventures or any partnership
23 between Decedent and the petitioner.

24 43. Petitioner filed a purported "will" of Decedent dated March 16, 2007 under King County
25 Superior Court Cause Number 08-4-02622-9 SEA. The "will" does not mention Benson
26 Ventures or any partnership between Decedent and the petitioner.

1 44. Respondent personal representative's daughter, Susan Reed, testified that she found the U.S.
2 Bank checkbook bearing the name "Benson Ventures" while cleaning up Decedent's
3 residence for sale in 2007. The Court finds this testimony credible. The checkbook was
4 promptly given to the Estate's lawyer, timely produced in discovery, and is an exhibit.

5 45. The evidence does not establish that the Personal Representative or others on her behalf
6 concealed or destroyed what was referred to in testimony as "the green ledger." The specific
7 allegation that the Personal Representative's son-in-law concealed or destroyed any alleged
8 ledger was not supported by credible evidence. To the contrary, Mr. Reed had reconstructed
9 a previously shredded document.

10 46. The evidence also established that Petitioner had an opportunity to examine all of the records
11 in Decedent's residence prior to the Respondent Personal Representative. Petitioner and his
12 wife had a key to the condominium from Decedent's date of death until March 2008.

13 Petitioner and his wife accessed the condominium on at least two occasions prior to giving
14 Mrs. Benson a key. Mrs. Benson received a key May 10, 2007.

15 47. Petitioner's wife, Karla Benson, testified that she removed all business-related documents
16 that she could find from Decedent's condominium soon after decedent died. Karla Benson
17 had assumed that her husband was executor of the estate. Petitioner and his wife retained the
18 documents for approximately one month and then turned them over to Mrs. Benson, whom
19 Karla Benson testified is "a sweetheart." Petitioner and his wife removed a desk top
20 computer from Decedent's residence. This occurred prior to the date that Mrs. Benson was
21 confirmed as Personal Representative. Petitioner and his wife retained the desk top computer
22 until approximately December 2008. Respondent Personal Representative took control of
23 Decedent's lap top computer. In December 2008, the parties agreed to have the lap top
24 computer and the desk top computer examined by a computer technician to look for deleted
25 data. The evidence does not establish that data was destroyed or deleted from either
26 Decedent's desk top computer or his lap top computer.

1 48. To the extent any Finding of Fact may be more properly characterized as a Conclusion of
2 Law, or vice versa, it shall be re-characterized as such.

3
4 Based upon the foregoing Findings of Fact, the Court enters the following:

5
6
7 **III. CONCLUSIONS OF LAW**

8 **A. The Court has jurisdiction over the parties and the subject matter of this action.**

9 **B. Partnership Formation/Burden of Proof.**

10 1. The party asserting the existence of the partnership bears the burden of proof. *Kintz v.*
11 *Read*, 28 Wn.App. 731, 734, 626 P.2d 52 (1981).

12 2. Petitioner has the burden of proving the existence of a partnership by a preponderance
13 of the evidence. *Ocean View Land, inc. v. Wineberg*, 65 Wn.2d 952, 400 P.2d 319
14 (1965).

15 3. Petitioner's evidence must be stronger than when third parties allege the existence of
16 a partnership. *Eder v. Reddick*, 46 Wn.2d 41, 278 P.2d 361 (1955).

17 4. A partnership is defined by Washington law as: "an association of two or more
18 persons to carry on as co-owners a business for profit." RCW 25.05.005(6). This
19 definition is from the Revised Uniform Partnership Act, which took effect in 1999.
20 The definition of partnership under the Uniform Partnership Act, which predated the
21 Revised Uniform Partnership Act, was identical.

22 5. A contract of partnership is essential to the creation of the partnership relationship.

23 6. The preponderance of evidence does not establish a partnership between Petitioner
24 and his father Rodger Benson Jr.

25 **C. Partnership Property.**

26 7. Property is partnership property if acquired in the name of the partnership or by one

1 of the partners with an indication in the instrument transferring title of the person's
2 capacity as a partner or of the existence of the partnership. RCW 25.05.065(1).
3 Property acquired in the name of one of the partners, without an indication in the
4 *instrument transferring title to the property of the person's capacity as a partner or of*
5 *the existence of the partnership and without use of partnership assets, is presumed to*
6 *be separate property, even if used for partnership purposes. RCW 25.05.065(4).*

- 7 8. The evidence does not rebut the presumption that the Charles Schwab account was
8 Mr. Benson's individual (non-partnership) property. The decedent's accounts at
9 Charles Schwab are not partnership property as defined by RCW 25.05.

10
11 **D. Spoliation.**

- 12 9. Spoliation is the intentional destruction of evidence. The evidence does not establish
13 that either party intentionally destroyed, concealed or withheld evidence.

14
15 **E. Partnership Dissolution.**

- 16 10. A three year statute of limitations applies to Petitioner's claims. *Malnar v. Carlson,*
17 *128 Wn.2d 521, 910 P.2d 455 (1996); RCW 4.16.080.*
- 18 11. Under the governing law in 1998, dissolution of partnership was defined as "the
19 change in the relation of the partners caused by any partner ceasing to be associated
20 in the carrying on as distinguished from winding up of the business." RCW
21 25.04.290.
- 22 12. The statute of limitations is an affirmative defense and the defendant carries the
23 burden of proof. *Rivas v. Overlake Hosp. Medical Center, 164 Wn.2d 261, 189 P.3d*
24 *753 (2008).*
- 25 13. Petitioner's claim is time-barred because the evidence preponderates that Petitioner
26 ceased to be associated in the carrying on of the alleged partnership in 1998.

1
2 **F. Community Property.**

3 14. Washington favors “characterizing property as community instead of as separate
4 property unless there is clearly no question of its character.” *In re Marriage of*
5 *Brewer*, 137 Wn.2d 756, 766, 976 P.2d 102 (1999). Assets acquired during a
6 marriage are presumed to be community property. *In re Marriage of Short*, 125
7 Wn.2d 865, 870, 890 P.2d 12 (1995); *In re Marriage of Griswold*, 112 Wn. App. 333,
8 339, 48 P.3d 1018 (2002). If assets are acquired during the marriage using separate
9 funds, then a presumption arises that the acquisition is a gift to the community. *In re*
10 *Marriage of Hurd*, 69 Wn. App. 38, 51, 848 P.2d 185 (1993).

11 15. The assets owned by Decedent on his date of death were acquired during his 34-year
12 marriage to Mrs. Benson. As such, the decedent’s assets are presumed to be
13 community property.

14 16. To rebut the presumption of community property, the evidence must establish that the
15 marriage was “defunct” or the property must be traced to the separate assets of one
16 spouse.

17 17. Tracing assets to the separate assets of one spouse must be proved by clear and
18 convincing evidence. *In re Marriage of Olivares*, 69 Wn. App. 324, 331, 848 P.2d
19 1281 (1993). It must be done with particularity. *See In re Marriage of Hurd*, 69 Wn.
20 App. 38, 50 (1993). The evidence does not trace the Charles Schwab accounts or any
21 of Decedent’s other assets to Decedent’s separate property.

22 18. A marriage is defunct only when “both parties to the marriage no longer have the will
23 to continue the marital relationship.” *In re Marriage of Short*, 125 Wn.2d at 871.
24 Mere physical separation is not enough to show a marriage is defunct. *Aetna Life Ins.*
25 *Co. v. Bunt*, 110 Wn.2d 368, 372, 754 P.2d 993 (1988); *Kerr v. Cochran*, 64 Wn.2d
26 211, 224, 396 P.2d 642 (1964). Courts have only found marriages defunct when *both*

1 parties have demonstrated the marriage was over. *Seizer v. Simmons*, 132 Wn.2d
2 642, 940 P.2d 261 (1997). The evidence does not establish that Decedent's marriage
3 to Mrs. Benson was defunct.

4 19. The evidence does not rebut the presumption of community property. Therefore,
5 Decedent's assets on his date of death are deemed community property.

6
7 **G. Attorneys' Fees.**

8 20. Attorneys fees are authorized under RCW 11.96A.150. In exercising its discretion
9 under this section, the Court does not award attorney fees in this case.

10
11
12 Based on the foregoing, the Court ORDERS, ADJUDGES AND DECREES as follows:

13
14 **IV. ORDER**

- 15 (1) The Verified Amended Petition to Obtain Interest in Partnership Assets and for
16 Appointment of a Substitute Personal Representative shall be and hereby is
17 DISMISSED WITH PREJUDICE.
- 18 (2) Rodger Benson III has no partnership interest in any property titled to Decedent
19 on his date of death, including but not limited to the Charles Schwab accounts.
- 20 (3) No legal partnership existed between the petitioner and the decedent.
- 21 (4) Decedent's Charles Schwab account was not partnership property and is part of
22 his probate estate.
- 23 (5) The contradiction of inventory claim is denied.
- 24 (6) The assets of the estate, including but not limited to the Charles Schwab accounts
25 were (moreover) community property of Decedent and Joan Benson at the time of
26 Decedent's death.

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Done this 29th day May, 2009

KING COUNTY SUPERIOR COURT


Hon. Timothy Bradshaw

APPENDIX B
DEAD MAN'S STATUTE FOUNDATION CONFLATION

Some of the questions and answers were admitted for limited purposes, but are included to place the evolution of the trial courts thinking in context that culminates on page 1226 where the court prohibits benign acts or foundational questions that “imply a partnership”. That legal limitation and the nineteen sustained objections are assigned as error:

pg. 227 – 228

Witness: Karla Benson

Q. Now, when did you first meet the decedent, Rodger II?

MS. VAUGHN: Objection. Dead Man's Statute. It's calling for testimony regarding a transaction with the decedent.

THE COURT: I just heard about the meeting so far so, overruled.

Q. (By Mr. Olver) When did you meet the decedent, Rodger?

A. In 1970, probably late '72.

pg. 228 – 229

Q. How was your relationship with the decedent, Rodger?

MS. VAUGHN: Objection, foundation, and the foundation is going to violate the Dead Man's Statute.

MR. OLVER: If I may be heard, Your Honor.

THE COURT: Could you rephrase the question?

MR. OLVER: I can certainly rephrase the question. I can back it up as far as it needs to go.

Q. (By Mr. Olver) You indicated that you had met, at some time, Rodger the decedent, Rodger II, in approximately 1979 or 1972; is that correct?

A. Probably late '72 early '73, yes.

pg. 229 – 230

Q. Before you went to Iran, how often would you see him in any given month?

MS. VAUGHN: Objection. These are transactions with the decedent and violate the Dead Man's Statute.

MR. OLVER: May I be heard, Your Honor?

THE COURT: Yes.

MR. OLVER: Transactions are the performing of business in which there's gain or loss. Meeting, talking, carrying stock certificates to the house, giving coffee, enemas, are not transactions; they're the classic things that people do. Transactions are only gain or loss.

THE COURT: Are these expected answers going to lead to any alleged transaction, material transaction with the deceased?

MR. OLVER: No. These are foundational. At some point in time, we will be talking about transactions but not for over a decade from now. The earlier objection was foundation. All we're doing now is foundation and we're in 1972.

MS. VAUGHN: May I respond? Pecuniary interest and material gain are relevant in determining whether a party is an interested party such that the Dead Man's Statute would apply. Once the party is interested as Mrs. Benson is, then their testimony about any transaction with the decedent is barred by the Dead Man's Statute whether that transaction is one for gain for loss or material. For example, in the cases, sexual activity has been defined as a transaction that is barred by the Dead Man's Statute. You cannot testify about that. You cannot testify about marriage. The definition of transaction is -- excuse me -- is whether or not the decedent -

THE COURT: Sorry, counsel. I don't know what that was.

MS. VAUGHN: -- if alive could repudiate the testimony. It's not as Mr. Olver says narrowly defined as something for material gain.

MR. OLVER: Your Honor, if you look at the Lennon case, the portion that I highlighted and gave to you a couple of days ago, you'll see that the inner workings of being a party in interest, inner workings of being a transaction, gain or lose all comes together. And you will also see by reviewing the cases a series of things. Like if you look at the An How case, the Lennon case where they're making claims for services. They're making claims for money. There is an extraordinary amount of discussion of things that are not just the transaction because you have to have the foundation to even ask the question. So I'd suggest that counsel's definition is a bit expansive, otherwise, if you read those cases, you would never know what had gone on.

THE COURT: A broad interpretation of a transaction with the deceased is certainly supported by the Shaughnessy (ph) case, I believe it is. At this point, though, I'm going to overrule on a limited basis that I'm just hearing about that foundational aspect.

MR. OLVER: Thank you, Your Honor.

Q. (By Mr. Olver) Between '72 and '76 when you went to Iran -- or '72 and '75 when you went to L.A. to live, how often would you see the decedent on a social basis?

A. Probably three to four times a month. Maybe more often depending on what was going on.

MS. VAUGHN: Your Honor, so I don't disrupt the flow of this, may I have a standing objection to the foundational questions with regard to the interaction with the decedent?

THE COURT: You may. I'm hesitating only because you still will be well within your rights to proffer another objection whenever you'd like.

MS. VAUGHN: Okay. I will do that.

THE COURT: Because to the extent that these things are quite nuanced as both counsel agreed, maybe a standing objection would not -- I leave it to you --

MS. VAUGHN: Okay.

THE COURT: -- whether you think you can customize--

MS. VAUGHN: All right.

THE COURT: I'll put it that way.

MS. VAUGHN: Okay. Fair enough. Thank you.

THE COURT: You may continue, counsel.

Q. (By Mr. Olver) I believe we were discussing how frequently you saw the decedent between 1972 and 1975 when you left for Los Angeles. After you returned from Iran, what was the frequency of your visiting on a social basis with the decedent?

A. About the same.

Pg 237

Q. After 1985 when you sold your house, did the frequency with which you saw the decedent change and if so how?

A. It increased.

MS. VAUGHN: Objection. This calls for testimony that relates to transactions with the decedent, and it is becoming a material period of time.

THE COURT: Overruled at this point.

Q. (By Mr. Olver) Okay. You may answer.

A. More often.

pg 239

Q. Over the first couple decades that you knew him, how often would you estimate that you talked to him either in person or on the phone?

MS. VAUGHN: Objection. Violates the Dead Man's Statute.

THE COURT: Sustained.

MR. OLVER: There is no transaction with how many times you talked. You got to get into what the conversation is --

THE COURT: What's the relevance?

MR. OLVER: The relevance is the foundation to show the relationship between this witness and the decedent in context so when other information is presented to this Court, this Court doesn't see it erupting out of the head of Zeus all of a sudden; it makes sense. It's just background information, Your Honor.

THE COURT: Unless it's offered to now or in the future to prove a transaction a relevant transaction with the deceased, right?

MR. OLVER: Right.

THE COURT: And you're telling me it's not?

MR. OLVER: It's not. I'm going to ask questions about transactions with the decedent, but I'm a long way from there yet.

THE COURT: I don't know about that. For a limited time, I'm overruling the objection.

Pg 240

Q. Did he have any pet names for you?

MS. VAUGHN: Objection. This violates the Dead Man's Statute.

THE COURT: Sustained.

Pg. 242 - 243

Q. Had you ever been approached in the past before 1997 by decedent with regard to business opportunities?

MS. VAUGHN: Objection. This violates the Dead Man's Statute.

THE COURT: Sustained.

Pg 252

Q. What were his work hours, when he left to go to – when he went to work --

A. Usually 8:00 to 4:30.

MS. VAUGHN: Objection. This is implicitly testifying in violation of the Dead Man's Statute.

MR. OLVER: His acts, her observations of him leaving the house are not a transaction.

THE COURT: Unless they're offered to prove a transaction. Are they?

MR. OLVER: No. They are being offered to show the change in the routine, the difference in times away from the house, the change in the stress level, et cetera, et cetera.

THE COURT: What's the relevance of all that?

MR. OLVER: The way that the household changed from the intense days of Turner and stress to the middle period of two years working full-time to the next period of time working for Mortenson plus working part-time, all involved changes in the household routine, changes in the amount of stress, and it puts into context by way of a foundation why someone would do something or what were the benefits and gains for the family, irrespective of having nothing to do with the decedent, having zero to do with anything financial, just the way the household evolved.

THE COURT: But if I'm hearing you correctly, you expect there to be circumstantial evidence about stress which is relevant to his change in business, correct, And a change in business would be resigning from an 18 year job and going into another enterprise and, of course, it's the latter part that presents problems here.

MR. OLVER: That is a possible inference. The testimony is just going to the stress, to the hours, to the ability to see your children so that the Court has an appreciation for how the Benson family survived in that 18, 2-year tenure, about a 30 year period. Now, down the road, I'm going to be talking about transactions, but right now I'm talking about a household, powers of commuting, et cetera. I think that it has probative value and --

THE COURT: That's what I'm still missing. I don't understand what it's relevant to.

MR. OLVER: People act in their enlightened self-interest, Your Honor. They do things that give them pleasure, and they avoid things that give them pain. And as you craft the lifestyle, you carve out the threats, you carve out the possible pain. That's why people live in gated communities. They have come to the conclusion that having a lifestyle that protects them and their families and is secure is a good thing. Now, as we progress through the next few days of testimony, that natural evolution in the Benson family is going to be the foundation, and the context for the Court understanding what did occur when I am able through that witness to talk about his own acts. The acts that he does, which do not violate the Dead Man's Statute, are then in context and they make sense. If they were not in context, this Court might be looking at some of his acts going, a serious person wouldn't do this or this seems unlikely, or the credibility of these witnesses is in question because it doesn't fit with my common sense. As you see these things come together, the foundation for the behavior of the family is the glue that has the common sense to appreciate in context the acts that are going to be testified to by Mr. Benson.

THE COURT: And he may be able to -- Well, it depends, but he may be able to testify to those. We keep coming all the way back, though, to whether there was a transaction, and so I'm going to sustain the objection.

MR. OLVER: I'm sorry. I've forgotten the question now. Is the --

THE COURT: It's okay because I sustained it.

Pg. 279-280

Q. (By Mr. Olver) You indicated too that -- something about a crest. Can you tell the Court the history of crest at all?

A. It's the Benson family crest. At one point, my father-in-law was excited about this crest and gave us all sweatshirts with the family crest on the front of them. That is the crest that we scanned when we were making the business cards.

Q. Where's the --

MS. VAUGHN: Objection. That testimony violated the Dead Man's Statute with regard to the transaction with the decedent.

THE COURT: Sustained. And have you had a chance to see the original, Ms. Vaughn?

MS. VAUGHN: No, Your Honor.

THE COURT: Originals. Okay.

MS. VAUGHN: We can look at them at the --

THE COURT: I'm sorry?

MS. VAUGHN: -- and I'm happy to look at them during break.

Pg. 280

MS. VAUGHN: Excuse me, I -- For my last objection, I also would like to move to strike the testimony that violated the Dead Man's Statute --

THE COURT: Granted.

MR. OLVER: -- which, I assume, Your Honor, is that limited portion where she says, He gave us sweatshirts, just my recollection.

THE COURT: Approximately, but I have it in my notes as well. Thank you.

Pg 282 -283

Q. And how do you know that Benson Ventures was personally was actually involved in evaluating -- without discussing anything that decedent may have said, how --

MS. VAUGHN: And I would object to the reference to Benson Ventures to the extent that, that's claimed to be a partnership with the decedent. This is a question that implicitly and actually explicitly involves Dead Man's Statute barred testimony.

THE COURT: Sustained. I wouldn't ask but let him finish the question though. But I think you may be objecting to the previous question where both contained objectionable language, but I'll ask counsel to finish the question.

Q. (By Mr. Olver) Without relating anything that decedent may have said or done, how did you arrive at personal knowledge that Benson Ventures was investing or considering investing in actual real estate?

MS. VAUGHN: Same objection.

THE COURT: Sustained.

MR. OLVER: The words cannot be off limits as they apply as a concept; that's what we'll hear about. The words themselves may mean anything, and we've got a number of pieces of paper that say those words, and if this client understands what I mean when I say, Benson Ventures, I think I'm allowed to use those words in a way without raising a transaction with the decedent.

MS. VAUGHN: Then there would be insufficient foundation, and it assumes facts not in evidence.

THE COURT: Sustained.

MR. OLVER: We're doing the foundation right now, Your Honor. It's foundational. I'll back up.

THE COURT: If I understand the objection and the part that I think is legitimate is the facts that are not in evidence would be the existence of this point of Benson Ventures, correct? So the foundation that I hear you trying to establish is about her personal knowledge of real estate investments. I think there's also a foundation that needs to be attempted or made regarding her, this witness's, knowledge that there was a Benson Ventures.

Pg 289

Q. What was your understanding of the purpose for which you were helping make the tags listed in Exhibit 89?

A. Benson Ventures was going to be staking a claim on property in Eastern Washington.

Q. Where in Eastern Washington?

MS. VAUGHN: Objection to the extent that the references to Benson Ventures and Benson Ventures is alleged to be a partnership with the decedent. This testimony violates the Dead Man's Statute.

THE COURT: Sustained.

Pg 326

Q. What did you do?

MS. VAUGHN: Objection as to the statements of the decedent; they violate the Dead Man's Statute. Move to strike.

THE COURT: Sustained. Granted.

Pg 326

Q. How long was he in the hospital following the fall off his bicycle?

A. He fell off the bike on Thursday. He called Sunday and said he was unable to eat and was having trouble.

Q. What did you do?

MS. VAUGHN: Objection as to the statements of the decedent; they violate the Dead Man's Statute. Move to strike.

THE COURT: Sustained. Granted.

Pg 1114

Witness: Rodger W. Benson, III

Q. (By Mr. Olver) Did you write the checks associated with check stubs 113 and 115?

MS. VAUGHN: Objection to the extent that writing checks on a joint account that is going to the decedent's investment account is a transaction with the decedent.

THE COURT: Are you asking to voir dire?

MS. VAUGHN: Your Honor, I'm going to object until counsel establishes through his questions that it is not a transaction with the decedent. Because of counsel's prior statements, I cannot voir dire without waiving the statute, but I will continue to object until it is established to not be through his testimony a transaction with the decedent.

THE COURT: Are you able to predicate questions to establish that, Mr. Olver?

MR. OLVER: Benign acts, Your Honor, acts of this witness, can testify as to what he does. If the world view of the Dead Man's Statue advocated in this Court by Ms. Vaughn was actually the law, you would have no knowledge of any of the facts set forth in An How, Lennon or Boettcher. I can do predicate questions till everyone faints on the floor.

THE COURT: I won't faint.

MR. OLVER: Okay.

THE COURT: The Court enjoys that predicate question.

MR. OLVER: I won't go back to then 10 years between 1997 and 2007, et cetera.

Pg 1116

Q. Who is Doug Casey?

A. He's a newsletter writer, focuses primarily on international investments and silver mining stock.

MS. VAUGHN: Objection to the testimony concerning the document if it's being offered with regard to the alleged partnership.

MR. OLVER: I'm at a loss, Your Honor, to understand how the identification of --

THE COURT: The objection is about testifying beyond the document itself and into the meaning of the document, right?

MR. OLVER: Absolutely. I absolutely meant to ask him who Doug Casey was, and I did anticipate that his answer would be that he is an analyst in the mineral business, which is, I believe, a fair question and a fair answer. And to extrapolate that into this world view of transactions that Ms. Vaughn is advocating and which I am bumping up against, I once again take exception to that construct and advocate that I can ask him who Doug Casey is.

THE COURT: Again, the Court would ask that we not delve into the meaning of these particular documents. Ask your next question.

Pg 1183

Q. In the hour and 15 minutes between page one and page two, did you make any changes to this exhibit from your computer?

A. I did, but I couldn't tell you sitting here looking at it what they were.

Q. If we took some time over the break, would you identify what changes, if any, you made in that hour and 15 minutes?

A. Sure.

MS. VAUGHN: An objection to the extent that this information is going to be offered to establish the truth of the matter asserted because this information, as I understand it, is his account of what he did as part of this alleged partnership, and the fact that it is once removed from his prior version which was also a violation of the Dead Man's Statute doesn't make it admissible, and his testimony about the document and about what it means is barred by the statute.

MR. OLVER: Your Honor, one of the problems that Ms. Vaughn's argument has been making is that she's conflating two things: The nature they're playing in the litigation with the thing that's being offered into evidence. Now, things being offered into evidence may imply something; they may imply one thing but they may imply many things. To the extent that they imply nothing or to the extent that they imply many things, it's not a transaction.

THE COURT: Right. We've been down this road before it seems because then the argument will be what's the relevance.

MR. OLVER: Right.

THE COURT: Right.

MS. VAUGHN: I mean, essentially, my understanding is he wrote down stuff that is a transaction with his father, translated into another electronic document, and translated it into this, and the stuff is still a transaction with the decedent. That's our objection.

THE COURT: Sustained.

MR. OLVER: You'll excuse me if I ask questions that go beyond the Court's ruling because I don't understand the objection or the ruling.

Pg 1224

Q. I'd like to just direct your attention to the, say, first year and a half. Could you describe for the Court how your learning curve occurred or how it grew or how it developed?

MS. VAUGHN: Objection. The question calls for testimony in violation of the Dead Man's Statute with regard to it, orientation to the first one-and-a-half years, presumably that involves the witness's father.

THE COURT: Please clarify.

MR. OLVER: I'm sorry?

THE COURT: Please clarify. First one and a half years of what?

Q. (By Mr. Olver) Mr. Benson, I'm asking you how your learning curve, your personal independent learning curve, evolved over the first year-and-a-half of your introduction of mineral certificates, mineral companies.

A. It was very, very steep.

MS. VAUGHN: Objection. Excuse me. Same objection with regard to involving the decedent and the Dead Man's Statute. This sounds like -- it's again, kind of vague testimony and trying to make the point, which I assume counsel is going to argue later on, fits within his totality of the circumstances that establish a partnership. Otherwise, it seems irrelevant and cumulative.

THE COURT: Are you okay?

MR. OLVER: I'm fine. I'm fine. I've been on my feet awhile.

THE COURT: Okay. I didn't hear solicited from that question testimony or evidence from this witness about Benson Ventures. So, on its face, it would have limited relevance as you observed on your objection. However, the objection on its face is overruled. That means that you can answer.

THE WITNESS: I can answer the question?

A. Yeah, I -- in the first couple of years in particular, I was dedicated 18 hours a day just about to learning about this industry. I met with literally hundreds of people, read thousands of periodicals and web information and just I was very thirsty to learn a lot about it, and I learned a lot very quickly. You know, I was out raking pieces of rocks off of mine adits, you know; I was pretty much doing it all.

Pg 1226

Q. Now, what happened, if anything, in '98 that caused you to change your employment?

MS. VAUGHN: Objection, question calls for testimony in violation of the Dead Man's Statute with regard to the reference of changing employment. That would involve the decedent presumably.

MR. OLVER: Once again, Your Honor, Ms. Vaughn is conflating the nature of our overall claim with the question and little teeny bit of evidence that's being asked at the time. And she is connecting dots like I will in closing argument, but these dots don't -- aren't a transaction. I asked him what caused him to change his employment in 1998. To the extent that, in the universe that was impacting him, there might have been a family member that was one of these things, then someday in this trial I might argue that. But to the extent that we are asking that other things are being elicited, I think that's fair without conflating that limited area into why we are in this courtroom and joining them up as a Dead Man's objection.

THE COURT: So, if I heard you correctly, as abstract as that was, you're admitting that there probably is a point -- probably closing argument -- where the labeling -- you would be agreeing with Ms. Vaughn about the labeling of this testimony; however, that's not what you're doing right now?

MR. OLVER: Absolutely. That's correct.

THE COURT: Which, of course, begs the question, what are you doing right now? So what you're doing is, as you put it, you're giving us a sense of this man and arguing the totality of circumstances, correct?

MR. OLVER: Absolutely.

THE COURT: Right, which takes us back to wondering what the relevance, exactly, is. So what the Court's trying and has been trying to do since 9:00 a.m. is to give both sides a fair trial under the rules of evidence. And the way that I'm going to continue to do that is to allow testimony about individual actions that this witness did that may conceivably have some relevance. However, we all need to be mindful, including the questioner, needs to be mindful of questions that really are designed to get at a partnership with the deceased. And if these questions could clearly be refuted by the deceased, you know, then we've crossed that line.

MR. OLVER: Allow me to rephrase my question, Your Honor.

THE COURT: You may.

MS. VAUGHN: If I may just illustrate my specific concern about the recent testimony which was --

THE COURT: Sure.

MS. VAUGHN: -- he testified that as a part of his learning curve, he spent 18 hours a day on learning, and if this comes up in closing argument as the witness was working 18 hours a day for his father or with his father as part of Benson Ventures, then it was a misrepresentation of what this testimony is in order to have it admitted at this point in time, and that is the concern that all of this testimony raises. It does seem to us to be an end-run around of the prohibitions of this statute if it's going to be used later on to argue their case.

THE COURT: I would imagine you would have a retort to that in closing argument.

MR. OLVER: I can address relevance, but I am entitled, I believe, to argue inferences from the evidence. And the admissibility, whether he's -- if he is testifying that he is working and that's admissible -- and we know from An How and Boettcher that he can say that -- then in the end when I do argue it -- I mean, that's why we filed the lawsuit; that's why we're here. Now, I am going to argue that everything that I've presented to this Court has some relevance. I'm not presenting anything to this Court on purpose without relevance, at least I'm trying not to. And the inferences that facts and circumstances are going to raise are -- Ms. Vaughn is leapfrogging way down the road and, once again, conflating our cause of action into the analysis which is exactly what you don't do. If

you're doing the laundry for Mr. Brock, you get to say, I did the laundry from Mr. Brock. It doesn't conflate to I had a contract for services. Of course you're there; that's why you walked into the courtroom, but you get to ask the question, What'd you do? And so, I'm trying to do what'd-you-do questions –

THE COURT: Sure. The concern, as you well know, is that even the Boettcher case, when they talk about that work and that labor, the Court went out of its way to specifically say that, that testimony did not – the Court wondered whether that testimony tended to prove a contract had been made.

MR. OLVER: Exactly.

THE COURT: Whereas here, this testimony, seems to be offered to prove a partnership; that, therefore, is a very important distinction, correct?

MR. OLVER: I would say it's --

THE COURT: And to put it another way, as I'm now joining you in abstract-land, but it's a legally valid point, it is, yes, you may argue inferences of evidence. Of course. That's how it's called closing argument. But it's also relevant what you imply with evidence. So the fact that you can infer may or may not mean you can imply. Or, more troublesome -- and I think this is Ms. Vaughn's point, though, she was probably being more artful than I'm being with it -- you're implying one thing but you will be inferring another from the same evidence.

MR. OLVER: The -- in *Jacobs v. Brock*, when she did the laundry, you could -- she said she did the laundry. You could imply or infer that she did it as a neighbor, as a volunteer or you can imply or infer that she did it for money; either inference or implication could arise from the same set of facts. The set of facts themselves were admissible. At the end saying, I want to be paid, is the conclusion of the attorney. Now, in that particular court, in that particular case, the trial court and the Court of Appeals – the Supreme Court, actually, kind of created a new -- I won't say a "presumption", but now a presumption from the facts, they said this Dr. Brock would not have accepted all these services without being an honorable man intention to pay. Now, there was no testimony admitted in the Court in that regard. That was the inference that the Court drew from the fact that this woman had, for many days, done the laundry and all the other things that we've talked about her doing. So I once again go back to saying the facts by themselves are -- they're naked. They're here. Now, they may imply or infer one thing or they may simply or infer that he was just spending time with his father or that this was so interesting just doing this was fun. It may imply or infer that he was a salaried employee and just agreed to work for very, very, very, very, little money. Now, it may imply or infer a partnership, a contract; that's what it may imply or infer, but the naked evidence itself is that he is doing laundry. That's all I'm asking. Now, when I get into the questions of demonstrating his knowledge of fundamentals and technical aspects, I'm showing you that he knows how to do laundry. He doesn't walk into the laundromat with no soap, without arms to do or a pan to scrub in, and those are little naked bits of information that once again makes it

reasonable when you look at the totality of the circumstance and you draw inferences, that your inferences are reasonable. Now, maybe, I've said too much. Maybe I've missed the point.

Pg 1232

MS. VAUGHN: Sorry. Again -- and I'm not good with abstraction so I will make this concrete, again with regard to the testimony that he was -- his learning curve consisted of 18 hours a day and the offer being that this has nothing to do with the decedent, the case law is very clear and the doctrine is very clear that a party cannot testify indirectly to create an inference as to what did or did not transpire between the party and the deceased. And taking that representation at face value which is it didn't involve dad is one thing but putting on that testimony and then arguing an inference from it later on violates the Dead Man's Statute because the Dead Man's Statute does apply to indirect testimony in order to create an inference of a transaction. And it appears to the Respondent, at least, that, that is what is going on with at least some of his testimony.

THE COURT: As I pointed out earlier, the application of the Dead Man's Statute particularly with regard to acts of transactions seems to me it would turn very much on the individual facts as they are presented and testimony as it's presented. So the Court does see a distinction between the witness testifying about his knowledge and what he did. The specific implication here is that he is working 18 hours for Benson -- a day for Benson Ventures is concerning. So I'm going to ask counsel to rephrase and clarify.

APPENDIX C
DEAD MAN'S STATUTE: TESTIMONY OF OWN ACTS

Some aspects of the following questions and answers were admitted for limited purposes but are included for the purpose of sharing the trial courts evolution of opinion culminating at CP 1790 that testimony about "acts" are admissible only if (a) decedent is not present and (b) are not offered to prove a partnership. That legal limitation and the twenty four sustained objections are assigned as error:

Pgs 290 to 308; 309 to 310

Witness: Karla Benson

Q. (By Mr. Olver) Were you physically and personally going to be involved in any of the placement of the tags that you -- metal claim tags, that you'd been describing?

A. Quite possibly.

Q. And did you personally go look at the dirt where the metal tags that you described were going to be placed?

A. Later on.

Q. How many times did you go to the dirt where the metal tags were possibly going to be placed?

A. At least twice.

Q. What was the name of the place that you went to where the metal tags were possibly going to be placed?

A. It's in the Okanagan. The exact name, I'm not sure. It's off the Similkameen River, I believe.

Q. When you went there, on at least one occasion, did you take any photographs?

A. Yes.

MR. OLVER: I'm referring, Karla, to what's been marked for identification purposes, Petitioner's 88 which purports to be some photographs. I'm showing you with reference, Your Honor, to page number -- in that exhibit. Counsel, these will be RB182 and 183.

Q. (By Mr. Olver) Karla, I handed you three original color photographs, and I'm also directing your attention to Exhibit 88 pages with RB182 and 183 at the footer.

A. Okay.

Q. Are the color photographs that I've handed to you, Karla, the same photos that are on pages 182 and 183?

A. Yes.

Q. And who took those photographs?

A. I did.

Q. And when did you take those photographs?

A. September 12th, 2004.

Q. And what, if anything, do these photographs -- excuse me. Are these photographs reasonable representations of what they purport to represent?

A. Yes.

MR. OLVER: Move admission of that part of 88 contained on RB182 and 183.

THE COURT: Are you not going to be offering any of the other pages that currently make up 88?

MR. OLVER: Your Honor, I'm going to be offering all of them. I'm just starting --

THE COURT: But not through this witness?

THE COURT: Okay. So we have two documents, correct? Sub numbers 182 and 183 that are being --

MR. OLVER: Yes, sir.

THE COURT: -- offered into evidence. Is that correct?

MR. OLVER: Yes.

THE COURT: Okay. So Exhibit 88 now a two page document is being offered sub numbers 182 and 183. Is there any objection?

MS. VAUGHN: Relevance.

MR. OLVER: Your Honor, we've had a number of foundation objections pertaining to what this witness knows about Benson Ventures or about the efforts by her husband in pursuit thereof, and actually physically being on the ground looking at dirt through this witness, I think, is probative and goes to her credibility.

THE COURT: Why would that not be photographic evidence of an alleged transaction involving business ventures -- Benson Ventures?

MR. OLVER: There's no transaction, Your Honor. This is -- this is moving from one place to another. They've gone up there to do something. Now, the something is what we'll be getting to, but going there as part of Benson Ventures is within her personal knowledge and it's -- we've said nothing about any gain or loss or anything other than describing what event is going on and showing that real physical activity occurred with this witness as part of her participation in the effort that we're going to be talking about later.

THE COURT: That's not a transaction?

MR. OLVER: No.

THE COURT: Why not?

MR. OLVER: Because her acts are not -- she can testify as to her acts. We know from *Jacobs v. Brock*, we know from *An How*, we know from *Boettcher*, we know from *Lennon* that a person can testify as to their own acts, and especially decedent's not on this trip. He can't say, You didn't go. So, A, it can't be contradicted by the decedent, and B, it's her own acts. Doesn't come within the hearsay -- the Dead Man's Statute, Your Honor. I can give you some examples out of *An How* or --

THE COURT: But to back up to what the current objection is, so if you're saying that this testimony in this exhibit -- two-part exhibit, that these are not related to a transaction involving Benson Ventures; that's what your saying, right?

MR. OLVER: This is not a transaction.

THE COURT: Right. And so, thus, the relevance objection. So I still haven't heard what the relevance of these photographs are.

MR. OLVER: This is -- This is foundation. No transaction wound up occurring, but in all businesses, you do due diligence, and Rodger and Karla are doing due diligence. And essentially, the decisions that you make not to do something are sometimes almost as important as the decisions that you make to do something. And they have personal knowledge of going -- she has personal knowledge of going there in conjunction with these metal plates and no transaction winds up occurring, but it's still an act of this person that is -- helps you evaluate, A, her credibility; B, it gives you a fuller understanding of her foundation for when they say, What does she know about Benson Ventures? Well, she's not only helping with the business cards, she's helping with the plates, she's driving out in the mountains, she's taking the photographs, and this is foundational to show that next time they say "foundation", you have been walking through hundreds of conversations between she and her husband. She's looked at many documents; she's done

physical things on the ground; she's been down in the basement cutting -- helping cut pieces of metal: That is the foundation that I need to establish so that when they say, What do you know, little girl, about Benson Ventures, you have already heard hours of testimony that give you the groundwork for why she can sit there and testify to anything.

THE COURT: Do you think the testimony that would include many transactions can provide a foundation to show that there was a transaction? Because I'm hearing a circular argument.

MR. OLVER: No. And the reason is, with all due respect, you're missing the act exception to the concept. The acts that she's doing are not transactions or to the extent that they imply -- for instance, for instance, check this out: When in *Jacobs v. Brock*, when the old lady is going to give him enemas and do all this work, they testify exceedingly detailed about how he had diarrhea and they had to do all this laundry and how she had to go to his house over and over and over; those are acts, okay? Now, at the end of *Jacobs v. Brock* it says, Did you send a bill? That's her act. Now, none of that violated the Dead Man's Statute. You don't get to the Dead Man's Statute until the questions asked of her husband who says, Why didn't you send a bill? And he says, I was under the impression we were getting the lake property. Now you've got a transaction. Now in that particular case, the Supreme Court said that because it's his impressions, it's going to be an exception. But of all the things that the wife did and the husband did to take care of Dr. Brock, all that was admissible, just so in the *Lennon* case. As I said before, when Roger is taking stock certificates here, taking stock certificates there, trying to cash them at the bank, those are all his acts, and he can testify to his acts. It's only when he doesn't return the big envelope that it's noticeable with a rubber band, and it would've been noticed by Elsie that the Court of Appeals said, Aha, we can infer that a transaction might be occurring here, therefore, that language is what you cannot get in. Just so in *Boettcher*, and I don't remember the facts of *Boettcher* as well as -- unless the redoubtable, Mr. Lee, has just handed it to me. An *How*. An *How* was a similar case where -- oh, *Boettcher* was -- I think *Boettcher* was the cook.

MR. LEE: An *How*'s the cook.

MR. OLVER: Thank you. An *How*'s the cook. And she cooks or he -- An *How* is a butler, cook and the guy cooks for this decedent for like a decade, and at the end he says, Hey, I've got a creditor's claim for my services. Now, all throughout An *How* with the Supreme Court he testifies as to how long he cooked, what he did in addition to cooking, all of his acts. And it's only when -- and then he's even testify -- they even went so far as to say that he could say whether or not he was paid for his services. For doing all that cooking, for doing all that, were you paid? No. Because that was his act. That was his, Did I receive money? No, I didn't receive money. It's not saying about the underlying transaction. I know *Boettcher* is great, but I can't remember the facts to explain it to you. Maybe, Mr. Lee, would be good enough to.

THE COURT: But doesn't Boettcher also get into looking at the transaction. As far as giving us a context for what acts are legitimate or illegitimate, it gets into whether the act is offered to prove a transaction or even related to a transaction?

MR. OLVER: Absolutely, it does.

THE COURT: All right. So these photographs are of a -- Are you telling me these are photographs not related to a transaction with the deceased?

MR. OLVER: Let me back up, and I'll be glad to -- in point of fact, they're not. There was no transaction. This is an act --

THE COURT: Related to a transaction.

MR. OLVER: Yes. All of the acts that people do are related to a transaction. When you're washing the laundry, when you're cooking the cookware -- in Boettcher, they testified that they managed the decedent's extensive properties. So we do have acts that do relate to transactions. And that's where I'm struggling communicating because there are all these acts in all these cases that do relate to transactions but because they're the witness's acts, they can testify to them: Did you get a letter? Did you cook? Did you do laundry? Did you do enemas? Did you manage his properties? On and on and on. Did you take the stock certificates to Seafirst? What'd you do then? I took them to Washington Mutual. These are his acts. And they -- yes, they absolutely do relate to a transaction at some point in time. In these cases, they're suing for services. Everything that they're talking about is the quid pro quo for money. They absolutely relate to the transaction. But because they're the individual's acts, they're exempt. And so, coming full circle, to this witness on this driving out to look at dirt, driving out and making little plates with BV on them, they are acts. In this particular case no gain or loss occurred, but it is in furtherance of the goals of Benson Ventures; that's true. Because like I said, you have to figure out what you're going to admit as well as you have to figure out what you're going to do. But as it's her acts, Your Honor, she -- it's an exception to the Dead Man's Statute.

THE COURT: If we come full circle and those actions, some of which you touched on, are related to Benson Ventures and the deceased could, if here, testify that, I've never seen those before in my life, those had nothing to do with Benson Ventures at all, correct?

MR. OLVER: Whether --

THE COURT: So you're saying they're related to Benson Ventures, that's where they derive their relevance, correct?

MR. OLVER: Yes.

THE COURT: Okay. These aren't pictures of a vacation?

MR. OLVER: Correct.

THE COURT: Right. But you think that they nonetheless do not violate the Dead Man's Statute because they're an action?

MR. OLVER: Absolutely.

THE COURT: Your response.

MS. VAUGHN: My response is the foundation that makes these documents relevant violates the Dead Man's Statute, and that was the basis of our prior objections with regard to Mrs. Benson testifying about what she was doing and linking it to Benson Ventures to the extent that they are claiming that Benson Ventures is a partnership or a joint enterprise involving the decedent; that testimony involves a transaction with the decedent and is barred by the statute.

MR. OLVER: May I tap dance on one aspect? And with all due respect to my colleague, I'd thought of this myself before he came over here.

THE COURT: You can respond.

MR. OLVER: The decedent cannot contradict whether or not they were in their basement making these. He cannot contradict whether they drove up and did thus and so, just as like Elsie could not contradict whether Rodger drove to B of A, drove to Washington Mutual. He's not present. He's not part of this event so he can't contradict it. And that is one of the elements why your personal acts are admissible.

THE COURT: No. I appreciate the attempt at distinction. It still seems to me, though, that he could contradict that those have any relevance at all to the enterprise, that those are part of it, that they have any relevance to Benson Ventures whatsoever.

MR. OLVER: There's no foundation that he would even know that these existed. He's not in the basement doing this work.

THE COURT: No. But he would know the business. He would know the partnership, correct?

MR. OLVER: He would know --

THE COURT: He would know whether this land was fertile for this. He would know whether that was a goal of the business plan, et cetera.

MR. OLVER: Absolutely.

THE COURT: Right.

MR. OLVER: Absolutely, and --

THE COURT: So he could contradict it.

MR. OLVER: He can contradict whether or not the general plan was in existence. He can't contradict that they're down in the basement making metal plates. Maybe they got up one day and said, You know, if we're going to claim that ground we've got to, we've got to read up and figure out how to do it. If we're going to do it, we've got to make these plates. I read about it in the manual from the Forestry Department. But in point of fact, every single lawsuit that involves payment of money at its heart has a quid pro quo, every single one. And if you're making a claim for services, every single case allows you to say what you did as that quid pro quo, whether you send a bill, whether you receive money, because it's the acts of an individual.

THE COURT: Ms. Vaughn, is the Dead Man's Statute prohibition limited to personal knowledge of the decedent?

MS. VAUGHN: Say that again, Your Honor, please.

THE COURT: Is the Dead Man's Statute prohibition limited to the decedent's personal knowledge?

MS. VAUGHN: No, it's not. It's related to anything that the decedent did -- well, no. Because it also bars testimony that something didn't occur; that's squarely within the bar of the Dead Man's Statute. And with regard to the relevance question, the cases that have allowed testimony concerning unilateral acts -- at least the Boettcher case makes the distinction that it did not tend to prove that a contract had been made, and that's the basis of the relevance objection to these photographs. If they're just photographs and they have nothing to do with the decedent, they are not relevant. The link -- the link violates the Dead Man's Statute because they are testifying explicitly or implicitly concerning either transactions with the decedent or statements made by the decedent, and that's why the foundation is an issue with this testimony. Because the foundation that makes the testimony admissible and makes the testimony relevant, violates the statute.

MR. OLVER: Briefly. Your question goes to the heart of the reason why it's an exception. You can't contradict unless you have personal knowledge one way or the other. Now, I'd just like to read a sentence to you out of the Boettcher case.

THE COURT: Please.

MR. OLVER: This is from page four. Evidence of the work --

THE COURT: Go ahead.

MR. OLVER: Okay. Okay. Yes. The testimony – and this is, if you'll find footnote three, Your Honor, headnote three, this is the next paragraph after headnote three in the body. And the way this is numbered is –

THE COURT: This is the testimony of the Respondent that he worked at the house?

MR. OLVER: Correct. The testimony of the Respondent that he worked at the house of the intestate and the character of the work performed by him was not testimony in relation to a transaction had by him with or any statement made by such intestate. Such testimony related solely to acts of the witness and was, we think, entirely competent. If you go down two paragraphs where it says, Evidence, it says, Evidence of the work which appellant did, did for decedent and the pay received for it did not tend to prove that a contract had been made under which decedent agreed to will property. Such evidence does not constitute a waiver of the bar. Now, if it is evidence of a transaction, it would waive the Dead Man's Statute. And because it doesn't waive it, just as they said two paragraphs up, testimony to work done, the character of the work was not testimony in relationship to a transaction. There's other cases that say it as clearly as that, but that's right on. Right. I love that guy. Just as the testimony in Boettcher of the work performed does not, according to the Supreme Court, tend to prove a contract and, therefore, is admissible. So to the work performed, the acts performed by this witness, do not establish a partnership. It's the acts -- In Boettcher, the acts don't prove a contract. Here, the acts don't prove a partnership. Exact same.

THE COURT: And Ms. Vaughn's going to remind the Court of her relevance objection.

MS. VAUGHN: Right. That's -- I have a smaller brain, so I'm just focusing on --

THE COURT: So that's the -- we keep coming back, thus my earlier observation about the -- what appears to me to be a circular argument, and the only independent reasoning I've heard thus far is its relevant overall credibility.

MR. OLVER: We got in a discussion about an hour ago about whether this witness could even properly use out of her mouth the words "Benson Ventures".

THE COURT: Right. And then --

MR. OLVER: And so we've been laying a foundation of her personal knowledge of what Benson Ventures is in documents, in conversations, and in physical acts so that when we do talk to this witness who's heard Benson Ventures mentioned on a daily basis for ten years over three thousand times, this witness, A, has a foundation to say something and use those words; and B, has credibility in this court. She's got to have the foundation. We're still doing foundation so that she can use the words "Benson Ventures" which is where I started with an hour ago.

THE COURT: Right. But the rubber meets the road, as they say, when exhibits are offered, so I think you -- things change. So we either have a foundation or we do not.

This is now real evidence that's being proffered of photographs, and if they're related to Benson Ventures, then they're barred, and if they're not related, they're not relevant.

MR. OLVER: I take serious exception. If they are related, they're relevant. And if they are related, they're the acts of the witness. She's up on the mountains, she's taking pictures of the dirt in furtherance of the goals and dreams of Benson Ventures, and the acts -- Boettcher couldn't be more clear. You get to say what acts you do because the other person's not there to contradict you. And we're not saying that -- what it is. We're saying that something exists called Benson Ventures in which certain things were done by the witness. It doesn't tend to say that it's this kind of thing or that kind of thing. Right now, we're just saying that some thing exists called Benson Ventures in which he works hours on the computer, she cuts little pieces of tin and goes places and looks at dirt.

THE COURT: One last comment.

MS. VAUGHN: Testifying about digging in the dirt is one thing. Testifying about digging in the dirt for Benson Ventures is another thing, and that's a violation of the Statute. These exhibits -- they're pretty pictures, but to make them relevant, she's going to have to testify in violation of the Dead Man's Statute.

THE COURT: I'll tell you, that's the way I see it right now, counsel. But what I'm going to do is -- we're going to break now, and we're going to return at 1:30. So I want to make sure I've had a chance to get to know these cases as much as you all know them. So, obviously, I think that this is an important issue to this case, so I'm going to re-read these cases. I know - I think that both sides have supplied the Court with cases. If there's additional authority that you believe particularly on point, you can simply e-mail the Court or try to call. All right? So we're going to return at 1:30.

THE COURT: All right. The Court's had an opportunity to review the case law previously submitted as well as two additional cases submitted over the noon hour. I do say I enjoy the opportunity to review cases from two centuries ago. So the Furth case of 1896 was reviewed as well as Tegram's (ph) trial practice civil. Before the Court specifically is the offering of Exhibit 88 comprising two separate pages or I'm presuming perhaps the original photos might be offered at some point as well. In reviewing the Boettcher case, when it asks whether the evidence of the work performed, in that particular case, did it tend to prove that a contract had been made? That certainly seems applicable to the circumstance but also different because in that case, they're not dealing with a partnership so the Court's instinct remains true that the testimony tends to prove or maybe infer to prove the existence of a partnership here. But the evidence as I understand and the proffer behind it specifically told the Court that it's not being offered to prove the partnership. It's being offered for another reason. Another reason may be found in Erickson v. Kerr, a Washington Supreme Court case. They're talking about the credibility as being a central issue of one of the principal witnesses. Third, the items being offered now are not testimonial; they are items of evidence. The Court is more inclined to admit that type of evidence rather than testimony about it or the meaning to be accorded it. Finally, because we have the convenience of this being a bench trial, the Court is in an

advantageous position to, if necessary, excise out or in the particular testimony. For those reasons, the objection is overruled and 88 is admitted. Thank you. (Petitioner's Exhibit Number 88 was admitted.)

Pg 1040 to 1041

Witness: Rodger W. Benson III

Q. Did there come a time when your relationship with your father changed, if at all?

A. Yes, after -- he used to come and watch me play basketball in high school so I started seeing him around a little bit more. And after I graduated from Nathan Hale I went and actually lived the summer with he and Carolyn up on Queen Anne Hill and started an ice cream vending business. So I was working closely with him and that was my first business venture of my life.

MS. VAUGHN: Objection. The answer violated the Dead Man's Statue with regard to the basketball transactions, living with him and Carolyn, and the starting the ice cream business.

THE COURT: Sustained.

MR. OLVER: This Court very properly characterized some aspects of interaction with deceased declarant's as benign transactions, and I took note of that because the next opportunity I have to create any law on this subject, I'm going to put that in and take full credit for it. Now, it's the -- because I think that aptly summarized the difference between Mrs. Jacobs giving Dr. Brock an enema on the one hand which is admissible, I keep going back to that, forgive me, and on the other hand a transaction which there is a gain or loss. Now, as we look at seeing someone's basketball game, that is what I'd call a benign comment. No gain or loss, no transaction, irrelevant for Dead Man's Statute purposes.

THE COURT: Okay. I appreciate that. What I did hear in the answer was testimony going toward a business relationship.

MR. OLVER: Excuse me.

THE COURT: So even if we accept the benign transaction line of cases --

pg 1060

Q. (By Mr. Olver) And approximately how long did the conversation regarding Exhibit 3 last, if you recall?

MS. VAUGHN: Objection. This involves a transaction with the decedent.

THE COURT: Sustained.

Pg 1066

Q. (By Mr. Olver) After you saw Exhibit 3, how long before you took any action and reliance upon it, if any?

MS. VAUGHN: Objection. Is this still part of the offer of proof?

MR. OLVER: No.

THE COURT: Okay. Well --

MS. VAUGHN: Then objection to the extent that it calls for testimony in violation of the Dead Man's Statute and involves a transaction with the decedent.

MR. OLVER: I believe the question, Your Honor, was what action, if any, this witness took as a result of seeing admitted exhibit.

THE COURT: Which would be related to the transaction. Sustained.

Q. (By Mr. Olver) How soon after you saw Exhibit 3 did you take any action with regard to it?

MS. VAUGHN: Same objection.

THE COURT: Same ruling.

Pg. 1072

Q. Mineral stock investment business, to what sort of things did you personally do to get the mineral stock investment business off the ground?

MS. VAUGHN: Same objection if this involves a business with the decedent.

THE COURT: Overruled.

A. Well, I did a lot of things. I bought office furniture to set up an office environment, computer equipment, fax machine, telephone answering machine, designed and printed business cards, designed and printed expense reports, designed forms, designed and printed stationary. I set up certain financial books, tracking devices, created spreadsheets for monitoring business transactions. Those are the kinds of things I did to kind of get things started.

Q. (By Mr. Olver) Where did you go to buy the furniture?

A. Ducky's in downtown Seattle.

Q. What did you buy at Ducky's?

A. A couple of file cabinets and a desk.

MS. VAUGHN: Same objection with regard to the questions and answers. It's impossible to determine, based on these questions, whether the decedent was with him when he did this and if -- even if he wasn't, for this testimony to be relevant to this case, it would have to involve a transaction with the decedent.

THE COURT: What is the relevance?

MR. OLVER: This witness has testified that he's getting involved in the mineral stock investment business which is why we're here. We're saying that there are stock investments in the mineral industry that he owns, and he has done things in that business to create wealth, and we're showing what he alone has done in that business to create wealth. And I've not asked about any third parties whatsoever.

THE COURT: Is it your position that your client's entitled to money separate from an alleged partnership with the deceased?

MR. OLVER: No.

THE COURT: Then I would sustain the objection.

MR. OLVER: Your Honor, let me be heard on that. The cases are legendary that he can testify as to his own acts. Now, I've been talking about Roger Lennon since day one. Roger Lennon testified that he took stock certificates from Elsie's house, went to his house, left some of them there, went back, left some there, went to Washington Mutual, went to SeaFirst; these are all actions that he could testify as to his own acts. Now, just as the lady giving the enema testified how much washing she did, in an action for compensation for those services. So yes, there is -- there is -- everyone knows that this -- that was a suit for payment for services. She's allowed to say everything she did. Now he's allowed to say everything he did in the same manner as Mrs. Brody for Dr. Jacob, just as Roger Lennon could. And An How, if you remember An How, was the one from 100 years ago where the butler -- he was a cook-butler, and he testified that from this period of time he worked doing butlering and did cooking, and there was a year when he took off, and then after that, he continued to butle and cook after that, and they allowed him to testify. And that also was an action for services, money coming from the decedent. Everyone knew where it was going, but it was his acts and the case on all three of those cases says that you can testify as to your own acts, Supreme Court and Division One.

THE COURT: Does it matter whether those acts are related to a transaction with the deceased?

MR. OLVER: In each of the three circumstances I've described -- An How, Roger Lennon, and the lady doing the washing and the enemas for Dr. Brock -- each one of those are services for a quid pro quo. Each one of those are transactions with decedent, but there's an exception for the acts of the person themselves which is why all three of those cases allow the whole line of testimony in. It's why, when the Lennon court, Division One, took that whole long litany of where the stocks went to visit, why the only thing that they said that violated the Dead Man's Statute was when Roger left the rubber banded bundle without the big envelope, it could be inferred that Elsie would know that he was taking it. And that would be a transaction that could be gained or lost that she could contradict. Now, all the other things that he did himself, she could contradict those too, but because they are his acts, just like the lady doing the wash, if old Doc Brock -- Jacob C. Brock, Dr. Brock, if Dr. Brock -- he could walk in if he was alive and say she didn't do my wash. She didn't give me enemas. She didn't do any of that. The decedent An How could walk in and say he didn't butle; he didn't cook. And those are all transactions for money. But the exception carved out consistently is that a person can testify as to their own acts as an exception to the Dead Man's Statute. And I'd offer those three cases.

THE COURT: Ms. Vaughn, your position, as I recall, consistent but also quite -- What's a good word for it, -- black and white. That your position is anything, any testimony that prompts the following question, could the deceased contradict, not "would", but "could" they contradict that testimony, anything is inadmissible, correct?

MS. VAUGHN: Yes, Your Honor. And I would like to elaborate on it, though, in this particular context which is the question was really too full, I think, did you do this thing and was it related to the investment business. Did you do this thing if it's this unilateral act is probably irrelevant, he's linking it, and the whole crux of their case is they're linking it to this claimed investment business they had. And so it is part of a transaction with the decedent and certainly, the decedent, out of his personal knowledge, could deny that it was part of the investment business, and that's the portion of it. It's the kind of relevance link that is the problem in this case given that this is a partnership case. This is a claim that this was part of partnership. And that is the basis for our objection and our argument that this falls within the transaction with the decedent.

THE COURT: Would you agree that there is a so-called acts exception that has been carved out in case law?

MS. VAUGHN: I would agree that there are cases that talk about that allow in testimony relating to unilateral acts. I don't know if I would go so far as to call it an exception. I think that there are -- certainly every case turns on its own facts, and the Dead Man's Statute cases do as well and the Boettcher case is an example. The individual was allowed to testify about his labor and his payment, but the Court also, in the same breath, said that it wasn't it did not tend to prove a contract. This isn't a quant amera (ph) case. He has a partnership claim here and the issue that we have is whether this is related to that alleged transaction, that alleged contract. I mean, it is a contract with his father, and that's what it's being offered for; otherwise, it's not relevant.

MR. OLVER: The niche in that is that none of these acts are being offered to prove a partnership; that is the critical distinction.

THE COURT: But why would they then be relevant?

MR. OLVER: The Court takes the facts and circumstances that are admissible. The acts are admissible. You add it up and if the totality of the circumstances under the Nickleson case convinces you, then that's where you go. This is totality of the circumstance. And it's the exception -- I can find the exact language. Okay. Anne Boettcher, quoting An How, the Court said, We agree with the trial court that the quoted testimony and the circumstances under which it was given did not constitute a waiver by Respondent's of the bar of the statute. For testimony by a party in interest as to the performance of labor or the rendition of services for the decedent is not prohibited under the statute as a transaction with the decedent. In An How vs. Furth, 13 Wash. 550 at 554 1896, this court said, The testimony of respondent that he worked at the house of the intestate and the character of the work performed by him was not testimony in relation to a transaction had by him with or any statement made by him by such intestate. Such testimony related solely to acts of the witness alone and was, we think, entirely competent. A few lines later it says, Evidence of the work which appellant did for decedent and the pay received for it did not tend to prove that a contract had been made under which decedent agreed to will property to appellant. Hence, such evidence does not constitute a waiver of a bar of the statute. Now, this line of questioning is relevant to show Rodger Benson III's activities related to the time spent together. They've introduced evidence in the deposition testimony of the -- Joan Benson that she knew they were working together. There's been testimony from the other kids that there's this time spent together. Mr. Decker has carved out that phrase laboriously for this Court, and so this is what this witness did in his time spent together and whether or not it is a partnership, there is nothing that this court can glean from hauling around four door file cabinets other than his acts are occurring. Now, if the totality later on goes there, this is in the same category as butling, cooking, and doing the laundry.

THE COURT: Ms. Vaughn, are you --

MS. VAUGHN: Well, with regard to the testimony of Mr. Decker or Joan Benson, neither one of those witnesses waived the Dead Man's Statute in their testimony. Mr. Decker's testimony is not barred by the Dead Man's Statute. The testimony by Joan Benson --

THE COURT: Right, no. I understand that.

MS. VAUGHN: So to the extent that this has anything to do with that testimony and is a violation of the Dead Man's Statute, that's irrelevant.

THE COURT: I've got that. On the issue on the question that asked the counsel about the relevance, I've heard now that it's relevant to refute an argument that you and Ms. Howle may be making about the spending time together.

MS. VAUGHN: As the spending time together not being a partnership?

THE COURT: That these facts would -- in their totality, they would refute a sort of dismissive characterization like that.

MS. VAUGHN: Our position in this case and the Respondent's position in this case is that there is no partnership. To the extent that they are offering them to refute that position, that is being offered to establish a transaction. I think that it's slicing the onion pretty thin to say that this is in response to something we're saying. We're denying their claim as we are required to do if we disagree with it, and it's not -- we're not characterizing the activities as anything except we're denying that it constitutes a partnership under Washington law.

Pg 1089

Q. And what restrictions, if any, were there on your ability to come and go to the condominium?

A. There were none.

MS. VAUGHN: Excuse me. Objection to the extent that calls for conversations and transactions with his father with regard to the restrictions.

THE COURT: Sustained.

MR. OLVER: And then once again we get into the benign acts, concept, gain or loss, doing laundry. I just note that comment.

Pg 1107 to 1108

Q. (By Mr. Olver) What is the next check that you wrote?

MS. VAUGHN: And I would object to the form of the question with regard to him writing the check. He can authenticate his signature and the writing without violating the Dead Man's Statute. Testifying about anything about this document, even that what it is or what he was doing with it, is a violation of the Dead Man's Statute.

THE COURT: The Court would be inclined to sustain objections that call for the witness to testify about the meaning of the documents, stubs, checks, et cetera. You may ask your next question.

Pg 1110

Q. (By Mr. Olver) Mr. Benson, without getting into line items where you may have done addition or subtraction, can you just go through and tell us what is the next check that you, yourself, signed to a payee?

A. Check number 114.

MS. VAUGHN: Objection again, to the form of the question relating to the check. These are check stubs and the question calls for answers that violate the Dead Man's Statute.

THE COURT: Sustained.

Pg 1180 to 1181

Q. Now, who, if anyone did -- made any changes to the input on this document?

A. It was my task to maintain all three Benson Ventures portfolio spreadsheets. For awhile, one of my father's companions was trying to help out and did some tweaking that wasn't helpful.

MS. VAUGHN: Objection to the portion of the answer that said, "it was my task".

THE COURT: Sustained.

Pg 1183

Pg 1187 to 1190

Q. Now of the -- At my request, did you go through all the transactions that were done, either buy or sell in the gold mining mineral investing stocks, between 1997 and 2007, your dad's date of death?

A. Yes, I did.

Q. How many transactions of buying or selling did you note?

A. Three-hundred-thirty-nine.

MS. VAUGHN: Excuse me. Could you repeat the question?

Q. (By Mr. Olver) How many quantity of buying or selling transactions occurred between 1997 and the date of death in 2007?

MS. VAUGHN: Objection. The question calls for testimony in violation of the Dead Man's Statute.

THE COURT: Counsel, it seems clear that the purpose of the testimony is for the witness to say that on behalf of Benson Ventures, he placed these transactions or he was involved, at least, with these transactions. Would not the deceased be in a position, a direct position to contradict that claim?

MR. OLVER: Your Honor, I understand the Court's interpretation of Lennon, and the Court understands how I disagree with its interpretation of Lennon. So the answer to your question is, "yes, but", and I don't think we don't need to go there. I'm introducing this area to now make an offer of proof. My offer of proof would begin with the same question.

THE COURT: Right. But the interpretation we seem to be disagreeing about is about the Dead Man's Statute itself.

MR. OLVER: That's correct.

THE COURT: Now, as interpreted under Lennon, as I indicated this morning, without direct personal knowledge she/he would not be able to contradict Rodger's testimony regarding those actions. Here the deceased, of course, could contradict that testimony.

MR. OLVER: That is one part of the analysis. I agree a hundred percent that, that is one part of the analysis. The other part of the analysis is what I've been saying in Boettcher, in An How, and in -- well, let's just take the ones where the Supreme Court says flat out testimony about services rendered and pay received is not violating the Dead Man's Statute. Now, how in the world -- and we know that they said that. They said it in An How; they said it in Boettcher. We know that they say testimony about services rendered and pay received does not violate it. How in the world can that be if the Court's analysis is entirely accurate? Because in every one of those cases, the decedent would've been present when he had the enema. He would have -- in paying money or receiving money is something that he could contradict. Every one of those things could be contradicted. And so what I'm saying is the analysis that's been done is accurate so far as it goes, but it hasn't -- it's not -- the Boettcher, An How, services-rendered, pay-received acts by the individual is not limited to the language in Lennon that carved out the when-the-person-is-not-there exception.

THE COURT: Right. And don't take my remarks as being overly defensive; that's not my intent or the way I wish to operate. What I'm getting at is, as we stated this morning, to the extent that I view admissible independent acts of this witness done not in the presence of the decedent or done with direct purpose of establishing a partnership, those things have been admitted and would continue to be admitted. So, unfortunately, we do just have to take this question, by answer, by question, by answer. So please ask your next question.

Q. When you went to work with Mortenson, what was your daily routine at that time?

A. Well, it started with my alarm clock going off at about six o'clock. I'd go to work. I -- Up until my dad passed away, I'd go in the office and perform my duties as the director of project development for Mortenson through the day. Generally, I'd talk to my dad at least once in the afternoon. Sometimes -- frequently I'd have lunch with him, but I had lunch with a lot of people. I went to lunch pretty much everyday, and normally around six o'clock, I'd leave the office. And I would -- I drove out of the parking -- It was my routine every single day as I drove out of the parking lot of my office, I would call my father on my cellphone. I'd talk with him all the way home. And I would -- when it takes only 20 minutes to get to my office on a Saturday, it takes sometimes over an hour to get home at night. There's a lot of traffic at the end of 520. And often I'd sit in my driveway and continue to talk to him about a lot of things including my investments. And then I go in the house and change my clothes into something more comfortable, and I would head down to my office every night, and my wife would generally bring me something to eat sometime in the evening. And I'd, you know, check my e-mails and do normal research on my investments whether it be, again, charting or looking at press releases and different publications. Most of what I did, I would read any written material that I had picked up at my other office and -- but most of the research that I did was internet based because it was pretty infinite.

MS. VAUGHN: Objection to the portion of the answer violates the Dead Man's Statute that the witness talked to his dad daily, that he had lunch with his dad daily, that he called his father and talked to him on the way home, that he talked to him in the driveway about a lot of things including investments; all of that violates the Dead Man's Statute.

THE COURT: If the son has a phone call with his dad about a football game, does that violate the statute?

MS. VAUGHN: It depends on what it's going to be offered for. If it's going to be offered to establish something that is at issue in the case, then it is relevant, and it would involve a transaction with the decedent because the decedent could admit or deny it.

THE COURT: Based on that last answer, the only thing I would suggest that would be directly relevant to this litigation would be his testimony that he talked to his father about his investments.

MS. VAUGHN: If the remainder of it is not being offered to establish the partnership or to establish anything that is at issue in this case, then our objection to that would be relevance.

THE COURT: The Court is striking only the portion of the answer referencing discussing his mineral investments. You may continue.

Pg 1272

Q. And with what projects are these claim markers associated, if any?

A. The filing of Benson Ventures claims on American Butte.

MS. VAUGHN: Objection to the portion of the answer that relates this to a transaction with the decedent.

THE COURT: Sustained.

Pg. 1285

Q. For what purpose did you create Exhibit 96?

A. To track the closing stock prices of the companies on the list there.

MS. VAUGHN: Objection to the extent that the companies are alleged to be part of Benson Ventures.

THE COURT: Sustained.

Pg 1286

Q. (By Mr. Olver) How, if at all, would tracking the stock values on Exhibit 96 assist you?

MS. VAUGHN: Objection. The question calls for testimony in violation of the statute.

THE COURT: Sustained.

Pg 1316 to 1317

Q. And when you took it to your home, what would you do with it at your home?

MS. VAUGHN: Objection to this line of questioning because this is mail that is addressed to the decedent, and if the testimony is that he is taking the decedent's mail, then that involves a transaction with the decedent if he is trying to imply that it was authorized.

THE COURT: That's the way the Court hears it at this point.

Q. (By Mr. Olver) When you returned from your house with the mail, did you ever return to a place where no one was physically present at that time?

MS. VAUGHN: The same objection. This is the decedent's mail.

THE COURT: Yes. I'm going to sustain.

MR. OLVER: Well, in point of fact, Your Honor, it's not the decedent's mail. And I'm not going to belabor it, but we've come up against the difference between our respective interpretations of Lennon, and I'll leave it at that.

Pg 1321 to 1325

Q. Where did it come from?

MS. VAUGHN: Objection. The question calls for testimony in violation of the Dead Man's Statute.

MR. OLVER: Make an offer of proof, Your Honor, and we'll see if it does not.

THE COURT: All right.

Q. (By Mr. Olver) Mr. Benson, where did the cash in the Charles Schwab account in March and April of 2007 come from?

A. It came from the sale of about a million shares of Kalahari stock, about ten thousand shares of Almaden stock, and I don't recall the exact number of shares, but some Strongbow stock.

MR. OLVER: I re-offer that testimony, Your Honor.

THE COURT: Were you going to ask another question which is his basis for that knowledge?

Q. (By Mr. Olver) Do you have -- With that opinion, how many sources of knowledge do you have that lead you to that opinion?

A. That initial opinion came from my adjustment of the Yahoo finance page when those stocks were sold. So that gave me a pretty good ballpark of how much money would have come out of that sale, both sales.

Q. Did you have any other sources for that opinion?

A. I have seen in -- subsequently in the Schwab monthly statement.

MR. OLVER: We offer the information.

MS. VAUGHN: If I understand this testimony, it's testimony concerning transactions that occurred prior to the decedent's death based on information that this witness assembled and put into the Yahoo account and compiled and is represented there. The source was --

if you trace it back far enough, had to be the decedent and because the Yahoo account doesn't independently do anything, this witness had to put the information in the Yahoo account, and the question is, Where did he get that information? And if it goes back another step, he had to have got the information directly or indirectly from the decedent. These are transactions involving the decedent's assets or at least assets that are titled to the decedent and, therefore, Respondent takes the position that this would violate the Dead Man's Statute.

THE COURT: And the deceased -- Are you maintaining that the deceased can refute his testimony?

MS. VAUGHN: He could refute the underlying testimony which is the base -- my understanding is that the Yahoo account was assembled by this witness with information that he had concerning assets that were titled to the decedent. And to the extent that the source of the information is the Yahoo account, that ultimately is the decedent with regard to that information. Otherwise, there is still no basis for it. If the basis is only what he thought, there's still no basis for the answer to the question. And the Yahoo account is what this witness's understanding of the values were.

THE COURT: Mr. Olver, how could the information not be traced back?

MR. OLVER: Your Honor, counsel's objection is to a way different question and answer. It's more in the line of a closing argument as to how forensic accounting works over a ten-year period. It really is not focused on the question and answer to this witness as to what the basis of his opinion was. His opinion was he made adjustments in the Yahoo account to reconcile the sales of three stocks in various amounts which produced a certain amount of cash which he then looked at another piece of paper that's admitted and confirmed that they're substantially identical. Now, to the extent that counsel is anticipating an argument in closing and is refuting that argument by her opinion of forensic tracing, I would suggest that the argument is not well focused as to this question and this answer.

THE COURT: If I heard correctly, it's not really a matter of forensic accounting. It's simply tracing where he must inevitably have received information. And if this is offered to prove the value of or existence of a partnership, that would have to include the deceased.

MR. OLVER: It's not offered to prove the value. It's offered to prove this witness's understanding of where this number comes from that's on the Yahoo account in date of death. And as the Court asked, are there bases for his opinion that it came from the sale of these stocks, he in addition said that it correlated to these other documents. But his opinion was based upon things that he did which could not be contradicted by the decedent in terms of making adjustments to the Yahoo accounts.

MS. VAUGHN: My understanding is it's being offered to show this witness's knowledge of his father's transactions, and that information came from the decedent whether through

statements or through involvement in the transaction itself, and it would be violated by the Dead Man's Statute. The Yahoo is kind of like laundering the information, but it doesn't change the fact that the source of the information violates the Dead Man's Statute.

THE COURT: Sustained

1327 to 1330

Q. (By Mr. Olver) After your father's death, what changes, if any, did you make to the Yahoo R-Benson-Five account or the Roger Gold Mining stock B-V American or B-V Canadian?

MS. VAUGHN: Objection to the relevance.

THE COURT: Relevance, counsel?

MR. OLVER: The relevance, Your Honor, is that the information that existed on the decedent's date of death in the Yahoo R-Benson-Five account and the B-V American and B-V Canadian if it has not been changed by this witness or by anyone else is the same information that existed on the date of death relative to the identity of items in the Yahoo finance account and relative to the number of shares of those items in the Yahoo finance account. So it would be the exact information that existed on the date of death in the Yahoo finance account.

MS. VAUGHN: I still don't understand the relevance.

THE COURT: And this 202 is a demonstrative exhibit to demonstrate this? What I see is dated March 8 and then February 25, both of 2009.

MR. OLVER: It is -- I hope to lay the foundation for explaining to the Court why the information that is printed out is exactly the same as the information existed inside the computer on the date of death. If the Court's ever worked with one of these websites, once you input 500 shares of Boeing, it keeps 500 shares of Boeing on the website unless someone changes it. Now, as the price fluctuates, the price would fluctuate daily and if you printed it out two years from now, it would say 50 shares of Boeing, and it would have that price. But if all you're looking at it for --

THE COURT: Why don't you proceed, recognizing the eventual alleged weight of this testimony and document and the lateness of the morning. Please proceed.

MR. OLVER: Exactly, Your Honor.

Q. (By Mr. Olver) Mr. Benson, are the -- How, if at all, do the list of stocks contained in the B-V American, B-V Canadian in Exhibit 202 compare to the list of stocks that existed on your dad's date of death?

A. They're essentially the same. The last time I made any adjustments to the Roger Mining Gold Stock account was prior to my dad's death, and I had taken the information I had and updated -- I thought I updated the B-V Canadian account just for the time being because I had a lot of other things I was working on, and I made modifications to two places, but they were in opposite sections of the page. So, basically, what I'm saying is that all the stocks are listed on the B-V Canadian half of the site, they match exactly what was in the Schwab account. The quantities of two of the stocks are different because when I made those adjustments, I inadvertently made the adjustments on the B-V American account. So the Almaden and Kalahari changes that happened in April are reflected there. So I guess what I'm saying is that if you combine the two, then they're identical.

MS. VAUGHN: Objection to the extent that this answer is commenting on the decedent's Charles Schwab account and the value of that account prior to death; that would necessarily involve a transaction or a communication with the deceased.

THE COURT: Had you objected on hearsay?

MS. VAUGHN: I haven't. I don't remember, Your Honor, whether I objected on hearsay. I mean, the other objection is that this is a new exhibit, and we are just seeing this exhibit. I haven't seen this exhibit before, and the date for exchanging exhibits is past. I don't know if it's being offered or not. If it is being offered, then we would certainly object to the content of it as being hearsay.

THE COURT: I'm assuming that this is not being offered, counsel?

MR. OLVER: I'm going to.

THE COURT: 202 that is.

MS. VAUGHN: And now I understand the issue too, I mean, his commenting on the Schwab accounts is hearsay.

MR. OLVER: Your Honor, in point of fact, many months ago we gave counsel the sign-in language and the password. They could have printed this out at their leisure at any time over the last few months. This printout is no different than would've existed years ago. The fact that we just printed it out -- It is being offered, Your Honor, to show that this witness's maintenance of the Yahoo account -- what this witness's maintenance of the Yahoo account was with regard to the identity of stocks and the number of shares but not the value as of April 2007.

THE COURT: The witness has testified as to his maintenance albeit in a general manner. But I sustain the objection. Next question, please.

Q. (By Mr. Olver) Mr. Benson, are the -- how, if at all, do the stocks listed on B-V Canadian compare to the stocks that you were maintaining on the Yahoo account in April 2007?

MS. VAUGHN: Objection.

THE COURT: Sustained.

Pg 1330 to 1334

Q. (By Mr. Olver) If you had run a printout in April 2007, how would the shares, the number of shares on the B-V American, page three of Exhibit 2002 (sic), compare to what you would have printed in April 2007?

A. They would be the same for those stocks.

MR. OLVER: Your Honor, at this time I re-offer Exhibit 2002 (sic) for the purpose of establishing what stocks and what shares were maintained in the Yahoo finance Roger Gold Mining Stocks, B-V American and B-V Canadian as of April 2007 as opposed to having him read into the record the names of all the stocks and shares that were maintained on that date in the Yahoo finance account that he solely maintained.

MS. VAUGHN: To the extent that it is being offered for the truth of the matter asserted and it apparently is, our objection is that the information had to come from the decedent. It would violate the Dead Man's Statute if it did. And we also have a procedural objection to the fact that this document was not exchanged. Notwithstanding the fact that we could have intuited that this might be something that's offered at trial, there was a witness list and there was an exhibit list due under both the local rules and the case schedule. And we have been flexible and both sides have been flexible in allowing in documents that we knew about or had some reason to know about, but we didn't have reason to know about this document.

THE COURT: Sustained.

Q. (By Mr. Olver) Mr. Benson, was the maintenance of the Yahoo Roger Gold Mining Stock, B-V American, B-V Canadian a business activity in which you engaged on a regular basis?

A. Yes.

Q. Did you maintain the Yahoo finance Roger Gold Mining Stock, B-V American, B-V Canadian in the ordinary course of business?

A. Yes.

Q. Is the information reflected on the Exhibit 2002 (sic) -- Strike that. Is the information reflected on Exhibit 202 with regard to the companies listed under B-V Canadian and the shares listed under B-V American an accurate representation of what was in those accounts in April 2007 to the best of your knowledge?

MS. VAUGHN: Objection. That question calls for testimony that violates the Dead Man's Statute.

THE COURT: Sustained.

Q. (By Mr. Olver) Mr. Benson, from what sources -- when you made adjustments to the B-V American and B-V Canadian accounts in the ordinary course of business, from what sources did you get your information?

A. Typically trade confirmation records from the broker.

Q. And if you were to have inputted the information from the confirmation records from the broker in March of 2007 and printed it out in 2007, would the list of shares, stock, represented on B-V Canadian and the number of shares represented on B-V American, have been the same?

MS. VAUGHN: Same objection with regard to the Dead Man's Statute. The fact that the information is coming from the trade confirmation is no different than it coming from the decedent's account statements. They're documents that were under the decedent's name, that were titled to the decedent, and the only way that this witness could access that information would be through a transaction or a communication that violates the Dead Man's Statute.

THE COURT: Sustained.

MR. OLVER: Your Honor, we have admitted approximately ten or twelve Yahoo statements, and to my recollection, there have been no significant difference in the foundation for those business records other than the date on which they were printed. And if it's established that the information in the computer -- and I think that we already learned that computer-generated evidence is admitted in the same form as long as the proper foundation is shown, if we've established that this computer-generated information on the date printed is the computer-generated information on a relative point in time, then before any dispute arose, it would have the same credibility as if it had been printed out on that date. And so I'm suggesting to the Court that the admissibility of all the other Yahoo printouts and these Yahoo printouts, insofar as they are business records, have the same foundation, the same inherent credibility in terms of admissibility, not, of course, as to weight but as business records under *Erickson v. Kerr* and that long discussion we had about that. I would suggest that the same grounds have been established for admission for 202.

THE COURT: Right. And I think you suggested that before.

MR. OLVER: Oh, well --

THE COURT: I understand the gist of the momentum you have behind offering the exhibit. The fact is it does not have the business records procedure that was established with the other documents. This also violated the procedures of the Court rules. This could have been generated not only by your opposing counsel but by you in a timely way, there remains the Dead Man's Statute issue, and the question also called for speculation. You may move on.

Pg 1340 to 1341

Q. How do you know that, that document would refresh your recollection?

A. Because I compared it with the Yahoo account. They matched exactly.

MS. VAUGHN: Objection to this line of questioning which is clearly designed to get around the Dead Man's Statute objection through refreshing the witness's recollection, and it would still be an inadmissible testimony based on that.

THE COURT: Sustained.

Pg 1345

Q. Mr. Benson, between 1997 and 2007, do you have an estimate of the amount of time that you personally have devoted to the management of mineral resource assets?

MS. VAUGHN: Objection to the extent that this question -- that the mineral resource assets that the question is asking about are titled to the decedent.

THE COURT: Sustained. Counsel, you're being encouraged to ask questions consistent with the Court's earlier ruling.