IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Estate of JODY SCOTT WOOD. DYLAN THOMPSON WOOD, Appellant, v. MARY FRANCES WHEALEN, as Personal Representative of the Estate of JODY SCOTT WOOD, Deceased, Respondent.	)))))))))))))))))	NO. 65376-8–I (Consolidated with NO. 65970-7-I) DIVISION ONE UNPUBLISHED OPINION FILED: October 31, 2011

Leach, A.C.J. — In this consolidated appeal, Dylan Thompson Wood primarily challenges trial court orders dismissing his petition to revoke probate of his mother's will and denying his petition to remove his mother's partner, Mary Whealen, as the estate's executrix. Tom[1] does not support his will challenge with any evidence in the record creating a genuine issue of material fact. And the record amply supports the trial court's exercise of discretion to dismiss the removal petition. We affirm.

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[1] We refer to the appellant by the name he uses to avoid confusion with the decedent.

FACTS

Jody Scott Wood and Mary Whealen were life partners for the 30 years before Wood's death in December 2007. In a 2004 will, Wood left the bulk of her estate to Whealen, including a Shoreline house where the couple resided and her interests in a real estate business and property in Okanogan, Washington. To Tom, who lives in California and visited Wood only once in the 20 years before her death, she bequeathed an antique rifle and artwork by his father, O.T. Wood. Wood named Whealen as personal representative, granting her nonintervention powers.

In January 2008, Whealen filed a petition to probate the 2004 will. At a hearing on the petition, Tom challenged the will's validity, arguing that it looked like it had been altered. Whealen testified, explaining that the will appeared as it did because she and Wood had updated their old wills by cutting and pasting new language into them. Whealen also brought a copy of her 2004 will to the hearing, which appeared similar in format to Wood's. Whealen said she probably typed the alterations, but "[t]he wording and changes we determined together."

The court admitted Wood's will to probate and appointed Whealen as personal representative.[2] Tom then filed two separate petitions: one to revoke

[2] The court explained that the will met the statutory requirements for

probate of Wood's will and the other to remove Whealen as personal representative.[3]

In the petition to revoke probate, Tom argued, among other grounds, that the will was invalid because Wood lacked testamentary intent and that the will was the product of undue influence. The trial court granted Whealen's motion for summary judgment because no admissible evidence supported Tom's claims. The court noted, "[Tom] Wood's 30 page declaration is largely inadmissible as evidence, and those portions are not considered by the court. Those portions that are argumentative, speculative, based on inadmissible hearsay, or lack of personal knowledge or foundation are inadmissible and have not been considered by the court."

The trial court also granted Whealen's motion for attorney fees and costs under RCW 11.24.050 and RCW 11.96A.150 after finding that Tom filed his petition in bad faith and without probable cause. The court explained, "The extensive record before the court establishes the sole design of Petitioner was to

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validity: "This is a will prepared in original form, and is not witnessed by . . . a beneficiary. Which is duly notarized. Which has original signatures on all the appropriate pages. And on that basis the court would intend to admit this will to probate, appoint Ms. Whealen as personal representative of the estate without bond."

[3] Tom also filed a civil complaint against Whealen under the Slayer Statute, chapter 11.84 RCW, alleging that Whealen proximately caused Wood's death. That case is not before us.

harass the Respondent through litigation of no merit, and to obfuscate the truth. Such litigation provided no benefit to the estate, and served only to drain it."

In his removal petition, Tom argued that Whealen breached her fiduciary duties, embezzled funds from Wood in the four years before her death, failed to pay off the Shoreline property's reverse mortgage, and engaged in other "serious misbehavior and acts of dishonesty and moral turpitude."

In connection with the petition, Tom filed a motion to compel discovery. He sought access to Whealen's financial records and to the Shoreline property to inspect, videotape, and photograph its interior and exterior and to copy "all files on the disc-drives of the computer(s) used by Decedent . . . and/or . . . Whealen." The trial court denied Tom's motion and granted Whealen's motion for a protective order.[4]

After two hearings, a superior court commissioner denied Tom's removal petition and awarded Whealen attorney fees and costs. The commissioner found the petition to be "unsupported by any factual statements that the Court may rely upon."

Tom filed a motion to revise the commissioner's order and judgment, arguing in part that the commissioner engaged in reverse discrimination. After a

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[4] This document was accessed through King County's Electronic Court Records.

de novo review, the trial court entered an order denying revision.

Tom appeals.

ANALYSIS

Petition To Remove Whealen as Personal Representative

Tom asserts the trial court erred by denying his motion to revise the commissioner's ruling. A probate court may remove a personal representative or restrict his or her nonintervention powers for waste, embezzlement, mismanagement, fraud, or "for any other cause or reason which to the court appears necessary."[5] We give considerable deference to a trial court's decision regarding a removal petition and will not disturb that decision absent a manifest abuse of discretion.[6]

Tom first claims that Whealen failed to perform her general duties as personal representative. A personal representative has a fiduciary duty to the estate's beneficiaries to marshal the estate's assets, to notify creditors and settle claims, to pay taxes, and to distribute the estate's assets to the proper parties.[7] Tom argues that Whealen breached this duty by failing to refinance the Shoreline house in order to pay the balance due on its reverse mortgage.

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[5] RCW 11.28.250; RCW 11.68.070.

[6] In re Estate of Jones, 152 Wn.2d 1, 10 n.2, 93 P.3d 147 (2004).

[7] RCW 11.48.010; see also In re Estate of Wilson, 8 Wn. App. 519, 527-28, 507 P.2d 902 (1973).

However, the record demonstrates that Tom's actions frustrated Whealen's attempts to make the required payment. After Wood's death, Whealen met with a mortgage broker to discuss the application process for a new mortgage. Then in May 2008, a month before payment on the reverse mortgage became due, Tom recorded a lis pendens against the property. Despite Whealen's requests, Tom refused to release this encumbrance to facilitate a new mortgage. In December 2008, Whealen obtained a court order requiring Tom to do so. Three months later, Tom finally released the lis pendens, after Whealen advised him that the property had gone into foreclosure. Whealen then avoided foreclosure by obtaining a new mortgage. This sequence of events demonstrates Whealen's diligent attempts to perform her personal representative duties and does not show mismanagement of the estate.

Second, Tom argues that Whealen should have been removed as personal representative based upon his claim that she embezzled at least $130,000 from Wood between 2004 and 2007. According to Tom, Whealen gained access to these funds by "forging" Wood's signature on "hundreds of checks." Tom's argument is fundamentally flawed for two reasons. First, there is no evidence in the record that Wood did not authorize any of the disputed transactions or that Whealen ever had an improper purpose. Second, because

the alleged misconduct occurred before Wood died, it necessarily occurred before the court appointed Whealen as personal representative. Therefore, her conduct during that time period cannot serve as the basis of a finding that she breached her duties as personal representative.

Finally, Tom claims Whealen should have been removed because she had "multiple, serious, and irreconcilable conflicts of interest" and engaged in waste by failing to maintain the Shoreline property in good repair.[8] Tom, however, does not support his claims with any citation to evidence in the record, as RAP 10.3(a)(6) requires. Without citation to the record, we cannot determine whether the trial court abused its discretion.[9]

Tom contends that another personal representative should be appointed. Because Tom has not shown that Whealen should have been removed, his claim fails.

Discovery

Tom next claims the trial court erred by denying his motion to compel discovery and by granting a protective order preventing Tom from entering the Shoreline property. According to Tom, the trial court's decision was improper

[8] RCW 11.48.020 requires a personal representative to keep property under her control in a tenable condition.

[9] RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (noting that an appellate court does not consider argument unsupported by citation to the record or authority).

under ER 106. But ER 106 governs the admissibility of certain documents or parts of documents. It does not speak to whether those documents are discoverable. Rather, CR 26, a rule that Tom does not cite, governs the scope of discovery. Additionally, Tom did not present an argument based on ER 106 to the trial court. Generally, we will not consider on appeal arguments or theories not argued below.[10] For these reasons, we reject Tom's claim.

Will Contest

Tom contends the trial court erred by granting Whealen's motion for summary judgment and dismissing his petition to revoke probate of Wood's will. According to Tom, the will is invalid due to lack of testamentary intent, improper form and preparation, fraud, forgery, mistake, and undue influence.

We review an order granting summary judgment de novo, engaging in the same inquiry as the trial court.[11] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[12] The moving party has the burden of proving that there is no genuine issue of material fact.[13] If the moving party meets its burden, the burden

[10] RAP 2.5(a); see also Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 290, 840 P.2d 860 (1992).

[11] In re Estate of Black, 153 Wn.2d 152, 160, 102 P.3d 796 (2004) (quoting Failor's Pharmacy v. Dep't of Soc. & Health Servs., 125 Wn.2d 488, 493, 886 P.2d 147 (1994)).

[12] CR 56(c).

[13] Black, 153 Wn.2d at 160-61.

shifts to the nonmoving party to "'set forth specific facts showing that there is a genuine issue for trial.'"[14] The nonmoving party must set forth evidentiary facts and cannot meet its burden by relying on "speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value."[15] In determining whether a genuine issue exists, we construe the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party.[16]

As a preliminary matter, we note that Tom's argument largely relies on phone and in-person conversations he claims he had with his mother. Generally, a court cannot consider inadmissible hearsay evidence when ruling on a motion for summary judgment.[17] Tom, however, seems to suggest the conversations were admissible because (1) Whealen waived the application of the dead man's statute[18] and (2) the conversations fall under the exceptions to the hearsay rule under ER 803(a)(3). Even assuming Whealen waived the dead man's statute's application, Tom fails to explain which hearsay exception applies

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[14] Black, 153 Wn.2d at 161 (quoting LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)).

[15] Seven Gables Corp. v. MGM/UA Entm't, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

[16] Black, 153 Wn.2d at 160-61.

[17] CR 56(e); Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986).

[18] RCW 5.60.030.

and provides no legal argument supporting his assertions. Thus, we do not consider these conversations in determining whether Tom raised a genuine issue of material fact regarding the validity of Wood's will.[19]

First, Tom claims that Wood lacked testamentary intent because "it was not her intent to disinherit her son." Tom cites the declaration of Kenneth Cottingham, one of Wood's neighbors. Cottingham stated,

> In the last few years of Jody's life, my wife and I had long talks with Jody when she was walking her dog in the park near our house. She was very happy and proud when she heard that she was going to be a grandmother and even happier when it actually occurred. Jody never appeared to be upset with Tom. She wanted to see him and the child, did not know where or how she would make the trip.

Because Tom filed Cottingham's declaration after the trial court granted Whealen summary judgment, the court did not consider the declaration in making its ruling. But even if it had, Cottingham's statement is not relevant to Wood's intent at the time she signed the will. And Cottingham's statement does not contradict the very specific testimony of the two witnesses to the will signing, Susan Hopkins and Marjorie Lynn, that Wood intended the document she signed to function as her last will and testament. Tom therefore fails to establish a

[19] See Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) ("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.").

genuine issue of material fact regarding testamentary intent.

Next, Tom attacks the preparation and appearance of Wood's will. Tom states, "[T]his 'cut and paste' Will, prepared with the active participation of the main beneficiary (Mary Whealen), without the supervision of an attorney, who would safeguard the integrity of the preparation and signing [of] the intended document, is highly suspicious, to say the least." We cannot discern a legal argument from this.

Regardless, Tom does not dispute that Wood's will complied with statutory requirements. Additionally, Whealen presented unchallenged evidence that the will is valid despite its appearance. In her declaration, she explained that she and Wood prepared their wills together, with Wood pasting the new language into the old will.

> So we made the changes we wanted on both our wills. That included . . . changes in the property that was involved. So we made those changes. And we wanted to change the language in how we referred to each other and make it more explicit about what our relationship was.
>
> So we cut and pasted those changes onto a copy of the old will, copied that, and then took it and signed it in front of the witnesses.

Further, Lynn stated in her declaration,

> Decedent showed us her will saying that she had had an earlier will and that she patched the new one together using the old one. I looked over the will and noticed that portions had been assembled using the cut, paste and copy method of preparation. Susan Hopkins asked Decedent if the "patch up" format was OK and she replied that she did not think it was a problem.

Tom presented no evidence contradicting Whealen's explanation. He thus has not established a genuine issue of material fact regarding the will's "manner and form."

Third, Tom claims that the evidence entitled him to a presumption of undue influence. A court may set aside a will upon a showing that a beneficiary exercised undue influence over the testator.[20] Undue influence is that "which, at the time of the testamentary act, controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice."[21]

The burden of proving undue influence is on the contestant.[22] The most important facts the court should consider in this context are

> (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or

[20] In re Estate of Lint, 135 Wn.2d 518, 535, 957 P.2d 755 (1998).

[21] Lint, 135 Wn.2d at 535 (quoting In re Estate of Bottger, 14 Wn.2d 676, 700, 129 P.2d 518 (1942)).

[22] Lint, 135 Wn.2d at 535.

> degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will.[23]

A combination of facts in a particular case may be of such a suspicious nature as to raise a presumption of undue influence and, in the absence of rebuttal evidence, may be sufficient to overturn a will.[24] This presumption imposes upon the proponent of a will an "obligation to come forward with evidence that is at least sufficient to balance the scales and '. . . restore the equilibrium of evidence touching the validity of the will.'"[25] But this presumption does not relieve a will contestant from proving his contentions by clear, cogent, and convincing evidence.[26]

Here, the record establishes the presence of the first two factors. But as to the third, Tom fails to present evidence that Whealen received an unnaturally large part of the estate. Wood's 2004 will varied little from her previous will. The only difference is that in the previous will, Tom would have received one of Wood's rental properties. By the time Wood prepared her 2004 will, however, that property had been sold and was no longer Wood's to give. Apart from his

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[23] Dean v. Jordan, 194 Wash. 661, 671-72, 79 P.2d 331 (1938).

[24] Dean, 194 Wash. at 672 (citing In re Estate of Beck, 79 Wash. 331, 140 P. 340 (1914)).

[25] Lint, 135 Wn.2d. at 536 (alteration in original) (internal quotation marks omitted) (quoting In re Estate of Smith, 68 Wn.2d 145, 154, 411 P.2d 879, 416 P.2d 124 (1966)).

[26] Lint, 135 Wn.2d. at 536.

apparent disdain for the relationship between Whealen and Wood, Tom does not explain what is unnatural about Wood's gift of virtually all her estate to her partner of some 30 years.

Additionally, the record contains no evidence that Whealen interfered with Wood's volition. Lynn testified in her declaration that Wood was "very strong-willed" and on the day of the will signing "was in good spirits [and] appeared to me to fully understand what she was doing." Similarly, Hopkins testified, "Decedent appeared to be clear-headed and fully aware of what she was doing. . . . Decedent did not appear to be incapacitated in any way."

Because Tom simply asserts that he was entitled to a presumption of undue influence based solely upon the presence of the first two factors and points to no other suspicion-raising facts or evidence of undue influence in the record, we hold that he failed to raise a genuine issue of material fact regarding undue influence.

Fourth, Tom asserts Whealen procured the will by fraud because she had other "intimate relationships," told Wood if she declined to "go along with Mary's demands, that Mary would abandon Jody and take half of Jody's money," and led Wood to believe they were running out of money. Because Tom provides no citation to the record or legal authority supporting this claim, we do not consider

it further.

Fifth, Tom contends that Wood's will was the product of mistake because Whealen could have substituted the real will with a fake one or inserted extra pages. We reject this baseless speculation, unsupported by facts or argument.

Finally, Tom argues that because Whealen stated that she signed Wood's name to her checks for her as a matter of practice, she also must have forged Wood's signature on the 2004 will. Again Tom's bald speculation is insufficient to create a genuine issue of material fact regarding the will's validity.[27]

Because Tom failed to meet his burden as the nonmoving party to demonstrate the existence of a genuine issue of material fact, we hold that the trial court did not err by granting Whealen's summary judgment motion.

Reverse Discrimination

Tom claims the commissioner and the trial court engaged in reverse discrimination against him. As support, Tom cites his and his attorney's declarations, which indicate they "feel" Tom was treated like a "gay basher" based on their "personal observations." While the basis for this claim is unclear, these feelings appear to have originated from the commissioner's statement that

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[27] We note that both parties hired handwriting experts, and both concluded that it was probable Wood signed the will.

Tom's removal petition was a "frivolous" waste of time.[28] But neither this statement nor any other evidence in the record shows animus toward Tom based upon his personal beliefs. Because evidence in the record does not support Tom's contention, we reject it.

Requirement To Post Bond

Tom claims that the trial court committed reversible error by requiring him to post a pretrial bond. As a question of statutory interpretation, we review de novo whether a trial court properly ordered security for attorney fees under RCW 4.84.210.[29]

RCW 4.84.210 authorizes a trial court to order a nonresident plaintiff to provide security for any cost award that ultimately might be entered against it. The statutory maximum is $200, but the trial court may order additional security beyond that amount where an independent basis in contract, statute, or equity allows.[30]

Under RCW 11.96A.150, a trial court has discretion to award attorney

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[28] In full, the commissioner stated, "All [the petition has] done, in my opinion, is waste my time and waste the PR's time. Once that will contest was dismissed, my view of it is counsel should have just abandoned this motion. Bringing it, in my view, is frivolous."

[29] White Coral Corp. v. Geyser Giant Clam Farms, LLC, 145 Wn. App. 862, 866, 189 P.3d 205 (2008), review denied, 165 Wn.2d 1018, 199 P.3d 411 (2009).

[30] White Coral Corp., 145 Wn. App. at 867.

fees to any party. This statute forms an independent basis by which the trial court could ultimately award attorney fees to Whealen. Therefore, the trial court could properly require additional security for attorney fees under RCW 4.84.210.

Tom argues that Whealen "did not present competent proof that the maximum $200 bond was insufficient." We review whether Whealen provided such evidence for an abuse of discretion.[31]

In seeking security, Whealen asserted that she expected her attorney fees to exceed $65,000 and her executrix fees to be $5,000. Whealen and her counsel also submitted declarations attesting to the amount of anticipated attorney and executrix fees. Based on this information, the trial court did not abuse its discretion in ordering a $50,000 bond.[32]

Tom disagrees, citing Ethridge v. Hwang.[33] That case, however, discussed whether a trial court properly awarded attorney fees and costs under the Consumer Protection Act,[34] not whether there was competent proof to support a motion for security under RCW 4.84.210.[35] Ethridge is therefore

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[31] White Coral Corp., 145 Wn. App. at 869.

[32] See White Coral Corp., 145 Wn. App. at 869 (finding that trial court did not abuse its discretion by granting $125,000 bond where party seeking bond asserted that (1) its claim for attorney fees would likely exceed $200,000 should it prevail at trial, (2) equity justified the amount, and (3) the case would be very expensive if tried).

[33] 105 Wn. App. 447, 20 P.3d 958 (2001).

[34] Ch. 19.86 RCW.

[35] Ethridge, 105 Wn. App. at 459-62.

inapposite.

Tom, however, asserts that Whealen waived her right to security. Tom argues that an 1888 territorial decision, Swift v. Stine,[36] required Whealen to request the bond when she filed her response to Tom's will contest on June 30, 2008. Instead, Whealen filed her motion in November 2008, which Tom claims was too late.

Tom relies on the following passage from Swift,

> The defendant may require security for costs of a non-resident, but he must exercise his right in time, and before answer, or at least with diligence. He cannot delay until, from the developments of the trial, he seriously apprehends defeat, and then assert it. His application then becomes dilatory, and cannot be favored. He must be held, under such circumstances, to have waived it.[37]

Swift, however, does not establish an unequivocal requirement that a defendant's security request come before her answer.[38] Rather, a defendant must pursue security "with diligence." Here, Whealen filed her motion before trial. There is no evidence that she intended to delay the proceedings with her request. Thus, we conclude that Whealen's exercise of her right was not

[36] 3 Wash. Terr. 518, 19 P. 63 (1888).

[37] Swift, 3 Wash. Terr. at 521.

[38] We also note that the last time a Washington court cited Swift was in 1938. And in the more recent White Coral Corp., it is clear from the facts that the defendant filed its request after it filed its answer, indicating that the reading Tom advances is stricter than what the courts actually require.

dilatory. The trial court did not err in granting her request for security.

Finally, Tom argues that RCW 4.84.210 violates a nonresident litigant's equal protection and due process rights. Tom did not make this argument below. He cannot raise it now because he does not argue that the issue is a manifest error of constitutional magnitude.[39] We therefore do not consider Tom's constitutional claims.

Attorney Fees

Tom claims that the trial court erred by granting Whealen's motion for attorney fees and costs because he filed his will contest in good faith and with probable cause. We review Tom's challenge for an abuse of discretion.[40]

The trial court awarded Whealen costs and fees under RCW 11.96A.150 and RCW 11.24.050. The Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, generally provides for attorney fees and costs. Specifically RCW 11.96A.150(1) states, "Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party." The amount of fees is that which the court deems equitable after considering "any and all" relevant and appropriate

[39] See RAP 2.5(a)(3).
[40] RCW 11.96A.150; In re Guardianship of Matthews, 156 Wn. App. 201, 212, 232 P.3d 1140 (2010).
[41] RCW 11.96A.150(1).

factors.[41]

RCW 11.24.050 provides specifically for costs in a will contest:

> If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.

Tom does not challenge the fee award under RCW 11.96A.150. Rather, he contends that the fee award was improper under RCW 11.24.050. Accordingly, Tom seems to argue that RCW 11.24.050 controls over the general provision in RCW 11.96A.150, thus requiring the court to find bad faith before awarding fees.

Tom is wrong. The TEDRA provision controls. RCW 11.96A.150(2) explicitly states that it "shall not be construed as being limited" by RCW 11.24.050. As Division Two recently explained, "Under the plain language of RCW 11.96A.150(2), a superior court can award attorney fees to any party as part of any Title 11 RCW action and it is not limited to awarding attorney fees just in TEDRA actions."[42] Therefore, the trial court had discretion to grant Whealen fees regardless of whether Tom brought his claim in good faith.

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[41] RCW 11.96A.150(1).
[42] Matthews, 156 Wn. App. at 213.

Because Whealen prevailed below and Tom does not argue that the trial court abused its discretion under the TEDRA fee provision, we find no error.

Both parties request attorney fees and costs on appeal. Under RAP 18.1, a party is entitled to attorney fees if a statute authorizes the award. RCW 11.96A.150 gives an appellate court discretion to award attorney fees and costs. Because Whealen is the prevailing party on appeal, we grant her request for reasonable attorney fees upon compliance with RAP 18.1(d).

CONCLUSION

We affirm.

Leach, A.C.J.

WE CONCUR:

Ellington, J.

Cox, J.