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No. 69546-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF T. MARK STOVER, Deceased,

TERESA VAUX-MICHEL,

Respondent,

v.

ANNE VICTORIA SIMMONS, as Personal Representative of the ESTATE OF T. MARK STOVER, Deceased,

Appellant.

BRIEF OF APPELLANT

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A. INTRODUCTION

Teresa Vaux-Michel claimed a relationship with the late Mark Stover. She also claimed that Stover made out a check in the amount of $150,000 to her as a gift causa mortis, leaving it in his desk.

Vaux-Michel presented a creditor claim to the Estate of Mark Stover ("Estate") for the alleged gift, but her creditor claim against the Estate was untimely and should have been rejected for that reason alone.

Moreover, because a gift causa mortis requires proof of the elements of such a gift on a clear and convincing basis, under the facts in this case, Vaux-Michel failed to establish a gift, under that higher burden of proof, particularly the requisite element of delivery.

Finally, the trial court should not have awarded attorney fees to Vaux-Michel under the Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A.150. Rather, the Estate was entitled to an award of fees from Vaux-Michel and is entitled to its fees in connection with this appeal.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its order on February 17, 2012 denying the Estate's motion to dismiss Vaux-Michel's creditor claim action.

2. The trial court erred in making finding of fact number 1 in its September 24, 2012 decision on the merits.

3. The trial court erred in making finding of fact number 9 in its September 24, 2012 decision on the merits.

4. The trial court erred in making finding of fact number 10 in its September 24, 2012 decision on the merits.

5. The trial court erred in making finding of fact number 36 in its September 24, 2012 decision on the merits.

6. The trial court erred in making finding of fact number 40 in its September 24, 2012 decision on the merits.

7. The trial court erred in entering conclusion of law number 2.

8. The trial court erred in entering conclusion of law number 3.

9. The trial court erred in entering conclusion of law number 4.

10. The trial court erred in entering conclusion of law number 5.

11. The trial court erred in entering conclusion of law number 8.

12. The trial court erred in entering conclusion of law number 9.

13. The trial court erred in entering conclusion of law number 10.

14. The trial court erred in entering conclusion of law number 11.

15. The trial court erred in entering conclusion of law number 12.

16. The trial court erred in entering conclusion of law number 13.

17. The trial court erred in entering its amended TEDRA order on October 1, 2012.

18. The trial court erred in making finding number 8 on fees.

19. The trial court erred in making finding number 9 on fees.

20. The trial court erred in entering conclusion of law number 5 on fees.

21. The trial court erred in entering conclusion of law number 6 on fees.

22. The trial court erred in entering conclusion of law number 8 on fees.

23. The trial court erred in entering a judgment on October 18, 2012.

(2) Issues Pertaining to Assignments of Error

1. Where the personal representative of an estate rejects a creditor claim and the creditor files an action on that claim against the estate pursuant to RCW 11.40.100, is the creditor's commencement of the action more than 35 days after the postmarking of the rejection of the creditor claim by the personal representative untimely? (Assignments of Error Numbers 1, 2, 6-9, 16, 17)

2. Where a decedent allegedly left a check on his desk made out to a person with whom he allegedly had a romantic relationship, did that person, as a creditor against the decedent's estate, establish the requisite elements of a gift causa mortis, particularly delivery, where a high burden of proof is required to establish such a gift and the basis for the trial court's decision was inadmissible hearsay? (Assignments of Error Numbers 3-6, 10-16, 17)

3. Did the trial court err in awarding a creditor her attorney fees under TEDRA, RCW 11.96A.150? (Assignments of Error Numbers 16-23)

4. Did the trial court err in denying an award of fees to the Estate? (Assignments of Error Numbers 16, 17, 23)

5. Is the Estate entitled to its fees on appeal?

C. STATEMENT OF THE CASE

Mark Stover disappeared from his Anacortes home and was later determined to have been killed on October 28, 2009. CP 1, 7, 107. Stover's death was a cause célèbre in Skagit County and was the subject of national news reports and television stories. 2RP at 29-30, 85; RP (2-17-12) at 4-5.[1] Stover was apparently murdered by Michael Oakes, who was convicted of his murder. CP 45. He died without a will. CP 45. Stover was not married or engaged at the time of his death. CP 7. Stover's sister, Anne Victoria Simmons, was appointed administrator of his intestate estate with nonintervention powers by the Skagit County Superior Court on January 7, 2011, and she qualified by filing her oath. CP 9-10.

Teresa Vaux-Michel claimed a relationship with Stover. CP 14. As Simmons testified, however, she was not aware of a relationship between Vaux-Michel and Stover at the time of Stover's death; she understood him to be dating other women as recently as August 2009. CP 78; 2RP at 131. No engagement between Vaux-Michel and Stover was ever announced. 2RP at 92. She did not have a wedding ring. 2RP at 91-92. No wedding date was ever set. *Id.* Vaux-Michel testified

[1] Transcription of the September 12-13, 2012 bench trial appears in two volumes, referenced herein as "1RP" and "2RP," respectively. References to a hearing on February 17, 2012 are designated by date.

that she did not have a key to Stover's house, and detectives had to let her into the house to get food for Stover's dog. CP 79.

In going through Stover's personal effects in his Anacortes home in early December 2009, Simmons and Leigh Hearon (a private detective hired by Jeffrey Kradel, Stover's legal counsel in a potential criminal case against Stover involving drugs) discovered a check for $150,000 made out to Vaux-Michel. CP 15, 35; 2RP at 8. Simmons found the check hidden in a desk drawer; the police had not found it. 2RP 66-68; CP 80-81. Vaux-Michel claimed the check was a gift causa mortis. CP 15. However, Vaux-Michel had never mentioned any such gift to Simmons between the time of Stover's disappearance and Simmons' canvassing of Stover's home in early December, a period of many weeks. 2RP 67; CP 80-81.

Approximately two years after Stover's death, on September 16, 2011, Vaux-Michel filed a creditor's claim in this matter and mailed a copy to the Estate's counsel, claiming the Estate owed her $150,000. CP 7, 14, 41.

The Estate sent Vaux-Michel's attorney a formal rejection of the claim by certified mail on December 19, 2011. CP 18. It was filed with the trial court on December 20, 2011. CP 18. On January 23, 2012, Vaux-Michel filed the present petition seeking an order that her creditor's

claim be paid. CP 19. In support of her petition, Vaux-Michel filed declarations from herself, Kradel, and Hearon, each of which related statements allegedly made by Stover. CP 27, 31, 35. The Estate responded, in part, that the petition was time-barred. CP 83. The Estate also filed a motion to strike the noted declarations for a variety of reasons, including that statements therein were not based on personal knowledge, or that such statements were hearsay (ER 801-02), or they violated Washington's Dead Man Statute, RCW 5.60.030, or were barred by the attorney-client privilege. CP 92-95.

The case was initially heard before the Honorable John M. Meyer on February 17, 2012. CP 76. The trial court rejected the Estate's argument that the creditor claim was untimely and set the claim over for trial by an order entered on February 17, 2012. CP 76. The trial court did not rule on the Estate's motion to strike which was also set for the February 17, 2012 hearing. CP 58-61, 76; RP (2-17-12) at 3-15. The Estate sought discretionary review, which this Court denied. CP 106-10.

The case was tried to the bench over 2 days. 1RP at 3-140; 2RP at 3-100. At the beginning of trial, the trial court heard the Estate's outstanding motion objecting to the declarations and testimony of Kredel, Hearon, and Vaux-Michel. 1RP at 3-13. The trial court ruled that in the interest of time, it would hear all testimony and rule at the conclusion of

the case determining what was admissible and what was not admissible. 1RP at 28. The trial court ruled that the Estate had a "continuing objection." 1RP at 28. The Estate noted that its list of objections included references to Stover's statements as hearsay. 1RP at 31. The trial court acknowledged that the Estate's "continuing objection touches all issues that were raised in [the Estate's] argument." 1RP at 31-32. Throughout the trial, the Estate periodically reiterated its hearsay objection to witnesses' testimony about statements that Stover made to them, which the trial court acknowledged. *See* 1RP at 74, 95, 106, 125, 131, 138; 2RP at 6. *See also,* 2RP at 16. The trial court's findings and conclusions, which contain its rulings on admissibility, do not mention hearsay. *See* CP 111-20. The trial court ruled in favor of Vaux-Michel, entering findings and conclusions on September 24, 2012 and an amended order on TEDRA on October 1, 2012. CP 111-21, 127-28. The trial court subsequently entered findings and conclusions and a judgment and an order on attorney fees on October 18, 2012. CP 186-91. The Estate filed a timely notice of appeal from the judgment. CP 196.

D. SUMMARY OF ARGUMENT

Because Vaux-Michel's creditor claim was untimely, the trial court was without jurisdiction to consider her claim. Even if Vaux-Michel's creditor claim was timely brought, she failed to establish a gift causa

mortis because the essential element of delivery was lacking, particularly where the trial court's decision is based on hearsay evidence.

Because Vaux-Michel's creditor claim fails, she was not entitled to fees and costs, and the Estate is equitably entitled to fees and costs at trial and on appeal under RCW 11.96A.150(1) and RAP 18.1.

E. ARGUMENT

(1) Vaux-Michel Did Not Timely Submit a Creditor Claim to the Estate under RCW 11.40.100

(a) The Time Deadlines of RCW 11.40.100 Are Strict

RCW 11.40.100 states in pertinent part:

> (1) If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection or the claim is forever barred. The personal representative shall notify the claimant of the rejection and file an affidavit with the court showing the notification and the date of the notification. The personal representative shall notify the claimant of the rejection by personal service or certified mail addressed to the claimant or the claimant's agent, if applicable, at the address stated in the claim. *The date of service or of the postmark is the date of notification.* The notification must advise the claimant that the claimant must bring suit in the proper court against the personal representative within thirty days after notification of rejection or the claim will be forever barred.

(emphasis added). Under the statute, the 30-day time period commences from the date of service of the rejection of Vaux-Michel's claim which is the date of the postmark.

It is undisputed that Vaux-Michel filed her claim on September 16, 2011, and that such claim was rejected by the Estate on December 19, 2011 when the rejection was mailed to Vaux-Michel's attorney by certified mail at the address listed on the claim. On the face of the rejection, the declaration of service states that the rejection was mailed on December 19, 2011. CP 18. The rejection on its face notified Vaux-Michel that she must bring suit in the proper court within 30 days after the notification of rejection or the claim will be forever barred. To be timely, any action by Vaux-Michel had to be filed by Vaux-Michel under RCW 11.40.100 no later than January 18, 2012.

It is also undisputed in this case that Vaux-Michel commenced the present action for her creditor claim in the trial court on January 23, 2012, 35 days after the postmarking of the rejection. CP 19. Vaux-Michel argued below that her action was timely under RCW 11.40.100 because CR 6(e)[2] allowed her 3 additional days upon which to act, because the rejection had been mailed to her. RP (2-17-12) at 9-12. Vaux-Michel's argument, relying on the general applicability of the civil rules, ignores the

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[2] CR 6(e) states:

> **Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

express provisions of Title 11 that except from those rules any Title 11 "special proceeding" for which the Legislature has expressly provided procedures within Title 11. RCW 11.96A.090(1) provides: "A judicial proceeding under this title is a special proceeding under the civil rules of court.[3] *The provisions of this title governing such actions control over any inconsistent provision of the civil rules.*" (emphasis added). RCW 11.96A.090(4) provides in relevant part: "The procedural rules of court apply to judicial proceedings under this title *only to the extent that they are consistent with this title.*" (emphasis added). *See also*, RCW 11.96A.100(2) ("A summons *must* be served in accordance with *this* chapter and, *where not inconsistent with these rules, the procedural rules of court*...." (emphasis added)).

Accordingly, the express procedural provisions of Title 11 will prevail over any inconsistent civil rules in this context, as demonstrated in *In re Estate of Toth*, 138 Wn.2d 650, 981 P.2d 439 (1999) and its progeny. In *Toth,* our Supreme Court ruled that CR 6(e) does not apply to probate proceedings generally. A will contest, like any other Title 11 proceeding,

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[3] CR 81(a) provides that the superior court civil court rules "shall govern all civil proceedings," "[*e*]*xcept* where inconsistent with rules or statutes applicable to special proceedings." (emphasis added). Subsection (b) of CR 81 reiterates the exception, noting "*Subject to* the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict." (emphasis added). *See* CR 81(a) and (b).

is subject to RCW 11.96A.090(1). In *Toth*, the Supreme Court addressed the timeliness of the commencement of a will contest, ultimately finding that the action was not timely filed under the will contest statute, RCW 11.24.010. The Court rejected the application of CR 6(e) to extend the period for a will contest, specifically noting that a will contest, like a creditor's claim, is a statutory proceeding, and the statutory provisions control. *Id.* at 653. The Court rejected applying CR 6(e) to the time periods for commencement of a will contest because nothing in the statute contemplated such an extension. *Id.* at 654. The Court determined that by its terms, CR 6(e) did not apply to will contests because the obligation of the party to act was triggered by the admission of the will to probate, not by the service of a notice on such party. But the Court also subscribed more broadly to the observation of the Court of Appeals in *Toth* that "[t]here is no controlling authority to support the … position that CR 6(e) applies to probate proceedings." *Id.* at 656-57.

Applying *Toth*, Division III subsequently held that "[a] will contest is a purely statutory proceeding, and the court must be governed by the provisions of the applicable statute. The jurisdiction of the trial court is derived exclusively from the statute, and may be exercised only in the mode and under the limitations therein prescribed." *In re Estate of Kordon*, 126 Wn. App. 482, 485, 108 P.3d 1238 (2005), *affirmed*, 157

Wn.2d 206 (2006) (quotation marks and citations omitted). This Court effectuates the legislative intent by looking no further than the statutory language when that language is clear. *Id.* In affirming Division III, the Supreme Court opined: "A court has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute; neither does a court of equity have power to entertain such jurisdiction." *Estate of Kordon*, 157 Wn.2d at 214 (internal quotation marks and citations omitted). The same is true for the statutory deadlines set forth in RCW 11.40.100 as discussed above.

No statutory language, and no case law, supports the argument advanced by Vaux-Michel that CR 6 should be imported into the calculation of time deadlines under RCW 11.40.100.[4] The principal authority cited by Vaux-Michel in support of her position is an unlawful detainer case. *Canterwood Place v. Thande,* 106 Wn. App. 844, 5 P.3d 495 (2001).[5] RP (2-17-12) at 11-12. It is noteworthy that in that case the Court chose to apply CR 6 to the statutory time deadlines under RCW 59.12 because the statute did not contain a complete rule regarding time

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[4] Vaux-Michel in fact *conceded* on discretionary review that "there is no controlling authority that Rule 6 applies to probate proceedings..." Answer to Motion for Discretionary Review at 12. She is correct. She can cite *nothing* that supports the argument that CR 6 relieves her of the obligation to strictly comply with the time deadlines set forth in RCW 11.40.100.

deadlines. *See Canterwood,* 106 Wn. App. at 848-49. By contrast, RCW 11.40.100 is complete. It defines when rejection of the claim by the personal representative is effective. It advises that claimants like Vaux-Michel must file their litigation to uphold a creditor claim within 30 days of the personal representative's rejection of that claim. It deliberately does not provide for a mailing rule like CR 6. Vaux-Michel simply did not timely file her lawsuit.

Washington courts in the probate setting have treated time deadlines strictly. *King County v. Knapp's Estate*, 56 Wn.2d 558, 559-60, 354 P.2d 389 (1960). Such claim filing requirements are *mandatory. Rigg v. Lawyer*, 67 Wn.2d 546, 553, 408 P.2d 252 (1965). The statutory time deadline cannot be waived by the personal representative. *Dillabough v. Brady*, 115 Wash. 76, 80, 196 Pac. 627 (1921). There are strong policy reasons for strict compliance with time deadlines in probate-related statutes. The need for certainty in the closure of the estate was an important consideration for the Legislature. Strict compliance affords a measure of certainty that looser standards for the compliance with deadlines in probate-related statutes will not. That is the reason that this Court in *In re Estate of Peterson*, 102 Wn. App. 456, 9 P.3d 845 (2000),

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[5] The Legislature promptly amended the summons period for unlawful detainer actions after *Canterwood Place,* Laws of 2005, ch. 130, § 1, effectively *overruling* it. *See Christensen v. Ellsworth,* 162 Wn.2d 365, 375 n.3, 173 P.3d 228 (2007).

review denied, 142 Wn.2d 1021 (2001), rejected the application of the discovery rule to filing of an action under the will contest statute. *See also, Ruth v. Dight*, 75 Wn.2d 660, 670, 453 P.2d 631 (1969) (rejecting application of discovery rule to probate non-claim statute, RCW 11.40).

The express language of RCW 11.40.100, strictly construed, required that Vaux-Michel file this case within 30 days of the rejection of her creditor claim on December 19, 2011. RCW 11.40.100 provides that the personal representative's rejection was effective from the date that the personal representative put that rejection in the mail. She had 30 days thereafter in which to file the lawsuit. She did not do so. The lawsuit was commenced on January 23, 2012, more than 30 days after the rejection of her claim. Consequently, Vaux-Michel's lawsuit was not timely commenced. The trial court had no authority to hear and determine her claim.[6] *See Estate of Kordan*, 157 Wn.2d at 214.

(b) RCW 11.40.080 Does Not Create a Separate Statute of Limitations Apart from RCW 11.40.100

Vaux-Michel argued below that RCW 11.40.080 somehow creates a separate statutory sequence from that of RCW 11.40.100. RP (2-17-12)

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[6] Accordingly, the trial court erred in denying the Estate's motion to dismiss Vaux-Michel's creditor claim and in entering conclusion of law number 4, which applied CR 6(e). (Assignments of Error Numbers 1 and 19)

at 6. Neither the language of RCW 11.40.080 or any authority supports that argument.

RCW 11.40.080 requires the personal representative to act on a creditor claim within the later of 4 months of the notice to creditors or within 30 days of the presentation of the claim by the creditor. If the personal representative fails to do so, the creditor may notify the personal representative that the creditor will petition the court to address the claim. Vaux-Michel served such a notice on October 19, 2011. CP 22, 41-42. Under RCW 11.40.080, the personal representative then has 20 days to address the claim and if he/she does not do so, the creditor may file an action in court on the claim.

As Division II noted in *Johnston v. Von Houck*, 150 Wn. App. 894, 209 P.3d 548 (2009), RCW 11.40.080 establishes a process by which a claimant can commence an action in court with respect to a creditor claim where the personal representative of an estate does not timely act on such a claim. But *nothing* in RCW 11.40.080 or in any cases provided by Vaux-Michel would suggest that time limitations of RCW 11.40.100 no longer apply if the personal representative rejects the claim before the creditor commences a court action, as occurred here.[7] In fact, the

[7] For this reason, the trial court's conclusion of law number 2, stating "RCW 11.40.100 ceased to be applicable," and conclusion of law number 3, stating that Vaux-

Johnston court discussed the application of RCW 11.40.100 even in the context of a suit commenced pursuant to RCW 11.40.080. *See id.* at 898-904.

In this case, the personal representative was prompted by Vaux-Michel's actions to reject her creditor claim. That rejection took place on December 19, 2011. CP 18. The time deadlines of RCW 11.40.100 continued to apply. By waiting to commence this action until January 23, 2012, Vaux-Michel's action was simply not timely under RCW 11.40.100. Vaux-Michel can point to nothing in the language of RCW 11.40.080 or RCW 11.40.100 or any case law that supports her argument that the time limitations for commencement of a creditor claim lawsuit under RCW 11.40.100 do not apply if a personal representative does not strictly adhere to the time deadlines for responding to a creditor claim set forth in RCW 11.40.080.[8]

(2) The Trial Court Erred in Concluding that a Gift Causa Mortis Was Present Here

The trial court here concluded that Stover made a gift causa mortis to Vaux-Michel. The trial court's finding number 36 regarding "delivery"

Michel properly "filed her petition within a reasonable time," are in error. CP 118. (Assignments of Error Numbers 17, 18)

[8] The threshold issue of the untimeliness of Vaux-Michel's creditor claim is dispositive of this appeal and the Court need not reach the gift causa mortis issue. If it

an essential element of a gift causa mortis was not supported by substantial evidence. CP 116.

Where the trial court has weighed the evidence, review is limited to ascertaining whether the findings of fact are supported by substantial evidence, and if so, whether the findings support the conclusions of law and the judgment. *In re Dependency of P.A.D.*, 58 Wn. App. 18, 25, 792 P.2d 159, *review denied*, 115 Wn.2d 1019 (1990). *See also, In re Disciplinary Proceeding Against Marshall*, 167 Wn.2d 51, 66-67, 217 P.3d 291 (2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 3480, 177 L. Ed. 2d 1059 (2010) ("*Marshall II*"); *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 329-30, 157 P.3d 859 (2007) ("*Marshall I*"). Findings of fact will not be disturbed if supported by substantial evidence. *Dependency of P.A.D.*, 58 Wn. App. at 25. However, the determination must be made in light of the degree of proof required. *Id.* If the proof required is clear and convincing, then the question on appeal is whether there is substantial evidence to support the findings in light of the highly probable test. *Id.* Thus, in effect, the substantiality of the evidence must be higher to sustain the requisite higher burden of proof for a gift causa

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does, the trial court erred in finding such a gift was present here for the reasons set forth in section (2).

mortis. *See Marshall II*, at 67; *Marshall I*, at 330 (substantial evidence review must take into account the heightened burden of proof).

A gift causa mortis may be present when: (1) the gift is made in view of approaching death from some existing sickness or peril; (2) the donor dies from such sickness or peril without having revoked the gift; (3) there was a delivery, either actual, constructive, or symbolical, of the subject of the gift to the donee or to someone for him, with the intention of passing title thereto, subject, however, to revocation in the event of recovery from sickness. *In re McDonald's Estate*, 60 Wn.2d 452, 454, 374 P.2d 365 (1962); *McCarton v. Estate of Watson*, 39 Wn. App. 358, 363, 693 P.2d 192 (1984). The burden of proof to establish the essential elements of a gift causa mortis must be *clear and convincing*. *In re White's Estate*, 129 Wash. 544, 547, 225 Pac. 415 (1924).

The *McCarton* court discussed at length what constitutes sufficient evidence of delivery to show a gift causa mortis. Therein, this Court generally explained:

> "A gift will not be presumed, but he who asserts title by this means must prove by evidence which is clear, convincing, strong and satisfactory a clear and unmistakable intention on the part of the donor to make a gift of his property, *and the delivery of the property must be as perfect as the nature of the property and the circumstances and surroundings of the parties* will reasonably permit."

McCarton, 39 Wn. App. at 364 (quoting *In re Gallinger's Estate*, 31 Wn.2d 823, 829, 199 P.2d 575 (1948) (emphasis added)). Regarding delivery, this Court further explained

> "It is not necessary that there be a manual delivery or an actual transition from hand to hand. The *delivery may be constructive or symbolical, but the general rule is that it must be as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit*."

Id. (quoting *Phinney v. State*, 36 Wash. 236, 246, 78 P. 927 (1904) (emphasis added)). Accordingly, "[c]ourts must scrutinize such transactions carefully and judge each case on its own facts." *Id.* at 368.

The *McCarton* court applied the rule that "where the intent to bestow is obvious and clear and there is no evidence of fraud or undue influence, *and the circumstances show that the donor has done all that, in his opinion, is necessary to do to accomplish his purpose*, the intent of the donor will answer for the act of delivery." *McCarton*, 39 Wn. App. at 365 (quoting *MacKenzie v. Steeves*, 98 Wash. 17, 23, 167 P. 50 (1917) (emphasis added)). Restated, the rule is that "constructive delivery" to support a gift causa mortis may be found "when the evidence of donative intent is concrete and undisputed, when there is every indication that the donor intended to make a present transfer of the subject matter of the gift, *and when the steps taken by the donor to effect such a transfer must have*

been deemed by the donor as sufficient to pass the donor's interest to the donee." *Id.* at 367 (emphasis added) (quoting *Scherer v. Hyland*, 75 N.J. 127, 380 A.2d 698, 701 (1977)).

Here, the trial court purportedly applied this rule in finding of fact number 36, stating "There is no evidence of fraud or undue influence, and the circumstances show that Mr. Stover did all that, in his opinion, was necessary to accomplish delivery of the check." CP 116-17. But the facts of this case are markedly different from the circumstances presented in *McCarton*. In *McCarton*, the court concluded that "the constructive delivery here was as perfect and complete as the attendant circumstances and conditions permitted. [The donor] felt she had done all that was necessary to accomplish her stated purpose." *McCarton*, 39 Wn. App. at 369.

That determination turned on the following facts that are not present in this case. In *McCarton*, the donor had instructions transcribed and witnessed directing that her stock certificates and bank accounts (the purported gifts causa mortis) were to go in part to the donee and to others upon her death; she discussed these instructions with the donee, and granted the donee power of attorney over her affairs. *Id.* at 367-68. Such actions showed concrete and unequivocal evidence of the donor's *present* intent to transfer the subject matter of the gifts. *Id.* Moreover, by virtue of

the power of attorney, the donee was in constructive possession of the gift items. *Id.* at 368. Also, the donor "inquired of [the donee] as to his knowledge of where the items were. Upon [the donee's] affirmative indication that he knew where the items were, the manifestation of intent and constructive delivery was complete." *Id.* at 369.

Here, there are no similar written instructions regarding the check, no discussions between Stover and Vaux-Michel regarding the check, and no power of attorney or similar authority granted to Vaux-Michel by Stover. There is also no similar constructive possession of the check by Vaux-Michel, as she had no key to Stover's house and thus she had no control over, or even access to, his home office where the check was found.[9] There is simply no delivery of the check, actual, constructive, symbolic or otherwise. Stover's act of leaving a check payable to Vaux-Michel on (or in) his desk evidenced neither a present intent to relinquish control of the purported gift nor could such action qualify as "delivery" of such item to Vaux-Michel. Stover could have effectuated delivery of the check to Vaux-Michel by placing it in a sealed envelope and hand delivering it to her, or mailing it to her, or placing it in another's hands for her, but he did none of those things. Accordingly, it cannot be said that

[9] Vaux-Michel testified that she had no key to Stover's house and that while he was alive she was on his property only when he was present. 2RP at 52-53.

Stover did all that was necessary to do to accomplish delivery of the gift item or that under the circumstances there was delivery "as perfect and complete as the attendant circumstances and conditions permitted." *McCarton*, 39 Wn. App. at 369. The record simply does not support the trial court's determination in finding number 36 that Stover accomplished "delivery"[10] of the check.[11]

Additionally, Vaux-Michel's claim utterly fails when hearsay evidence is properly excluded. The trial court found delivery because of the putative relationship between Stover and Vaux-Michel that was not proved at trial, except by hearsay evidence. Most tellingly, Vaux-Michel had no key to Stover's house. As noted, the Estate had a continuing hearsay objection to testimony that relied on Stover's statements. The trial court reserved ruling on that objection, but never did so. The hearsay rule bars admission of out-of-court statements offered to prove the truth of the matter asserted unless a recognized exception to the rule applies. *See* ER 801, 802. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 619, 762 P.2d 1156 (1988)

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[10] The evidence does not meet even a standard substantial evidence test, thus, it cannot meet the *enhanced* substantial evidence test reflecting the more demanding clear, cogent, and convincing burden of proof placed on Vaux-Michel at trial. *See Marshall II*, at 67; *Marshall I*, at 330.

[11] Because finding of fact number 36 regarding "delivery" fails, all of the trial court's conclusions of law concerning a gift causa mortis that rely on that finding (conclusion numbers 8-12) also fail. (Assignments of Error Numbers 15, 22-26)

(a witness's testimony is inadmissible hearsay where he has no personal knowledge on which to base the statements and he was relying on statements made to him out of court).

Here, most of Vaux-Michel's witnesses testified as to what Stover had told them regarding his relationship with Vaux-Michel.[12] Because such statements were offered as proof of Stover's relationship with Vaux-Michel they were hearsay and improperly admitted over the Estate's continuing hearsay objection. This is an additional basis for reversing the trial court.[13]

(3) The Trial Court Erred in Awarding Attorney Fees to Vaux-Michel

The trial court here made a substantial fee award to Vaux-Michel. CP 190-92. That award was error where there was no gift causa mortis. Moreover, even if a gift occurred, this is not the type of case in which fees should be awarded against the Estate.

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[12] *See, e.g.*, 2RP at 4-5 (Margaret Jean Nordstrom testified that Stover told her that Vaux-Michelle had saved his life and they were going to be married). 1RP at 32 (Jeffrey Kradel testified that Stover told him he wanted to marry Vaux-Michel). 2RP at 10 (Leigh Hearon testified that in conversations with Stover he referred to Vaux-Michel as his significant other). 1RP at 115 (Elizabeth Dorris testified that Stover told her he was going to marry Vaux-Michel). 1RP at 109 (Andrea Franulovich testified that Stover told her Vaux-Michel was the love of his life and he wanted to marry her).

[13] Disregarding such improperly admitted testimony about what Stover "told" the witnesses, there is no admissible evidence supporting findings 11-15, which are based on Stover's hearsay statements. *See* CP 113-14. As a result, conclusion of law 6, which is based in part on such findings, also fails. *See* CP 118-19 (Assignments of Error Numbers 5-9, 21)

The 1999 Legislature enacted a broad attorney fee provision as part of the Trust and Estate Dispute Resolution Act ("TEDRA"). RCW 11.96A.150(1) states:

> Either the superior court or the court of appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable.

In general, to award fees under TEDRA, a court must look to whether the action benefited the estate or the beneficiaries in a substantial fashion. *In re Estate of Black*, 153 Wn.2d 152, 174, 102 P.3d 796 (2004); *Matter of Estate of Niehenke*, 117 Wn.2d 631, 647-48, 818 P.2d 1324 (1991); *In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004); *In re Estate of Ehlers,* 80 Wn. App. 751, 911 P.2d 1017 (1996).

Courts may choose not to award fees in estate proceedings under TEDRA where novel statutory interpretation issues are present. *In re Estate of D'Agosto*, 134 Wn. App. 390, 401-02, 139 P.3d 1125 (2006), *review denied,* 160 Wn.2d 1016 (2007); *Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004), *review denied*, 154 Wn.2d 1029 (2005); *Mearns v. Scharbach*, 103 Wn. App. 498, 514-15, 12 P.3d 1048 (2000), *review denied,* 143 Wn.2d 1011 (2001).

Here, as discussed above, Vaux-Michel's creditor's claim is "forever barred" because it was not timely filed under RCW 11.40.100. Moreover, Vaux-Michel argued a novel theory at trial, contending that the time parameters contained in RCW 11.40.080, for the personal representative to allow or reject a claim against the estate, somehow altered the separate time limit in RCW 11.40.100 for Vaux-Michel to file suit challenging the personal representative's rejection of her creditor's claim. That is an issue of first impression for this Court. As explained in section 1(b), Vaux-Michel's contention is specious as well as novel.[14] Additionally, as discussed herein, she has failed to establish all the requisite elements of a gift causa mortis by clear and convincing evidence.

Vaux-Michel's novel and/or specious contentions do not provide a valid basis for a fee award. *See Estate of D'Agosto*, 134 Wn. App. at 402 (declining to award fees under RCW 11.96A.150 because case involved novel issues of statutory construction); *see also*, *Niehenke*, 117 Wn.2d at 648 (inappropriate to assess fees against an estate when the litigation could result in no substantial benefit to the estate). Accordingly, the trial

[14] Commissioner Neel's May 16, 2012 ruling denying the Estate's motion for discretionary review attests to the novelty of Vaux-Michel's theory concerning RCW 11.40.080. The commissioner's ruling denied discretionary review, in part, because of the lack of controlling case law on the issue and thus the absence of "obvious error" warranting discretionary review at that procedural juncture of the case. CP 108.

court erred in awarding Vaux-Michel attorney fees under RCW 11.96A.150(1).

(4) The Estate Is Entitled to Its Fees at Trial and on Appeal

The Estate should recover its fees at trial and on appeal under RCW 11.96A.150(1) and RAP 18.1. As noted, the statute provides that both the trial court and this Court may award costs and reasonable attorney fees in a TEDRA action to be paid by any party as the court deems equitable. RCW 11.96A.150(1). The rule allows attorney fees on appeal if applicable law authorizes them. *See* RAP 18.1. *Bartlett v. Betlach*, 136 Wn. App. 8, 22, 146 P.3d 1235 (2006), *review denied*, 162 Wn.2d 1004 (2007). Here, equity supports a discretionary award of fees and costs to the Estate.

Washington favors the protection of an estate's interests through the award of attorney fees. *Laue v. Estate of Elder*, 106 Wn. App. 699, 712-13, 25 P.3d 1032 (2001), *review denied*, 145 Wn.2d 1036 (2002) (citing *In re Estate of Kerr*, 134 Wn.2d 328, 949 P.2d 810 (1998)). In *Kerr*, a will beneficiary unsuccessfully sought the removal of a personal representative. Our Supreme Court held that the trial court had discretion to award fees to protect the estate's interest. *See Laue*, 106 Wn. App. at 712-13 (discussing *Kerr*). In both *Lau* and *Kerr*, the estate bore the costs of defending against a claimant's suit, thus, an award of fees to the estate

was appropriate. The same is true here. The personal representative, Anne Simmons, acting on the advice of counsel,[15] denied Vaux-Michel's claim, and then defended against Vaux-Michel's creditor claim suit on behalf of the Estate. Simmons has acted reasonably (i.e. under the advice of counsel) and for the benefit of the Estate by defending against a $150,000 claim. Under these circumstances, the Estate should be awarded attorney fees and costs for defending at trial and on appeal.

F. CONCLUSION

The trial court committed error in engrafting the time periods of CR 6(e) onto the statutory time deadlines for a creditor's claim against an estate under RCW 11.40.100. This Court should reverse the trial court's order on timeliness and remand the case to the trial court with directions to dismiss Vaux-Michel's petition.

Alternatively, if the Court concludes the creditor claim was timely, the trial court erred in concluding that Stover made a gift causa mortis to Vaux-Michel. Vaux-Michel did not establish such a gift, particularly delivery, by clear and convincing evidence.

The Court should vacate any fee award to Vaux-Michel. Costs, on appeal, including reasonable attorney fees should be awarded to the Estate.

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[15] *See* 2RP at 86.

DATED this 21st day of March, 2013.

Respectfully submitted,

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APPENDIX

2. Respondent, Anne Victoria Simmons, is the Decedent's sister and the personal representative of the Estate of T. Mark Stover. She had communicated with her brother one time in the twenty years that preceded his death. There was estrangement to some extent in the family, making it less likely that relatives would necessarily be the natural objects of Mr. Stover's bounty.

3. Mr. Stover's sole legal heir was his mother, Anne W. Hamilton. Respondent is the guardian of the person and estate of Anne W. Hamilton, who is in her 90's.

4. Respondent and her half-brother, James Bolerud, are the sole heirs of Anne W. Hamilton.

5. On January 4, 2010, letters of administration were issued to Respondent.

6. During the summer of 2009, Mr. Stover began to suspect that his ex-wife, Linda Opdycke and her father, Wally Opdycke, were plotting to have him murdered.

7. In August 2009, after drugs were found in his car upon the execution of a search warrant, Mr. Stover hired an attorney, Jeffrey Kradel, who hired a private investigator, Leigh Hearon, to assist him in determining who may have planted the drugs.

8. During the period from August 2009 until his death in October 2009, Mr. Stover became very frightened and told numerous people of his fear that Linda Opdycke and her father, Wally Opdycke, were going to have him murdered. He expected them to be successful in doing so.

9. Mr. Stover and Ms. Vaux-Michel were introduced by Ted and Gerri Frantz in 2008. They dated for a while until Ms. Vaux-Michel decided to "slow things down" sometime in the Spring of 2009. In August of 2009, Ms. Vaux-Michel and Mr. Stover began

to date again and continued to date until his death. Mr. Stover wanted to take care of her in case he was murdered, and he prepared for that eventuality.

10. Ms. Vaux-Michel helped Mr. Stover with his business and had access to his home and in-home office. They communicated by telephone several times per day. Ms. Vaux-Michel in fact reported Mr. Stover as missing.

11. In late August or early September 2009, Mr. Stover told Jeannie Nordstrom, a client of his for 10 years, that Ms. Vaux-Michel had "saved his life" and that he wanted to marry her.

12. Sometime in late August 2009, Mr. Stover told Mr. Kradel that he wanted to marry Ms. Vaux-Michel and to provide for her in the event the Opdyckes had him murdered.

13. Sometime in late August 2009, Mr. Stover told Ms. Hearon that he planned to marry Ms. Vaux-Michel, that he wanted to provide for her in the event the Opdyckes had him murdered, and that he had written a check to Ms. Vaux-Michel and left it on his desk in plain view for her in case his fear that he would be murdered came to pass. Mr. Stover often told Ms. Hearon of his love and affection for Ms. Vaux-Michel.

14. Sometime in October 2009, Mr. Stover told Elizabeth Dorris that he had left a check for Ms. Vaux-Michel in the event he was murdered. Mr. Stover often told Ms. Dorris of his love for Ms. Vaux-Michel and that he was going to marry her.

15. Sometime in late October 2009, Mr. Stover told Andrea Franulovich that he had left a check for Ms. Vaux-Michel in the event he was murdered. Mr. Stover told her that he planned to marry Ms. Vaux-Michel and showed Ms. Franulovich the engagement ring he

had purchased. Mr. Stover often expressed his love for Ms. Vaux-Michel and his plan to marry her to Ms. Franulovich.

16. On or about October 28, 2009, T. Mark Stover went missing, and on October 22, 2010, a Skagit County jury returned a guilty verdict of murder in the first degree for Stover's murder against Michiel Oakes, who was the boyfriend of Linda Opdycke.

17. In early November 2009, Detective Dan Luvera of the Skagit County Sheriff's Office searched Mr. Stover's desk and, among other items, found on top of the desk a check made out to Teresa Vaux-Michel in the amount of $150,000. The check was a single check not in a check register or check book. It had been left in a place where it was easily discoverable.

18. Detective Luvera called Respondent, who was in Georgia, and told her about the check made out to Ms. Vaux-Michel.

19. Detective Luvera sent that check, and other items found on Mr. Stover's desk, to Respondent in pre-addressed, pre-stamped boxes provided by her.

20. In December, 2009, Ms. Hearon and the Respondent went to Mr. Stover's house to go through his personal effects, primarily to look for a will. Respondent also told Ms. Hearon she was going to look for the check made out to Ms. Vaux-Michel. Ms. Hearon had not yet told Respondent that she knew about the check.

21. As they were going through Mr. Stover's effects, Respondent either found or represented that she had found a check in the amount of $150,000, dated August 9, 2009, and made out to Ms. Vaux-Michel. Responded testified she found the check "hidden" in an inconspicuous place in Mr. Stover's desk drawer. The check, No. 1002, was still attached to a

Vanguard check register. Check Nos. 1001, 1003 and 1004 are missing from the check register and Respondent testified she did not know where they were. The check register contained no written recordings.

22. After Respondent found the check, Ms. Hearon told her of Mr. Stover's intent to marry Ms. Vaux-Michel, of his fear that he would be murdered, and that he had written the check to Ms. Vaux-Michel because he wanted her to be taken care of if he was murdered. Ms. Hearon also told Ms. Vaux-Michel that she should tell law enforcement about the check.

23. Detective Luvera emphasized, when shown in court the check found by Respondent, that it was a different check than the one he found. The check he had found and told Respondent about was a single detached check and it was not attached to a check register.

24. As she was searching Mr. Stover's bedroom, Ms. Hearon found a letter to Mr. Stover on the night stand. The letter, from close friend Gerri Franz, explained to Mr. Stover how he could "win [Ms. Vaux-Michel's] heart."

25. On September 21, 2009, Mr. Stover "rescinded" a writing dated November 21, 2007, wherein he expressed his intent to leave his business to two employees if he were to die.

26. Mr. Stover never revoked the $150,000 check he wrote to Ms. Vaux-Michel.

27. Mr. Stover died intestate.

28. On January 6, 2011, an order adjudicating solvency of the Estate of T. Mark Stover and granting Respondent nonintervention powers was entered.

29. Respondent did not give Ms. Vaux-Michel actual notice of her appointment as personal representative of Mr. Stover's estate as permitted and provided for by RCW 11.40.020(1)(c).

30. Ms. Vaux-Michel presented and filed her claim pursuant to RCW 11.40.070 on September 16, 2011.

31. Respondent did not allow or reject Ms. Vaux-Michel's claim within thirty days from presentation of the same as required by RCW 11.40.080 ("The personal representative shall allow or reject all claims presented in the manner provided in RCW 11.40.070").

32. On October 19, 2011, Ms. Vaux-Michel served, via certified mail, written notice on Respondent that she would petition the court to have the claim allowed. RCW 11.40.080(2).

33. Respondent did not notify Ms. Vaux-Michel, within twenty days after her receipt of written notice, that she was either allowing or rejecting her claim. *Id.*

34. On December 20, 2011, Respondent filed a rejection of Ms. Vaux-Michel's claim.

35. Ms. Vaux-Michel filed her petition to restrict Respondent's non-intervention powers and to allow Petitioners claim on January 23, 2012. For purposes of this proceeding only, the Court has assumed that Ms. Vaux-Michel had standing to raise the issue in light of the solvency of the Estate.

36. There is no evidence of fraud or undue influence, and the circumstances show that Mr. Stover did all that, in his opinion, was necessary to do to accomplish delivery of the

checks.

37. There are no conflicting interests by creditors or other assignees or donees of Mr. Stover.

38. The estate is presently worth in excess of $700,000.

39. The estate began and has remained solvent and will continue to remain solvent upon the payment or provision for payment of all Creditor's Claims lawfully filed and allowed, including Ms. Vaux-Michel's.

40. Other than the unusual and perhaps suspicious circumstances surrounding the location and number of checks written to Ms. Vaux-Michel, no evidence suggests that the personal representative has discharged the business of the Estate sufficiently inappropriately to justify her removal or limitation of her non-intervention powers. However, the Estate shall not be closed until the personal representative has taken the steps required by the terms of this ruling.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter in this TEDRA action.

2. Because Respondent failed to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within thirty days of notice of the claim, RCW 11.40.100, and then failed to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within twenty days after receiving notice that Ms. Vaux-Michel would petition the Court to allow the claim, RCW 11.40.080, Respondent no longer had statutory authority to reject Ms. Vaux-Michel's claim

and, therefore, Ms. Vaux-Michel had a reasonable time within which to file her petition. RCW 11.40.080(2). The provisions of RCW 11.40.100 ceased to be applicable when Respondent failed to exercise her rights thereunder by her failure to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within 20 days after receiving notice.

3. Ms. Vaux-Michel filed her petition within in a reasonable time after notifying Respondent that she would petition the court.

4. Even if the thirty day period of RCW 11.40.100 were applicable, Ms. Vaux-Michel timely filed her petition. Respondent mailed her rejection on December 19, 2011, Ms. Vaux-Michel received notice on, and had thirty days after December 19, 2011, to file her petition. Thirty days after December 19, 2011 was Wednesday, January 18, 2012, with three additional days for mailing (CR 6(e)), the date to file fell on Saturday January 20, 2012, which put "the first day other than a Saturday, Sunday or legal holiday, following the third day," on Monday, January 23, 2012. CR 6(e).

5. The parties have stipulated as to the authenticity of Vanguard check #1002 as having been written by Mr. Stover to Ms. Vaux-Michel. The Court accepts that stipulation as clear and convincing evidence of an intended gift. The Court further finds that Detective Luvera did discover a different check for the same amount and to the same payee on October 29, 2010. For purposes of its analysis of the facts in this case, the Court has referred to the check discovered by Detective Luvera.

6. The testimony and declarations of attorney Jeffrey Kradel and private investigator Leigh Hearon regarding statements by Mr. Stover to them do not contain communications protected by the attorney-client privilege. . Assuming arguendo that Mr.

Stover's communications were made in confidence and were privileged, he waived that privilege by disclosing the substance of the communications to others. Mr. Stover made no secret of his love for Ms. Vaux-Michel or his desire to take care of her if he were murdered. Mr. Stover's declarations of love for Ms. Vaux-Michel, his intent to marry her and the corresponding desire to take care of her by leaving a check for her in case he was murdered cannot be reasonably considered to be quiet confidences Mr. Stover intended to be silenced by an attorney-client privilege. Mr. Stover hired Jeff Kradel because someone had planted drugs in his car.

Even if the communications were confidential and the privilege was not waived, substantial and clear and convincing evidence over and above that given by Mr. Kradel and Ms. Hearon exists in the record to support the Court's ruling.

7. Mr. Stover was murdered on or about October 28, 2009, the precise peril he feared. Before his murder, he did not revoke the check.

8. The check was constructively delivered by Mr. Stover to Ms. Vaux-Michel. By putting the check on his desk and telling others about the check and its purpose, and because Ms. Vaux-Michel worked at the same desk the check was located. It is a conclusion well supported by the evidence that Mr. Stover told Ms. Vaux-Michel about the check and its purpose, that the gift was accepted by Ms. Vaux-Michel, thereby ensuring that if he was murdered the checks would be retrieved by or given to Ms. Vaux-Michel.

9. Mr. Stover had been through a difficult divorce and, though he gave a present interest in the money in his Vanguard account to Ms. Vaux-Michel as evidence by the fact that the check was made out to her, and because the check was made out to her, Mr. Stover could only guarantee his ability and right to revoke the gift of the check if it remained accessible to him, but also to Ms. Vaux-Michel or anyone who would retrieve it on her behalf in the event he was murdered.

The constructive delivery by Mr. Stover to Ms. Vaux-Michel was the best which the nature and situation of the property and the circumstances of the parties admit of.

10. The evidence of Mr. Stover's donative intent is concrete and undisputed. Mr. Stover could have, but never did revoke the gift.

11. Mr. Stover intended to deliver the gift and believed that he had successfully delivered it. He did all that, in his opinion, was necessary to do to accomplish delivery of the gift.

12. By clear and convincing evidence it has been shown that the check is a gift causa mortis, and Ms. Vaux-Michel is the donee of the gift.

13. The Estate of T. Mark Stover must pay Ms. Vaux-Michel her creditor's claim in the amount of $150,000. The Estate shall not be closed without further order of the Court. To the extent that costs and attorney fees are awardable under statute, the Petitioner shall have same.

Dated this 9/24/12.

JOHN M. MEYER, JUDGE

Hon. John M. Meyer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE SKAGIT COUNTY

IN RE THE ESTATE OF T. MARK, STOVER, Deceased. TERESA VAUX-MICHEL, Petitioner, v. ANNE VICTORIA SIMMONS, as Personal Representative of the ESTATE OF T. MARK STOVER, Deceased, Respondent.	**NO. 09-4-00411-1** FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PETITIONER'S MOTION FOR REASONABLE ATTORNEY'S FEES

After considering the pleadings filed by the parties and the argument of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

1. Petitioner's counsel, Brian Fahling, is an experienced trial and appellate attorney.

2. Ms. Vaux-Michel did not have the financial ability to retain counsel on an hourly fee arrangement. The only way she could obtain legal representation was on a contingency basis. Mr. Fahling would be compensated only if he achieved a successful

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outcome. It is not unusual for cases with some risk and potential damages to be taken on such a fee basis.

3. Respondent engaged in a vigorous defense and had significant resources. There was a significant factual dispute as to the $150,000 gift that Mr. Stover left for the Petitioner: where it may have been located, by whom it was discovered, and how many checks there were. At trial, however, neither party questioned the authenticity of the check in evidence.

4. The Respondent's mother, the sole heir of Mr. Stover, is in her 90's; when she passes, the Respondent and her half-brother will be the sole heirs of their mother.

5. The novelty and difficulty of the questions in this case required some additional time and labor to properly address. While gifts causa mortis cases are rare, the law is relatively clear. The case was relatively simple to try.

6. Respondent also challenged the Petition, claiming that it was untimely. This challenge resulted in two questions of first impression concerning the application of RCW 11.40.080 and RCW 11.40.100. The questions were briefed and argued before this Court, and, when her motion to dismiss based on untimely filing of the petition was denied, Respondent sought discretionary review in Division I of the Court of Appeals, which was denied, as was her motion to modify the commissioner's ruling. No hours spent on the discretionary appeal were included in Mr. Fahling's time sheet.

7. Immediate attention to this case was required because only approximately two months remained on the statute of limitations when Mr. Fahling accepted the case.

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8. Reasonable hourly billing rates for attorneys in Western Washington with skill and experience comparable to Mr. Fahling's range from $225.00 per hour to more than $400.00 per hour for some experienced trial attorneys. Mr. Fahling's normal billing rate of $350.00 per hour falls within the range of fees charged by similarly experienced attorneys for similar work.

9. Mr. Fahling claims to have spent 178.4 hours on this matter. The Court has no reason to doubt this representation. At a billing rate of $350.00 per hour, his fee would be $62,440.

10. Mr. Fahling's fee under the contingency agreement with Ms. Vaux-Michel would be $60,000 ($150,000 x .40).

CONCLUSIONS OF LAW

1. Mr. Fahling spent 178.4 hours on the litigation. His documentation of the work performed was somewhat detailed, but insufficiently so to allow a thorough analysis by the Court of usage of the time spent; there were no unsuccessful claims. The hours listed may reflect duplicated effort or other unproductive time. For example, travel time portal to portal is claimed at full rate; some meetings and pleading drafting seem to have taken a great deal of extra time; a significant amount of time for an attorney of Mr. Fahling's experience was spent on last minute trial prep; and it is unclear whether paralegal or secretarial functions were undertaken by counsel.

2. The above and other general factors justify a Lodestar reduction of 1/3. The time claimed by counsel was excessive in light of the overall circumstances. This was not a particularly complex case to try.

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3. The likelihood of success at the outset of the litigation was low to moderate.

4. The contingency agreement between Petitioner and Mr. Fahling provides for a 40% contingency fee of any judgment.

5. The contingency fee and hourly rate charged by Mr. Fahling are reasonable in view of his skill and experience, the nature of the case, the questions presented and the time limitations imposed.

6. The contingency fee charged by Mr. Fahling reflects the agreement between him and Petitioner and it appropriately accounts for the risk that there would be no fee recovery.

7. Petitioner's costs are reasonable. As reasonable attorney fees are awarded, statutory attorney fees should not be.

8. The Estate of T. Mark Stover shall pay to Petitioner reasonable attorney's fees of $40,000.00 and her reasonable costs of $340.00.

DONE IN OPEN COURT this _____ day of 10/18, 2012.

JOHN M. MEYER, JUDGE

Presented by:

LAW OFFICE OF BRIAN FAHLING

By _____
Brian Fahling WSBA #18894
Attorney for Petitioner
Teresa Vaux-Michel

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Hon. John M. Meyer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE SKAGIT COUNTY

IN RE THE ESTATE OF T. MARK, STOVER, Deceased. TERESA VAUX-MICHEL, Petitioner, v. ANNE VICTORIA SIMMONS, as Personal Representative of the ESTATE OF T. MARK STOVER, Deceased, Respondent.	**NO. 09-4-00411-1** JUDGMENT IN FAVOR OF PETITIONER TERESA VAUX-MICHEL AND AGAINST RESPONDENT ANNE VICTORIA SIMMONS, PERSONAL REPRESENTATIVE AND AGAINST THE ESTATE OF T. MARK STOVER

I. JUDGMENT SUMMARY PURSUANT TO RCW 4.64.030

1. **Judgment Creditor:** Teresa Vaux-Michel

2. **Attorney for Judgment Creditor:** Brian Fahling, WSBA #18894, Law Office of Brian Fahling, 4630 116th Ave. NE, Kirkland, WA 98033

3. **Judgment Debtor:** Estate of T. Mark, Stover, Anne Victoria Simmons, Personal Representative

4. **Principal Judgment:** $150.000.00

5. **Reasonable Attorney's Fees:** $ 40,000-

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5. **Costs:** $ 340.00

6. **Statutory Attorney Fees:** $

7. **Total Judgment:** $ 190,340

8. The Judgment shall bear interest at the statutory rate, ~~of 12.00 per cent per annum.~~

II. JUDGMENT

The Court hereby enters judgment in favor of Petitioner Teresa Vaux-Michel and against the Estate of T. Mark Stover, Anne Victoria Simmons, Personal Representative, based upon the Order on TEDRA awarding Teresa Vaux-Michel's creditor's claim, dated September 24, 2012, and based upon the Order Granting Teresa Vaux-Michel's Motion for Award of Reasonable Attorney's Fees and Costs, dated 10/16, 2012 as follows:

Principal Judgment:	$150,000.00
Reasonable Attorney's Fees and Costs:	$ 40,340
Statutory Attorney's Fees:	$
Total:	$ 190,340

The total judgment award shall bear interest at the statutory rate, of ~~12.00 percent per annum.~~

DONE IN OPEN COURT this ____ day of 10/18, 2012.

JOHN M. MEYER, JUDGE

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Presented by:

LAW OFFICE OF BRIAN FAHLING

By _____
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Attorney for Petitioner Teresa Vaux-Michel

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DECLARATION OF SERVICE

On the date stated below I deposited in the U.S. Mail for service a true and accurate copy of Brief of Appellant in Court of Appeals Cause No. 69546-1-I to the following:

Brian Fahling Law Office of Brian Fahling 4630 116th Ave NE Kirkland, WA 98033-8730	John Sherwood Peterson Russell Kelly PLLC 10900 NE 4th St Ste 1850 Bellevue, WA 98004-8341
Gerald T. Osborne PO Box 1216 Anacortes, WA 98221	

Original filed with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 21, 2013, at Tukwila, Washington.

Christine Jones

Christine Jones
Talmadge/Fitzpatrick