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IN THE SUPREME COURT
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In the Matter of the Estate of

MARGARET L. PERTHOU-TAYLOR,

Deceased,

ALISON PERTHOU,

Petitioner/Appellant,

v.

CORNELIA PERTHOU MacCONNEL, Individually and as Executrix and Notice Agent for the Estate of Margaret L. Perthou-Taylor,

Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

Thirty years after her former mother-in-law allegedly promised to fund a retirement fund for her benefit, and seven years after her former mother-in-law died, Alison Perthou filed a lawsuit against Cornelia MacConnel, her former sister-in-law, alleging that her actions wrongfully interfered with her expectancy of a gift. Because there is no evidence to support this claim of a gift under any legal or equitable theory, even a claim of tortious interference with a testamentary expectancy or gift, and because the claims are barred by the creditor claim statute, RCW 11.40.051, the probate court properly dismissed the claims on a CR 12(b)(6) motion.

Discontent with the probate court's decision, Ms. Perthou sought revision in the trial court. The trial court reviewed extensive briefing by Ms. Perthou and denied her motion for revision and her later motion for reconsideration.

II. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court correctly denied Ms. Perthou's motion for revision and affirmed the Commissioner's Order approving Ms. MacConnel's petition to dismiss Ms. Perthou's claims. The claims are barred by RCW 11.40.051 because they were asserted more than seven years after the mother-in-law's date of death and after the filing and publication of a nonprobate notice to creditors. In addition, there is no Washington law or admissible evidence to support a cause of action for

tortious interference with a gift; in fact, there is no well-pled claim supporting the existence of any such gift or that Cornelia MacConnel knew about or did anything whatsoever to interfere with respect to the alleged gift before Ms. Perthou's inquiry — which was made only after Ms. Perthou had slept on her expectations and hopes for 30 years. CP 281; RP 18-19.

2. The trial court correctly declined to recognize the tort of tortious interference with a testamentary expectancy or gift because Ms. Perthou's unsubstantiated allegations, based on nothing more than her suspicions, belief and supposition are insufficient to support such a claim. CP 281; RP 18-19.

3. The trial court correctly concluded there was no basis to conduct a conflict of law analysis to apply California law to impose punitive damages because Ms. Perthou failed to plead sufficient facts. CP 281; RP 18-19.

4. The trial court correctly denied Ms. Perthou's motion for reconsideration because Ms. Perthou failed to state a claim or provide a good faith basis for a claim of conversion or for imposition of a constructive trust. Moreover, both CR 59 and RCW 2.140.050 required denial of the motion for reconsideration because Ms. Perthou belatedly attempted to present new arguments based on facts that were known to Ms. Perthou and her counsel prior to filing her petition, but which were not on the record presented to the Commissioner. CP 322.

III. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether Ms. Perthou's claims are barred by the creditor claim statute, RCW 11.40.051, because she failed to file a creditor claim within the two year period set by the statute.

2. Whether Ms. Perthou's claim, asserted thirty years after the alleged gift was made and seven years after the death of the purported donor, is untimely and barred by laches.

3. Whether Ms. Perthou's claim fails to meet the required elements to establish a valid gift under Washington law.

4. Whether Ms. Perthou's claim for tortious interference with a testamentary expectancy or gift is not recognized under Washington law, and, even if it were, Ms. Perthou claims fails to satisfy the elements of tort, and in particular, fails to allege any independent tortious conduct by Ms. MacConnel.

5. Whether Ms. Perthou's testimony presented to support her claim is inadmissible and barred as evidence under RCW 5.60.030.

6. Whether the arguments presented to the trial court failed to warrant a conflict of law analysis to apply California law to impose punitive damages.

7. Whether the trial court correctly denied Ms. Perthou's motion for reconsideration because Ms. Perthou failed to state a claim or

provide a good faith basis for a claim of conversion or for imposition of a constructive trust.

8. Whether the trial court correctly denied Ms. Perthou's motion for reconsideration under CR 59 because Ms. Perthou belatedly attempted to present new arguments based on facts not previously pled, but that were known to Ms. Perthou and her counsel prior to filing the claim.

9. Whether the trial court correctly denied Ms. Perthou's motion for reconsideration as required under RCW 2.140.050 because Ms. Perthou's new arguments were based on facts that were not on the record presented to the Commissioner.

IV. RESPONDENT'S ASSIGNMENTS OF ERROR

1. The trial court erred in failing to award attorney's fees and costs to Ms. MacConnel under RCW 11.96A.150. CP 323.

V. ISSUES PERTAINING TO RESPONDENT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in denying Ms. MacConnel's request for an award of attorney's fees and costs under RCW 11.96A.150 on the basis that Ms. Perthou presented a novel issue, when Ms. Perthou presented no admissible evidence to support a claim for tortious interference with testamentary expectancy or gift, and where Ms. Perthou's baseless claim has imposed substantial needless expense upon Ms. MacConnel, who in good faith administered her mother's Trust and

distributed her assets pursuant to her mother's intent as stated in her Will and Trust.

2. Whether the trial court abused its discretion in denying Ms. MacConnel's request for an award of attorney's fees and costs when it contravenes the decedent's clear direction that Ms. MacConnel, as trustee, not be personally liable for attorney's fees or expenses in administering the Trust.

VI. STATEMENT OF THE CASE

A. Facts

Margaret Perthou-Taylor passed away on January 20, 2005. CP 92. Seven years later, Ms. Perthou, her former daughter-in-law, filed a lawsuit against Ms. MacConnel, her former sister-in-law and the daughter of Mrs. Perthou-Taylor, seeking $2.3 million based on her claim that in 1982, thirty years earlier, her former mother-in-law promised to create and fund a retirement account for her benefit. CP 66-67, 92. The only evidence Ms. Perthou presented to support this purported promise is a letter allegedly written by Mrs. Perthou-Taylor in 1982. CP 66-67.

There is an indisputable absence of any evidence that Mrs. Perthou-Taylor ever created or funded an account of any kind for Ms. Perthou. Mrs. Perthou-Taylor's meticulous check registers, dating back to 1980, demonstrate that she wrote checks to pay for club dues for Ms. Perthou and gave her and Ms. Perthou's children Christmas and birthday gifts. CP 260, 366. But there are no checks to an account for her benefit. CP 260, 366-67.

Mrs. Perthou-Taylor created a Trust in 1996 and the records documenting the transfer of her assets into the Trust demonstrate there is no record of any account for Ms. Perthou. CP 366-67, CP 408-33. Mrs. Perthou-Taylor's tax returns are likewise silent as to any gifts to Ms. Perthou or an account for her benefit. CP 366. Two accountants worked with Mrs. Perthou-Taylor from 1986 until her death in 2005 and neither have any knowledge about an account for Ms. Perthou's benefit. CP 380-84. From 1986-2002, one accountant prepared Mrs. Perthou-Taylor's income tax returns and gift tax returns and handled numerous financial matters for her and has no knowledge about an account for Ms. Perthou. CP 382-84. The accountant who worked with Mrs. Perthou-Taylor from 2002 until her death similarly never received any information about an account for the benefit of Ms. Perthou. CP 380-81. Likewise, Mrs. Perthou-Taylor's financial advisor has no knowledge about an account for Ms. Perthou's benefit. CP 373-74.

During the 20-year period between 1982 and 2002 Mrs. Perthou-Taylor handled her own financial affairs without assistance from her daughter, Ms. MacConnel. CP 374, 383. Beginning in 2002, Ms. MacConnel was co-trustee of her mother's Trust and served as trustee of the Trust after her death in 2005. CP 367. Ms. MacConnel never saw any documentation regarding an account for Ms. Perthou's benefit. CP 367. Mrs. Perthou-Taylor's Will and Trust, which were executed in 2002, demonstrate that Mrs. Perthou-Taylor did not make any bequest to Ms. Perthou. CP 336-42, 408-33. Mrs. Perthou-Taylor's accountant assisted

with post-death tax matters for Mrs. Perthou-Taylor and found no account in Ms. Perthou's name, payable at death to Ms. Perthou or held in joint tenancy with Ms. Perthou. CP 380.

As part of the Trust administration, Ms. MacConnel published nonprobate notice to creditors as provided under RCW 11.42.030. CP 335. Two years later, Ms. MacConnel filed estate tax releases from the Internal Revenue Service and the Washington State Department of Revenue. CP 93. Ms. Perthou did not file a creditor claim during the two years following Mrs. Perthou-Taylor's death. CP 92. Although Ms. Perthou attended the memorial service for Mrs. Perthou-Taylor in 2005 and was in touch with her family after her death, at no time during the two-year period that Ms. MacConnel administered Mrs. Perthou-Taylor's Trust did Ms. Perthou so much as mention a claim or the fact that she expected anything from Mrs. Perthou-Taylor or her estate. CP 367. Nor did she take any actions in the seven years after Mrs. Perthou-Taylor's death.

As Ms. Perthou's brief states, her entire case is based "upon information and belief." *See* Brief of Ms. Perthou, p. 5 and 6. The only evidence Ms. Perthou offers is a letter allegedly written in 1982 in which Ms. Perthou "infers" that Mrs. Perthou-Taylor intended to give her money. *Id.* at p. 21. Ms. Perthou merely "believes that [the decedent] fulfilled her promise and immediately began funding an investment account for [Ms. Perthou's] retirement." *See* Ms. Perthou's Statement of Reasons for Direct Review, p. 3. Ms. Perthou further believes that such account was

"dissolved by [Ms. MacConnel] and/or her legal counsel and representatives." *Id.* at p. 4. But there is no evidence that an account for the benefit of Ms. Perthou ever existed, let alone that anyone interfered with it.

B. Procedural History

On February 18, 2005, Ms. MacConnel filed Mrs. Perthou-Taylor's Will and a nonprobate notice to creditors in King County Superior Court. CP 334-342. The notice to creditors was published and the Affidavit of Publication was filed March 15, 2005. CP 346-347.

On May 24, 2012, more than seven years later, Ms. Perthou filed a TEDRA petition against Ms. MacConnel as executrix of her mother's estate, alleging breach of fiduciary duty, conversion, constructive trust and tortious interference with gift. CP 3-13. Ms. MacConnel moved to dismiss Ms. Perthou's claims pursuant to CR 12(b)(6). CP 91-102. Ms. MacConnel filed a note for motion scheduling hearing of the petition to dismiss on October 10, 2012. CP 88-90. Ms. Perthou filed a memorandum in opposition to Ms. MacConnel's petition to dismiss. CP 103-14. At the October 10, 2012 hearing on the petition to dismiss, Commissioner Joan Allison entered an Order dismissing Ms. Perthou's claims with prejudice for failure to comply with the creditor claim statute, RCW 11.40.051 and because Washington does not recognize a claim for tortious interference with a gift or a claim for punitive damages under the facts alleged by Ms. Perthou. CP 125-27.

Ms. Perthou sought revision of the order dismissing her claims and filed a motion to vacate the order of dismissal. CP 178-82, 193-200. Ms. Perthou also filed an objection to Ms. MacConnel's proposed findings of fact, conclusions of law and proposed order awarding attorney fees and submitted a supplemental declaration introducing new evidence to support her claim. CP 205-38, 259-66. The trial court denied Ms. Perthou's motion for revision. CP 280-83. In declining to recognize a cause of action for tortious interference with a gift, the trial court specifically ruled that "while the appellate courts can and will recognize new causes of action this is not the proper case in which to do so." CP 281. The trial court also concluded that "under the facts it [had] before it would be hard pressed to apply a conflicts of law analysis and apply California law with respect to punitive damages." RP 18. The trial court also declined to award attorney's fees because "petitioner presented a novel issue of law in the State of Washington, which has been adopted in other jurisdictions." CP 281.

Ms. Perthou filed a motion for reconsideration of the order denying motion for revision. CP 286-88. Ms. MacConnel also filed a motion for reconsideration of the trial court's order denying Ms. MacConnel's request for an award of attorney's fees. CP 292-97. The trial court denied both motions for reconsideration. CP 322-23.

VII. ARGUMENT

A. Appellant's Failure to File a Creditor Claim within Two Years, as Required under RCW 11.40.051, Bars Her Claim.

Washington law requires that a claim against a decedent must be filed within the statutory time period or it will be barred. Under RCW 11.40.051, a person is "forever barred from making a claim or commencing an action against the decedent" unless the creditor presents her claim against the estate within 24 months from the decedent's date of death. RCW 11.40.051(1)(b)(ii). The statute is mandatory and is strictly construed; compliance with its requirements is essential to recovery. *Messer v. Shannon's Estate*, 65 Wn.2d 414, 415, 397 P.2d 846 (1964).

Following her mother's death, Ms. MacConnel filed a nonprobate notice to creditors and the affidavit of publication was filed March 15, 2005. CP 334-342, 346-347. Ms. Perthou did not file a creditor claim. Instead, Ms. Perthou waited seven years to file an action to enforce the alleged promise her former mother-in-law made to fund a retirement account for her benefit 30 years before. CP 66. Ms. Perthou's argument that she was not yet 65 when Mrs. Perthou-Taylor died in 2005 or within two years of her death, does not negate the requirement to comply with the creditor claim statute.

Washington's creditor claim statute, RCW 11.40.010, applies to "claims of every kind and nature, both those established and contingent." *Davis v. Shepard*, 135 Wn. 124, 125, 237 P. 21 (1925) "This includes claims arising out of obligations that the decedent incurred during his or

her lifetime but are not due at the time of the decedent's death or at the expiration of the creditor's claim filing period." *Estate of Earls*, 164 Wn.App. 447, 262 P.3d 832 (2011). In *Estate of Earls*, the decedent signed a personal guaranty to lease commercial space and died during the pendency of the lease. *Id.* at 449. At the time of decedent's death, the lessee was in compliance with the lease. *Id.* After the period for filing creditor claims expired, the lessee defaulted and the lessor filed a petition seeking to enforce the personal guaranty. *Id.* at 450. The petition was dismissed because the lessor failed to timely file a creditor claim. *Id.* The Court of Appeals held that the lessor was required to file a creditor's claim even though the decedent's obligation under the personal guaranty did not arise until after the claims filing period expired. *Id.* at 451. The court reasoned that because the claim arose out of a contractual obligation incurred by the decedent during his lifetime, the lessor's claim to enforce the obligation was subject to the creditor claim statute. *Id.* at 454.

Likewise, Ms. Perthou's claim arose out of an alleged promise made by Mrs. Perthou-Taylor during her lifetime and any claim Ms. Perthou may have to enforce that promise was subject to the creditor claim statute. The trial court properly dismissed Ms. Perthou's claim because she failed to file a creditor claim.

Ms. Perthou attempts to seek refuge from her admitted failure to file a creditor claim by citing to dicta in *O'Steen v. Estate of Wineberg*, 30 Wn. App. 923, 640 P.2d 28 (1982), for the premise that the creditor claim statute "does not apply where the claim is for specific property in the

estate." *Id.* at 934. But the facts in *O'Steen* are not on point. The lawsuit before the court in *O'Steen* resulted from the estate's rejection of a timely filed creditor claim. *Id.* at 927. The executor of the estate contended that the claim should be barred because a creditor claim should have been filed thirteen years earlier when the decedent's spouse died and the stock at issue was included in the inventory of her estate. The court rejected that argument and noted, in dicta, that the statutory bar "does not apply where the claim is for specific property in the estate." *Id.* at 934. The support for that proposition came from *Compton v. Westerman*, 150 Wn. 391, 273 P. 524 (1928), where the claim was for shares of stock held as collateral for a loan. The court in *Compton* held that because the property could be specifically identified and was "not in any way commingled in the assets of the estate," no creditor claim was required. *Id.* at 397. The court reasoned that the claim was not for anything that belonged to the estate, but was for the claimant's own property. *Id.*

That is not the case here. Ms. Perthou's claim is not for a specific asset, but is premised on a letter allegedly written by her former mother-in-law thirty years earlier in which she said she would "fund [her] retirement." CP 66. There is no evidence that Mrs. Perthou-Taylor ever funded a retirement account for the benefit of Ms. Perthou or confirmed the existence of such an account in any way. Nor has Ms. Perthou identified anyone with knowledge of the fictional account. Because Ms. Perthou's claim cannot be specifically identified, a creditor claim was

required. The trial court correctly dismissed Ms. Perthou's claim because she failed to file a creditor claim.

B. Laches Precludes Appellant's Untimely Assertion of Her Claim.

Laches is another bar to Ms. Perthou's claim. It has long been recognized in Washington that laches may bar a claim to inherited property. *Meyer v. Trantum*, 135 Wn. 449, 237 P. 1006 (1925). Laches assumes the existence of a valid claim to property, but refuses to enforce it when it would be inequitable to do so. The elements of laches are: (1) knowledge or reasonable opportunity to discover a cause of action; (2) an unreasonable delay in commencing that cause of action; and (3) damage to defendant resulting from that unreasonable delay. *Buell v. Bremerton*, 80 Wn.2d 518, 495 P.2d 1358 (1972).

Ms. Perthou admits that she has been aware of her former mother-in-law's alleged promise to fund a retirement account for her since 1982. Yet in the intervening 23 years of Mrs. Perthou-Taylor's life, she never confirmed the existence of a retirement account for Ms. Perthou's benefit or even asked about it. There is no evidence that Mrs. Perthou-Taylor actually funded a retirement account for Ms. Perthou. In fact, other than paying club dues for Ms. Perthou and giving her Christmas and birthday gifts, Mrs. Perthou-Taylor's meticulous check registers and accounting records reveal no such gift was ever made to Ms. Perthou.

When Mrs. Perthou-Taylor died in January 2005, Ms. Perthou did not so much as mention the hypothetical retirement account, much less ask

about it. In fact, Ms. Perthou remained silent about the alleged gift until 2011, long after all of Mrs. Perthou-Taylor's assets were distributed and long after expiration of the three year and six year limitations periods imposed by Washington law on typical or familiar claims in tort or contract. RCW 4.16.040-080. Ms. Perthou unreasonably delayed commencing her action against Mrs. Perthou-Taylor by waiting thirty years from the time she allegedly promised to "fund her retirement" and seven years after she died. Ms. Perthou's excuse for her unreasonable delay is that she was not yet 65 years old at the time Mrs. Perthou-Taylor died. Ms. Perthou should not be allowed at this late date to assert her claim against Ms. MacConnel, who in good faith administered her mother's Trust, prepared tax returns, paid taxes and distributed her mother's assets pursuant to her mother's intent as stated in her Will and Trust. Even if Ms. Perthou had a valid claim, which she does not, her failure to act in good faith and her inexcusable delay in pursuing her claim creates a significant disadvantage to Ms. MacConnel and Mrs. Perthou-Taylor's beneficiaries. Any equitable relief therefore is barred by laches.

C. There Is No Admissible Evidence to Support Appellant's Claim.

The only evidence Ms. Perthou relies upon is a copy of a 1982 letter she claims she received from her former mother-in-law. While the Deadman's Statute does not exclude such a letter allegedly written by Mrs. Perthou-Taylor, it does preclude any testimony by Ms. Perthou about the meaning of letter or any conversation Ms. Perthou claims to have had with

Mrs. Perthou-Taylor about this subject. *Wildman v. Taylor*, 46 Wn. App. 546, 731 P.2d 541 (1987).

RCW 5.60.030 provides:

> In an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from 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** . . .

Emphasis added. The purpose of RCW 5.60.030, commonly known as the Deadman's Statute, "is to prevent interested parties from giving self-serving testimony about conversations or transactions with a dead or incompetent person." *Lasher v. University of Wash.*, 91 Wn. App. 165, 169, 957 P.2d 229 (1998). "The statutory rule was formulated in recognition of the fact that, when the lips of the one who is said to have made the statement, or with whom the transaction is alleged to have been had, are sealed in death, it becomes difficult, and often impossible, to rebut such adverse testimony." *Thor v. McDearmid*, 63 Wn. App. 193, 199, 817 P.2d 1380 (1991). The Deadman's Statute is intended to prevent the potential unfairness of allowing a witness to testify in his or her own behalf against the interests of the estate of a decedent, whose lips have been sealed by death, and who is thus unable to confirm or contradict the proffered evidence.

A "party in interest" is any person who at the time of testifying has

a "direct and certain" interest in the outcome of the litigation. *Wildman*, 46 Wn. App. at 549. Ms. Perthou is clearly an interested party in this action, and is subject to the restrictions of the Deadman's Statute.

"Transactions" subject to the Deadman's Statute are broadly construed to include "the 'doing or performing of some business . . . or the management of any affair . . . [and] include[s] a tort and . . . is much broader than a contract.' The test is whether the deceased, if living, could contradict the witness of his own knowledge." *Thor*, 63 Wn. App. at 199. "When it appears that there was a personal transaction with the deceased and the testimony offered tends to show either what did or did not take place between the parties, it must be excluded so long as it concerns the transaction or justifies an inference as to what it really was." *Lennon v. Lennon*, 108 Wn. App. 167, 174-75, 29 P.3d 1258 (2001).

Ms. Perthou's own brief admits that she can only "infer" that Mrs. Perthou-Taylor would give her money. Brief of Appellant, p. 21. Any testimony by Ms. Perthou about the letter she allegedly received from Mrs. Perthou-Taylor or the supposed promise to fund a retirement account would be on behalf of herself as to a transaction with or statement by the decedent and would violate the Deadman's Statute.

D. Appellant Cannot Establish the Necessary Elements to State a Claim of a Valid Gift.

Even if Ms. Perthou could overcome the impediment to testifying about the promise allegedly made by Mrs. Perthou-Taylor, she cannot establish the necessary elements of a valid gift. In Washington, the

essential elements of a valid gift are: "(1) An intention on the part of the donor to presently give; (2) a subject matter capable of passing by delivery; and (3) an actual delivery at the time." *Old National Bank & Union Trust Co. v. Kendall*, 14 Wn.2d 19, 24, 126 P.2d 603 (1942). "A gift will not be presumed;" but must be proven by clear, cogent and convincing evidence. *Id.* Ms. Perthou cannot meet her burden of proof.

Ms. Perthou contends that it may be reasonably inferred that Mrs. Perthou-Taylor intended to gift her money, "especially in view of her annual gifting." Brief of Ms. Perthou, p. 21. But Mrs. Perthou-Taylor never made annual gifts to Ms. Perthou. On the contrary, the 1982 letter on which Ms. Perthou relies, states that any funding would "require diverting my annual gifting to you." CP 66. Ms. Perthou has no evidence that Mrs. Perthou-Taylor did so.

Delivery may be manual, constructive or symbolic, but it must be as complete as the nature of the property and the attendant circumstances will permit. *McCarton v. Estate of Watson*, 39 Wn. App. 358, 364-65, 693 P.2d 192 (1984). As the court in *Old National Bank* stated, "there must be not only donative intent, but complete stripping of the donor of all dominion or control over the money." 14 Wn.2d at 25. Unlike the facts in *Old National Bank*, where the court found that it was clearly established that the donor intended to make a present gift of a savings account and the account actually existed, Ms. Perthou has offered no evidence of actual delivery of the claimed gift or the creation of any type of account for her benefit. Ms. Perthou simply asserts that the 1982 letter "contemplates

delivery of the gifted money to an investment account for [Ms. Perthou's] benefit. Brief of Ms. Perthou, p. 22. Ms. Perthou's interpretation of what Mrs. Perthou-Taylor contemplated is inadmissible under the Deadman's Statute and does not begin to establish the element of actual delivery of a gift, let alone rise to the level of clear, cogent and convincing evidence of delivery. Accordingly, Ms. Perthou failed to state a claim under Washington law for the existence of a valid gift.

E. Appellant Has No Admissible Evidence to Support a Claim for Tortious Interference with a Testamentary Expectancy or Gift.

As Ms. Perthou admits, Washington does not recognize a claim for tortious interference with a testamentary expectancy or gift. Such a claim is not an issue of public importance because there are other adequate remedies under Washington law. As the California case cited by Ms. Perthou notes "[m]ost states prohibit an interference action when the plaintiff already has an adequate probate remedy." *Beckwith v. Dahl,* 205 Cal. App.4th 1039, 141 Cal.Rptr.3d 142 (2012). In fact, the tort is an unnecessary intrusion on the probate court's special procedures and evidentiary requirements. A probate court has all the powers of a court of general jurisdiction and can settle any tort issues or other controversies that arise within a probate proceeding. *Hadley v. Cowan,* 60 Wn. App. 433, 804 P.2d 1271 (1991). In *Hadley,* the court indicated that even if the tort were recognized, the probate court would have jurisdiction to hear it and ruled that res judicata precludes such an action when issues involving

the same nucleus of operative facts can and should be settled in the probate court. *Id.* at 439.

Ms. Perthou filed her claim in probate court and the court properly dismissed the claim. Not because Washington does not recognize tortious interference with an expectation of inheritance, but because the claim is time-barred and because there is no admissible evidence to support Ms. Perthou's claim.

Contrary to Ms. Perthou's assertion, the majority of states, including Washington, have declined to recognize the tort. In many of the cases in which the tort has been recognized, courts have overlooked the availability of relief in restitution. "In virtually every case in which the tort has been recognized in the absence of relief in probate, the plaintiffs could have brought an action in restitution for constructive trust." J.C.P. Goldberg and T.H. Sitkoff, "*Torts and Estates: Remedying Wrongful Interference with Inheritance,*" 65 Stanford Law Review 335, 368 (2013).

In 2006, the Washington Court of Appeals explicitly declined to recognize the tort in *In re Estate of Hendrix*, 2006 WL 2048240, 1 (Wn. App. Div. 1, 2006). On appeal, the court began by stating that "[n]o Washington case has adopted the tort of interference with an inheritance expectancy," while acknowledging that other states have done so. *Id.* at 16. The court then evaluated the viability of such a tort claim and concluded: [O]n these facts — where the potential tort claimant has unsuccessfully pursued a will contest remedy — **we decline to adopt the**

tort of interference with an inheritance expectancy." Emphasis added, *Id.* at 18.

There are numerous legal and equitable theories that provide adequate remedies when a disappointed beneficiary believes they have been the victim of wrongful conduct, which Ms. Perthou could have pursued had she filed her claim on a timely basis. She did not. Ms. Perthou waited 30 years, and more than seven years after the decedent's death, to assert her claim against the decedent's daughter.

Although California's Supreme Court recognized the tort of intentional interference with an expectancy of inheritance last year, the court reasoned that "the integrity of the probate system and the interest in avoiding tort liability for inherently speculative claims are very important considerations." *Beckwith,* 205 Cal. App.4th at 1056. Unlike the circumstances in *Beckwith*, there is no reasonable basis for this Court to recognize a new cause of action in tort under the facts alleged here. Contrary to Ms. Perthou's contention, a new cause of action for the tort of intentional interference with an expectancy of inheritance is neither urgent nor a fundamental issue of broad public import, nor an idea or approach of particular merit. *See* J.C.P. Goldberg and T.H. Sitkoff, "*Torts and Estates: Remedying Wrongful Interference with Inheritance*," 65 Stanford Law Review 335, 368 (2013). It is only important to Ms. Perthou because she failed to timely file any claims under the numerous legal theories that could have provided adequate remedies under Washington law.

Even if tortious interference with an expectation of inheritance was an important public issue, the present case is not the appropriate case for this Court to determine whether Washington should recognize the tort. As the King County Superior Court concluded in dismissing Ms. Perthou's case, "While the appellate courts can and will recognize new causes of action **this is not the proper case in which to do so**." CP 281.

Ms. Perthou relies heavily on the California case of *Beckwith* to support her tortious interference claim, but she cannot satisfy the elements articulated by the *Beckwith* court necessary to state a claim for tortious interference with a gift. In particular, Ms. Perthou cannot prove, by "a reasonable degree of certainty" that the gift would have been in effect at the time of Ms. Perthou-Taylor's death but for Ms. MacConnel's interference, there is no evidence that Ms. MacConnel knew of Ms. Perthou's expectancy of inheritance and took deliberate action to interfere with it, or that Ms. MacConnel directed independently tortious conduct at someone other than Ms. Perthou. *Beckwith,* 205 Cal. App.4th at 1057. Importantly, the *Beckwith* court noted that the courts that have recognized the tort require that "[t]he fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. **The beneficiary is not directly defrauded** or unduly influenced; the testator is." *Id.* at 1058, *citing, Whalen v. Prosser*, 719 So.2d 2, 6 (Fla.Dist.Ct.App. 1998). Ms. Perthou alleges no conduct on the part of Ms. MacConnel that she induced or caused her mother to take some action that deprived her of her expected gift. Rather, Ms. Perthou alleges that

Ms. MacConnel and/or her legal counsel and representatives dissolved an account allegedly created by Mrs. Perthou-Taylor of Ms. Perthou's benefit. As the *Beckwith* court noted, under these circumstances, "the plaintiff has an independent tort claim against the defendant and asserting the intentional interference with an expectancy of inheritance tort is unnecessary and superfluous." *Id.*

Ms. Perthou's unsubstantiated allegations of the key facts in support her claim are based on nothing more than her "belief." Ms. Perthou's claim is based solely on a letter written in 1982 by her former mother-in-law, which is not an agreement or enforceable contract under any legal theory. Moreover, there is no evidence of a gift or bequest to Ms. Perthou. Ms. Perthou merely "believes that [the decedent] fulfilled her promise and immediately began funding an investment account for [Ms. Perthou's] retirement." *See* Ms. Perthou's Statement of Reasons for Direct Review, p. 3. Ms. Perthou simply imagines that such account was "dissolved by [Ms. MacConnel] and/or her legal counsel and representatives." *Id.* at p. 4. But Ms. Perthou does not plead or cite a single act by Ms. MacConnel that would support a claim against her personally. Nor is there any act alleged in her role as a fiduciary to support a claim against Ms. MacConnel. There is simply no basis for a claim of any kind against Ms. MacConnel.

F. Ms. Perthou Failed to State a Claim of Conversion or for Imposition of a Constructive Trust.

Ms. Perthou offered no facts to establish the elements of a claim for conversion. "[C]onversion is the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *PUD of Lewis County v. WPPSS*, 104 Wn.2d 353, 378, 705 P.2d 1195 (1985). Money may the subject of conversion in Washington under certain circumstances; however, there can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it. *Id.*

Ms. Perthou's pleadings are devoid of any facts that Ms. MacConnel willfully interfered with funds belonging to Ms. Perthou. Ms. Perthou merely alleges "on information and belief" that an unknown retirement account "was dissolved" and "commingled with other assets." CP 6-7, 61. Ms. Perthou's conversion claim is supported by two sentences: "Here, Cornelia P. MacConnel is obligated to return the specific money taken from Alison's retirement account. Cornelia P. MacConnel is therefore liable to Alison for conversion." CP 23, 75. These are legal conclusions, not facts. And Ms. MacConnel's denial of any wrongdoing is not a fact that supports a claim for conversion, let alone that provides a basis for filing of such a claim.

Ms. Perthou's claim for imposition of a constructive trust is equally devoid of any act by Ms. MacConnel that shows any breach of fiduciary duty or any "tortious conduct." A constructive trust is an

equitable remedy that can arise when someone holding title to property has an equitable duty to convey to another person on the grounds that they would be unjustly enriched if permitted to retain it. *Baker v. Leonard*, 120 Wn.2d 538, 547-48, 843 P.2d 793 (1984). Fraud, misrepresentation, bad faith or overreaching generally provide the rationale for imposition of a constructive trust, which can only be imposed when there is clear, cogent and convincing evidence. *Id.*

Again, there is no evidence of any property belonging to Ms. Perthou that Ms. MacConnel had a duty to convey to her, nor is there any evidence of any act by Ms. MacConnel to retain or interfere that alleged property. In fact, none of the pleadings Ms. Perthou filed articulate any factual basis for a claim against Ms. MacConnel, including Ms. Perthou's untimely supplemental declaration, which contains her self-described "suspicions" that Ms. MacConnel must be responsible. There are simply no facts to support the imposition of a constructive trust, let alone clear, cogent and convincing evidence.

G. There Is No Basis to Conduct a Conflict of Law Analysis to Apply California Law to Impose Punitive Damages.

Ms. Perthou relies on *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981) for the proposition that a Washington court may allow punitive damages when another state has the most significant relationship to a controversy. In fact, the court in *Kammerer* held "[u]nder the law of this state, punitive damages are not allowed unless expressly authorized by the legislature." *Id.* at 421.

In *Kammerer*, the Supreme Court of Washington found application of California law on punitive damages appropriate, holding that "a Washington court can award punitive damages under the law of California." *Id.* at 712. However, that a Washington court *can* award punitive damages under California law does not mean that it could (or would) do so on the facts of *this* case.

Kammerer is distinguishable from the instant case. There, not only were the plaintiffs residents of California, but all negotiations of the parties and all fraudulent representations were made in California, royalty payments were to be made in California, and the Washington defendant corporation had a "substantial part" of its business in California. *Id.* at 711-12. As a basis for finding that California had a "specific interest to be furthered," the *Kammerer* court noted that "the most significant relationships were in California" and "the conduct and acts as to the fraud and misrepresentation were accomplished in California. *Id.* at 712.

Furthermore, *Kammerer* is totally distinguishable from the instant case for another reason — the parties in *Kammerer* specifically *chose* California law in their negotiations. *Id.* at 712.

Without any evidence to support her claim, Ms. Perthou alleges that Ms. MacConnel interfered with the alleged gift from her former mother-in-law and because Ms. MacConnel is a resident of California, "the State of California has an interest in protecting against such conduct within its borders." Brief of Appellant, p. 27. Ms. Perthou's mere allegations are insufficient to support a claim for punitive damages. The

trial court properly concluded that, based upon the facts as presented by Ms. Perthou, there was no basis to conduct a conflicts of law analysis to apply California law regarding punitive damages to this case.

H. Denial of Ms. Perthou's Motion for Reconsideration Was Required Under CR 59 and RCW 2.140.050.

Ms. Perthou also failed to identify the basis under CR 59 that would support granting her motion for reconsideration. The claim for conversion was included in the initial *Petition*. CP 8. Ms. Perthou based her motion on declarations from her and her attorney filed in opposition to Ms. MacConnel's fee request. In May 2011, a year before filing her *Petition*, Ms. Perthou sent a letter to her attorney, which she filed after her claims were dismissed in a belated attempt to resuscitate her claims. In that letter and Ms. Perthou's untimely supplemental declaration, she recounts her version of events she believes took place in late 2010 or early 2011.

The "new" information contained in the declarations was not new, nor has Ms. Perthou provided any explanation for failing to present information clearly within her control when she filed her claim. There is no basis to claim she was prevented from having a hearing on these issues she elected not to include, no "accident or surprise," no newly discovered evidence that she could not reasonably have produced or provided in her filing and no error of law objected to during the hearing before the trial court. Quite simply, Ms. Perthou failed to satisfy the provisions of CR 59(a)(1)-(9). Her choice to withhold information from her pleadings until

after the claims were dismissed is not grounds for reconsideration. *See, e.g. Fishburn v. Pierce Co. Planning and Land Services Dept.*, 161 Wn. App. 452, 472, 250 P.3d 146 (2011). Nor does CR 59 permit a party, unhappy with the results, to bring a motion essentially proposing a new theory of her case. *See, JDFJ Corp. v. International Raceway, Inc.*, 97 Wn. App. 1, 970 P.2d 343 (1999); *Vaughn v. Vaughn*, 23 Wn. App. 527, 531, 597 P.2d 932 (1979).

I. RCW 2.140.050 Requires Denial of the Motion for Reconsideration as the Basis for the Motion Was Not Before the Commissioner.

Likewise, RCW 2.140.050 required denial of Ms. Perthou's motion for reconsideration because the basis for the motion was not before the commissioner. This matter was set before the trial court on a motion to revise the commissioner's order. RCW 2.24.050 states clearly that revision shall be "upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." While there is a broad scope of review, it must be based on the record presented to the commissioner. *In re Dependency of B.S.S.*, 56 Wn. App. 169, 782 P.2d 1100 (1989). The reviewing court has an independent opportunity and obligation to review the issues presented, including both the facts based on the record below and determining the appropriate legal conclusions based on those facts. *In re Estate of Wegner v. Tesche*, 157 Wn. App. 554, 237 P.2d 387 (2010); *In re Estate of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008); *Goodell v. Goodell*, 130 Wn. App. 381, 388, 122 P.3d 929 (2005).

Ms. Perthou, however, presented an argument based on information never included in her initial Petition, her Amended Petition, or her Memorandum in opposition to the petition to dismiss her claims. In fact, she failed to include this information until after the trial court heard argument and dismissed her claims. RCW 2.24.050 requires that the trial court's decision be based on the record presented below, and Ms. Perthou's belatedly filed declarations were clearly not in the record.

VIII. CROSS APPEAL

A. Equity Required the Trial Court to Award Ms. MacConnel Her Attorney Fees Under RCW 11.96A.150.

RCW 11.96A.150 squarely recognizes that trial judges have discretion in their authority to act equitably. Accordingly, the appellate courts consistently have reviewed TEDRA attorney fee awards under the abuse of discretion standard. *In re the Estate of Black,* 116 Wn. App. 476, 489, 66, P.3d 670 (2003), affirmed, *Estate of Black,* 153 Wn.2d 152, 173, 102 P.3d 796 (2004). The Court of Appeals in *Black* directed that "the award be made **as justice may require**." (Emphasis added). *Id.*

Courts have consistently found that equity requires a party who unsuccessfully brings a suit that does not benefit the estate to pay the attorneys' fees of others involved in the litigation. For example, in *In re Estate of Kerr,* 134 Wn.2d 328, 344, 949 P.2d 810 (1998), the Washington Supreme Court held that an award of fees to the estate from a party who tried to remove the personal representative was proper under former RCW

11.96.140.[1] The Court reasoned that because the estate bore the cost of litigation to defend its personal representative, the trial court properly awarded fees under RCW 11.96.140. *Id.* at 344; *see also In re Korry Testamentary Marital Deduction Trust for Wife*, 56 Wn. App. 749, 756, 785 P.2d 484 (1990). Similar to *Kerr*, equity here demands that Ms. Perthou compensate Ms. MacConnel for the legal costs incurred to defend her baseless claims.

In *In re Estate of Jones*, 152 Wn. 2d 1, 20, 93 P.3d 147 (2004), the party whose conduct necessitated litigation was ordered to pay the other parties' attorney's fees. Likewise, Ms. Perthou's actions forced Ms. MacConnel to incur attorney's fees she would not otherwise have incurred but for her baseless litigation. It is inequitable for Ms. MacConnel to incur the expense of defending Ms. Perthou's unfounded claims. The trial court should have awarded her attorney fees.

In denying Ms. MacConnel's request for an award of attorney fees, the trial court concluded that Ms. Perthou presented a novel issue. However, even if Ms. Perthou's argument to expand Washington law to recognize the tort of intentional interference with expectancy of a gift had merit, she did not allege facts sufficient to satisfy the elements of the tort, nor did she allege facts sufficient to support any of the other claims she asserted under existing Washington law. It is simply inequitable to

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[1] In 1999, the Washington Legislature repealed RCW 11.96.140 and adopted RCW 11.96A.150 in its place.

impose Ms. MacConnel with the costs to defend this untimely claim, under any of the legal theories pled.

B. The Trial Court's Denial of Ms. MacConnel's Request for an Award of Attorney's Fees Is Inconsistent with the Provisions of Mrs. Perthou-Taylor's Trust.

Mrs. Perthou- Taylor's Trust provided that Ms. MacConnel, as trustee, should not be personally responsible for the expenses of administering her estate and she was to be absolved of any liability and financial responsibility in carrying out her duties. Mrs. Perthou-Taylor's clear intent was to protect her daughter in carrying out her fiduciary duties, and not create a personal financial burden in carrying out her wishes. Ms. MacConnel faithfully carried out her mother's intent as directed in her Trust. At no time did she find any evidence that her mother provided for Ms. Perthou as claimed in this lawsuit. Had Ms. Perthou timely failed her claims, any attorney's fees incurred to defend those claims would have been paid from the Trust assets. The trial court's decision to deny Ms. MacConnel's fee request is inconsistent with the clear direction of Mrs. Perthou- Taylor's Trust. The Court should remand for an award of fees.

C. This Court Should Award Ms. MacConnel Her Fees on Appeal.

The Court should also award Ms. MacConnel her appellate attorney fees under RCW 11.96A.150 and RAP 18.1. This Court has discretion to award attorney fees on appeal. RCW 11.96A.150(1); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 500-01, 176 P. 3d 510 (2008).

IX. CONCLUSION

Whereas there was no good faith basis for the claims against Ms. MacConnel, there does exist multiple grounds for dismissal of Ms. Perthou's claims. The absence of any conduct, tortious or otherwise, by Ms. MacConnel as an individual or as a fiduciary bars the claims against her in either capacity; the lack of any proof that any account existed for the benefit of Ms. Perthou bars the claims; the creditor claim statute bars the claims; laches bars the claims; the failure to satisfy the legal requirements for a gift bars the claims; the inability to support a claim for tortious interference, even if recognized in Washington, bars the claims.

The Commissioner's *Order* dismissed Ms. Perthou's claims for failure to state a claim and the trial court appropriately denied the motion to revise the Commissioner's *Order*, and the motion to reconsider that decision, and this Court should affirm.

RESPECTFULLY SUBMITTED this 12th day of August, 2013.

KUTSCHER HEREFORD
BERTRAM BURKART PLLC

By:_____
Karen R. Bertram, WSBA#22051
Attorneys for Respondent/Cross-Appellant
Cornelia Perthou MacConnel

No. 88500-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In the Matter of the Estate of

MARGARET L. PERTHOU-TAYLOR,

Deceased,

ALISON PERTHOU,

Petitioner/Appellant,

v.

CORNELIA PERTHOU MacCONNEL, individually and as Executor and Notice Agent for the Estate of Margaret L. Perthou-Taylor,

Respondent.

CERTIFICATE OF SERVICE

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BERTRAM BURKART PLLC

Karen R. Bertram, WSBA #22051

Attorneys for Respondent/Cross-Appellant Cornelia Perthou MacConnel

I, Susan Cartozian, hereby certify that on August 12, 2013, I served a copy of the following documents on the parties listed below in the manner shown:

1. Brief of Respondent/Cross-Appellant
2. Certificate of Service

Party	Method of Service
Mark G. Olson, WSBA #17846 Law Offices of Mark G. Olson P.O. Box 836 Everett, WA 98206 Phone: 425-388-5516 Fax: 425-252-4357 mark@mgolsonlaw.com *Attorneys for Petitioner Alison Perthou*	☒ US Mail Postage Prepaid ☐ Certified Mail Postage Prepaid ☐ Seattle Legal/Legal Messenger ☒ E-mail ☐ Facsimile
Gregory G. Rockwell, WSBA #3887 Attorney at Law 4020 E. Madison Street, Suite 326 Seattle, WA 98112 Phone: 206-322-6000 Fax: 206-322-7000 grocket@msn.com *Attorneys for Petitioner Alison Perthou*	☒ US Mail Postage Prepaid ☐ Certified Mail Postage Prepaid ☐ Seattle Legal/Legal Messenger ☒ E-mail ☐ Facsimile

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

DATED this 12th day of August, 2013.

By: Susan Cartozian
Susan Cartozian, Paralegal

OFFICE RECEPTIONIST, CLERK

To: Susan Cartozian
Subject: RE: Estate of Margaret Perthou-Taylor; Alison Perthou v. Cornelia Perthou MacConnel; No. 88500-1.

Received 8-12-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Susan Cartozian [mailto:scartozian@khbblaw.com]
Sent: Monday, August 12, 2013 1:33 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Mark G. Olson (mark@mgolsonlaw.com); Gregory G. Rockwell (grocket@msn.com); Karen Bertram
Subject: Estate of Margaret Perthou-Taylor; Alison Perthou v. Cornelia Perthou MacConnel; No. 88500-1.

Re: In the Matter of the Estate of Margaret L. Perthou-Taylor; Alison Perthou v. Cornelia Perthou MacConnel
Washington Supreme Court No. 88500-1
Filed by Karen R. Bertram, WSBA No. 22051, Kutscher Hereford Bertram Burkart PLLC, Attorneys for Respondent/Cross-Appellant Cornelia Perthou MacConnel

Dear Clerk:

Per Karen Bertram's request, I am attaching the following documents to be filed today with the Supreme Court regarding the above matter:

1. Brief of Respondent/Cross-Appellant
2. Certificate of Service

Thank you for your assistance.

Sincerely,

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