SUPREME COURT No. 90841-9

COURT OF APPEALS No. 44246-9-II

SUPREME COURT OF THE STATE OF WASHINGTON

THE ESTATE OF CATHERINE HENINGTON

PETITION FOR REVIEW

Mona K. McPhee, WSBA# 30305
Counsel for Petitioner

Desh International Law
400 108th Ave NE, Suite 700
Bellevue, WA 98004
(360) 870-0769

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I. IDENTITY OF PETITIONER

Pursuant to RAP 13.4, Richard Wills, personal representative for the Estate of Catherine Henington seeks review of the decision not to award attorney fees on appeal from the estate for the handling of the appeal when the personal representative had a fiduciary duty to pursue the appeal.

II. COURT OF APPEALS DECISIONS

The Court of Appeals Division II, filed its Opinion in *In re Estate of Catherine Henington*, 44246-9-II on July 22, 2014 and summarily denied a motion for reconsideration on September 3, 2014. These decisions are contained in Appendix A.

III. ISSUE PRESENTED

When the probate court enters an order that is based on patently obvious errors closing an estate in contravention to governing law, should attorney fees on appeal be denied thereby placing all personal representatives of estates in Washington in the untenable position of choosing between ignoring and violating their statutorily imposed fiduciary duties or complying with those duties but facing the (now) real risk of personally incurring the expenses of the fees and costs for such compliance?

IV. STATEMENT OF THE CASE

Catherine Henington died leaving a will naming her daughter Crystal Henington as the sole beneficiary, in trust, of her estate. (CP 151-154.) Petitioner Richard Wills is the Successor Personal Representative for the estate of Catherine Henington following appointment by the probate court to replace the original Personal Representative, Roy Henington, the decedent's estranged husband whose only interest in the estate is his one-half community property portion of the estate's community property. (CP 213-214.) Mr. Henington was left out of the will. (CP 151-154.)

Administration of the estate was complicated due in large part to Mr. Henington's uncooperative behavior (e.g. failing to comply for years with the court's order to provide information to the successor personal representative; thwarting the sale of the estate's major asset, the decedent's home; repeated petitions to the court for early distribution; and requesting joint tax returns be prepared, filed, and paid on his behalf for the years Mrs. Henington did not file and pay during her lifetime, but failing to ever sign the returns himself). (*See* CP 14, 54-57, 247, 251, 356-357, 358, 412, 414, 416-417, 458; Verbatim Report of Proceedings ("VRP.B"), 11/16/12 at 11:10-12, 13:1-6.) In addition, in April 2010, following the petition from Mr. Henington, the probate court entered an order that both Ms. Crystal Henington, the estate's sole will beneficiary,

and Mr. Henington would each receive $7,000.00, as prior partial distributions from the estate, plus each would receive an additional $1,000 per month from May 2010 forward that "shall be allocated against the final community property interest and testamentary share of each Roy Henington and the Crystal Henington Trust, respectively." (CP 333-336.) As a result, approximately $66,000.00 in estate assets were distributed to Ms. Henington and Mr. Henington prior to all demands against the estate being paid, including all administrative costs due, all taxes and associated interest and fees due, and the viable claims of Mr. Leonard Bradley. (CP 18-23, 334-335.)

Through payment of the allowed claim of Evergreen Bank, (significant but incomplete) tax payments to the IRS, and other payments from the estate, the estate's assets naturally declined. Mr. Wills sought an order from the probate court approving his final plan of distribution and closing of the estate when it appeared the estate would no longer be able to pay all the demands against it. (*See* CP 4-49 ("Final Report").) Despite prior and on-going distributions from the estate to him, Mr. Henington objected to payment of any potential creditor, including the IRS, and, without reference to any supporting legal authority, asked that all remaining funds be equally distributed to Roy Henington and Crystal Henington. (CP 51-52; CP 61; CP 126-29.)

Instead of approving the Mr. Wills's proposed final plan, including allowing Petitioner to set aside a reserve from the amounts remaining in the estate to pay the anticipated tax deficiencies, interest and fee assessments to the IRS as permitted by statute and pursuant to the usual practice in probate administration, the probate court ordered the estate to be closed "as is" by ordering administrative fees to be paid to Mr. Wills with the remainder of the estate to be distributed in equal shares to Ms. Henington and Mr. Henington. (CP 69-72.) The superior court declined to revise the portion of the probate court's decision that is now on appeal. (CP 134-135.)

As the Court of Appeals ultimately agreed, the probate and superior courts' orders were based on obviously unsupported findings of fact and on conclusions of law that were contrary to governing law, and resulted in the estate failing to pay its debts to either the IRS or Leonard Bradley, an outstanding claimant whose claims Mr. Wills had allowed in his proposed Final Report. Mr. Wills was, therefore, obligated by his fiduciary duty as a Personal Representative to appeal the closing of the estate as ordered by the lower court. Having no trial or appellate experience, Petitioner hired an attorney with appellate experience, Mona K. McPhee, who filed a notice of appearance with the Court of Appeals on March 27, 2013. On July 22, 2014, the Court filed an Opinion (published

in part) agreeing with Petitioner that the lower courts had erred in closing the estate on the basis of unsupported findings of fact and in contravention to governing law as to the claims made and debts owed by the estate. The Court, however, "declined to award additional fees on appeal."[1] (*In re Estate of Catherine Henington*, 44246-9-II, slip opinion filed July 22, 2014 at 7 (hereinafter cited as "Slip Opinion") and included in Appendix A.). The Court of Appeals summarily denied Petitioner's motion for reconsideration of this issue.[2] (Appx. A.)

V. WHY REVIEW SHOULD BE ACCEPTED

A. When a Personal Representative in order to satisfy his fiduciary duties appeals a patently erroneous court order that improperly closes and distributes an estate then the denial of an award of attorney fees on appeal creates an untenable precedent affecting the administration of estates, the duties of personal representatives, and the practice of law throughout Washington.

In Washington, personal representatives ("PR") of estates have statutorily mandated duties to settle the estate they are administering, and they are designated as fiduciaries to the estate and those beneficially interested in the estate. RCW 11.48.010. As a fiduciary, a PR's duties

[1] No fees or costs on appeal have been awarded.

[2] Petitioner also asked the Court of Appeals to correct or delete the inaccurate statement of fact in the published portion of its opinion that "A few months later, Mr. Henington signed the returns and filed them with the IRS." (Opinion at 2.) The record demonstrates only that Mr. Henington did not sign the returns and it was the estate's personal representative, Mr. Wills, who filed them without Mr. Henington's cooperation or signature. ((CP 15-17; CP 80-82; VRP.B 4:6-23, 10:12-17; *see also* CP 11-13; CP 341-54; CP 366-78; CP 413-14, 417; CP 427-32; CP 453-57.) This request was dealt with as part of the Court of Appeals summary denial.

include ensuring that the estate is distributed and closed according to the governing statutes so that the estate and those beneficially interested in it are treated equitably and according to the law. The personal representative of an estate is,

> an officer of the court and stands in a fiduciary relationship to those beneficially interested in the estate. In the performance of his fiduciary duties he is obligated to exercise the utmost good faith and to utilize the skill, judgment, and diligence which would be employed by the ordinarily cautious and prudent person in the management of his own trust affairs.

Hesthagen v. Harby, 78 Wn.2d 934, 942, 481 P.2d 438, 443-44 (1971); *see also In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985) (the personal representative owes the beneficiaries of an estate a fiduciary duty to act in the estate's best interest); *Trask v. Butler*, 123 Wn.2d 835, 843, 872 P.2d 1080 (1994) (same). An essential part of a PR's fiduciary duties include, "the duty [] to guard against error in the distribution of an estate...." *Hesthagen*, 78 Wn.2d at 941 (quoting *In re Estate of Maher*, 195 Wn. 126, 131, 79 P.2d 984, 986 (1938)). In other words, a PR's duties require that he ensure that the estate is distributed as mandated by the governing statutes. (*See also e.g.*, RCW 11.76.110 (laying out the priority of distribution).)

When an estate is closed by the probate court on the basis of obvious factual and legal errors that affect payment of proper demands on

the estate and the distribution of the estate, then the estate's PR has a duty to take the steps necessary to correct the errors so the estate is not distributed and closed in violation of the law. (RCW 11.48.010; *see also Hesthagen*, 78 Wn.2d at 941-942.) If the steps that are necessary to correct the errors require professional assistance, then the personal representative has a duty to the estate to engage that assistance. *See In re Evans' Estate*, 138 Wn. 101, 102, 244 P. 260 (1926).

With these paramount duties in focus, then review of the Court of Appeals denial of an award of attorney fees on appeal in this case is warranted pursuant to RAP 13.4(4). Denial of an award of attorney fees on appeal when a personal representative is under a fiduciary duty to appeal the obvious errors in the lower court's administration of an estate places personal representatives of estates in Washington in the untenable position of deciding between satisfying their fiduciary duty or risking the expense of appeal as a personal cost when the probate code intends for such expenses to be paid from the estate. *See In re Jennings' Estate*, 6 Wn. App. 537, 538, 494 P.2d 227, 228 (1972) ("The allowance of attorney's fees, when properly made, is paid from the assets of the estate as a reimbursement to the executor for the faithful discharge of his duties and the expenses incurred in performing them."). The lawful administration of estates, the carrying out of fiduciary duties of personal representatives, and

the ethical obligations of the legal profession are all implicated and threatened by the Court of Appeals denial of an award of attorney fees on appeal when an appeal by the PR is the only method that will satisfy the law's mandate that estates be properly administered and distributed for its own benefit and that of the beneficiaries, heirs, and claimants. By refusing to award attorney fees on appeal in the type of circumstances this case presents personal representatives throughout this state now face two significant obstacles in the day-to-day practice of probate and estate administration: (1) making a choice between an unlawful position and an unjust position, and (2) engaging competent legal counsel to handle an appeal under the current precedent. As a matter of substantial public interest, this issue merits review by the Supreme Court.

B. This case illuminates the obstacles now in place by the denial of an award of attorney fees on appeal because the Personal Representative chose to embrace his fiduciary duty and appeal the probate court's patently erroneous errors and despite prevailing on the substantive issues has been denied an award of attorney fees.

In this case, the PR's fiduciary duties run to the estate, to the claimants against the estate including the IRS and claimant Leonard Bradley, and Crystal Henington, a named beneficiary in the will.[3] Here, according to both the PR and the Court of Appeals, the probate court

[3] Mr. Henington's interest in the estate is as the owner of one-half of the estate's community property and not as a beneficiary.

closed the estate on the basis of significant errors affecting the payment of demands against the estate and distribution and settlement of the estate. The Court of Appeals found the lower courts erred by:

> (1) entering a finding that the IRS had been paid all amounts due when that finding was unsupported by any evidence and the PR had in fact "represented to the trial court that he did not have confirmation from the IRS that it had accepted the returns. And ... that [he anticipated] there may be additional taxes because the joint returns were late and Mr. Henington initially failed to sign them," and thus closing the estate in violation of RCW 11.68.114; and
>
> (2) deciding that claimant Leonard Bradley's claims against the estate were time barred when the $300 claim must be allowed pursuant to RCW 11.40.090(2), and the probate court did not have sufficient evidence before it to determine which statute of limitation applies to the other claims and therefore erred in concluding the claims are time barred.

(Appx. A, Slip Op.) These errors arose in large part from the lower courts' handling of the matter and from representations made on behalf of Mr. Henington (including the drafting of the proposed order adopted by the court commissioner of the probate court). (*See* CP 69-72.) The PR initially

undertook to correct the probate court's errors by filing a motion for revision but the superior court refused to correct the errors and affirmed the decision to close the estate and distribute the remaining funds equally to Mr. Henington and Ms. Henington. (CP 134-135.)

Following these decisions, the PR had to either accept the patently erroneous order or continue to abide by his fiduciary duties and file an appeal to correct the probate court's errors. Under the law, and in Petitioner's view, this is not a choice. The PR has a duty to the estate to ensure that it is is closed and distributed in harmony with governing statutes and he was obligated to pursue this appeal.

Furthermore, an appeal by the PR on behalf of the estate was the only realistic manner through which the probate court's errors would be corrected, thereby placing an emphasis on the imposed duty of the PR to act and to appeal. Although Mr. Henington; Ms. Henington, the estate's sole beneficiary; or the IRS and Mr. Bradley, claimants to the estate, could have brought an appeal, none had a duty to do so. And neither Mr. Henington nor Ms. Henington had a financial interest in doing so because the probate court's errors meant that they were to each receive additional distributions from the estate in addition to distributions each had already received throughout the pendency of the probate. (CP 18-23, 69-72, 134-135, 334-335.) Without the PR's appeal the estate would have been closed

and improperly distributed despite significant errors by the probate court. These circumstances underscore and support the purpose of imposing these duties on personal representatives. Without the imposed duty on the PR in this case, and in any case where the probate court errs because of reliance on orders improperly drafted by objecting parties as in this case or due to reasons of case-load, large files, or other administrative and legal mistakes, the estate would be quietly and erroneously closed in violation of the law.

The law, however, mandates the correction of errors in probate. *In re Peterson's Estate*, 12 Wn.2d 686, 722-23, 123 P.2d 733 (1942). While it is the probate court that is charged with distributing the estate only after the debts, expenses and other demands against the estate have been paid in order of priority set forth in RCW 11.76.110, when the lower courts persist in obvious material errors that significantly affect the administration, closing, and final distribution of the estate, who else but the PR should take the necessary procedural step of an appeal to correct these errors? It is on this basis that Petitioner's fiduciary duties were triggered mandating that he appeal the lower courts' erroneous orders.

As a result of a PR's duty to appeal a probate court's apparent errors, the PR has a corresponding duty to ensure that qualified legal counsel handle the matter. For most estates, the PR is a lay person who is

unqualified or is an attorney specializing in probate who is only occasionally qualified to efficiently and effectively handle an appeal while complying with the procedures governing appeals. Therefore, hiring an appellate attorney (or any competently qualified attorney) is a necessary step in the administration of the estate and compliance of the PR's fiduciary duties in circumstances such as those in this case. *See In re Evans' Estate*, 138 Wn. 101, 102, 244 P. 260 (1926) (the administrator of an estate, even though he may be an attorney, may employ an attorney to assist in the settlement of the estate, provided 'it is necessary.')

The PR in this case is an attorney who worked exclusively in the areas of estate planning and probate for 15 years and for 20 years in the areas of estate planning, guardianship, and probate, including volunteer work. (Declaration of R. Wills filed with the Court of Appeals in support of the motion for reconsideration at ¶ 1 (contained in Appendix B to this petition).) This experience demonstrates that Mr. Wills is capable of handling probates but he has had no trial or appellate experience. (Id. at ¶¶ 1, 9.) Therefore, handling the appeal himself would likely violate his duties to the estate as a personal representative and as a licensed attorney. (Id. at ¶ 9.) Instead, Mr. Wills sought and hired qualified appellate counsel. (Id; *see also e.g., In re Evans' Estate*, 138 Wn. at 102.)

Denial by the Court of Appeals of the PR's request for an award of attorney fees on appeal results in either appellate counsel writing off the fees or the PR personally paying appellate counsel for her services – a result that is inequitable to either. Regardless of the fact that the portion of the opinion denying the award of attorney fees is unpublished, this decision sets a tangible precedent in the day-to-day administration of probate and the practice of probate law that is highly discouraging to qualified appellate counsel accepting such work and, therefore, creates a significant obstacle to personal representatives fulfilling their duties to the estate when a probate court acts in error and improperly affects the lawful distribution and settlement of the estate. (*See* Appx. B.) This case particularly illuminates the obstacles now in place by the denial of an award of attorney fees on appeal because the PR was obligated to appeal the probate court's obvious errors including, for example, the finding and order that all amounts due to the IRS had been paid where there was no evidence whatsoever supporting that decision and all the evidence before the probate court was to the contrary.

In re Estate of Jolly, 3 Wn.2d 615, 101 P.2d 995 (1940), applies this reasoning to the analogous circumstances of a personal representative who is likewise duty bound to act – in that case to defend a will in good faith. The *Jolly* Court noted that to deny a personal representative an

award attorney fees and costs from the estate "would be to encourage and promote failure of duty...[and s]ince duty and the law require an executor to defend in such a situation, he should not be required to defend at his peril." *Id.* at 626.[4] Denial of an award of attorney fees creates the precedent that places the PR in the position of making an impossible election – either do nothing and accept patently incorrect rulings that significantly affect the administration and distribution of the estate in violation of his duty or engage appellate counsel and move forward with the appeal at the risk that even if the Court of Appeals agrees that the probate court erred attorney fees will be denied thereby leaving no realistic source to pay appellate counsel and "encourage[ing] and promot[ing] failure of duty" from personal representatives. *Id.*

In this case, the PR actively and diligently engaged in administering and settling the estate and performed his duties in good faith. (*See e.g.*, Slip Op., 44246-9-II (noting that Mr. Wills rejected the two claims from the Ford Motor Company and had the estate pay the claim from Evergreen Bank.) He also chose not to fail in his duty by allowing the probate court's order to stand. Instead, he embraced his duty and appealed.

[4] "Costs" referred to in the *Jolly* case "include a reasonable attorney's fee." *Jolly*, 3 Wn.2d at 620.

Because hiring a competent attorney to handle the attorney was a necessary step in the administration of the estate in order to satisfy the PR's fiduciary duties, an award of attorney fees on appeal protects the proper administration of the estate as mandated by the law. Therefore, the Court of Appeals should have made such an award.

C. *When the fiduciary duty of a personal representative is the basis of an appeal, then the estate is the proper source for the award of attorney fees on appeal and the status of the estate's solvency should not be considered in the determination of whether to make an award.*

Hiring appellate counsel and pursuing the correction of the probate court's erroneous orders was necessary to manage and settle the estate pursuant to the PR's fiduciary duties. RCW 11.48.050 provides that a PR "shall be allowed all necessary expenses in the care, management, and settlement of the estate." The estate is the proper source for payment of the expenses of the appeal. *In re Jennings' Estate*, 6 Wn. App. 537, 538, 494 P.2d 227, 228 (1972) ("The allowance of attorney's fees, when properly made, is paid from the assets of the estate as a reimbursement to the executor for the faithful discharge of his duties and the expenses incurred in performing them.").

In addition, RCW 11.48.210 states, in relevant part, that "An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor *out of the estate* as

the court shall deem just and reasonable." (Emphasis added.) An award of "just and reasonable" compensation for services rendered in handling the appeal should be made in order to pay the fees of appellate counsel. *See Chesnin v. Fischler*, 43 Wn. App. 360, 369, 717 P.2d 298, 303 (1986) (appellate attorney for the personal representative of the estate is awarded attorney fees from the estate for the appeal). The award of attorney fees on appeal should be paid from the estate. *In re Peterson's Estate*, 12 Wn.2d. at 730-31 (it is sensible to allow an award directly from the estate to an attorney whose hiring was necessary to the fulfillment of the personal representative's duties). Moreover, considering that the PR was acting pursuant to his duty to the estate in bringing an appeal and in hiring legal counsel to handle the appeal, it is simply equitable that it is the estate that must bear the attorney fees incurred for this necessary action.

According the Court of Appeals decision which provided no analysis and only the slightest of rationales, it denied "additional fees on appeal," because "the estate is likely insolvent." (Appx. A, Slip Op., 44246-9-II, at 7.) The solvency of the estate should not govern whether an award of attorney fees is made and it should not govern in this case. At the time of the probate court's erroneous order estate assets had previously been used to pay the mortgage on Decedent's home, pay a claim from Evergreen Bank, pay partial tax debts, pay administrative fees including to

the court-appointed guardian ad litem for the time Crystal Henington was a minor, Mr. Henington's attorney, the personal representative, and as partially distributed to Mr. Henington and Ms. Henington prior to the closing of the estate by the lower court. At the time of appeal the amount of estate assets whose distribution by the probate court was disputed and appealed totals $18,034.78. (Appx. B at ¶ 4).)

As the appearing parties in this case have agreed, the demands against the estate are paid in order of priority set forth in RCW 11.76.110 "Order of Payment of Debts," which provides:

> *After payment of costs of administration* the debts of the estate shall be paid in the following order: ...
> (4) Debts having preference by the laws of the United States.
> (5) Taxes, or any debts or dues owing to the state...
> (7) All other demands against the estate.

(Emphasis added.) Administrative debts including attorney fees and costs are prioritized and paid first. Then, if any funds remain, the estate's obligations to the IRS are paid; and, then if any funds remain, the estate's obligations to Decedent's creditors are paid. The statute recognizes that it is likely that no additional funds remain to be distributed to the estate's beneficiary. However, both the will beneficiary, Ms. Henington, and the community property claimant, Mr. Henington, are not left without benefit by this result because they have already received a significant share of the

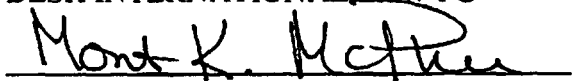
estate assets. (CP 18-23, 334-335.) Because many claimants and expenses have been paid, and the sole will beneficiary has already received prior distributions, the status of the estate's solvency should not be the determining factor for denying an award of attorney fees in a necessary appeal considering the PR's duty to appeal the clearly erroneous lower court orders.

V. CONCLUSION

Petitioner requests that this Court accept review of the Court of Appeals decision denying an award of attorney fees on appeal because the decision affects an issue of substantial public interest – namely the fiduciary duties of personal representatives in the administration of estates throughout Washington. Personal representatives now face two significant obstacles in the day-to-day practice of probate and estate administration: (1) making a choice between an unlawful position and an unjust position, and (2) engaging competent legal counsel to handle an appeal under the current precedent. As a matter of substantial public interest, this issue merits review by the Supreme Court pursuant to RAP 13.4(4).

RESPECTFULLY SUBMITTED this 2nd day of October, 2014.

DESH INTERNATIONAL LAW PC



MONA K. MCPHEE, WSBA No. 30305
Counsel for Petitioner

APPENDIX A

1. *In re the Estate of Catherine Henington*, Court of Appeals Case No. 44246-9-II, Slip Opinion filed July 22, 2014.

2. *In re the Estate of Catherine Henington*, Court of Appeals Case No. 44246-9-II, Order filed September 3, 2014.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Estate of:

CATHERINE HENINGTON,

Deceased.

No. 44246-9-II

PUBLISHED IN PART OPINION

MELNICK, J. — Richard Wills, the personal representative (PR) of Catherine Henington's estate, challenges the trial court's order closing the estate and distributing its assets to her heirs. He argues that the trial court erred when it (1) denied three creditor's claims as time barred and (2) failed to withhold a reserve for paying taxes and penalties. Additionally, both Mr. Wills and the respondent, Roy Henington, the decedent's estranged husband, seek attorney fees on appeal. In the published part of this opinion, we hold that the filing of creditor's claims did not toll the statute of limitations; however, because there is insufficient evidence in the record regarding the exact nature of the claims, we remand to the trial court to determine whether they are time barred. In the unpublished part of this opinion, we hold that the trial court erred when it failed to withhold a reserve because insufficient evidence existed to show that all the taxes had been paid. We remand for the trial court to reconsider the creditor's claims and whether taxes are owed. We do not award attorney fees to either party on appeal.

FACTS

Ms. Henington died testate on March 15, 2008, at which time she and her husband, Roy Henington, were estranged. Ms. Henington's will left her entire estate, with the exception of Mr. Henington's share of the community property, to the daughter she had with Mr. Henington.

Initially appointed as the PR, Mr. Henington subsequently had his attorney, Mr. Wills, succeed him as the PR.

Mr. Wills published a probate notice to creditors on April 2, 2008. On May 15, 2008, the estate received three creditor's claims from Leonard Bradley, Ms. Henington's father: one from 2003 for $9,446.12 that Ms. Henington had been paying off before her death, one from 2008 for $4,000, and another from 2008 for $300. Mr. Wills took no action on these claims. The estate also received two creditor's claims from Ford Motor Company, both of which were rejected, and a creditor's claim from Evergreen Bank, which the estate paid.

The Internal Revenue Service (IRS) also sent the PR notice that Ms. Henington had not paid her personal income taxes for the four years before her death. Consequently, the estate paid Ms. Henington's personal income taxes and the estate's taxes. Mr. Henington wanted to file joint returns, so Mr. Wills sent the returns to Mr. Henington for his signature. Mr. Henington did not reply, so Mr. Wills eventually filed the joint returns without Mr. Henington's signature. A few months later, Mr. Henington signed the returns and filed them with the IRS.

In August 2012, Mr. Wills filed in the trial court a "Final Report & Account & Petition for Distribution." Clerk's Papers at 4. The petition alleged that the estate was insolvent and that it should be closed. It requested fees for Mr. Wills's services as PR and asked the court to reserve some of the estate to pay any outstanding IRS liabilities that may come due. The petition then stated that any remaining money should be first used to pay Mr. Bradley's creditor's claims and the balance should be split between Mr. Henington and Mr. and Ms. Henington's daughter.

The superior court commissioner closed the estate and found that Mr. Bradley's creditor's claims were time barred and that all amounts due to the IRS had been paid. The

commissioner further ordered that Mr. Wills's fees be paid out of the estate's assets and the remainder distributed evenly between Mr. Henington and Mr. and Ms. Henington's daughter.

Mr. Wills filed a motion for revision of the commissioner's order, arguing that Mr. Bradley's creditor's claims were not time barred and that the commissioner erred when he found that the estate had paid all amounts due to the IRS. Mr. Wills also sought additional compensation for his services as personal representative. The trial court denied the motion for revision but increased Mr. Wills's fees by $10,000. Mr. Wills appeals the denial of Mr. Bradley's creditor's claims and the failure to set aside a reserve for unpaid taxes.

ANALYSIS

I. CREDITOR'S CLAIMS

Mr. Wills argues that the trial court erred when it dismissed Mr. Bradley's creditor's claims as time barred. We hold that the mere filing of a creditor's claim in a probate case, without any further action by the claimant or the PR, does not toll the statute of limitations.

In order to resolve this case, we rely on inter-related statutes from chapter 4.16 RCW and chapter 11.40 RCW. In so doing, we find that the meaning of each of the applicable statutes is plain on its face.

"Statutory interpretation involves questions of law that we review de novo. In construing a statute, the court's objective is to determine the legislature's intent." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005) (citation omitted). "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" *Jacobs*, 154 Wn.2d at 600 (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). "[T]he plain meaning is . . . derived from what the Legislature

has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Campbell & Gwinn*, 146 Wn.2d at 11.

RCW 4.16.200 provides: "Limitations on actions against a person who dies before the expiration of the time otherwise limited for commencement thereof are as set forth in chapter 11.40 RCW." A creditor must then follow the claims procedures established in chapter 11.40 RCW or be forever barred from making a claim or commencing an action against the decedent. However, if the claim or action is barred by other applicable statutes, it cannot be pursued. "An otherwise applicable statute of limitations applies without regard to the tolling provisions of RCW 4.16.190."[1] RCW 11.40.051(2).

Contrary to the PR's argument, when read together, this statutory scheme does not state that the filing of a creditor's claim tolls the statute of limitations.[2] Rather, it affirmatively states that limitations on actions apply to chapter 11.40 RCW: Claims Against Estate. RCW 4.16.200; RCW 11.40.051(2). Therefore, we hold that the statute of limitations is not tolled by the mere filing of a creditor's claim against an estate.[3] Tolling occurs when an action is commenced against an estate. RCW 4.16.170.

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[1] RCW 4.16.190, which tolls the statute of limitations for personal disability, is inapplicable to the present case.

[2] We do recognize that the legislature has the power and authority to include tolling provisions in statutes and, in fact, has done so. *See* RCW 4.92.110 and RCW 4.96.020(4).

[3] We are not deciding whether the statute of limitations is tolled when the parties take action on the claim and petition the court pursuant to RCW 11.40.080(2).

In so ruling, we note that neither the PR nor Mr. Bradley acted on the claims after they were filed in May 2008. The PR did not at any time allow or reject the claim. Mr. Bradley did not serve written notice on the PR or petition the court for a hearing on the matter. *See* RCW 11.40.080(2). Approximately four years of inaction elapsed before the court declared the claims time barred.

In the present case, Mr. Bradley complied with the time limits of RCW 11.40.051 for filing a creditor's claim. However, we are unable to determine from the trial court record whether the statute of limitations has run. The applicable statute of limitations depends on whether the loans were made pursuant to oral or written contracts. RCW 4.16.040, .080. Here, the parties do not agree on the nature of the contracts underlying the loans. Because Mr. Bradley did not have a chance to fully present his creditor's claims to the court, there is insufficient evidence in the record to determine which statute of limitations applies. Accordingly, we remand for the trial court to determine the actual statute of limitations on the creditor's claims.[4]

On remand, the $300 claim must be allowed. A claim that does not exceed $1,000 and is presented in the manner provided in RCW 11.40.070 must be deemed allowed and may not be rejected unless the PR has notified the claimant of rejection of the claim within the later of six months from the date of first publication or two months from the PR's receipt of the claim. RCW 11.40.090(2). The statute is not equivocal; all claims under $1,000 *must* be accepted unless the PR notifies the claimant within a specific time frame. Mr. Wills did not notify Mr. Bradley that he was rejecting this claim within the statutory time frame. Regardless of whether

[4] We are not ruling on whether the statute of limitations has run in the interim, leaving that determination to the trial court.

the three-year or six-year statute of limitation applies, Mr. Bradley timely filed the $300 claim. Therefore, this claim is automatically allowed under RCW 11.40.090(2).

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

I. TAXES

Mr. Wills argues that the trial court erred when it closed the estate and distributed it to Mr. Henington and to Mr. and Ms. Henington's daughter without reserving a portion to pay for taxes and penalties. Because the evidence does not show that the estate had paid the entire amount owed in taxes, we agree.

We review challenged findings of fact for substantial evidence. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the finding's truth. *Jones*, 152 Wn.2d at 8.

The trial court found that, according to the PR, the estate had paid all amounts due to the IRS. This finding is not supported by substantial evidence. Although Mr. Wills had filed and paid Mr. and Ms. Henington's joint income tax returns and the estate's income tax returns, he represented to the trial court that he did not have confirmation from the IRS that it had accepted the returns. And he stated that there may be additional taxes because the joint returns were late and Mr. Henington initially failed to sign them. Thus, the record does not show that the estate had paid the IRS all amounts due.

The PR retains the power to deal with the taxing authority of any federal, state, or local government and hold a reserve for the payment of any additional taxes, interest, and penalties. RCW 11.68.114 Because it is not clear that the estate has paid all of the taxes, we remand for the trial court to consider whether additional taxes are owed and, if necessary, to allow Mr. Wills to establish a reserve for them.

II. ATTORNEY FEES

Mr. Wills requests administrative and attorney fees for this appeal. If no compensation is provided for the PR in the will, then the court may allow such compensation as it deems just and reasonable, including compensation for services as an attorney. RCW 11.48.210. The PR may apply to the court at any time for compensation. RCW 11.48.210. RCW 11.96A.150(1) gives us discretion to award attorney fees to any party from any party or from the estate's assets in an amount it deems equitable. In awarding attorney fees, we may consider any and all relevant factors, including whether the litigation benefits the estate. RCW 11.96A.150(1). Here, the estate is likely insolvent. We decline to award additional fees on appeal.

Mr. Henington also requests attorney fees under RAP 18.9 for responding to a frivolous appeal. An appeal is frivolous if it presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal. *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997). Here, we reverse the trial court's order. Therefore, this appeal is not frivolous and we do not award Mr. Henington attorney fees on appeal.

We remand for the trial court to reconsider Mr. Bradley's creditor's claims and whether taxes are owed. Neither party receives attorney fees on appeal.

Melnick, J.

We concur:

Worswick, J.

Johanson, C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE ESTATE OF:

CATHERINE HENINGTON.

No. 44246-9-II

ORDER DENYING MOTION FOR RECONSIDERATION AND MOTION FOR ATTORNEY FEE AWARD

APPELLANT moves for reconsideration and attorney fee award of the Court's **July 22, 2014** opinion. Upon consideration, the Court denies the motions. Accordingly, it is

SO ORDERED.

PANEL: Jj. Johanson, Worswick, Melnick

DATED this 3rd day of September, 2014.

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

Jeffrey Grant Nielsen
Attorney at Law
1008 Yakima Ave Ste 100
Tacoma, WA, 98405-4850
jeff@tacomacounsel.com

Arthur Colby Parks
A. Colby Parks, Attorney at Law, P.S.
1008 Yakima Ave Ste 100
Tacoma, WA, 98405-4850
colby@tacomacounsel.com

Richard Wills
Attorney at Law
20122 163rd Ave NE
Woodinville, WA, 98072-7030
richardwills@washington-probate.com

Crystal Henington
6870 Riverland Dr. #62
Redding, CA, 96002

Mona Kathleen McPhee
Desh International Law
400 108th Ave NE Ste 700
Bellevue, WA, 98004-8425
mmcphee@deshlaw.com

APPENDIX B

1. Declaration of Appellant Richard Wills, Successor Personal Representative, In Support of the Combined Motion for Reconsideration and Motion by Appellate Counsel for Attorney Fee Award Pursuant to RCW 11. 48.210.

No. 44246-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE ESTATE OF CATHERINE HENINGTON.

DECLARATION OF APPELLANT RICHARD WILLS, SUCCESSOR PERSONAL REPRESENTATIVE, IN SUPPORT OF THE COMBINED MOTION FOR RECONSIDERATION AND MOTION BY APPELLATE COUNSEL FOR ATTORNEY FEE AWARD PURSUANT TO RCW 11.48.210

Mona K. McPhee, WSBA# 30305
Counsel for Appellant

DESH INTERNATIONAL LAW
400 108TH AVE NE, SUITE 700
BELLEVUE, WA 98004
(360) 870-0769

I, **Richard Wills, as the successor Personal Representative of Decedent's estate**, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I graduated from graduate school in 1970 with a Ph.D. in molecular biology & from law school in 1979 (at age 37) and worked in Los Angeles law firms from 1979-1985, when I retired. During those six years, I did nothing but estate planning, guardianship, and probate. After having engaged in other pursuits, from 2000 through 2002, I served as volunteer contested guardianship counsel for the King County Guardianship Monitoring Program, and from 2002 through 2005, I served as the volunteer intake attorney for the Delinquency & Contempt Calendar for the King County Probate Court. In 2005, I began Washington Probate, in which I have practiced only probate law from then until today. In sum, I have worked exclusively in the areas of estate planning and probate for 15 years and for 20 years in the areas of estate planning, guardianship, and probate, including volunteer work.

2. On July 22, 2014, the Court issued its opinion in this matter, which is to be published in part. In its opinion, the Court remanded the issues of the payment of taxes by the estate and the payment of the Creditor's Claims of Leonard Bradley to the trial Court to determine, for which Declarant is grateful. The Court, however, denied the payment of attorney's fees from the estate to Declarant's appellate attorney. Declarant

WASHINGTON PROBATE
Richard Wills --- WSBA 19720
20122 163rd Ave NE
Woodinville, WA 98072 --- 206 545-1463
RichardWills@Washington-Probate.com

desires to move the Court to reconsider its ruling on this matter and in this Declaration sets forth facts and circumstances he believes to be germane as to why the Court should allow those fees.

3. As shown in the record, on April 8, 2010, the Pierce County Court ordered that $7,000 from the estate be distributed for the benefit of Roy Henington ($5,000 to his attorney and $2,000 to Richard Wills to reimburse him for costs paid on Mr. Henington's behalf), for his one-half community interest in the estate and $7,000 from the estate be distributed to the representative of Crystal Henington, as Decedent's sole beneficiary; and that $1,000 from the estate be distributed each month thereafter to each of those recipients. As shown in the record, namely Declarant's Accounting to the Pierce County Court, over the following years, a total of $33,000 from the estate was distributed to or for the benefit of each of Roy Henington and Crystal Henington, a total of $66,000.

4. Following the lower courts' order closing and distributing the remainder of the estate (which the Court of Appeals overturned in its July 22, 2014 decision), on January 4, 2013, Declarant deposited into the Pierce County Court's Registry the remaining assets of Decedent's estate, namely, $18,034.78 of funds withdrawn from the estate's bank accounts at Umpqua Bank; this $18,034.78 is all that remains in the estate.

WASHINGTON PROBATE
Richard Wills --- WSBA 19720
20122 163rd Ave NE
Woodinville, WA 98072 --- 206 545-1463
RichardWills@Washington-Probate.com

5. As shown in the record, Decedent failed to report her individual income and pay her taxes thereon for the four-year period, 2005-2008, ending in the year of her death. As PR, Declarant was responsible for their reporting and payment. Accordingly, Declarant engaged an accountant to prepare Decedent's individual reports for those years, and Declarant submitted those reports and paid from the estate $103,783 in individual taxes thereon to the IRS.

6. As shown in the record, as PR, Declarant was responsible for reporting the estate's fiduciary income and paying its taxes thereon for the four-year period 2008-2011. Accordingly, Declarant engaged the accountant to prepare the estate's fiduciary reports for those years. Declarant submitted those reports and paid from the estate $22,251 in fiduciary taxes thereon to the IRS.

7. As shown in the record, Roy Henington desired to lessen the amount of Decedent's individual taxes by having Decedent's income reported jointly by the estate and Mr. Henington. According to IRS rules, however, that requires the relevant tax reports to be signed not only by the PR but also by Mr. Henington as Decedent's surviving husband. The PR repeatedly requested Mr. Henington to sign Decedent's tax returns, but Mr. Henington consented in writing to Decedent's tax returns being filed jointly only much later. Consequently, the IRS imposed penalties and

WASHINGTON PROBATE
Richard Wills --- WSBA 19720
20122 163rd Ave NE
Woodinville, WA 98072 --- 206 545-1463
RichardWills@Washington-Probate.com

interest against the estate. At the time of Declarant's Final Report and Account and Petition for Distribution, over a year ago, the penalties and interest totaled approximately $6,000 but have increased since then due to the passage of time and remain an obligation of the estate.

8. In response to Declarant's Final Report and Account and Petition for Distribution, the Pierce County Court, at both the Commissioner's and the Judge's level following a Motion for Revision, ruled that the estate's obligation to the IRS for the estate's taxes had been paid, and that Mr. Bradley's Creditor's Claims were barred, and that Court ordered the estate to be closed and distribution. Declarant believed these rulings were erroneous, and as PR, Declarant had the duty to take action for their correction. Consequently, he determined to appeal them to this Court, and this Court has remanded all of these rulings back to the trial Court, confirming Declarant's belief.

9. Declarant has no experience at either trial or appeal and believed that were he to handle the appeal, he would be committing legal malpractice. Therefore, he sought the assistance of appellate counsel and ultimately engaged Mona McPhee, an experienced appellate attorney, following a referral from Ken Masters, to handle the appeal.

10. Despite the Court's remanding both the tax and the claims issues back to the trial Court, the Court has denied the payment from the

WASHINGTON PROBATE
Richard Wills --- WSBA 19720
20122 163rd Ave NE
Woodinville, WA 98072 --- 206 545-1463
RichardWills@Washington-Probate.com

estate for the PR's appellate counsel. Equitably, this is unfair and effectively puts any person in the PR's position in this situation to an unfair and unjust election of remedies. Either the PR must breach his or her duty and accept the Superior Court's erroneous rulings that the Court of Appeals has now overturned, or the PR must do his or her duty but knowing that no attorney's fees and costs will be provided for doing so. Given that outcome, what appellate attorney would be willing to represent a PR knowing that no funds from the estate will be available to pay the appellate attorney's fees and costs?

11. Here, both equitably and legally, the $18,034.78 that remains in the estate should be paid:

a. First, for the estate's unpaid costs of administration, namely, to the PR's appellate attorney for her just and reasonable fees and necessary costs in handling the appeal.
b. The remaining funds thereafter to the IRS.
c. Any then remaining funds to Decedent's creditors.

12. Declarant has posted a summary of the Court's rulings on the probate and trust listserve of the Washington Bar Assn. His comment re the denial of attorney's fees and costs was:

> Attorney's Fees: What remains, however, is that the appellate Court denied attorney's fees. When a Comm'r and a Judge both issue rulings that appear patently incorrect, a

WASHINGTON PROBATE
Richard Wills --- WSBA 19720
20122 163rd Ave NE
Woodinville, WA 98072 --- 206 545-1463
RichardWills@Washington-Probate.com

> PR engages appellate counsel to appeal the ruling (as I did), and the appellate Court overturns the Comm'r's and the Judge's ruling, it seems reasonable to me to allow the appellate attorney's fees and costs and unfair and inequitable to deny them. But for the engagement of appellate counsel and the prosecution of the appeal, the prior ruling would have stood and not have been found to have been in error. To me, the appellate Court's ruling denying attorney's fees and costs to appellate counsel puts the PR at an impossible election --- either do nothing and accept the incorrect ruling or engage appellate counsel and go forward with the appeal at the risk that even if the appellate Court rules in your favor, it will deny attorney's fees and costs, leaving no source to pay appellate counsel.

Declarant received supportive comments regarding his summary. One such comment by a Seattle attorney regarding the attorney's fees and costs issue was: "That attorney's fees part should go to the Supremes. It sets a very bad precedent for the reasons Richard states."

13. Throughout the pendency of the probate, Declarant communicated with Decedent's father and claimant Leonard Bradley. Declarant was aware of Mr. Bradley's claims and intended to allow them upon final petition to the probate court, which is in fact how the claims were handled and allowed prior to the probate's court decision to reject them as time-barred. Declarant has independently notified Mr. Bradley of

WASHINGTON PROBATE
Richard Wills --- WSBA 19720
20122 163rd Ave NE
Woodinville, WA 98072 --- 206 545-1463
RichardWills@Washington-Probate.com

the Court of Appeals decision in this case and recommended that Mr. Bradley consult with his own legal counsel.

SIGNED

On August 7, 2014

At Seattle, WA

/s/ R. Wills
Richard Wills, WSBA 19720
Personal Representative

WASHINGTON PROBATE
Richard Wills --- WSBA 19720
20122 163rd Ave NE
Woodinville, WA 98072 --- 206 545-1463
RichardWills@Washington-Probate.com

APPENDIX C

1. Text of RCW 11.48.010

2. Text of RCW 11.48.050

3. Text of RCW 11.48.210

4. Text of RCW 11.76.110

RCW 11.48.010
General powers and duties.

It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate. The personal representative shall collect all debts due the deceased and pay all debts as hereinafter provided. The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.

[1994 c 221 § 30; 1965 c 145 § 11.48.010. Prior: 1917 c 156 § 147; RRS § 1517; prior: Code 1881 § 1528; 1854 p 291 § 141.]

Notes:

Effective dates -- 1994 c 221: See note following RCW 11.94.070.

RCW 11.48.050
Allowance of necessary expenses.

He or she shall be allowed all necessary expenses in the care, management, and settlement of the estate.

[2010 c 8 § 2034; 1965 c 145 §11.48.050 . Prior: 1917 c 156 § 156; RRS § 1526; prior: Code 1881 § 1541; 1854 p 295 § 164.]

Notes:

Rules of court: SPR 98.12W.

Attorney's fee to contestant of erroneous account or report: RCW 11.76.070.

Broker's fee and closing expenses -- Sale, mortgage or lease: RCW 11.56.265.

Compensation -- Attorney's fee: RCW 11.48.210.

Monument, expense of: RCW 11.76.130.

Order of payment of debts: RCW 11.76.110.

Will contests, costs: RCW 11.24.050.

RCW 11.48.210
Compensation — Attorney's fees.

If testator by will makes provision for the compensation of his or her personal representative, that shall be taken as his or her full compensation unless he or she files in the court a written instrument renouncing all claim for the compensation provided by the will before qualifying as personal representative. The personal representative, when no compensation is provided in the will, or when he or she renounces all claim to the compensation provided in the will, shall be allowed such compensation for his or her services as the court shall deem just and reasonable. Additional compensation may be allowed for his or her services as attorney and for other services not required of a personal representative. An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. Such compensation may be allowed at the final account; but at any time during administration a personal representative or his or her attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees. If the court finds that the personal representative has failed to discharge his or her duties as such in any respect, it may deny him or her any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

[2010 c 8 § 2043; 1965 c 145 § 11.48.210. Prior: 1917 c 156 § 158; RRS § 1528; prior: Code 1881 § 1541; 1854 p 295 § 164.]

Notes:

Rules of court: SPR 98.12W.

Allowance of necessary expenses: RCW 11.48.050.

Will contests, costs: RCW 11.24.050.

RCW 11.76.110
Order of payment of debts.

After payment of costs of administration the debts of the estate shall be paid in the following order:

(1) Funeral expenses in such amount as the court shall order.

(2) Expenses of the last sickness, in such amount as the court shall order.

(3) Wages due for labor performed within sixty days immediately preceding the death of decedent.

(4) Debts having preference by the laws of the United States.

(5) Taxes, or any debts or dues owing to the state.

(6) Judgments rendered against the deceased in his or her lifetime which are liens upon real estate on which executions might have been issued at the time of his or her death, and debts secured by mortgages in the order of their priority.

(7) All other demands against the estate.

[2010 c 8 § 2068; 1965 c 145 § 11.76.110. Prior: 1917 c 156 § 171; RRS § 1541; prior: Code 1881 § 1562; 1860 p 213 § 264; 1854 p 298 § 184.]

Notes:

Borrowing on general credit of estate: RCW 11.56.280.

Claims against estate: Chapter 11.40 RCW.

Sale, etc., of property -- Priority as to realty or personalty: Chapter 11.10 RCW.

Tax constitutes debt -- Priority of lien: RCW 82.32.240.

Wages, preference on death of employer: RCW 49.56.020.

CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2014, I caused to be served the foregoing Petition for Review including Appendices A, B, and C on the following interested parties by first class mail with a courtesy copy transmitted electronically if an email address has been provided:

SERVED PERSONS:

Crystal Henington
6870 Riverland Dr. #62
Redding, CA 96022

Arthur Colby Parks, Attorney for Roy Henington
Attorney at Law
1008 Yakima Ave, Ste 100
Tacoma, WA 98405-4850
Email: Colby@tacomacounsel.com

Leonard Bradley
1524 33rd Avenue Court
Puyallup, WA 98373

IRS
915 2nd Ave
Seattle, WA 98174

DATED this 2nd day of October, 2014.

Mona K. McPhee

MONA K. McPHEE

DESH INTERNATIONAL LAW

October 02, 2014 - 10:36 AM

Transmittal Letter

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Case Name: Estate of Catherine Henington
Court of Appeals Case Number: 44246-9

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Motion: ____

Answer/Reply to Motion: ____

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Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): _____

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Response to Personal Restraint Petition

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■ Petition for Review (PRV)

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Comments:

No Comments were entered.

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A copy of this document has been emailed to the following addresses:

mmcphee@deshlaw.com
colby@tacomacounsel.com
richardwills@washington-probate.com