No. 321924

COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON

Spokane County Cause No. 11-4-01394-6

In the Matter of:

ESTATE OF BETTY L. LOWE,

Deceased.

AARON L. LOWE, Son of Decedent

Petitioner/Appellant,

v.

LONNIE D. LOWE, Individually and as Personal Representative of the Estate of Betty L. Lowe, Deceased,

Respondent/Appellee.

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Donald Lowe ("Don"), father of Appellant, Aaron Lowe ("Aaron") and also Respondent, Lonnie Lowe ("Lonnie"), spent a lifetime hoarding 22 pure silver bars, each weighing 55 to 67 pounds per bar, four large bags of silver and gold coins containing an estimated 70,000 coins, of which well over half have been traced. Don hid them in a fireplace flume in the basement of the family residence. After Don died in 2003, Lonnie removed all he found and took them to his safe in his garage in Olympia, telling no one but his wife. Don's spouse, Betty, mother of Aaron and Lonnie, died in 2011. Lonnie contends he is entitled to all the plunder he took even though the parents wanted all three brothers to share equally. Lonnie was a financial abuser of his mother so he gets nothing under current law.

The trial court erred by allowing Lonnie to keep his secret and illegal alienation of gold and silver in complete defiance of testamentary intent as outlined in Don Lowe's will and the letter of intent to his children.

The case must be reversed and remanded so that the items taken can be distributed in accordance with Betty's and Don's wills.

I. ASSIGNMENTS OF ERROR

1. The trial court erred in Findings of Fact No.'s 19, 18, 14, 27, 28 and 35, CP 321-3, by allowing the United States coins to be distributed under the separate writing statute, RCW 11.12.260(1) and (4), which does not allow disposition of legal tender. Also, it did not define the recipients of the property or the property with reasonable certainty. Aaron's objections are at CP 195-229.

2. The trial court erred by failing to allow the Second Amended and Supplemental Petition and Findings of Fact No. 35, CP 37-53, 54-5, and Conclusions of Law 1, 2, 5, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20, 22, 22, 24, 25 denying tortious interference of Lonnie with Aaron's inheritance from his parents.

3. The trial court erred in Findings of Fact No.'s 22, 24, 34, 35 and failing to allow the Second Amended and Supplemental Complaint and by failing to deny any gift or inheritance to Lonnie from Betty as he was a financial abuser of Betty. CP 54-5.

4. The trial court erred in Findings of Fact No.'s 12, 13, 14, 17, 18, 19, 20, 22, 27, and 35, CP 321-3, by holding that Aaron did not inherit from his fathers will. Findings of Facts numbers 19 and 20, CP 321, are not

based on any evidence. Betty never told Lamp or her children about the gold and silver. VRP 469.

5. The Court erred in Findings of Fact No. 35, CP 323, and Conclusion of Law 21, CP 326, by denying the request to remove Lonnie as Personal Representative as Lonnie's owns testimony and that of the probate attorney provide no formal appraisal, a total lack of records of the cash hoard and a sale of thousands of coins of the hoard without a formal appraisal making it impossible and a total lack of accounting since 2003 by Lonnie as a fiduciary under a Power of Attorney to keep any records or balances whatsoever of money taken from the hoard.

6. The trial court erred by denying the Second Amended and Supplemental Petition. CP 54-5. Findings of Fact No.'s 34, 35, CP 323.

7. The trial court erred by ruling that evidence was not relevant to prove that Aaron inherited half of the unreported hoard from his father and allowing Betty's estate to claim the hoard. VRP 494. Findings of Fact No.'s 12, 13, 14, 3, 10, 20, 22, 24, 27, 28, 34 and 35. CP 320-3. Lonnie was a fiduciary as he acted in managing Betty's financial affairs under an immediately effective power of attorney executed in 2003. Betty Lowe suffered from dementia and addiction. VRP 132, 134, 428, 434. She was not

financially able to handle her finances from 1960 on. Finding of Fact No. 26, CP 322, is misleading as internally contradictory. Finding No. 23 is misleading as Lonnie did not return the tools until threatened with a lawsuit. VRP 164, 165.

8. The trial court erred in Findings of Fact No.'s 22, 35, 16, 19, and 29. Lonnie testified, contrary to Findings of Fact No. 29, that he took gifts of cash from Betty during her life, VRP 95-99, by holding that the burden of proof was not on the donee, and that Betty validly gifted cash and other assets to Lonnie even though gifts to Lonnie were prohibited under the power of attorney. CP 143. Ex. P-10.

9. The trial court erred by awarding attorney's fees to Lonnie when it was proven by Aaron that Lonnie never accounted for his mother's property as an attorney in fact or personal representative, and by accepting the proof by Aaron that no formal appraisal was ever made. The Court allowed Lonnie fees when he never prevailed in defending a formal appraisal or accounting. His attorneys represented him in conflicting roles as a claimant against the estate and as personal representative. CP 147, CP 232, CP 285, CP 353.

10. The trial court committed errors of law in Conclusions of Law No.'s 2, 10, 12, 13, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26 and 34. Lack of evidence or lack of sufficient evidence to prove the facts found.

II. STATEMENT OF THE CASE

Donald and Betty Lowe had a long term marriage. VRP 397, Ex. R-115, Ex. R-116. Together they had four children; Larry, born September 5, 1951, Aaron born November 22, 1954, Rodonna, born September 22, 1956, died in 2002, and Lonnie born June 17, 1959. VRP 50, Ex. P-31. Don and Betty lived in Spokane in a modest residence at 2128 East Sharp, Spokane, Washington, during their marriage. The children lived there during their childhood. VRP 235. Don died testate on April 16, 2003. Ex. P-45, VRP 79. Betty died testate on October 1, 2011. Ex. P-19. The home is appraised at $93,000.00. Ex. P-19. On August 14, 2006, Lonnie sent an email to his older brother, Larry stating ". . .I don't trust Aaron with anything, and I won't let Mom do anything he says. And I will fight him with everything I have." VRP 53-4, Ex. P-27. Lonnie testified that he made sure Betty, the boy's mother, signed a memorandum regarding tangible personal property. Lonnie contends that this memorandum gives him almost all of the Lowe Estate. "I told her that knowing Aaron, he would sue me, so she could go to

Bob Lamp and have it done that way..." So it was Lonnie's intent from the beginning of his illegal actions to defraud the rest of the heirs of the Lowe Estate. VRP 323.

Lonnie, from 2003 through 2007, after his father died, secretly took large amounts of gold and silver from his parents home. He took this hoard of gold and silver by removing cinder blocks of a sealed fireplace foundation or flume in the basement of the parents' residence. VRP 68-9, 70-77, 79-80. Lonnie immediately took this gold and silver to his safe in his garage in Olympia, VRP 77-79. Lonnie told only his wife and no one else about his removal. VRP 80, 131. He has always kept the hoard in his personal possession. VRP 78. In 2011, Lonnie sold at least $226,000 of the gold and silver he took. Lonnie intends to keep the money from the gold and silver he secretly stole. VRP 106, 83, 85. The well hidden hoard was valued by Lonnie to be at least $430,000.00, but an independent family friend, Donald Poindexter, (hereafter Poindexter) helped Don hide the gold and silver in this secret hiding place inside the flume. Poindexter was the person who physically hid the hoard. Poindexter placed in the hiding place twenty-two (22) silver bars each weighing between 55 to 67 pounds, one (1) bank bag of gold Krugerrands, and three (3) bank bags of silver U.S. currency (before

1965). VRP 209-215, 218. The hoard was hidden in the late 1970's or early 1980's. VRP 217-8. The market value of these precious items in 2011 would have been several million dollars.

Poindexter suggested the hiding place to Don. Poindexter took out the block, lowered the hoard into the flume with a rope, and then resealed the flume with the hoard inside. VRP 212-14. Lonnie verified that there were canvas bags 8-10 inches wide and 12 to 16 inches long of coins. VRP 71-72. Aaron confirmed that the sacks were so heavy they were hard to lift. VRP 122. Lonnie admitted there were thousands of U.S. coins, VRP 74-5, but Lonnie never made a record at the time he took them or ever counted or inventoried the hoard. VRP 72. In 2011, Lonnie sold over 35,000 U.S. silver coins. Ex. P-21, VRP 87. No formal appraisal was made of the coins sold by Lonnie. VRP 71, 322, 111, 74-6, 98. Lonnie never made records at the time or thereafter and could never reconcile any balance of what he took and what remains. VRP 321-2. No formal inventory of market value of the hoard was made in Betty or Don Lowe's estates. VRP 479. There were thousands of coins that were never formally valued. VRP 473. Bob Lamp, attorney for the estates of both parents, VRP 387, admitted that no formal appraisal was made of the hoard. VRP 474. After the trial, the court ordered a formal

appraisal. CP 145. But the unverified appraisal was incomplete as it could not include the coins sold. It consisted only of a few coins Lonnie took to the coin shop. CP 334-7. Moreover, Lonnie never commissioned an independent accountant to list and catalogue what he secretly took from his parents home. VRP 325.

The Will and intent of Donald E. Lowe was disregarded.

Don's will (Ex. P-31, R-116) was admitted to probate on October 27, 2003, in Spokane County, File Number 03-4-01223-0. Ex. R-121, R-122. Moreover, Don wrote a letter entirely in his own handwriting entrusting Aaron with his property imploring Aaron to take care of his mother and after her death to split it equally among the three children. Ex. P-35. Don was Betty's husband for over fifty (50) years. Ex. P-31. The letter in part stated, "I have asked Aaron to take responsibility in looking after your mother. It may be necessary to sell whatever he can to care for her. Please help him care for her. After she is gone, I want everything else divided between you boys or sold and the money divided between you." Ex. P-35. Only Lonnie knew of this document and he kept the letter secret until sending it to probate Attorney, Bob Lamp, on August 18, 2003, but this letter was not forwarded to the other Lowe heirs until years later. VRP 316-7.

Don's will made specific bequests of musical instruments to family members. The rest of Don's estate was willed to Aaron to be distributed after Betty's death. Don's will gives Aaron the residue of his father's estate. Ex. P-31. Aaron was appointed personal representative of Don's will. VRP 145. Lamp, the probate attorney, petitioned the court to ignore Don's will. The Petition Lamp drafted (Ex. R-118) stated in part:

> 6. Residuary Estate. In his Will, the Decedent gives his residuary estate to the personal representative. But since he nominates a personal representative and two (2) alternative representatives, he (Don) probably did not intend to give the residuary estate outright to any of the nominated individuals. Since all persons nominated to serve as personal representative have declined to serve and have nominated the Petitioner's surviving spouse as personal representative, the Decedent's estate should be distributed to the surviving spouse as sole intestate heir. (Underlining added.)

The will at 5.3, page 2 of 5, directed Aaron as the personal representative, and the trustee, to be "liberal in charging my estate and trust" with expenses incurred. Page 2 of 5 states "For a period of nine (9) months following the date of my death, my personal representative may, but need not, disclaim or release all or any portion of a legacy, devise, bequest or power of appointment passing or created in one, unless already accepted by me." (Underline added.)

Until this trial in 2013, Aaron never saw the handwritten letter his dad wrote appointing him trustee of his dad's estate. VRP 146. The residue of the Don's estate was supposed to be given to the personal representative, Aaron. Page 2 of 5. Aaron, at Article 5 of Don's will admitted to probate, was appointed "as my personal representative."

The residuary clause at Article 4 states "I give all my remaining property in my estate not disposed by the foregoing provisions to the Personal Representative as appointed in Article 5 of this will." The trial court's conclusion, footnote 10, CP 136, is wrong. The will gave a definitive direction. Aaron "declined" to be personal representative, but he did not "disclaim" his inheritance under his father's will. VRP 153, 516. Lamp had Don's note since August 18, 2003. VRP 457. Lamp did not remember that he probated Don's estate. VRP 387. Lamp acknowledged that the residue of Don's will went to the personal representative, which was Aaron. VRP 480, 481, 489, 491-2. No cash, silver or coins were inventoried in Don's estate by Lonnie, Betty or Lamp. VRP 465, 469-470. The estate was closed in 2004 by Lamp. VRP 466. What Lamp wrote in the Petition in Don's estate, Ex. R-118, was completely contrary to Don's will and intent. This is also directly

contrary to Lamp's testimony that Don's will had a residuary clause. VRP 480-1.

Lamp was sought by Lonnie to draft a will for Betty. VRP 241-2, 386. After several requests, in the third deposition session of Lamp on August 6, 2013, a handwritten, undated letter written by Don was produced, which Lamp had in the probate files of Don. VRP 485. The letter states in part: "I have asked Aaron to take responsibility in looking after your mother. After she is gone, I want everything else divided between you boys or sold and the money divided (sic) between you." Lonnie knew of the letter at least on August 18, 2003, when he faxed it to Lamp, VRP 457, and testified that his mother found the letter in the hutch in the residence, but Lonnie and Betty kept it secret from Larry and Aaron. VRP 316, CP 26. VRP 138. Lonnie stated that the letter was not found until his dad died. VRP 330.

Lamp, in a completely false statement, testified under oath that he asked Aaron to sign a disclaimer and that Aaron signed a "disclaimer". VRP 481, 482. Lamp stated that a "declination" to serve as a personal representative would not be a "disclaimer". VRP 485. Lamp was asked by the court, at the trial in September 18, 2013, to search his records for Aaron's "disclaimer." VRP 485.

Washington's disclaimer statutes, RCW 11.86.021 and RCW 11.86.031, require a writing and filing in the probate file within nine (9) months of the death. Lamp unequivocally testified that he prepared the disclaimer and had Aaron sign it, VRP 483, 485, 486, 508, 509. However, no disclaimer was ever found or filed. VRP 516. Aaron was the beneficiary under Don's will, VRP 145, and Aaron never disclaimed his inheritance from Don. VRP 153. Lamp admitted that half of the estate reported in Betty's probate should have been in Don's estate. VRP 469-70. This half was to be given to Aaron. VRP 145, VRP 491.

After searching during lunch break on September 18, 2013, for Aaron's "disclaimer", however, attorney William Etter stated on the record that he searched Lamp's law firm records both paper files and electronic and that he could not locate any qualified "disclaimer" that was allegedly signed by Aaron. VRP 516. Lamp and Etter did not find a disclaimer executed by Aaron because Aaron never signed a disclaimer.

The estate of Donald Lowe was improperly and illegally distributed to Betty, not Aaron. Aaron is requesting that Don's will and letter of intent be honored and Don's residuary estate be distributed to Aaron.

Both Lonnie and Lamp knew the cash hoard was not reported in Don's estate before it was closed; half the cash hoard should have been distributed to Aaron Lowe.

Don's estate did not inventory any money, coins, gold or silver. VRP 325-6, Ex. R-122. The inventory filed in Don's estate consisted of the family home, another residence in Spokane at 737 North Napa, no cash, no stocks and bonds, various pieces of industrial equipment including a D9 caterpillar tractor, a back hoe, guns and tools. Ex. R-122.

None of the hoard was included in the inventory of Don's estate primarily because these precious metals had not been discovered yet by Lonnie or anyone else. VRP 465. Lonnie doesn't remember whether he ever told Lamp later that he found the coins, silver, and gold in 2003. VRP 325. Lamp received the handwritten letter in August 18, 2003 from Lonnie Lowe. VRP 457-8. The inventory in Don's estate was filed January 27, 2004. VRP 467. Lamp testified that he was not informed of the hoard from the basement of the Lowe family home when he drew Betty's will signed on September 15, 2003. If Lamp knew about the hoard, he would have inventoried it in Don's estate, but the hoard was not inventoried. VRP 469. Lonnie, however, found the hoard in 2003 and eventually took it all to Olympia and stored it in his

safe along with other items owned by him. VRP 69, 76, 78, 97. There is no proof that Betty authorized Lonnie to take the hoard into his custody.

The uncontradicted evidence in this case is that the will of Donald Lowe, Ex. P-31, CP 43-45, and handwritten note were known to Lonnie and Lamp prior to the time Don's estate was closed on April 15, of 2004. Findings of Fact 14, CP 320, CP 136. VRP 465, VRP 241. At least one 55-67 pound silver bar was sold in 2003 by Lonnie. VRP 110. Lamp would not, and did not, reopen Don's estate even to include assets four times larger than the existing inventory. VRP 496. Lamp stated that Don Lowe "...probably did not intend to give the residuary estate outright to any of the nominated individuals" and represented that it should go to Betty, who was not even given anything in Don's will, but who was named. VRP 394, 396. Lamp, after substituting his own intent for Don's intent, concluded, without any legal authority and with flawed legal analysis, that Don died intestate, completely disregarding the will and Don's written intent. Ex. P-31, 35. The will and note written by Don which clearly provided that Aaron was to receive Don's residual estate, and look after his mother. Lamp also verified that one half of the hoard would be community property and should be included in Don's probate. VRP 470.

Both Lonnie and Lamp had Don Lowe's letter at least on August 18, 2003, VRP 457, but collaborated to draft written instructions for Betty Lowe to sign. Ex. P-42, 43, 52, VRP 49. This assertion is contained in the Second Amended and Supplemental Petition, CP 16, Ex. P-9. Lonnie wanted to make the instructions bulletproof against what he feared was litigation from Aaron. VRP 323. Four (4) years elapsed from the written instructions until Betty's death, but a new will was never executed by Betty Lowe. VRP 500. This petition requests that Don's estate be distributed and awarded to Petitioner, Aaron, as intended by Don Lowe's will. Aaron recognized his dad's handwriting. VRP 146. Aaron never disclaimed his inheritance from his father. VRP 186. Aaron is requesting his inheritance from Don's estate.

Half of the hoard should be included in Don's estate.

The hoard was never identified in any traceable way in Betty's estate. Ex. P-19, Ex. R-105. VRP 465. Half of the hoard was owned by Don, who predeceased Betty. It was Don's testamentary intent that Aaron, not Lonnie or Betty, was to receive half the hoard. Aaron is requesting that he receive Don's portion of the hoard.

Betty's Power of Attorney Prevented any Gifts to Lonnie. Lonnie gifted cash of Betty to himself over eight years.

From 2003 on, Lonnie had a Power of Attorney (POA) from his mother, Betty L. Lowe, executed on September 15, 2003. Ex. P-10. VRP 67. The POA did not contain a clause allowing the holder of the power to receive gifts. Ex. P-10. Accordingly, Lonnie could not receive gifts from Betty.

Lonnie testified that from 2003 until her death, Betty allegedly gifted cash in the amount of three to four hundred dollars at a time to him personally over periods of time before her death without any written verification. VRP 95. VRP 268. Lonnie admitted that he has no written evidence of these alleged gifts. VRP 96.

The POA was also prepared by attorney Bob Lamp. VRP 460, 464. The POA was effective immediately. VRP 68. The POA was never revoked by Betty. VRP 68. The POA allowed gifting only to achieve free medical assistance. Betty never used this exception. VRP 465. There were no other provisions regarding gifting. VRP 465.

Lonnie stated "Everything that I took out of the chamber (the flume) I took to Olympia." VRP 263. "I placed it in the safe." VRP 78. He has had possession of the hoard since he took it. VRP 260. Lonnie testified that he received gifts from Betty "just over periods of time." The period of time was

from 2003 through 2011, VRP 95-96, but Lonnie never kept any records of when he received these gifts or the cash. VRP 96. Lonnie also admitted that from 2003 to the date of her death Betty gave him three or four hundred dollars at a time. VRP 268. The cash came from selling the hoard. VRP 97. Before Betty died, the alleged gifts were always "green backs" or currency. VRP 97. Lamp testified that a physical transfer would be required to make a gift to Lonnie. VRP 470. Lamp never counseled Lonnie or Betty in gifting. VRP 464. The durable power of attorney did not allow general gifting. The POA was signed by Betty and notarized by Lamp. The POA did not authorize any gifts to Lonnie, the attorney in fact.

The flume was deconstructed by Lonnie, rebuilt and camouflaged so it looked like no one had deconstructed and rebuilt the flume. VRP 71-76. Lonnie admits that he personally, and secretly, took the items that were in the bottom of the flume himself. VRP 78.

Lonnie's safe also stores his personal property. VRP 79. In contrast to Poindexter's independent testimony, Lonnie denies that the secret hideaway had any gold. VRP 72. Lonnie, however, admits to one large silver bar, but cannot remember how many other silver bars were in the hiding place in the Lowe family home on East Sharp. VRP 73-4. Lonnie

refuses to disclose what happened to the silver bars or give an estimate of how many of these cumbersome and heavy objects were in the secret hideaway in the flume. VRP 322, 324.

Don owned at least half of this hoard. The hoard was community property. Moreover, Don's portion of the hoard should have been inherited by Aaron in accordance with Don's testamentary intent.

In the late 1960's, Betty Lowe developed an addiction to amphetamine diet pills. VRP 132, VRP 157. After Betty's treatment for this addiction, Don handled all the couple's finances in order to limit Betty's access to diet pills. VRP 132. Don's letter verifies that he wanted Aaron to take care of his mother financially. Betty complained that Lonnie had her money. VRP 153. Betty regularly asked Aaron for money. Aaron gave it to her. VRP 133.

Aaron, when deposed on June 26, 2013, stated that when his father sold his automobile wrecking business, Don bought several silver bars. VRP 117. Aaron had this knowledge from his age of 14 on. VRP 117.

Lonnie admitted that he never had a list or any records of what he took of expenses and cash before his mother died. VRP 107, VRP 324. Although requested, Lonnie did not produce any records. VRP 108. It is

common knowledge that old gold and silver coins vary in value according to condition, date of issue and other circumstances. These coins were worth much more than face value of the coin because of their high content of silver and gold. VRP 118. Lonnie admitted that he sold large amounts of un-catalogued precious metals and coins amounting to over $226,000. VRP 87, VRP 74, 75. Lonnie never had any coins appraised as to the value beyond face value. Lonnie also did not photograph or inventory the hoard he took. VRP 104, VRP 474, VRP 75, 76, 73, 111, 322, 320. Lonnie never even asked someone else to count the coins or bars. VRP 325.

The hoard of Coins, Gold and Silver

Since the 1950's, Don owned a wrecking yard called Hanson Wrecking that was located in the 6200 block on East Sprague. VRP 116. Don was state president of a trade organization and music associations, VRP 135. To some extent, he was a politician. VRP 157. Don sold the wrecking yard about 1969, and he netted about $50,000. With the $50,000.00, Don then purchased large silver bars, silver U.S. coins, and gold coins. VRP 117. Aaron, as a child, would search for pre-1965 silver U.S. coins that Don obtained from banks. VRP 118. The pre-1965 coins had more silver content, and were worth much more than the face value of the coin. VRP 118-122.

Don never spent any of the hoard he collected. VRP 123. There were other coins, including gold coins, kept in Don's bedroom and these coins were the ones that were "collectible coins." VRP 138. "Collectable" coins were also stored in a maple hutch off the kitchen. VRP 138-9.

Poindexter, a family friend who often stayed at the family home, helped Don hide the gold and silver coins and bars in the fireplace flume in the basement of the Lowe home. VRP 209.

The family residence construction was centered around a fireplace flume or foundation. VRP 210. The base of the fireplace was in the basement that also housed the furnace. This chimney foundation flume was made of 8" by 8" by 16" cinder blocks, and the flume extends upward from the basement through the next floor and out through the roof. VRP 126-9. Poindexter removed a concrete block in the fireplace foundation behind some shelves and lowered the 55 to 67 pounds silver bars in a canvas bag with a piece of rope and then dumped the bars out of the bag since he could not touch the floor. VRP 211-212. The bars could not be lifted with one hand. VRP 214, VRP 122. Only one arm or shoulder could be inserted into this opening at a time. VRP 211-2. Poindexter replaced the cement block after

he lowered the bags of coins and silver bars, and re-grouted the cinder block back into place. VRP 214-5.

Two sets of shelving three quarters the size of the fireplace wall about 6 or 7 feet filled with "stuff" accumulated over 40 years was placed against the flume so a person could not see where the grout had been replaced. VRP 128-9. Nails secured the shelving to the blocks. VRP 69. After 2007, Aaron saw that piles in front of the shelves had ben moved. VRP 130. Until this case was started in 2012, Lonnie denied having the hoard. Aaron never actually knew that Lonnie took anything from the basement hideaway until the trial of this matter. VRP 148, VRP 131. Lonnie did not change his statements on the hoard until Lonnie knew Poindexter was still alive and that Poindexter could provide testimony regarding the hoard. VRP 148-9.

Lonnie testified that he removed portions of the hoard on three or four different occasions from 2003 to 2007. VRP 68-9. Lonnie testified that he took four 8 x 8 cinder blocks out of the opposite side of the fireplace flume and lifted the bags from their secret place they had been hiding for over forty (40) years. Regarding the silver bars, Lonnie now contends that "there were not that many of them" (large silver bars). VRP 260. However, Lonnie never counted them at the time or anytime afterwards. VRP 72, 74-6, 94-5,

111. The U.S. coins were never separated as Lonnie contended they were all junk silver. VRP 74. Lonnie sold one of the 55-67 pound silver bars and kept some of the money. VRP 94, 95. Many sales of the silver and gold were during his mother's life. VRP 95, 499. The entire record and especially the testimony at VRP 111, 71, 74, 75, 94, 96, 97, 475, and 479 prove complete failure to catalog and record the dates, value and condition of any coins found in the hoard. VRP 97. Aaron testified that some of the more valuable coins were kept upstairs. VRP 118, 138.

Lonnie never made any accounting; he was Betty's fiduciary.

Lonnie admitted that he never made a record of any of the hoard he secreted in 2003-2007. VRP 72. He testified that until his mother's death (2011), he didn't "keep track" of any of the property he removed from his parents' residence. VRP 111. Lonnie was the attorney in fact of a power of attorney in which his mother, Betty, was the grantor executed September 15, 2003. The POA was effective immediately, and the POA was in force at that time in effect for the rest of Betty L. Lowe's life. VRP 67-8. Lamp stated that the power of attorney created a "fiduciary responsibility" of Lonnie as holder of the power of attorney. VRP 460. Lonnie never "kept track" of how many bags he took out. VRP 71, 72. Therefore, he never gave Betty an

inventory record of Betty's property received by him under the POA.

Lonnie thought that the U.S. silver coins were all "junk" silver and that there were no collectible coins in the fireplace flume. VRP 74. Since Lonnie kept no records and no one else inventoried these precious items, it was impossible for Lonnie to know what "junk" silver or pure silver existed. VRP 74.

Lonnie has no evidence of gifts to him from Betty. VRP 96, 109. Lonnie was ordered by the Court to make a formal written appraisal, but did not verify the appraisal. CP 145, CP 334-9. In fact, in 2011 the spot price of silver went over $50.00 an ounce and gold was over $1,800 an ounce. Lonnie didn't know when or where, or to whom he sold any of the silver bars. VRP 110. He thought it might have been 2003. VRP 110. Lonnie has no receipts or records and never had any for the sale of silver bars. VRP 111. Lonnie didn't know how much he received for selling a silver bar. VRP 111. Lonnie never counted or photographed the silver coins. VRP 321, VRP 104. Lonnie has no record of what he sold and how much of these precious metals are left. VRP 321-2. By the time of his mother's death, he had secretly removed everything. VRP 111.

Until Lonnie found out that Poindexter was still alive, and knew about the hoard, Lonnie denied to his brothers that there was a hoard, that he had taken any gold and silver from the sealed flume. VRP 148. After his mother died in 2011, Lonnie still denied that any silver in large quantities existed. VRP 148. Lonnie never attempted to find an unbiased person to reconcile the original amount and balance the books on the hoard. VRP 325. Lonnie testified that checks of $10,000 were written to each of his brothers, but does not have a check supposedly written to Aaron. VRP 112. Aaron never saw the check and never received it. Aaron doubts the check ever existed. VRP 137.

Lonnie never gave Betty any receipts for these cash gifts and he has no record of the alleged gifts so there is no way to know the value of these gifts now. VRP 96. The cash allegedly came from the sale of silver taken from the family residence by Lonnie. VRP 97. Lonnie self gifted it to himself and helped himself to three or four hundred dollars at a time during Betty's life. From the coins and silver proceeds, Lonnie, without proof, contends that he paid for a roof on the house, a car, windows and bathroom fixtures. VRP 95. Lonnie kept no records of what he spent for his mother's benefit and what he kept as a gift. VRP 98, 109. Betty, due to cost, would

not purchase some of her medications. VRP 431. Aaron regularly gave Betty money. VRP 133, 147.

The September 7, 2007 and September 11, 2007 Written Instructions.

Lonnie testified that his mother gave him the written instructions signed by her, bearing the date of September 7, 2007. Ex. P-52, Ex. P-42. Even though the statute (RCW 11.12.260) requires a description of the person who is to receive the property and the property itself with "reasonable certainty", it does not apply to legal tender such as U.S. coins. The "Memorandum re Tangible Personal Property" in Betty's handwriting at Number 2 states "Lonnie Lowe any and all silver coins and bars to distribute in his discretion." Lonnie testified "I told her that knowing Aaron, he would sue me, so she should go to Bob Lamp and have it done that way." VRP 323. Lonnie anticipated litigation over his parent's property as far back as September of 2007. Betty's last will was dated September 15, 2003. Ex. P-15. The first written instruction was faxed to Lamp on September 7, 2007, from Lonnie. VRP 439, Ex. P-52, 498. Until that time, Lamp had not seen the document. Lamp drafted the second document in an attempt to comply with RCW 11.12.260. VRP 471-2. Lamp admitted that the phrase "As he shall determine with reasonable certainty" did not indicate "who" was to

receive it. VRP 471. This statement is too broad and violated the reasonable certainty designation of the recipient RCW 11.12.260, Lamp agreed. VRP 471.

The first memorandum executed September 3, 2007 did not have the clause "or to retain to himself." Lamp, not Betty, inserted the phrase in the written instruction. VRP 471-2. Lamp interpreted the provision to mean that Lonnie could, in the alternative distribute to "family" or keep everything himself. VRP 497-8. However, the first memorandum stated "If I make more than one Memorandum and if there is any inconsistency between them, this (first) Memorandum shall control as to the inconsistency." Ex. P-42. Lamp testified that the clause he added "to himself" complied with the inconsistency. VRP 472. The second Memorandum did not revoke, or even mention, the first Memorandum. Ex. P-43. Lamp testified that if an asset described in a written memorandum is sold or given away before the date of death, the asset does not pass by the written instruction but falls under the will as to that asset. VRP 499.

The *Haviland* (177 Wash.2d 68) vulnerable adult facts were proven.

Lonnie controlled all of Betty's finances from Olympia, while Aaron saw or talked to his mother daily because Aaron also lived in Spokane. VRP

151, 152. Since the 1960's, Betty did not ever have control of her money as she had a diet pill addiction. VRP 132. After that, the father controlled the finances. VRP 132. When Don sold the business, he bought a hoard of gold and silver and hid it. VRP 117, 210-212. It was never sold. Lonnie never gave any of the cash hoard to his mother when he found it, but took it to his safe in Olympia and had complete possession of the hoard all during his mother's remaining life. VRP 76. This is an illustration of the reciprocal of the golden rule "Whoever has the gold makes the rules." (Wikipedia, www.wikipedia.org, Google.com - current).

Betty was born in 1931, VRP 159, and would have been 60 years old in 1991, and later. Contrary to findings of fact No. 27, there was also testimony that Betty suffered from Alzheimers and dementia. VRP 134, VRP 428, VRP 44. As a doctor of chiropractic medicine, Lonnie was familiar with medications. VRP 272, 274. Lonnie obtained a memorandum allowing him to distribute personal items Betty owned at death. However, all the hoard was in Lonnie's safe. Betty did not have the items. Lonnie vowed to fight his brother with everything he had. Lonnie stated "I won't let mom." Lonnie was Betty's youngest son. Lonnie testified that he was "her favorite." VRP 238. Lonnie accompanied Betty to the attorney's office and was present

when she met with her attorney to draft her will appointing him as personal representative. VRP 388. Lamp made a decision to allow Lonnie to meet in Betty's will conference to let Lonnie "stay in the room" as she felt more comfortable with Lonnie in the room. VRP 384. Aaron knew about his mother's mental issues and knew Betty had limited resources. VRP 152. Lonnie also knew that Betty had limited resources. VRP 295-6. Betty complained to Aaron the "Lonnie's got my money." VRP 153. The mental and financial exploitation of Betty by Lonnie was as an abuser. VRP 152. Aaron's testimony conclusively established that Lonnie was Betty's financial abuser. VRP 151-2.

The U.S. Silver Coins

Lonnie admitted that he removed "thousands of coins" hidden in the flume. VRP 75. Half of the hoard was Don's community property. Exhibits in the case proved that in 2011 Lonnie Lowe sold about 35,000 of U.S. silver coins to the Northwest Territorial Mint. Ex. P-21, VRP 81-85. Several of these U.S. coins were part of the Betty Lowe estate since Lonnie could not receive gifts under the POA. Ex. P-10, Ex. R-106. Some of the U.S. silver, however, somehow allegedly ends up in her estate, but was sold before Betty Lowe's death. VRP 110, 111.

Lonnie Lowe's 2011 1040 Federal tax return was admitted. Ex. P-5, VRP 86, 88-92. At page 15 of the return, "silver coins" are listed. Under date acquired, it states "inherit." It lists date sold as 12/31/11, which is the end of the year, and not when these U.S. silver coins were taken and sold by Lonnie. No entry was carried forward from the schedule. No sales price or cost or adjustments are listed so no gain or loss was reported. The gross income of the $226,000 sold is never taken into Lonnie's income. Lonnie never kept a record of sales of the silver until his mother's death. VRP 111.

Tortious Interference

Lonnie, in an August 14, 2006 email (Ex P-27) stated "But I don't trust Aaron with anything and I won't let mom do any thing he says and I will fight him with everything I have." The chain of custody of all the hoard was from Don to the flume, VRP 211-2, and thereafter completely in possession of Lonnie. VRP 58. The written instructions that Lonnie obtained from his mother and faxed to Lamp, Ex. P-52, Ex. P-43, Ex. R-102, were intended to defeat Aaron's receipt of one third of the residue under his mother's will. Moreover, Lonnie's actions totally denied Aaron's right to inherit Don's portion of the hoard in accordance with Don's testamentary intent. Lonnie admitted he sent the email, VRP 300, and accused Aaron of "trying to take

over from my dad." VRP 300. Lonnie was in receipt of his dad's letter appointing Aaron to "take over" and care for Betty. VRP 315, 457-8. Until August of 2013, Aaron never knew that his dad wanted him to act as trustee of his mother and divide what was left of the assets.

Amendment of Petition

Petitioner, on August 23, 2013, filed its Second Petition to Amend and Supplement his Petition since Aaron had learned after 2012 many of the above referenced facts. CP 37-53. It requested that assets received from Don's estate be removed from the Betty's inventory; that a judgment be entered against Lonnie for the fair market value of assets sold, CP 50; a declaratory judgment listing all assets of the Donald Lowe estate be distributed to Aaron; that Lonnie be determined to be a financial abuser of Betty prohibiting him from receiving any gifts or inheritance, CP 51; that all assets transferred to Lonnie Lowe as holder of a power of attorney be restored as property of the estate of a judgment against Lonnie Lowe be entered; that the written instructions were ineffective to pass gifts of coins to Lonnie Lowe and that Lonnie Lowe be determined to be the financial abuser of Betty Lowe thereby prohibiting him from receiving any gifts or inheritances from Betty Lowe or her estate. The filing of Second Amended and Supplemental

Petition was denied. CP 19-20, CP 56-130, 133. Amendment is to be freely given.

Aaron also made an offer of proof of financial abuser, misuse of Lonnie Lowe's as attorney in fact of the power of attorney and failure to follow the intent of Donald Lowe. VRP 19-20. The Court denied the Motion to Amend and Supplement on August 30, 2013, CP 54-5. Aaron detailed the facts and proved that Lonnie was a financial abuser. VRP 151-153.

A Motion to Continue the trial to review the trial court's denial of the Second Amended and Supplemental Petition was filed by Petitioner, CP 56. It was denied on September 13, 2013 and Judge Maryann Moreno, who had only been assigned the case on August 9, 2013, VRP 14, ordered the case to be tried commencing on September 16, 2013. Judge Moreno thought she had presided over the case for a year. VRP 14. At trial, Petitioner also moved that burden of proof on proof of gifts was on the donee and also whether the power of attorney allowed a gift to the holder of the power. This burden of proof would also be on Lonnie Lowe. VRP 20-1. The Court erroneously held the burden of proof was on Aaron Lowe, not Lonnie Lowe. CP 143.

Attorney's Fees

The attorney for Lonnie personally, Greg Devlin, argued the case for both the estate and Lonnie personally. The representation of both is a

conflict. Attorney, William Etter, also took part in the trial (CP 516) even though both Robert Lamp, who testified extensively and materially on how the probates were handled and also drafted documents, VRP 241, and counseled Betty on her estate planning. VRP 386-387, VRP 241-243. The testimony of Lamp was likely to be adverse and at times did conflict with Lonnie's testimony. Especially on Don's estate. See RPC 3.7(b) comment. Examples are that Lamp testified that one half of the hidden hoard should be in Don's estate. VRP 469, 470. Lamp also testified that Lonnie should have kept a record of gifts to himself. VRP 460, 465. Lonnie admitted he had no evidence of gifts from Betty to him. VRP 96. Lonnie had the handwritten letter of Don as early as August of 2003. Don's estate was closed in 2004. Lonnie found the hoard in 2003 before Don's estate was closed. VRP 69. Robert Lamp testified that "Now isn't your experience, if there's a dispute or even a real concern about who gets the property that you don't represent both parties." VRP 490. A. Correct.

Q. In other words, a conflict?

A. If it was adversarial. Yes. VRP 490

On VRP 491 "Isn't it the practice, if you perceive that there's a question as to who gets the property, that you do not represent both parties."

A. Agreed.

Aaron proved that no formal appraisal was obtained by Lonnie. The Court in its opinion ordered one. CP 145. Aaron was the prevailing party on this issue and proved complete failure to account for the cash hoard from 2003 through the death of Don in 2003 and Betty in 2011, nevertheless, Aaron Lowe was ordered to pay attorney's fees. CP 316. Aaron was also successful in proving that the hoard should have been inventoried in Don's estate, proving Don's intent. Aaron presented first impression issues. Aaron should not have been assessed attorney fees. Aaron should be awarded fees.

III. SUMMARY OF THE ARGUMENT

One half of the coin inventory should be in Don's estate and distributed to Aaron. The written instructions cannot transfer the U.S. coins. The designations to Lonnie and others were uncertain as to asset, recipient, and exclude legal tender. The 2003 Power of Attorney prohibited all gifting from Betty to Lonnie. No gifts were proven by Lonnie. Lonnie tortiously interfered with Aaron's inheritance and was an abuser. Aaron proved secret transfer of the hoard by Lonnie to Lonnie's complete control, that no accounting was furnished and the Court ordered a formal appraisal. Lonnie should be removed as personal representative. The Second Amended Complaint should have been allowed.

Lonnie should get nothing from Betty's estate as he financially abused her from 2003 until her death. The entire record requires attorney's fees to Aaron and reversal of attorney's fees at the trial court level.

IV. ARGUMENT

Introduction

The trial court's opinion in this case characterizes this case as a will contest. The trial court devotes several pages upholding Betty Lowe's will.[1] CP 134-43. The trial court's opinion stated the issues to be testamentary capacity, CP 138, undue influence, CP 140, inter vivos gifting, ineffective instructions, CP 143, and removal of Lonnie as personal representative. CP 144. Prior to the time the case was assigned to the trial court, the Petitioner on November 2, 2012, filed An Amended and Supplemental Petition that was allowed. CP 11-25. This petition did not contest Betty's will. At VRP 40, Aaron Lowe's attorney on the record stated "There's no dispute that Betty Lowe's will is valid." Aaron believed the will was valid. VRP 157-8. Despite Aaron's Amended and Supplemental Petition and clarification before trial, the trial court's opinion, CP 140, states Aaron further alleges that his mother did not have the capacity to execute her will. "The burden of proof

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[1] The facts are incorporated by this reference into this argument section.

on this issue of testamentary capacity rests upon the party contesting the will." The Court referred to the Petition filed February 22, 2012, but the trial court never mentioned the Amended Petition filed and allowed November 2, 2012. The trial court's will contest memorandum opinion after the trial, at a minimum, confused what this case was about. Despite the denial of the amendment and the opening arguments, VRP 31, Aaron questioned alleged gifts, VRP 36, lack of appraisal, VRP 38, no inclusion in Don's estate, misuse of power of attorney, VRP 39. Lonnie concealed over a million dollars of assets of his parents for 8 years and alienated a lot of the money. The Second Amended Supplemental Petition was lodged August 23, 2013, CP 37-53, 54-5, but not allowed. It noted the Amended Petition and notes that the Second Amended Petition supplements the First Amended Petition of November 9, (sic) 2, 2012. The Court also refused to keep assets in Donald Lowe's estate out of Betty Lowe's estate inventory stating the issue was not relevant. VRP 494. The Findings of Fact No.'s 3, 10, 12, 13, 15, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 34, 35, and Conclusions of Law No.'s 1, 2, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26 are all disputed as not supported by evidence or applicable law.

The Court never discussed the legal tender issue of RCW 11.12.260(4) and held, CP 144, "All of the U.S. silver coins and bars pass to

Lonnie Lowe via the written instructions." The statute at (1) only applies to tangible personal property and at (4) legal tender is not tangible personal property that can be distributed by written instructions.

Lonnie should be removed as Personal Representative as he totally secreted his mother's assets and diverted them to him personally from 2003 on.

The Court erred by not removing Lonnie as Personal Representative and (POA) from 2003 on. As POA, Lonnie secretly took 80% of his parents' property from their home and told no one but his wife until Aaron, by this suit, revealed these actions. Lonnie never kept track of any of the property taken by him as a POA or as a fiduciary. The statement of the case outlines a total motive of Lonnie to get all the hoard and keep it for himself.

When a fiduciary fails to make an opening inventory or detail of when and how much was sold and how much he took, it is impossible to determine what is left. VRP 72-76, VRP 111. RCW 11.48.060 applies. It states:

> If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he or she shall stand chargeable, and be liable to the personal representative of the estate, in the value of the property so embezzled or alienated, together with any damage occasioned thereby, to be recovered for the benefit of the estate. (Underlining added.)

Merriam Webster dictionary, page 53, 3rd edition 1981 defines "alienate" as "to convey or transfer." Failure to remove Lonnie prevented restoration of the hoard to the Lowe estates. Lonnie's failure to inventory alone supports reversal of the trial court's rulings on these issues. *In re Martin's Estate,* 82 Wash. 226, 144 P. 42 (1914). Demand to inventory assets and refusal required an answer. *Id.* at 234.

In re Estate of Jones, 152 Wash.2d 1, 93 P.3d 147 (2004) the Court held: "The trial court's removal of Russell Jones as a personal representative was based on several breaches of fiduciary duty. These breaches included using estate property for personal use, commingling estate funds and refusing to disclose information to the beneficiaries." *Id.* at 11-12. Until this case was commenced, Lonnie never told anyone else that he found his parents' hoard. Lonnie sold $226,000 of coins without formal appraisal. When the personal representative, prior to the estate, takes property, depletes the estate personally and abuser facts are present, the personal representative must be removed by the Court. RCW 11.48.060, 070; *In re Estate of Haviland,* 177 Wash.2d 68, 73, 301 P.3d 31 (2103). Lonnie never gave anyone a copy of the handwritten note indicating that Aaron was to get Don's estate to distribute. VRP 108. Until Lonnie found out that Poindexter was alive, Lonnie lied to his brothers, and denied that the hoard existed and that he had taken it. VRP

148. Even after being ordered by the Court, Lonnie never obtained a formal verified appraisal of all the estate property he had. CP 145, CP 334-339. *Allard v. Pacific National Bank,* 99 Wash.2d 394, 663 P.2d 104 (1983) in part provides: "The trustee duty includes the responsibility to inform the beneficiaries fully of all facts." *Id.* at 404. Like in re *Matter of Estate of Cooper,* 81 Wash.App. 79, 94, 913 P.2d 393 (1996) retaining Lonnie who wants to fight Aaron with everything he has only "insures more litigation." *Id.* at 95. This is improper and unfaithful conduct. *Jones, supra* at 12, 15.

RCW 11.28.250 allows removal of the PR for any other cause or reason to which to the Court appears necessary. Aaron requested a detailed inventory in his amended petition, CP 22. Aaron prevailed in his request and the court ordered it, but charged him attorneys fees for proving the need. Aaron objected to the findings of Lonnie, CP 97, but the Court allowed all of the requested fees. CP 133, CP 315-7, 329. CR 15(a) states "Leave shall be freely given when justice so requires evidence that comes to light during discovery allows amendments. *Denny's Restaurants v. Security Union Title,* 71 Wash.App. 194, 213, 859 P.2d 619 (1993). Estate litigation allows amendments as the probate is ongoing. *Lind v. Frick,* 15 Wash.App. 614, 617, 550 P.2d 709 (1976). Probate courts have "broad authority." *Foster v.*

Gilliam, 165 Wash.App. 33, 46, 268 P.3d 945 (2011); *In re Martin's Estate,* 82 Wash. 226, 144 P. 42 (1914).

There was simply no will contest at issue, and why the trial court focused on this non-issue is perplexing. The issue in this appeal is Lonnie's attempt to convey gold and silver to himself that were in his possession, not in Betty's possession and whether the written instructions comply with the statute, RCW 11.12.260, whether Lonnie was an abuser, and gets nothing, and whether Lonnie tortiously interfered with Aaron's inheritance in both estates. Since Lonnie stole the hoard and is an abuser, Lonnie should receive nothing under the Lowe estates.

One half of the hoard should have been distributed to Aaron as Don's residuary heir.

Lamp, the probate attorney of Don's estate, was asked "Wouldn't some of the property be Donald Lowe's property?" VRP 470. Lamp answered "If it were community property, one half would be his (Don's)." The hoard was acquired during Don and Betty's marriage. VRP 116-17. The hoard is presumed to be community property of which Don owned half. RCW 26.16.030(1), VRP 172.

The breach of fiduciary duty by Lonnie and Betty in Don's estate was discovered September 12, 2012, or later. VRP 131, 146-7, 79-80. The

discovery rule of RCW 11.96A.070, RCW 4.16.180 and 190(1), or similar laws, tolls any statute of limitations, if in fact or law, the limitations period applies. *August v. U.S. Bancorp,* 146 Wash.App. 328, 341, 190 P.3d 86 (2008); *Foster v. Gilliam,* 165 Wash.App. 33, 51, 268 P.3d 945 (2011); and *Green v. A.P.C.,* 136 Wash.2d 87, 960 P.2d 912 (1998). Rather than follow Don's testamentary intent, Lonnie's view of the law is essentially "...finders keepers...losers weepers..." Lonnie secretly found and took the gold and silver hoard despite Don's letter and will. The omitted assets are community property and one half is to be inventoried in Donald E. Lowe's estate, and ultimately distributed to Aaron.

Like in *Rubenser v. Felice,* 58 Wash.2d 862, 365 P.2d 320 (1961) and *In re Estate of Sherry,* 158 Wash.App. 69, 240 P.3d 1182 (2010), the issue is whether the estate of Betty, which is not yet distributed, has the correct inventory to distribute. Don did not die intestate. No statute or any authority gives any probate attorney the right to substitute the attorney's incorrect conclusion contrary to the words written by the testator. The intent of the testator controls. RCW 11.12.230. The Amended and Supplemental Petition, CP 11-23, alleges (CP 16) that others acted in concert with Lonnie. Lonnie claims that Don's estate went to his mother. VRP 330. Lonnie, referencing Don's will, stated that Lamp ". . .got it null and void." VRP 61. Don knew

that Betty could not handle money due to her addiction. VRP 132. He wanted Aaron to handle Betty's money. The result was opposite to Don's intent and estate plan. Aaron should be awarded Don's portion of the hoard and a judgment against Lonnie for the difference between Poindexter's accounting of the hoard and what is left. The measure is the highest interim value. RCW 11.48.060 applies. Accordingly, this matter must be reversed and remanded so the trial court can distribute Don's estate to Aaron.

The Written Instructions could not transfer U.S. silver coins, the hoard left was all U.S. silver coins.

Betty's written instructions cannot apply to the U.S. silver coins and bars. The items, i.e. thousand of coins, are not described, nor are the recipients. Lonnie was not included in the first draft and Betty also wanted to give to others who were undefined.

The statute at RCW 11.12.260(1) states that the instructions only allow "tangible personal property" to be disposed of under the statute. Therefore, since U.S. coins are normal legal tender, it is clear that the coins cannot be effective to be distributed under the statute. Lamp added the typed addition referring to Lonnie "in an abundance of caution." VRP 443. He tried to execute it with the formalities of a "will or codicil." VRP 440. The

written instruction statute is not a catch all. A will or intestate succession is the only way to convey undescribed assets.

In this situation, if the instructions are a last will, Aaron and Larry would be pretermitted. Under the statute, they would be omitted children, and they would each get one third of the estate. (See e.g. RCW 11.12.091(1)). VRP 471. Betty had eight (8) years to change her will to give Lonnie everything he took in 2003-2007, but she did not.

The hoard could not be ascertained by Betty as it was not in her possession. Lonnie had it in his safe in Olympia. At the time the written instructions were signed on September 11, 2007, neither Betty, Lonnie, or anyone else could even list the number of U.S. coins, let alone describe even the denominations with reasonable certainty as required in the statute. Poindexter took the only inventory ever taken by anyone. A conservative estimate of the value of the hoard in 2011 would be well over one and one half million dollars.

The descriptions of recipients is likewise impossible since both Lonnie and to "distribute as he shall determine" is a total lack of recipient. The statute excludes money as it is "legal tender." RCW 11.12.260(4). In the United States, all currency is issued by the federal government. Only Congress can coin money. U.S. Const. art 1, § 8, cl. 4; § 10. Legal tender

is defined in 31 U.S.C. § 5103 as "United States coins" and excepts Krugerrands as they are "foreign coins." Lonnie Lowe stated that there were no foreign coins, and only nine (9) U.S. gold coins. VRP 72. They were not even mentioned as gold and were found elsewhere. VRP 72. The 1000 ounce bars were not inventoried and were adeemed prior to Betty's death, VRP 499, 260, 261, 72, so could not pass by the instructions. Accordingly, even assuming that Betty's instruction is legally valid, and Aaron asserts that it is not valid for all the reasons outlined above, subsection (4) of the statute provides that all of the U.S. coins, currency and any other U.S. currency in Betty's estate cannot pass to Lonnie under Betty's instruction because the U.S. coins are legal tender. Price and Donaldson, "*Price on Contemporary Estate Planning*" § 4.19.4 page 4033 (CCH Wolters Kluwer 2014 ed.) states that "items of substantial value should not be disposed of by an informal list"..."Coins and currency should not be disposed of under this provision because the section applies to items 'other than money'." At § 4.16.4 page 4026 the treatise also notes that "the item might pass to a person who had no appreciation" (of it). Normally, mementos that have personal sentimental value are provided for in the written instructions. Here, Lonnie sold the U.S. coins immediately. VRP 81-85.

The Court's plain meaning ruling is erroneous, CP 144. It is abundantly clear that all the thousands of U.S. coins admitted by Lonnie to be taken by him, VRP 75, are legal U.S. tender and are to pass under the residuary clause of the will. In addition, they were not described with reasonable certainty and the recipients were not described with reasonable certainty. The first written instruction declared that the first memorandum controls if there is an inconsistency.

The Power of Attorney did not allow the gifts to Lonnie Lowe.

Aaron moved at trial that the burden of proof on the gifting was on the donee. VRP 20-1. The court improperly imposed the burden on Aaron. CP 143. RCW 11.94.050 in part provides that a Power of Attorney must specifically provide "...to make any gifts of property owned by the principal." Betty appointed Lonnie as her attorney in fact on September 15, 2003. Ex. P-10. The POA contained a clause at page 3, number 5, that "...gifts could be made for the purposes of qualifying me for medical assistance or the limited casualty program for the medically needy."

Lamp correctly testified that this provision would not apply unless it was used only to get medical assistance. VRP 465. A donee must prove all the elements of a gift by clear, cogent, and convincing evidence. *Estate of Lennon v. Lennon*, 108 Wash.App. 167, 29 P.3d 1258 (2001) holds that a

holder of a power of attorney cannot gift to himself. *Id.* at 183. *Estate of Aguirre v. Koruga*, 42 Fed.Appx. 73, 2002 WL 1579746 *3 (9th Cir. 2002) follows *Lennon* and requires "Evidence that the specific gift was authorized by the principal." It also lists the elements of a completed gift and that the heavy burden of proof is on the donee. *Id.* at 181-2.

In re Hamilton's Estate, 26 Wash.2d 363, 147 P.2d 301 (1946) held "A gift will not be presumed, but one who asserts title by this means must prove it by clear, convincing, strong and satisfactory evidence." *Id.* at 368. The Court denied the alleged gift of jewelry stating "We do not find any evidence that the brooch was ever given to Appellant." *Id.* at 367. "The burden rests upon a party to litigation who seeks to prove a gift in his favor." *Whalen v. Lanier,* 29 Wash.2d 299, 310 (1947).

The elements of a completed gift are: "(1) an intention of the donor currently to give; (2) a subject matter capable of passing by delivery; (3) a delivery as perfect as the nature of the property and the circumstances; surroundings will reasonably permit; and (4) an acceptance by the donee." *Lennon, supra* at 181.

Lonnie contends that his mother gifted him cash during her life. He When asked, Lonnie replied, "Q: What written evidence do you have of the

gifts? A: None." VRP 96. He also stated he got all cash and had no receipts or written records. VRP 96.

A gift is not presumed. *In re Gallinger's Estate*, 31 Wash.2d 823, 829, 199 P.2d 575 (1948). Actual delivery of a gift must be made to the donee. The delivery of the gift must be actual, constructive or symbolical and perfect as the circumstances permit. *McCarton v. Estate of Watson,* 39 Wash.App. 358, 364, 693 P.2d 192 (1984). Here, the circumstances would require a written document, not total lack of evidence.

The Court's memorandum opinion, CP 143, on the gift issue states "There is no proof that Lonnie gifted any of the metals to himself. The only silver bar wold was a 1000 ounce bar, the proceeds of which were used for improvements to Betty's home." There is no evidence in the record to support this finding. The reasons are that Lonnie didn't know when he sold the bar or how much he received. VRP 110, VRP 94. Lonnie didn't remember what the roof cost. VRP 109. He never kept track of anything he sold during his mother's life. VRP 98. Lonnie said he only removed one silver bar from the hoard. VRP 94. He didn't remember how many silver bars were in the hoard. VRP 73-4. Lonnie admitted to one but later said "bars". VRP 95. He also admitted there were "smaller bars." VRP 267. He

admitted "There were not that many of them." VRP 260. The reference was to silver bars the size of a loaf of bread. VRP 260.

Silver sold for $10 to $45 an ounce during theses periods. Even at the minimum price, one bar would well for over $10,000 as the minimum was 55 pounds. Lonnie testified that his mother gave him cash gifts from the silver sales amounting to three or four hundred dollars at a time. VRP 268, 95-6. The cash came from sales of the hoard. VRP 97. He never kept track of his possession of over a million dollars of gold and silver that did not belong to him. Roofing a $100,000 small house would cost less than $10,000. Betty sold a house on Napa Street in 2007 and distributed $10,000 to each of two sons, but not to Aaron. Betty received approximately $100,000.00 from the Napa Street property. VRP 99-100. She might have used the Napa sale money to get the roof and other repairs. Vague, untraced, unknown cost and timeline from 2003 on is illusory. 22 silver bars, when sold, would yield at least $220,000 at a minimum and $1,100,000 at a maximum.

Lonnie's testimony is that he always handled all the money for Betty. VRP 78, 85, 94-5, 97, 265. Lonnie placed Betty's cash in his safe. VRP 267, 311, 336, 340. Where the POA did not permit gifts in general, a unilateral gift to the holder of a POA is not legally possible. Accordingly, those illegal alleged gifts from Lonnie, as POA, to himself must be returned to Betty's

estate. See, e.g., RCW 11.48.060. Continuing and consistent case authority prohibits gifts from the grantor to the attorney in fact, unless the document specifically contains the authority.

In Estate of Lennon v. Lennon, 108 Wash.App. 167, 29 P.3d 1258 (2008) no ownership interest was proven to unilaterally make gifts to the holder of the power of attorney. *Id.* at 182. Lonnie testified that the hoard did not belong to him at least during his mother's life. VRP 97. He never had any evidence of a unilateral gift to himself.

The hoard was hidden for the reason that Betty had a past problem with drug addiction. VRP 132. Lonnie found the hoard after his Dad's death. Lonnie always had the hoard in his personal possession from 2003 forward, and it was not in Betty's possession. VRP 78, 109-112, 74-5, 85.

In *Dingley v. Robinson*, 149 Wash. 301, 270 P. 1018 (1928), the son "attended to the details" of the mother's business, and had access to the mother's safety deposit box. *Id.* at 302. The case denied self dealing gifts alleged from joint control funds.

A POA does not permit gifts of community property. *Bryant v. Bryant*, 125 Wash.2d 113, 114, 882 P.2d 169 (1994). *Scott v. Goldman*, 82 Wash.App. 1, 917 P.2d 131 (1996) holds "Courts strictly construe the powers set forth in a general power of attorney." *Id.* at 6.

The leading treatise on Washington estate law is Price and Donaldson, "*Price on Contemporary Estate Planning*", § 2.4.4., page 2015 (CCH Wolters Kluwer 2014 ed.) states: "...gifts made by an attorney-in-fact acting under a durable power of attorney may be revocable by the principal and thus incomplete unless the attorney-in-fact is expressly authorized to make gifts." The same treatise at § 4.36.1, page 4083 states:

> *Agent is Subject to Fiduciary Duties.* An agent under a power of attorney is a fiduciary and, as such, is subject to a strict duty of loyalty that requires the agent to act "solely for the benefit of his or her principal in all matters connected with the agency and adhere faithfully to the instructions of the principal...An agent's duty is to act solely for the benefit of the principal in all matters connected with the agency, even at the expense of the agent's own interest."

Cited as authority is *Crosby v. Leuhrs*, 669 N.W.2d 635, 643-44 (Neb. 2003). It is completely in point and holds self dealing is constructive fraud. *Casey v. C.I.R.*, 948 F.2d 895 (4th Cir. 1991) also holds that self dealing gifts are invalid.

Lamp confirmed that Lonnie, by virtue of the power of attorney, had a fiduciary duty. VRP 460. Lonnie had no authority to gift any of the hoard of Betty to himself.

Betty was also legally incapable of "gifting" Don's community property to Lonnie that was bequeathed to Aaron. *See, e.g., In re McCoy's Estate*, 189 Wash. 103, 110, 63 P.2d 522 (1937).

The Trial Court, in it's Memorandum Opinion, CP 143, incorrectly states "However, the evidence reflects only that Betty gifted small amounts of cash directly to Lonnie infrequently." This does not recognize Aaron's testimony that Betty stated "Lonnie's got my money, I need something to live on." VRP 153. Lonnie testified that usually when anything was sold, his mother gave him three or four hundred dollars "when we would sell stuff." VRP 268.

The trial court conclusion that the gifts were only small amounts is completely in error. There was no evidentiary support on the small size of the gifts. Three or four hundred dollars is not a "small amount" especially when Lonnie testified that the gifts occurred from 2003 until 2011 and he had over a million dollars in his possession. VRP 95-6. The cash came from the hoard that Lonnie took from the flume. VRP 94-95. It is not possible to conclude the gifts were small when there is no evidence that 8 years of sales took place.

The independent evidence is that Betty never made any cash gifts to Lonnie. Betty never discussed the disposition of the hoard when it was

discovered. VRP 259. It is undisputed that Poindexter counted the size of the hoard. Each Krugerrand contains one ounce of gold, and sells for over a thousand dollars each. VRP 214, 219, 220, 212, 213. The bag of gold coins would be worth at least several hundred thousand dollars.

Betty had very limited resources to live on. VRP 152-3. Lonnie testified that all Betty had was social security and income from cleaning houses. VRP 295-6. Aaron regularly gave money to his mother.

It is illogical that Lonnie, who made a net income of $132,234 in 2011 (Ex.P-5), would even accept or receive gifts from his low income mother. The entire record proves that Lonnie never recorded or kept track of anything, including sales from the hoard. VRP 76, 94, 110, 111. Lonnie has no evidence or no records whatsoever. VRP 96. The Court's conclusion of small amounts lacks evidence to support it, is contrary to the record and it must be reversed and include these illegal "gifts" from Lonnie-to-Lonnie added back into the Lowe estates. If the trial court's decision is upheld and condoned, the fiduciary duty of holders of POA is obliterated in this state.

The abuser statute was violated; Lonnie Lowe receives nothing and must pay the estate.

RCW 74.34.020(2) defines "abuse" to include exploitation of a vulnerable adult; (6)(a) defines financial exploitation as control over property

of the vulnerable adult for the controlling person's profit; 6(b) defines breach of fiduciary duty to include misuse of a power of attorney and unauthorized appropriation of property for the person's benefit; 6(c) includes obtaining the vulnerable adult's property without lawful authority; (8) references 11.88.010(1)(b). It states that a person is deemed incapacitated where the vulnerable adult is at significant risk of financial harm "based on a demonstrated inability to adequately manage property or financial affairs." Testimony in the case proved Betty's inability to handle funds due to addiction. VRP 132, 157. RCW 74.34.020(a) defines a vulnerable adult as a person over 60 who has functional inability to care for herself; (b) includes inability under RCW 11.88 to be unable to financially care for herself. The chapter is to be "broadly" construed. RCW 11.84.900. When RCW 11.48.060, 070 are also considered, the damages are the entire hoard inventoried only by Poindexter. VRP 218-9, 212-4.

In re Estate of Haviland, 177 Wash.2d 68, 301 P.3d 31 (2013), holds that a distribution of assets that pass outside of probate or in probate prevent receipt by a financial abuser. *Id.* at 76. The statute is applied to the distribution even though the "abuse itself occurred in the past," *ibid.* at 76. RCW 11.84.900 construes the statutes broadly as the policy is "that no person shall be allowed to profit by his own wrong, wherever committed."

Haviland, *id.* at 77. RCW 74.34.110(1) allows a petition for an order for relief from financial exploitation. Damages are allowable. *Haviland, supra,* at 81.

All of the *Haviland* factors are set forth in the factual part of this brief and throughout are factually attributable to Lonnie's abuse of Betty. Financial abuse by transferring assets occurred in *Haviland, id.* at 72, and in this case. Lonnie never allowed his mother to possess the extremely valuable hoard. Lonnie always possessed this hoard and doled it out to himself and his low income mother. VRP 78-9. Betty complained to Aaron. VRP 98, 109. Change of co personal representatives occurred in *Haviland. Id.* at 72. Here, Aaron was never informed of his fathers wishes. Lonnie took the parent's assets. In *Haviland,* the abuser received a "nest egg" *id.* at 72. In *Haviland,* the abuser diverted substantially all the assets, except a small piece of real estate to the abuser. *Ibid.* at 73. Lonnie's actions were essentially the same as the abuser in *Haviland.*

The abuser in *Haviland,* like Lonnie, filed a petition "to determine whether Ms. Haviland engaged in a pattern of transferring assets from Dr. Haviland's estate for her and her designee's benefit." The Court stated at page 73:

> FN1, "No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following." RCW 11.84.020. An abuser is "any person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult" RCW 11.84.010(1).

Aaron, on August 23, 2013, moved to file his Second Amended and Supplemental Petition that included the abuser facts. CP 37-53. The trial court denied the motion on September 23, 2013. CP 54-55. Aaron appealed to this Court (No. 318991) a Motion to Continue Trial was filed based on the discretionary review. CP 56-130. The review was denied.

An offer of proof at the trial court was made that Lonnie was the financial abuser of Betty. VRP 19-20. RCW 74.34.020(2) includes exploitation of vulnerable adults, .020(2)(d) "means" causing a vulnerable adult to "act in a way that is inconsistent with relevant past behavior." Here, Lonnie kept all the hoard, rather than allow Don's will to distribute Don's assets to Aaron. Ex. P-14, Ex. P-15. Lonnie took possession of assets worth at least several hundred thousands of dollars and possibly millions of dollars. Betty couldn't remove the hoard from Lonnie's safe. Prior to Lonnie's removal, he was not entrusted with the hoard by his parents. They were hidden. When RCW 11.88.010(1)(b) applies, Betty didn't have the functional ability to financially care for herself due to her pill addiction and

general lack of finances. Betty always needed financial help from Aaron. VRP 151-153. RCW 74.34.020(17)(a) and (b) apply for the reason that she couldn't handle money and even if she could handle money "Lonnie's got my money." VRP 153. The financial abuser elements were proven. Lonnie was an abuser of Betty. This case must be reversed and remanded on this issue.

The failure to allow the Second Amended and Supplemental Petition is reversible error.

Rule 15(d) of the rules for Superior Court allows a supplemental pleading for events that "...occur which have happened since the date of the pleading sought to be supplemented." The letter of Don, not previously disclosed and in the exclusive control of Lonnie, was found long after February 22, 2012, the date of the First Amended Petition.

CR 15(a) states that "Leave shall be freely given when justice so requires." Aaron should have been permitted to amend his pleadings as more information regarding Lonnie's behavior was discovered. If Lonnie violated the abuser statute, he would not be able to inherit from his mother's estate, thereby increasing the remaining heirs' portion of the estate.

Caruso v. Local Union 690, 100 Wash.2d 343, 670 P.2d 240 (Wash. 1983) *id* at 351, holds claims that arise out of the same conduct are allowed. This litigation is in an estate case. *Lind v. Frick,* 15 Wash.App. 614, 550

P.2d 709 (1976) allowed an amendment stating "Modern rules of procedure are intended to allow the courts to reach the merits, as opposed to disposition on technical niceties." *Id.* at 617. Lonnie served in a fiduciary capacity from 2003 on. He is not excused from "actions while he served in this position." *Foster v. Gilliam*, 165 Wash.App. 33, 50, 268 P.3d 945 (2011). *Foster* also states that claims for breach of trust are equitable claims, *id.* at 48, and the probate court has broad authority to "settle all estate and trust matters." Citing RCW 11.96A.020. *Id.* at 46.

The court abused its discretion by denying Aaron's motion to amend so all the issues could have been decided on their merits, including issues that are uncovered during discovery. *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wash.App. 194, 213, 859 P.2d 619 (1993).

This Court's admonition in *Keck v. Collins*, 181 Wash.App. 67, 88, 325 P.3d 306 (2014) that technicalities cannot control the merits applies. Here, both Lonnie and Lamp did not comply with Aaron's subpoena. VRP 387-388. Lonnie was in possession of the facts and not prejudiced. Where the case involves an accounting, the equitable side of the court allows amendment to conform to the evidence. *Goupille v. Chaput*, 43 Wash. 702, 707, 86 P. 1058 (1906).

The motion to amend was timely as an amendment is allowed any time. *Federal Rubber Co. v. M.M. Stewart Co.,* 180 Wash. 625, 630, 41 P.2d 158 (1935). "Thus a motion's timeliness alone, without more, is generally an improper reason to deny a motion to amend". *Quality Rock Products v. Thurston County,* 126 Wash.App. 250, 273, 108 P.3d 805 (2005).

Attorney's Fees

Aaron Lowe in his Amended and Supplemental Petition, CP 11-22, requested a detailed inventory and a complete and adequate accounting. The Court agreed, CP 145, and ordered it. Aaron also proved that Lonnie removed at least $430,000 of the hoard from his parents house, had it under Lonnie's complete personal dominion and control and never made any record of any of it. Inexplicably, even though the Court ordered a complete formal appraisal, it ordered Aaron to pay Lonnie's attorney's fees. Conclusions of Law 26, CP 326, included fees for conflicting capacities as the court awarded fees for Lonnie "individually and as personal representative." Lonnie never complied with the Court Order as the report he made did not represent that he valued all coins he had left in his safe. Moreover, Lonnie did not swear to the formal inventory, nor did the appraiser. CP 334-39.

Attorney Greg Devlin, in applying for attorney's fees, stated that he represented Lonnie personally and also the estate. CP 232, 285. This is a

clear ethical violation since Devlin cannot represent both parties adverse one to the other. *See, e.g., Matter of Disciplinary Proceeding Against McMullen,* 127 Wash.2d 150, 164, 896 P.2d 1281 (1995). Lonnie was not the prevailing party as a fiduciary under the Power of Attorney or as Personal Representative. Aaron obtained relief to the Estate. To obtain attorney's fees, the attorney must show that the fees "...were reasonably necessary for the estate." In the *Matter of Estate of Larson,* 103 Wash.2d 517, 531, 694 P.2d 1051 (1985). The award to Lonnie depleted the estate. Logically, since the court decided the will contest, which was moot, Lonnie did not prevail in the will contest.

The argument on the instructions were vulnerable adult and tortious interference first impression in this state. Where the attorney represented a claimant and later represented the estate, no fees were allowed as conflicting interest were represented. *Matter of Estate of Shano,* 869 P.2d 1203, 1209 (Ariz. 1993). Here, the attorney defended gifts and instructions benefitting Lonnie personally and also the estate at the same time, which is another ethical violation by Devlin. Aaron proved that a formal appraisal was needed and the Court ordered it. Aaron prevailed and should not have been charged fees, but Aaron should have received fees. The court in *Allard v. Pacific National Bank*, 99 Wash.2d 394, 401-2, 663 P.2d 104 (1983), reversed an

award to the estate as it held failure to obtain an appraisal was a breach of fiduciary duty. The beneficiaries prevailed. *Id.* at 408.

Lonnie did not keep accounts or obtain a formal appraisal. Lonnie sold $226,000 of U.S. coins and never accounted for them. Lonnie should pay Aaron the fees personally both before the trial court and this court. *Matter of Estate of Cooper*, 81 Wash.App. 79, 92, 913 P.2d 393 (1996). The court in *Bale v. Allison*, 173 Wash.App. 435, 460, 294 P.3d 789 (2013), denied attorneys fees where unique issues are involved. Aaron did not ask for personal relief. Aaron wanted Lonnie to return the property to the probates as Lonnie was an abuser, that a proper accounting be filed, tortiously interfered with his right to inherit under the wills of Betty and Don. VRP 148, 152, 154. "All those things go back into the residuary of the estate." VRP 163. Aaron tried to restore assets to both estates and asked for nothing personally. CP 21, 22. There were four (4) parties involved in this suit. Lonnie individually contended that his mother gave him lifetime gifts, Lonnie as personal representative of Betty's estate, Aaron as beneficiary of Don's and also Betty's estate. An executor, executrix or administrator of an estate of a deceased person acts in a trust capacity, and must conform to the rules governing a trustee, *Matter of Drinkwater's Estate*, 22 Wash.App. 26, 30, 587 P.2d 606 (1978), "A fiduciary stands in a fiduciary relation." *Ibid.* at 30.

Aaron asked the court to declare his rights and "clarify Respondent's obligations." CP 22. He proved that he did not disclaim his rights under Don's will, proved that there was no disclaimer of his right to inherit from Don's will, obtained production of Don's handwritten letter, proved that there was no formal appraisal and that no appraisal was possible of the 35,000 of coins sold, proved that Lonnie never had any evidence of purported gifts to himself from Betty and found out who took Don's hidden cash hoard, yet was assessed attorneys fees.

In re Estate of Black, 116 Wash.App. 476, 66 P.3d 670 (2003) reversed an award of attorneys fees where two wills were involved stating "The Estate benefits when all competing interests of all beneficiaries are resolved, regardless of out come." *Id* at 491. Lonnie's hostility was proven by his emails and failure to admit taking the hoard, keeping his actions secret and failing to produce documents. VRP 108, 68, 80, 317, 146, 148-9, 150, 152, 322-4. Like the co-trustee in *Foster v. Gilliam*, 165 Wash.App. 33, 268 P.3d 945 (2011), Lonnie "was obstructive from the beginning" and should not receive attorneys fees. *Id.* at 66.

Washington follows the American rule of not awarding fees when multiple parties are involved and concurrent representative violates the RPC's (former RPC 1.7). *LK Operating, LLC v. Collection Group, LLC*, 181

Wash.2d 117, 123, 330 P.3d 190 (Wash. 2014). In *Bale v. Allison, supra* at 461the court held "...because this case involved a unique issue - whether quit claim deed gifting property must recite consideration - we conclude an award of fees to either party is unwarranted." See, e.g., *In re Estate of Burks v. Kidd*, 124 Wash.App. 327, 333, 100 P.3d 328 (2004) (declining to award fees under RCW 11.96A.150 because of the unique issues in the case); *In re Estate of D'Agosto*, 134 Wash.App. 390, 402, 139 P.3d 1125 (2006) declining to award fees under RCW 11.96A.150 because the case involved novel issues of statutory construction.

Aaron prevailed on ordering a formal appraisal of coins and also proved that the hoard was never inventoried in Don's estate. See, e.g., *Estate of Lennon v. Lennon*, 108 Wash.App. 167, 185 29 P.3d 1258 (2001) applies and denies fees. The court in *Estate of Jones*, 170 Wash.App. 594, 612, 287 P.3d 610 (2012) held attorneys fees are denied when both parties prevail.

Attorney's Fees under RAP 18.1

Here, Aaron requests attorneys fees and expenses on appeal. See, e.g., RAP 18.1. Aaron will have prevailed as a beneficiary restoring assets to the estates. *In re Wheeler's Estate,* 71 Wash.2d 789, 797, 431 P.2d 608 (1967); *Matter of the Estates of Mathwig*, 68 Wash.App. 472, 479, 843 P.2d 1112 (1993). Accordingly, Aaron must be awarded fees and costs.

Lonnie Lowe intentionally interfered with Aaron Lowe's right to inheritance.

The trial court improperly concluded "...there is no proof offered that Lonnie Intentionally interfered with that expectancy." CP 146. This is completely erroneous.

Lonnie diverted 80% of the parents community assets to Lonnie. Lonnie Lowe's admissions prove the wrongful interference. During 2011, when gold and silver were at an all time high, Aaron could have recognized a much greater gain than currently.

The entire record in this case proves intentional interference. The Court noted that Washington has not accepted the tort of intentional interference with inheritance or gift. CP 146. One published case *Hadley v. Cowan*, 60 Wash.App. 433, 804 P.2d 1271 (1991), discussed the issue, but it sidestepped the issue. *Id.* at 445. Two unreported cases discuss the issues. One is in September of 2014. GR 14.1(a) precludes their citation. *Hadley, id.* at 443, rejects the trial court's conclusion and holds that tortious interference facts "could constitute a cause of action if the will were never at issue."

A comprehensive law review, Diane J. Klein, "'*Go West, Disappointed Heir': Tortious Interference with Expectation of Inheritance-*

A Survey with Analysis of State Approaches in the Pacific States" 13 Lewis and Clark Law Review 209, 13 LCLR 209 (2009), *id.* at 228, concludes "...in a different case, one more like Frohwein or Allen perhaps, the Washington courts might be more inclined to recognize the tort." The reference to *Allen v. Hall*, 974 P.2d 199 (Or. 1999) and *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Ia. 1978). These cases do not require independently tortious conduct, but only an improper purpose (*Allen, supra* at 281). The trial court committed reversible error by requiring undue influence fraud or duress as an element. These cases expand business interference to non commercial cases. *Frohwein, supra* at 795. Only an improper objective of harming someone through improper means and casual effect is required. One unreported Washington case reviews these two cases. The law review article also concludes that the unreported Washington case reached the wrong conclusion on burden of proof. The tort case is not the same as a will contest. The tort only needs to be proven by a preponderance of the evidence. *Id.* at 230.

The famous case of Anna Nichole Smith, *Marshall v. Marshall*, 547 U.S. 293, 301, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006) states that tortious interference is "a widely recognized tort" *id* at 312.

Washington has recognized the tort of wrongful interference with businesses expectancy. *Calbom v. Knudtzon*, 65 Wash.2d 157, 396 P.2d 148

(1964). In *Pleas v. City of Seattle*, 112 Wash.2d 794, 774 P.2d 1158 (1989), the City of Seattle was held liable for intentionally catering to the opposition to Parkridge's construction project. *Id.* at 799. The Court held that interference, ill will, spite or coercion "ingredients of the tort of intentional interference" are not essential. *Id.* at 800.

Restatement (Second) of Torts § 774B states "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of inheritance or gift".

This Court in *Tamosaitis PHD v. Bechtel National, Inc.*, 182 Wash.App. 241, 250, 327 P.3d 1309 (2014) cited *Restatement (Second) of Torts* § 766 B cmt. c 1979 and observed "in some states, a similar tort has been recognized for tortious interference with some non commercial activities." *Id* at 1314 (P.3d).

V. CONCLUSION

Lonnie should be removed as personal representative. He should account for the money he alienated and concealed. RCW 11.48.060; 070. He violated the Power of Attorney and should return all gifts of cash as he admitted he had no evidence to prove the gifts. A judgment should be entered against Lonnie for the amount of the hoard he dissipated.

The written instructions of Betty did not define the persons, or the item with reasonable certainty. Even if they did, U.S. coins that are left, cannot pass to anyone as they are U.S. legal tender. Half of the hoard is in Don's estate and should be awarded to Aaron to distribute. Lonnie was an abuser of Betty and tortiously should receive nothing from either estate. The attorneys fees should be reversed with attorneys fees to Aaron on trial and appeal.

Lonnie tried to get away with the ultimate coup and theft over Aaron, whom he despised. Lonnie found the hidden gold and silver. Lonnie took the hoard as his own and told no one until Aaron commenced this case and exposed the theft.

The trial court failed to apply contemporary, and emerging law to facts well proven by Aaron that prevent inheritance by greedy heirs who attempt to take it all from their vulnerable parents. The case must be reversed and remanded. This court must ensure Lonnie places back into the Lowe estates what he took, or were allegedly gifted, for proper distribution in accordance with Don and Betty's testamentary intents.

DATED this 10th day of December, 2014.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Opening Brief of Appellant was served on Counsel for Plaintiff/Appellee by hand delivery addressed as follows:

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