89549-0

No. 68749-2-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

WASHINGTON FEDERAL SAVINGS,
Appellant,

v.

MICHAEL P. KLEIN, Personal Representative
of the Estate of ROBERT KLEIN, Deceased,
Respondent.

BRIEF OF RESPONDENT

Appendix to Answer to PRV

Mathew L. Harrington (WSBA #33276)
Joan E. Hemphill (WSBA #40931)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, Washington 98101-2393
MLH@stokeslaw.com
JEH@stokeslaw.com
(206) 626-6000

Attorneys for Respondent Michael P. Klein

TABLE OF CONTENTS

I. INTRODUCTION 1

II. UNDISPUTED FACTS 3

A. Decedent Robert Klein Executed a Note and a Deed of Trust to Buy Condo 11W 3

B. Condo 11W Lost Significant Value 3

C. The PR Provided Probate Notice to Creditors as Required by Statute 5

D. WaFed Failed to File a Creditor's Claim Until After the Statutory Deadlines 5

E. Attempts to Address the Untimely Filed Creditor's Claim in the Probate Proceedings 6

F. The PR Rejected the Creditor's Claim, and WaFed Filed this Action 8

G. WaFed's Motion for Summary Judgment and Judge Armstrong's Order 8

H. Attorney Fees For PR and Appeal 9

III. ARGUMENT 9

A. Standard of Review 9

B. The Probate Code and Probate Non-Claim Statute Are Meant to Reach Finality and Settle Estates 11

C. Probate Procedure is Exclusive, and Failure to Abide by it Bars a Claim 13

D. Pursuant to the Non-Claim Statute, WaFed is Forever Barred From Filing a Creditor's Claim Because it Missed the Mandatory Deadlines 16

1. The PR Provided "Actual Notice" to WaFed 16

2. The Deed of Trust Does Not Trump the Non-Claim Statute's Requirements 19

3. WaFed Missed the Deadline for Filing Its Creditor's Claim 21

4. *In re Estate of Earls* Directs the Outcome of this Case 22

E. WaFed Submitted No Evidence That Would Raise a Genuine Issue of Material Fact 22

F. The Evidence Submitted by the PR Demonstrates that the PR Provided Actual Notice 28

IV. CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Bakke v. Buck,
21 Wn. App. 762, 587 P.2d 575 (1978) 14, 19, 21

Bellevue Sch. Dist. v. Brazier Constr. Co.,
103 Wn.2d 111, 691 P.2d 178 (1984) 11, 12

Boguch v. Landover Corp.,
153 Wn. App. 595, 224 P.3d 795 (2009) 10

Brackman v. City of Lake Forest Park,
163 Wn. App. 889, 262 P.3d 116 (2011) 24

Davis v. Shepard,
135 Wash. 124, 237 P. 21, 41 A.L.R. 163 (1925) 13

Ensley v. Mollmann,
155 Wn. App. 744, 230 P.3d 599, *review denied*, 170 Wn.2d 1002 (2010) 9, 27

Greene v. Lindsey,
456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982) 17, 18

Hanks v. Nelson,
34 Wn. App. 852, 664 P.2d 15 (1983) 19, 21

In re Estate of Earls,
164 Wn. App. 447, 262 P.3d 382 (2011) 13, 14, 19, 22

In re Trustee's Sale of Real Property of Whitmire,
134 Wn. App. 440, 140 P.3d 618 (2006) 15, 16

Judson v. Associated Meats & Seafoods,
32 Wn. App. 794, 651 P.2d 222 (1982) 13, 20

Mennonite Bd. of Missions v. Adams,
462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) 17, 18

Messer v. Shannon's Estate,
65 Wn.2d 414, 397 P.2d 846 (1964) 14, 22

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950) 17

Nelson v. Schnautz,
141 Wn. App. 466, 170 P.3d 69 (2007) 12

Orix Fin. Servs. v. Phipps,
72 Fed. R. Serv. 3d 400, 2009 WL 30263 (S.D.N.Y. Jan. 6, 2009) 17

Rigg v. Lawyer,
67 Wn.2d 546, 408 P.2d 252 (1965) 14

Schroeder v. City of New York,
371 U.S. 208, 83 S. Ct. 279, 9 L. Ed. 2d 255, 89 A.L.R.2d 1398 (1962) 18

Sourakli v. Kyriakos, Inc.,
144 Wn. App. 501, 182 P.3d 985 (2008) 24

State v. Northwest Magnesite Co.,
28 Wn.2d 1, 182 P.2d 643 (1947) 20

Strong v. Terrell,
147 Wn. App. 376, 195 P.3d 977 (2008) 11

Tulsa Prof'l Collection Servs., Inc. v. Pope,
485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988) 11, 18

Turner v. Lo Shee Pang's Estate,
29 Wn. App. 961, 631 P.2d 1010 (1981) 13

Turngren v. King County,
33 Wn. App. 78, 649 P.2d 153 (1982), *remanded*, 100 Wn.2d 1007 (1983) 11, 27

Tuttle v. Allstate Ins. Co.,
134 Wn. App. 120, 138 P.3d 1107 (2006) 10

Walker v. City of Hutchinson,
352 U.S. 112, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956) 18

Weigner v. City of New York,
852 F.2d 646 (2d Cir. 1988) 17, 18

Young v. Key Pharm., Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989) 10

Zedrick v. Kosenski,
62 Wn.2d 50, 380 P.2d 870 (1963) 10

STATUTES

RCW 11.40.010 ..... 13, 14, 19, 21

RCW 11.40.020 ..... passim

RCW 11.40.051 ..... passim
RCW 11.40.100 12
RCW 11.40.130 15
RCW 11.40.135 2
RCW 11.76.040 25

OTHER AUTHORITIES

Wash. State. Bar Ass'n, WASHINGTON PROBATE DESKBOOK at §5.1, §5.3 (2005) 12

RULES

CR 56(c) 10
CR 56(e) 26
RAP 2.5(a) 23
RAP 9.12 23

I. INTRODUCTION

Michael P. Klein, Personal Representative ("PR") of the Estate of Robert Klein ("Estate") asks this Court to affirm the trial court's order dismissing on summary judgment Washington Federal Savings ("WaFed")'s complaint for breach of contract. The contract at issue is a Promissory Note that the decedent, Robert Klein, executed with WaFed to finance the purchase of a condominium at 404 N. D St. #11W, Tacoma, Washington ("Condo 11W"). After the decedent's death, the PR of the Estate gave statutory probate notice to creditors, including WaFed, of the pendency of probate. WaFed then failed to file a timely creditor's claim with the PR.

RCW 11.40.051 (1)(a) and (c) provide that a creditor who fails to file a creditor's claim within the statutory period is forever barred from collecting a debt from the estate. The policy underlying the probate statute is to bring finality and settlement to the probate of an estate. The non-claim statute necessarily bars creditors from asserting claims against an estate where creditors miss the claim-filing deadlines set forth in RCW 11.40.051. This is precisely what happened to WaFed. The undisputed evidence shows that the PR sent WaFed "actual notice" — as defined in the statute, and WaFed failed to file a creditor's claim within the statutory time period. Because the deadline for WaFed to file its

creditor's claim had lapsed, any unsecured deficiency on the Promissory Note is unenforceable, and this Court should affirm the trial court's order dismissing WaFed's claims on summary judgment.

Before explaining why this is so, it is critical to understand that nothing prevents WaFed from enforcing the Deed of Trust on Condo 11W, which was recorded as security for the Promissory Note. A creditor need not file a creditor's claim to enforce a deed of trust and realize on the security. RCW 11.40.135. In most circumstances, banks do not need to file creditor's claims when their loans are secured by deeds of trust on real property. During normal circumstances — and especially during a real estate boom — it is understandable that banks do not worry about filing creditor's claims because so long as banks do not overestimate the value of a property during the underwriting process, the amount owed on the note will not be at risk of exceeding the value of the property secured by the deed of trust. But when real estate values decline, there is a risk to banks that the security (the market value of the property as secured by the deed of trust) could be less than the amount owing on the loan. This is particularly true if a bank engages in less-than-rigorous underwriting practices, overestimating the value of its security. In making the loan to Robert Klein, WaFed took the risk that the security would be sufficient to cover its losses in the event of a default, but that turns out to have been a

poor business decision. Here, Condo 11W's market value is now significantly less than the amount owed on the Promissory Note.

This unsecured ***deficiency*** — the amount owed on the note that exceeds the current value of the condo property — is no longer collectible because WaFed failed to file a timely creditor's claim to collect on the Promissory Note. Because WaFed failed to file its creditor claim within the statutory period, its complaint is barred by the non-claim statute.

II. UNDISPUTED FACTS

A. Decedent Robert Klein Executed a Note and a Deed of Trust to Buy Condo 11W

On June 23, 2006, WaFed and Robert Klein executed an agreement whereby WaFed loaned him $375,000. Clerk's Papers ("CP") 66, 98. That same day, Robert Klein executed a Promissory Note. CP 66. To secure payment of the Promissory Note, Robert Klein also executed and delivered to WaFed a Deed of Trust on Condo 11W. *Id.* At the time of the disposition below, the balance of the mortgage was $356,088, plus fees and interest. *Id.*; *see also* CP 98, 104.

B. Condo 11W Lost Significant Value

The PR petitioned for an order to probate the decedent's Last Will and Testament under King County Superior Court Case No. 09-4-06471-4 SEA (the "Probate Matter") and the Court appointed him as Personal Representative of the Estate to serve with non-intervention powers. CP

67, 98. In the course of probating the Estate, the PR attempted to sell Condo 11W. The PR was unable to sell Condo 11W for an amount equivalent to what is owed on the Promissory Note, and evidence showed that the market for condominiums in Tacoma was diminishing. CP 67, 94, 99, 128-148. After reducing the price of Condo 11W five times and rejecting three offers that fell significantly short of the listing price, the listing agent was unable to sell the condo. CP 67. Condo 11W would not sell for enough to repay the note amount of $353,324, and it was unlikely to sell for more than $200,000 at any time in the near future. CP 67, 95; *see also* CP 99-100, 128-148. Condo 11W was listed at $220,000, and there was an open offer from a potential buyer for $200,000. CP 67, 95, 99. Though the PR had attempted to offer to WaFed a deed in lieu of foreclosure, WaFed rejected that offer, insisting that it would seek to collect on any deficiency owed above the value of the property. CP 67, 99-100.

C. The PR Provided Probate Notice to Creditors as Required by Statute

In the course of the PR's duties, the PR duly provided notice of the decedent's death and the pendency of probate to WaFed under the probate statute, RCW 11.40.020(2).[1]

On January 28, 2011, the PR's counsel sent WaFed a letter enclosing a Probate Notice to Creditors. CP 68, 116. On the same day, an Affidavit of Mailing was executed and filed in the probate matter attesting that actual notice of the notice to creditors had been given to WaFed. CP 68, 119.

D. WaFed Failed to File a Creditor's Claim Until After the Statutory Deadlines

Despite having been sent direct notice, WaFed did not timely file a creditor's claim. WaFed was required to file a creditor's claim for any unsecured deficiency due on the Promissory Note the later of (a) 30 days

---

[1] The PR provided other notices contemplated in the statute:

For instance, the PR provided notice by publication as required under RCW 11.40.020 on January 7, 2010. CP 107. Affidavits of Publication were filed with the Court. CP 107-09.

On January 21, 2010, the PR sent WaFed a letter of notification about the decedent's death and the pendency of the probate proceedings. CP 67, 111. This notice is corroborated by an Affidavit of Reasonable Diligence filed by the PR on December 29, 2010, attesting that "all actual and potential creditors who came to my attention were sent actual notice of the decedent's death and were instructed to send any final bills or claims to the attention of the undersigned as Personal Representative...." CP 150. Despite WaFed's complaints, Br. of App. 22-23, these notices are not germane to the disposition of this appeal.

from the PR's mailing of notice, which would have been February 27, 2011 (based on the January 28, 2011 letter), or (b) four months after the date of first publication of the notice, which would have been May 7, 2010 (based on a date of first publication of January 7, 2010). CP 68; *see* RCW 11.40.051(1)(a). But WaFed did not file and serve its creditor's claim until one year after it received notice from the PR, on May 10, 2011. CP 68, 122-23. Thus, WaFed missed the statutory deadline for filing its creditor's claim for the deficiency (the amount owing on the Promissory Note that exceeded the current value of the property). CP 68.

E. Attempts to Address the Untimely Filed Creditor's Claim in the Probate Proceedings

In the probate proceedings, the PR filed a petition under the Trust and Estates Dispute Resolution Act ("TEDRA") seeking a declaration that it did not have to continue paying on the Promissory Note. CP 68-69. At the hearing on that petition, the Commissioner agreed that the PR had provided proper notice under RCW 11.40.020 to WaFed. CP 90 (Commissioner: "Okay. So, they have the proof, that they sent the notice. So, now, what's the next step, that makes the notice ineffective?"); *see* CP 69. The Commissioner erroneously determined, however, that it did not have the authority to issue such an order. CP 90.

The Commissioner ruled as follows:

> Okay counsel. You gave 'em notice. They got the notice, but the notice doesn't cut off the deficiency. That's my ruling.
>
> . . .
>
> There's no way that, having read those cases and, frankly, my understanding of the statutes and how it works, that your client can avoid dealing with the deficiency. ... I can't, I can't, I can't get in the way of the contractual obligation that the decedent agreed to with the bank. And the probate statutes aren't designed to wipe out the deficiency of the secured creditor.

Id.

The PR timely filed a Motion for Revision. *See* CP 307. On June 30, 2011, Judge Douglass North denied the Motion for Revision on different grounds. CP 56-57. He found that the notice provisions in the Deed of Trust applied, and the PR had not provided notice in the matter stated in the Deed of Trust. *See id.; see* CP 68-69. As discussed in the argument section, below, this is incorrect because Robert Klein's contract (the Promissory Note) with WaFed cannot supersede Washington's non-claim statute regarding how notice is provided, and moreover the notice provisions to which Judge North referred are contained in the Deed of Trust, not the Promissory Note. *See* CP 68-69.

The PR then sought to appeal that order, but the Washington Court of Appeals determined that the standards for interlocutory review were not

met because the PR had neither rejected nor accepted WaFed's creditor's claim and because WaFed had not yet petitioned the probate court to have the claim allowed. CP 316.

F. The PR Rejected the Creditor's Claim, and WaFed Filed this Action

On October 27, 2011, the PR's attorney transmitted a Notice of Rejection of Creditor's Claim notifying WaFed that the PR was rejecting WaFed's creditor's claim. CP 126.

On November 23, 2011, WaFed filed this new action challenging the PR's rejection of its creditor's claim. *See* Br. of App. 12.

G. WaFed's Motion for Summary Judgment and Judge Armstrong's Order

The PR moved for summary judgment on WaFed's claims. CP 65. WaFed's opposition contended, among other things, that the PR failed to provide "actual notice" to WaFed. CP 152, 166. However, at no time during the proceedings below did WaFed seek discovery from the PR or suggest that discovery would be necessary to resolve a factual dispute as to whether it (WaFed) received actual notice of the pendency of the probate proceedings from the PR. In its summary judgment briefing, the PR argued that because WaFed had missed its opportunity to file a creditor's claim against the estate, it was barred from later collecting on it under the non-claim statute. CP 65, 72-73. The trial court, Judge Sharon

Armstrong, was the first court to consider the issue after the PR had rejected the creditor's claim. *See* CP 316 (Division I commissioner's order noting that appeal — and therefore prior proceedings before Commissioner Velategui and Judge North — occurred before creditor's claim had been rejected and before WaFed petitioned to have the claim allowed). The trial court agreed with the PR and granted his motion for dismissal of WaFed's claims on summary judgment. CP 388-90. The trial court ruled, "Plaintiff's claim to enforce the promissory note, above the value secured in the deed of trust, is DISMISSED." CP 389.

H. Attorney Fees For PR and Appeal

The trial court awarded attorney fees and costs to the PR. *See* Supplemental Clerk's Papers, Sub. No. 41. WaFed appealed to this Court.

III. ARGUMENT

WaFed's failure to file a creditor's claim for the debt owed on the Promissory Note until well after the deadlines set forth in RCW 11.40.051 precludes it from enforcing any unsecured deficiency against the Estate.

A. Standard of Review

This Court reviews summary judgment orders *de novo*, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Ensley v. Mollmann*, 155 Wn. App. 744, 750-51, 230 P.3d 599, *review denied*, 170 Wn.2d 1002 (2010). Summary

judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 125-26, 138 P.3d 1107 (2006) (citing CR 56(c)). A material fact is one on which the outcome of the litigation depends. *Zedrick v. Kosenski*, 62 Wn.2d 50, 54, 380 P.2d 870 (1963). The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795 (2009). Once the moving party satisfies the initial burden of establishing the absence of a material fact issue, the inquiry shifts to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the trial court should grant the moving party's motion for summary judgment. *Id.* (holding that because the plaintiff did not present competent evidence to rebut the defendants' initial showing of the absence of a material issue of fact, the defendants are entitled to summary judgment). "Conclusory allegations, speculative statements or argumentative assertions that unresolved factual matters remain are not sufficient to preclude an order of summary judgment." *Turngren v. King*

County, 33 Wn. App. 78, 84, 649 P.2d 153 (1982) (concluding that the trial court did not err in granting summary judgment), *remanded*, 100 Wn.2d 1007 (1983); *see also Strong v. Terrell*, 147 Wn. App. 376, 384, 195 P.3d 977 (2008).

B. The Probate Code and Probate Non-Claim Statute Are Meant to Reach Finality and Settle Estates

The intent of the probate code and the non-claim statute is to limit *in rem* claims against the decedent's estate, expedite the settling of estates, and facilitate the distribution of decedent's property to the Estate's heirs and devisees. *Bellevue Sch. Dist. v. Brazier Constr. Co.*, 103 Wn.2d 111, 120, 691 P.2d 178 (1984) (noting that allowing parties to bring *in rem* claims against estates long after the claim period has expired would frustrate the purpose of settling estates and distributing a decedent's property to designated heirs). As the United States Supreme Court noted, "Giving creditors a limited time in which to file claims against the estate serves the State's interest in facilitating the administration and expeditious closing of estates." *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 479-80, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988).

An estate's personal representative is tasked with marshaling the estate's assets and ascertaining liabilities. Thus, the general procedure is that unsecured creditors of an estate must present their claims. The

personal representative must then determine whether such claims are separate or community in character, and determine if each claim is valid and enforceable. The personal representative also determines the extent of claims against the estate, determines the extent of assets, and properly charges estate debts against estate property. *See generally*, Wash. State. Bar Ass'n, WASHINGTON PROBATE DESKBOOK at §5.1, §5.3 (2005). A critical step is that the personal representative must accept or reject the claims made against the estate. If the personal representative rejects a claim, the general unsecured creditor must file suit or lose the claim. RCW 11.40.100 (personal representative may compromise claims if it is in the best interest of the estate).

The non-claim statute is an important component of that scheme. It provides a bright-line cutoff of claims in order to accomplish this process of settling estates. *Nelson v. Schnautz*, 141 Wn. App. 466, 475, 170 P.3d 69 (2007) ("The intent of the probate code is to limit claims against the decedent's estate, expedite closing the estate, and facilitate distribution of the decedent's property.") (citing *Bellevue Sch. Dist.*, 103 Wn.2d at 120).

Because the purpose of the probate code is to obtain early and final settlement of estates so that those entitled may receive the property free from any encumbrances and charges that could lead to long litigation, the

non-claim statute, RCW 11.40.010 *et seq.*, is more strictly enforced than general statutes of limitation. "***The statute is mandatory, not subject to enlargement by interpretation, and cannot be waived.***" *Judson v. Associated Meats & Seafoods*, 32 Wn. App. 794, 798, 651 P.2d 222 (1982) (emphasis added) (internal citation omitted). Courts have held that the non-claim statute applies to the settlement of estates, supersedes all other statutes of limitation, and applies to every kind and character of claim against an executor and administrator. *See Turner v. Lo Shee Pang's Estate*, 29 Wn. App. 961, 963, 631 P.2d 1010 (1981)); *see also In re Estate of Earls*, 164 Wn. App. 447, 453 n.9, 262 P.3d 382 (2011) (citing *Davis v. Shepard*, 135 Wash. 124, 125, 237 P. 21, 41 A.L.R. 163 (1925) (stating that the non-claim statute applies to claims of every kind and nature, both those established and contingent)).

C. Probate Procedure is Exclusive, and Failure to Abide by it Bars a Claim

The non-claim statute provides specifically that "[a] person having a claim against the decedent may not maintain an action on the claim unless a personal representative has been appointed and the claimant has presented the claim as set forth in this chapter." RCW 11.40.010. The non-claim statute further provides that "a person having a claim against the decedent ***is forever barred*** from making a claim or commencing an

action against the decedent . . . unless the creditor presents the claim in the manner provided ...." RCW 11.40.051 (1) (emphasis added). If the PR provides "actual notice" pursuant to RCW 11.40.020 (1)(c), the creditor must present the claim within the later of thirty days after the PR's service or mailing of notice to the creditor and four months after the date of first publication of the notice. RCW 11.40.051(1)(a).

It is "well-settled" in this jurisdiction that the non-claim statute, RCW 11.40.010, "is mandatory and is strictly construed; compliance with its requirements is essential to recovery." *Estate of Earls*, 164 Wn. App. at 450-51 (citing *Messer v. Shannon's Estate,* 65 Wn.2d 414, 415, 397 P.2d 846 (1964)); *see Rigg v. Lawyer*, 67 Wn.2d 546, 553, 408 P.2d 252, 257 (1965) (noting that the failure to file a claim is an effective bar to any attempt to collect on a promissory note). As courts have observed, creditor's claim statutes are, in essence, statutes of limitation. *Bakke v. Buck*, 21 Wn. App. 762, 767, 587 P.2d 575 (1978). "They mandate that if a creditor's claim is not timely filed, the claim against the estate is barred." *Id.* (citing RCW 11.40.010). Probate law is the exclusive procedure under the present circumstances. Even if WaFed had obtained a judgment after suing on the contract against the Estate before decedent's death — which it did not — WaFed still could not have ***executed*** on the judgment without going through probate procedures. RCW 11.40.130; *In*

re Trustee's Sale of Real Property of Whitmire, 134 Wn. App. 440, 448, 140 P.3d 618 (2006) (in cases where creditor already had a lien against specific estate assets, court nonetheless held: "Unless specific property has already been executed or levied upon, a person who obtains a judgment against the decedent is subject to probate procedures [i.e., the non-claim statute]."). In order to exempt its claim for breach of contract from probate procedure, WaFed would have had to sue on the Promissory Note, obtain a judgment, complete execution by following writ of garnishment procedures, and obtain a writ of garnishment on the judgment against what normally would have been unsecured estate property — all before the death of the decedent. That was not done.

Unless another statute, case law, or other authority provides otherwise, probate statutes generally apply and probate procedure is the exclusive procedure that must be followed by a creditor that wants to assert a claim against unsecured and unperfected estate property. 134 Wn. App. at 448-49. As discussed more fully below, the Deed of Trust and the Promissory Note may not purport to impose greater notice than is required by the probate statutes. "Under Title 11 RCW, a [party] must present [its] claim against the decedent according to the procedures set forth under the probates statutes; otherwise, the claimant may be barred from collecting from the estate. RCW 11.40.010 and .051." *Id.* 448 n.7.

D. Pursuant to the Non-Claim Statute, WaFed is Forever Barred From Filing a Creditor's Claim Because it Missed the Mandatory Deadlines

1. The PR Provided "Actual Notice" to WaFed

The PR provided "actual notice" to WaFed by regular first class mail, postage pre-paid, as required by the non-claim statute. RCW 11.40.020 expressly establishes that "actual notice" as set forth in RCW 11.40.051 may be satisfied by "mailing the notice to the creditor at the creditor's last known address, by regular first class mail, postage prepaid . . .." RCW 11.40.020 (c). Notably, the triggering event for actual notice is the personal representative's act of "mailing" the notice to creditors. RCW 11.40.051; RCW 11.40.020. The statute does not require receipt or confirmation of mailing, as WaFed asserts. *Cf.*, Br. of App. 19-20. WaFed provides no legal authority whatsoever to support its position that actual notice requires proof of notice beyond that which is expressly set forth in the probate statute. Because WaFed's argument is unsupported by the evidence and contrary to probate law, this Court should reject it.

WaFed's argument, Br. of App. 18, that constitutional Due Process requires more than notice by mail is meritless. The U.S. Supreme Court has repeatedly recognized that "the mails are an 'efficient and inexpensive means of communication' that generally may be relied upon to deliver notice where it is sent." *Orix Fin. Servs. v. Phipps*, 72 Fed. R. Serv. 3d

400, 2009 WL 30263, at *10 (S.D.N.Y. Jan. 6, 2009) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, 70 S. Ct. 652, 94 L. Ed. 865 (1950)); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983); *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982). The cases following *Mullane* have held that "actual receipt of notice by a party is not required to satisfy the dictates of due process." *Orix Fin. Servs.*, 72 Fed. R. Serv. 3d 400, 2009 WL 30263 at *9-10 (concluding that even if the Court were to accept defendant's affidavit averring that she had never received notice from any party, the certificate of mailing notice was all that was necessary to satisfy Due Process). "[T]he relevant inquiry for due process purposes focuses on the party providing the notice, and asks whether that party has provided 'notice reasonably calculated' to inform interested parties." *Id.* (noting that both the United States Supreme Court and the Second Circuit have ruled that under most circumstances notice "sent by ordinary mail is deemed reasonably calculated to inform interested parties" of an impending action) (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)). "Indeed, the Supreme Court has applied this rule — that

due process is satisfied upon the proper mailing of notice — in a wide array of proceedings where a defendant's property rights are at issue." *Id.*[2]

To hold otherwise would allow any creditor whose claim has been barred to resurrect that claim simply by asserting the mail was never delivered. Because WaFed's argument that notice by mail violates Due Process is contrary to the law, this Court should reject it.

Furthermore, contrary to WaFed's assertion, the mailbox rule has no bearing on the issues in this case. In its brief, WaFed urges this Court to apply the common law mailbox rule to its analysis of the issues in this case. Br. of App. 31. But the probate statute — not the mailbox rule — governs the determination of whether actual notice was mailed. If the legislature had intended for the mailbox rule to apply to probate proceedings it would have codified the rule or its language in the probate statute. As it stands, the probate statute contains no such language, and WaFed provides no legal authority to support its argument for applying

---

[2] *See, e.g., Tulsa Prof'l Collection Servs.,* 485 U.S. at 490 (notice to creditors in probate proceedings); *Mennonite Bd. of Missions,* 462 U.S. at 799-800 (notice of mortgagee of tax foreclosure); *Greene v. Lindsey,* 456 U.S. 444, 455, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982) (notice to public housing tenants of forcible entry and detainer actions); *Schroeder v. City of New York,* 371 U.S. 208, 214, 83 S. Ct. 279, 9 L. Ed. 2d 255, 89 A.L.R.2d 1398 (1962) (notice of condemnation proceedings); *Walker v. City of Hutchinson,* 352 U.S. 112, 116, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956) (notice of condemnation proceeding).

the mailbox rule in this case. Indeed, there is no case in Washington that applies the mailbox rule in the context of a probate proceedings, or that otherwise invalidates a probate notice based on this rule. WaFed tacitly concedes this point by characterizing the mailbox rule as "instructive," Br. of App. 31, rather than controlling. Because the mailbox rule does not apply, this Court should reject WaFed's argument on this point.

2. The Deed of Trust Does Not Trump the Non-Claim Statute's Requirements

WaFed has highlighted that the Deed of Trust contains enhanced notice provisions (which benefit the bank, but not the borrower), and that under those provisions the PR's notice was not effective until actually received. Br. of App. 4. WaFed suggests that its duty to file a creditor's claim in the probate matter was, therefore, never triggered. This is incorrect. Notably, only the Promissory Note is the basis of this breach of contract lawsuit. The Deed of Trust is not at issue. Moreover, neither the Deed of Trust nor the Promissory Note can alter or trump the notice requirements of the non-claim statute. *See* RCW 11.40.010; *Bakke v. Buck*, 21 Wn. App. 762, 767, 587 P.2d 575 (1978) (if a creditor's claim is not timely filed, its claim against estate is barred); *Hanks v. Nelson*, 34 Wn. App. 852, 855-56, 664 P.2d 15 (1983) ("Compliance with the statutory non-claim requirements is essential for recovery."); *Estate of*

Earls, 164 Wn. App. 447, 262 P.3d 832 (2011) (strict compliance with the statutory requirements was "essential to recovery"). A contract "which is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable." *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 26-27, 182 P.2d 643 (1947). In sum, no contractual provision between the parties which contradicts the mandatory non-claim statute may be enforced.

Logic also compels this rule. As a matter of practical necessity and sound policy, the way estates are administered in probate must be the same for all estates. The probate statute, discussed above, controls the manner of notice of the pendency of probate. If WaFed were allowed to require greater notice, every other creditor to an estate could also impose its own byzantine notice rules that would undermine the purposes of the probate statute. Imposing other notice provisions would be impractical also because a personal representative has the duty to ascertain known creditors, but may not even be aware of a given debt owed by the estate. Yet a personal representative could not adhere to notice provisions of which he or she is not even aware. Probate law requires, and imposes, the same notice of all estates in probate, and no provision of the Promissory Note that is the subject of this action (let alone the Deed of Trust, which is not the subject of this action) may change those notice requirements.

Judson v. Associated Meats & Seafoods, 32 Wn. App. 794, 798, 651 P.2d 222 (1982) (the non-claim statute, RCW 11.40.010 *et seq.*, is more strictly enforced than general statutes of limitation, is mandatory, is not subject to enlargement by interpretation, and cannot be waived). Because the non-claim statute supersedes the notice requirements set forth in the Promissory Note and Deed of Trust, WaFed's argument fails.

3. WaFed Missed the Deadline for Filing Its Creditor's Claim

It is undisputed that, after the PR provided actual notice in the January 28, 2011 mailing, WaFed failed to file a creditor's claim until May 10, 2011. *Compare* CP 116-20 *with* CP 122-24. Because WaFed's creditor's claim was not timely filed, WaFed is forever barred from asserting its creditor's claim against the Estate. *See* RCW 11.40.010; *Bakke*, 21 Wn. App. at 767 (if creditor's claim not timely filed, claim against estate is barred); *Hanks v. Nelson*, 34 Wn. App. at 852 ("Compliance with the statutory non-claim requirements is essential for recovery."). Thus, the Promissory Note is not enforceable, and the trial court properly granted summary judgment for the PR. WaFed's ability to collect the debt on the Promissory Note is now limited to the amount secured by the Deed of Trust, which amount is determined by the market value of Condo 11W.

4. *In re Estate of Earls* Directs the Outcome of this Case

This Court recently reiterated the foregoing principle in *In re Estate of Earls*, 164 Wn. App. 447, 262 P.3d 832 (2011). There, the Court rejected a creditor's attempt to enforce a personal guaranty and ruled that the claim was barred because the creditor failed to timely present the claim against the estate by the deadlines set forth in the statute. *Id.* 447. The Court found that the creditor's claim to enforce the decedent's personal guaranty was subject to the non-claim statute, and that strict compliance with the statutory requirements was "essential to recovery." *Id.* 450-51 (citing *Messer v. Shannon's Estate*, 65 Wn.2d 414, 415, 397 P.2d 846 (1964)). On this basis, the Court held that the creditor's claim was barred and affirmed the trial court's dismissal of the creditor's action to enforce the personal guarantee. Like the creditor in *Earls*, WaFed's failure to comply with the probate laws bars it from filing a creditor's claim against the Estate.

E. WaFed Submitted No Evidence That Would Raise a Genuine Issue of Material Fact

There is no genuine issue of material fact in dispute. WaFed complains that (1) the PR lacked "personal knowledge" of the mailing of the notice, and (2) the signed affidavit of mailing from the PR's attorney's office is insufficient to establish the fact of mailing notice to creditors. In support of the motion for summary judgment, the PR's declaration

included the probate notice to creditors that his former attorney, George L. Smith, had mailed to WaFed and the affidavit of mailing signed by Mr. Smith's legal assistant, Anne Favretto, attesting to the fact that she caused the notice to creditors to be mailed to WaFed on January 28, 2011. CP 116, 119.

Tracking the language of RCW 11.40.020(1), Ms. Favretto's affidavit stated, "On January 28, 2011, I have given, or caused to have given, the creditors listed on said Exhibit A, actual notice by mailing to the creditor's last known address, by regular first class mail, postage prepaid true and correct copy of the notice to creditors filed herein." CP 119. Exhibit A lists WaFed as a creditor. CP 120. Nonetheless, WaFed complains for the first time on appeal that the affidavit of mailing "is at best ambiguous" about whether "Ms. Favretto herself put anything into the mail." Br. of App. 27.

Because WaFed did not raise any issue with regard to Ms. Favretto's affidavit in the trial court, this Court should decline to address its attempt to do so for the first time on appeal. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12; RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court."); *see*

Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985, 989 (2008) ("An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal.").

In the alternative, if the Court decides to address WaFed's new allegations regarding Ms. Favretto's affidavit on appeal, it should reject WaFed's argument on the merits.

As discussed above, the declarations and affidavits filed by the PR's attorney and the attorney's legal assistant, in addition to the declaration filed by the PR, are sufficient to demonstrate that notice to WaFed was mailed exactly as the statute requires—"by regular first class mail." RCW 11.40.020; CP 119. "Where a statute is clear on its face, its meaning is to be derived from the language of the statute alone." *Brackman v. City of Lake Forest Park*, 163 Wn. App. 889, 262 P.3d 116 (2011) (holding that an affidavit of mailing is sufficient proof of service under the Mandatory Arbitration Rules, where the affidavit was made under oath or under penalty of perjury) (citation and quotes omitted).

The evidence shows that the PR provided actual notice by directing the mailing of notice to WaFed. The affidavit of mailing attests that a witness, Ms. Favretto, caused notice to be mailed to WaFed on January 28, 2011. CP 119. This affidavit was executed near the time of the events it memorializes. *Id.* This notarized affidavit of mailing is sufficient

evidence of service. Its language satisfies the requirements of legal service in other contexts. *See* RCW 11.76.040 (PR required to provide notice of place and time of hearing by caus[ing] a copy of the notice "to be mailed"). It would be news to law offices across Washington that notice is inadequate where a declarant attests that he or she "caused to be served" a pleading or notice. WaFed's argument would require that lawyers and their legal assistants escort every pleading to the mail room and then on to the post office box in order to competently certify that service was effected.

WaFed also appears to take the position that a signed affidavit of mailing notice is insufficient proof of mailing unless the affidavit's author can confirm, based on first-hand knowledge, that the notice was subsequently received by the creditor. But this contention is inconsistent with the probate statute, which provides that actual notice is satisfied by "mailing" the probate notice to creditors by regular first class mail. The probate statute does not require that the creditor's receipt of notice be witnessed in person or otherwise confirmed.

WaFed complains (incorrectly) that the PR, his attorney Mr. Smith, and Ms. Favretto lacked personal knowledge of mailing the Probate Notice to Creditors to WaFed. Br. of App. 25-28. But the declaration that WaFed itself submitted demonstrates that bank officer Betsy Nelson

lacked personal knowledge of the facts in her declaration, including whether WaFed employees received the PR's probate notice to creditors. CP 191-94. Ms. Nelson's declaration includes statements about an "investigation" into whether pertinent employees received the PR's notice and how "such employees" responded to questions apparently asked during the investigation. *See* Br. of App. 30-31; CP 191-94. However, it is unclear whether Ms. Nelson was involved in the investigation, how she obtained the information about the investigation and whether she communicated with "every employee . . . who was a possible recipient" of the notice. CP 193. She lacks personal knowledge sufficient to testify to all the facts she submits. Ms. Nelson's declaration also relies on inadmissible hearsay. *See* CP 191-194. While it is clear that Ms. Favretto has sufficient personal knowledge of causing the Probate Notice to Creditors to be mailed, it is WaFed's evidence which is not admissible and not based on personal knowledge as required by CR 56(e).[3]

[3] WaFed has technically failed to submit any evidence in this case because it did not properly submit its evidence pursuant to CR 56(e)'s requirements that sworn or certified copies of all papers attached to an affidavit be submitted. Instead, it submitted its evidence via two "requests for judicial notice," pointing the trial court to pleadings filed under other cause numbers. *See* CP 176-320; 379-87. At oral argument the trial court invited WaFed to present its evidence in a proper form, but WaFed failed to resubmit its evidence. Because the evidence on which WaFed relies

Even when viewing WaFed's evidence and all inferences therefrom in the light most favorable to WaFed, there is simply no dispute that the PR provided the probate notice to creditors as required under the non-claim statute, as Ms. Favretto's ***contemporaneous*** signed and sworn affidavit of mailing demonstrates. *See Ensley v. Mollmann*, 155 Wn. App. at 750-51; CP 119. WaFed's speculative assertion that a genuine issue of material fact remains is unsupported by the evidence and contrary to the requirements of the non-claim statute. *See Turngren v. King County*, 33 Wn. App. at 84. No evidence contradicts the affidavit attesting that the notice was mailed; the PR is entitled to judgment as a matter of law.

By contending that the PR must establish the chain of custody of the notice to creditors in order to prove that actual notice was made, WaFed is attempting to change the probate statute's standard for "actual notice." Contrary to WaFed's argument, the probate statute requires no further notice from the PR to trigger the time period for filing a creditor's claim with an estate. *See* RCW 11.40.051. The legislature expressly established the requirements of notice. It presumably sought to allow notice by a means that would reduce the costs for settling estates, and would be affordable for estates large and small alike. The legislature

---

was never properly admitted in the trial court, it is not preserved on appeal.

could have required personal service, akin to a summons, but chose not to do this. The legislature presumably hoped to avoid litigation over whether such notice was effected, and so created a simple and efficient system, via first class mail, for establishing that notice was effected. WaFed's argument, if it prevails, would eviscerate the effectiveness of notice by mail as called for by the Washington legislature. It would open the door to any litigant with sufficient resources to defeat the finality contemplated by the non-claim statute by hauling such issues into court in order to argue that "the mail never arrived." Because the probate statute imposes no such enhanced notice requirements, and WaFed provides no legal authority to support its position, this Court should reject its argument.

F. The Evidence Submitted by the PR Demonstrates that the PR Provided Actual Notice

The non-claim probate statute is clear that once the PR provides actual notice to creditors, creditors must file their claims against the estate within 30 days or 4 months. RCW 11.40.051. Here, the PR mailed notice to creditors on January 28, 2011, and WaFed was required to file a creditor's claim by the later of February 27, 2011 (30 days) or May 7, 2010 (four months after the date of first publication of the notice on January 7, 2010). RCW 11.40.051. *See* CP 106. However, it is undisputed that WaFed failed to file a creditor's claim until May 10, 2011,

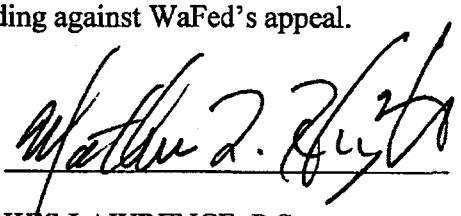
see CP 122, which is more than 16 months after the first date of publication and more than 70 days after the date of mailing notice.

Where, as here, a creditor misses the deadline for filing a creditor's claim against an estate, it is forever barred from doing so pursuant to the non-claim statute. The undisputed facts demonstrate that because the PR provided actual notice and WaFed failed to file its creditors claim until well after the deadlines set forth in RCW 11.40.051, the claim filing period has lapsed, and WaFed is precluded from filing a creditor's claim to collect the debt owed on the Promissory Note. WaFed's argument to the contrary is unavailing and unsupported by the evidence of record.

IV. CONCLUSION

The probate laws seek to promptly administer estates and settle expectations. There is no material dispute of fact that the PR gave actual notice and WaFed failed to file its creditor's claim in a timely manner. WaFed's apparent failure in this case to adjust its practices to the declining real estate market and abide by the rules it knows well prevents it from recovering on the Promissory Note (though it still can recover on the Deed of Trust). To hold otherwise would award a windfall to WaFed. The Court should affirm the trial court's order granting PR's motion for summary judgment against WaFed and the trial court's award of attorney fees and costs to the PR.

In addition, based on the Promissory Note's unilateral provision for attorney fees and RCW 11.96A.150 (TEDRA), this Court should award attorney fees and costs to the PR pursuant to RAP 18.1(a) for the expense the estate incurred in defending against WaFed's appeal.

By: 

STOKES LAWRENCE, P.S.

Mathew L. Harrington (WSBA #33276)
Joan E. Hemphill (WSBA #40931)
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 626-6000
MLH@stokeslaw.com
JEH@stokeslaw.com
Attorneys for Respondent

67731.doc

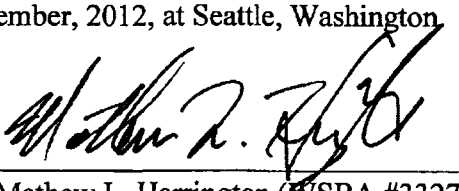
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 26th day of November, 2012, I caused a true and correct copy of the foregoing document, "Brief of Respondent," to be delivered by messenger to the following counsel of record:

Counsel for Appellant:

Michael Pierson
Michael D. Carrico
Riddell Williams, P.S.
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154-1192

Dated this 26th day of November, 2012, at Seattle, Washington.



Mathew L. Harrington (WSBA #33276)
Joan E. Hemphill (WSBA #40931)

STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
mlh@stokeslaw.com
jeh@stokeslaw.com
(206) 626-6000
Attorneys for Respondent Michael P. Klein

Appendix B

RCW 11.40.020
Notice to creditors — Manner — Filings — Publication.

(1) Subject to subsection (2) of this section, a personal representative may give notice to the creditors of the decedent, in substantially the form set forth in RCW 11.40.030, announcing the personal representative's appointment and requiring that persons having claims against the decedent present their claims within the time specified in RCW 11.40.051 or be forever barred as to claims against the decedent's probate and nonprobate assets. If notice is given:

(a) The personal representative shall file the notice with the court;

(b) The personal representative shall cause the notice to be published once each week for three successive weeks in a legal newspaper in the county in which the estate is being administered;

(c) The personal representative may, at any time during the probate proceeding, give actual notice to creditors who become known to the personal representative by serving the notice on the creditor or mailing the notice to the creditor at the creditor's last known address, by regular first-class mail, postage prepaid; and

(d) The personal representative shall also mail a copy of the notice, including the decedent's social security number, to the state of Washington department of social and health services office of financial recovery.

The personal representative shall file with the court proof by affidavit of the giving and publication of the notice.

(2) If the decedent was a resident of the state of Washington at the time of death and probate proceedings are commenced in a county other than the county of the decedent's residence, then instead of the requirements under subsection (1)(a) and (b) of this section, the personal representative shall cause the notice to creditors in substantially the form set forth in RCW 11.40.030 to be published once each week for three successive weeks in a legal newspaper in the county of the decedent's residence and shall file the notice with the superior court of the county in which the probate proceedings were commenced.

[2005 c 97 § 4; 1999 c 42 § 601; 1997 c 252 § 8; 1974 ex.s. c 117 § 34; 1965 c 145 § 11.40.020. Prior: 1917 c 156 § 108; RRS § 1478; prior: 1883 p 29 § 1; Code 1881 § 1468.]

Notes:

Part headings and captions not law -- Effective date -- 1999 c 42: See RCW 11.96A.901 and 11.96A.902.

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Application, construction -- Severability -- Effective date -- 1974 ex.s. c 117: See RCW 11.02.080 and notes following.

RCW 11.40.051
Claims against decedent — Time limits.

(1) Whether or not notice is provided under RCW 11.40.020, a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent, if the claim or action is not already barred by an otherwise applicable statute of limitations, unless the creditor presents the claim in the manner provided in RCW 11.40.070 within the following time limitations:

(a) If the personal representative provided notice under RCW 11.40.020 and the creditor was given actual notice as provided in RCW 11.40.020(1)(c), the creditor must present the claim within the later of: (i) Thirty days after the personal representative's service or mailing of notice to the creditor; and (ii) four months after the date of first publication of the notice;

(b) If the personal representative provided notice under RCW 11.40.020 and the creditor was not given actual notice as provided in RCW 11.40.020(1)(c):

(i) If the creditor was not reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within four months after the date of first publication of notice;

(ii) If the creditor was reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within twenty-four months after the decedent's date of death; and

(c) If notice was not provided under this chapter or chapter 11.42 RCW, the creditor must present the claim within twenty-four months after the decedent's date of death.

(2) An otherwise applicable statute of limitations applies without regard to the tolling provisions of RCW 4.16.190.

(3) This bar is effective as to claims against both the decedent's probate and nonprobate assets.

[2005 c 97 § 6; 1997 c 252 § 11.]

Notes:

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Appendix C

311 P.3d 53
(Cite as: 311 P.3d 53)

H

Court of Appeals of Washington,
Division 1.
WASHINGTON FEDERAL SAVINGS, Appellant,
v.
Michael P. KLEIN, Personal Representative of the Estate of Robert Klein, Deceased, Respondent.

No. 68749–2–I.
Oct. 11, 2013.
Publication Ordered Oct. 11, 2013.

Background: Personal representative of borrower's estate opened probate and sent out notice to creditors. Lender filed claim against deceased borrower's estate for balance due on promissory note secured by deed of trust on borrower's real property. The Superior Court, King County, Sharon Armstrong, J., entered summary judgment dismissing lender's claim, and lender appealed.

Holding: The Court of Appeals, Becker, J., held that lender received actual notice of probate that triggered 30–day period for lender to file claim against estate.

Affirmed.

West Headnotes

[1] Executors and Administrators 162 ⚿226

162 Executors and Administrators
162VI Claims Against Estate
162VI(B) Presentation
162k226 k. Notice to creditors. Most Cited Cases

An estate creditor's claimed nonreceipt of a probate notice delivered by mail is not material to proving actual notice of the probate that triggers the 30-day period for filing a claim against the estate. West's RCWA 11.40.020(c), 11.40.051(a).

[2] Executors and Administrators 162 ⚿226

162 Executors and Administrators
162VI Claims Against Estate
162VI(B) Presentation
162k226 k. Notice to creditors. Most Cited Cases

Actual notice of a probate that triggers the 30-day period governing an estate creditor's claim is accomplished by mailing, without regard to proof of receipt. West's RCWA 11.40.020(c), 11.40.051(a).

[3] Constitutional Law 92 ⚿4089

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General
92k4087 Wills, Trusts, Probate, Inheritance, and Dower
92k4089 k. Proceedings. Most Cited Cases

Proof of receipt of a notice of probate that triggers the applicable limitations period governing a creditor's claim against the estate is not necessary to satisfy due process; rather, under most circumstances, notice sent by ordinary mail satisfies due process because it is deemed reasonably calculated to inform interested parties of an impending action. U.S.C.A. Const.Amend. 14; West's RCWA 11.40.051(a).

[4] Appeal and Error 30 ⚿169

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k169 k. Necessity of presentation in general. Most Cited Cases

As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. RAP 2.5(a), 9.12.

[5] Executors and Administrators 162 ⚿226

162 Executors and Administrators
162VI Claims Against Estate
162VI(B) Presentation
162k226 k. Notice to creditors. Most Cited Cases

Executors and Administrators 162 ⚿252

162 Executors and Administrators
162VI Claims Against Estate
162VI(D) Disputed Claims
162k248 Trial by Probate Court
162k252 k. Evidence. Most Cited Cases

Unrebutted affidavit of mailing executed by legal assistant of attorney representing debtor's estate in which legal assistant averred that she had "given, or caused to have given," notice of probate of borrower's estate to creditors in attached exhibit, by regular first class mail at their last known address, which exhibit included lender, was sufficient proof of actual notice of probate that triggered 30-day period for lender to file claim against estate, regardless of whether lender actually received notice. West's RCWA 11.40.020(c), 11.40.051(a).

***53** Michael Dicharry Carrico, Michael David Pierson, Riddell Williams P.S., Seattle, WA, for Appellant.

***54** Mathew Lane Harrington, Joan Elizabeth Hemphill, Stokes Lawrence, P.S., Seattle, WA, for Respondent.

BECKER, J.

¶ 1 Washington Federal Savings appeals a summary judgment order that dismissed as untimely its creditor claim against a deceased borrower's estate. Washington Federal contends that because it did not receive a copy of the estate's notice to creditors, it was subject to a two-year time bar on creditor claims—which it met—not the far shorter period permitted under RCW 11.40.051(a) to creditors who are given actual notice—which it failed to meet. But the statute requires only proof that the estate's notice was mailed, not proof that it was received. Washington Federal's evidence of nonreceipt does not rebut the estate's proof of mailing. We affirm.

FACTS

¶ 2 In June 2006, appellant Washington Federal Savings, a savings and loan association, loaned $375,000 to Robert Klein, M.D., to buy a condominium unit in Tacoma, Washington. To secure payment of the promissory note, a deed of trust was recorded against the property.

¶ 3 Three years later, on December 11, 2009, Dr. Klein died at the age of 82. He had not paid off the loan. The balance on the loan was about $350,000. The value of the property had dropped. It is now worth about $200,000.

¶ 4 Dr. Klein's son Michael Klein, respondent herein, became the personal representative of the estate. He opened a probate in King County Superior Court in late December 2009. A notice to creditors was filed with the court and published in two local newspapers in January 2010, in accordance with RCW 11.40.020(1)(a).

¶ 5 Under the probate code, in addition to publishing the notice, an estate may notify known creditors at any time by mailing the notice to the creditor:

> The personal representative may, at any time during the probate proceeding, give actual notice to creditors who become known to the personal representative by serving the notice on the creditor or mailing the notice to the creditor at the creditor's last known address, by regular first-class mail, postage prepaid ...

RCW 11.40.020(c). A creditor who is given actual notice as provided in RCW 11.40.020(c) must present the claim within 30 days of the personal representative's service or mailing of the notice, or within 4 months of first publication of the notice,

whichever is later. RCW 11.40.051(1)(a). If the creditor was not given actual notice despite being reasonably ascertainable, the creditor has 24 months from the decedent's date of death to present the claim. RCW 11.40.051(1)(b)(ii).

¶ 6 Washington Federal, a known creditor, presented its creditor claim to the estate on May 10, 2011. This was months after the 30–day time bar had elapsed but still within the 2–year time bar that applies if Washington Federal was not given actual notice. The question in this appeal is whether Washington Federal was given actual notice in the manner required by RCW 11.40.020(c) —i.e., by service or mailing of the notice to creditors.

¶ 7 On January 28, 2011, about a year after the opening of probate, the estate's attorney wrote a letter to Washington Federal stating that a copy of the notice to creditors was enclosed and calling the bank's attention to the statutory time bar provisions. On the same day, the estate filed an "Affidavit of Mailing" with the court in the probate matter. The affidavit was sworn by Anne Favretto, a legal assistant of the law office for the estate's attorney, under seal of notary on the same date. The affidavit states, in full:

> Anne Favretto, first being duly sworn on oath, states that this Affidavit is made on behalf of the personal representative.
>
> On January 28, 2011, I have given, or caused to have given, the creditors listed on said Exhibit A, actual notice by mailing to the creditor's last known address, by regular first class mail, postage prepaid, a true and correct copy of the notice to creditors filed herein.
>
> /s/ Anne Favretto
>
> ***55** SUBSCRIBED AND SWORN to before me this 28th day of January, 2011.
>
> [signature and stamp of notary]
>
> Exhibit A comprised page two of the affidavit.

Washington Federal was one of two creditors listed on Exhibit A.

¶ 8 Under RCW 11.40.051(a), the applicable claims bar was 30 days after the personal representative served or mailed the notice to creditors. The 30–day deadline passed on February 27, 2011, with no response from Washington Federal.

¶ 9 The estate had been making monthly payments of $2,433 on the loan since Dr. Klein's death, while trying to sell the condo. The estate received, and rejected, an offer of $260,000 for the condo in March 2011.

¶ 10 On April 8, 2011, Klein wrote to Washington Federal and offered to give it the deed to the property in lieu of foreclosure. He wished to "turn over the property to Washington Federal ... and to walk away from" the condo and its related costs. Washington Federal declined.

¶ 11 On April 27, 2011, Klein filed a "Petition for Instructions" asking the court to order Washington Federal to accept his offer of a deed in lieu of foreclosure, in light of its failure to file a timely creditor's claim to any unsecured deficiency above the value of the deed. Klein attached to his petition the January 2011 letter from the estate's attorney, the attached notice to creditors, and the affidavit of mailing by Favretto. Washington Federal claims this was the first time it had ever seen any of these documents. On May 10, 2011, within 30 days, Washington Federal filed a creditor's claim.

¶ 12 Washington Federal also filed an opposition to the petition for instructions. Bank employees Barbara Peten and Betsy Nelson submitted declarations stating that neither they nor anyone else at Washington Federal received the estate's January 2011 letter, that Washington Federal maintained "standard policies and procedures" for the proper handling of such notices that arrive by mail, and that the April 2011 petition was their first notice that the estate was attempting to avoid liability for any deficiency between the value of the promissory

note and the value of Washington Federal's secured deed.

¶ 13 There followed several months of inconclusive litigation concerning the petition for instructions which need not be detailed here. For purposes of this appeal, the next significant event occurred on October 27, 2011, when Klein filed a formal notice rejecting Washington Federal's creditor claim.

¶ 14 Washington Federal then sued the estate for breach of contract, alleging that the personal representative had breached the estate's obligations under the promissory note and the deed of trust. Washington Federal sought to enforce the promissory note against the estate and to collect the deficiency above the value secured by the deed of trust.

¶ 15 The estate moved for summary judgment. The estate argued, in part, that Favretto's mailing of the notice to creditors in January 2011 constituted an affirmative defense to any unsecured claim against the estate by Washington Federal because the lender had not filed its claim within 30 days after that notice was mailed.

¶ 16 The court granted the estate's motion on April 11, 2012, reasoning that the notice mailed in January 2011 with the letter from the estate's attorney was enough to start the clock ticking. The court awarded the estate its attorney fees and costs, totaling $12,045. This appeal followed.

¶ 17 When reviewing an order granting summary judgment, this court engages in the same inquiry as the trial court, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Jones v. Allstate Ins. Co.,* 146 Wash.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is appropriate if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one on which the outcome of the litigation depends. *Zedrick v. Kosenski,* 62 Wash.2d 50, 54, 380 P.2d 870 (1963).

¶ 18 The party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved ***56** factual issues remain, or on having its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.,* 106 Wash.2d 1, 13, 721 P.2d 1 (1986). The party must set forth specific facts rebutting the moving party's contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables,* 106 Wash.2d at 13, 721 P.2d 1.

¶ 19 Washington Federal rests its case on its claim that it never received the documents mailed by the estate's legal team in January 2011. The evidence Washington Federal submits are affidavits by two of its employees stating that the documents were never received and detailing the careful procedures that have been put in place to ensure that mail does not get lost.

[1][2] ¶ 20 If Favretto's affidavit proves mailing of the notice—an issue we will address below—these affidavits do not rebut it. A creditor's claimed nonreceipt of a probate notice is not material to proving actual notice. Had proof of receipt been of concern to the legislature, it could have so provided. Just such a requirement exists in the mortgage foreclosure context, for example, where the legislature requires creditors to transmit notices of foreclosure sale " *by both* first-class and either certified or registered mail, return receipt requested." RCW 61.24.040(1)(b) (emphasis added). Actual notice under RCW 11.40.020(c) is accomplished by mailing, without regard to proof of receipt.

[3] ¶ 21 And proof of receipt is not necessary to satisfy due process. Under most circumstances, notice sent by ordinary mail satisfies due process because it is deemed reasonably calculated to inform interested parties of an impending action. *Weigner v. New York,* 852 F.2d 646, 650 (2d Cir.1988), *cert. denied,* 488 U.S. 1005, 109 S.Ct. 785, 102 L.Ed.2d 777 (1989); *Tulsa Prof'l Collec-*

tion Srvs. v. Pope, 485 U.S. 478, 490, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988); *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791, 800, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

¶ 22 The Mississippi and Kansas cases cited by Washington Federal do not establish a rule that due process requires proof of receipt. One would have to lift sentences out of context in order to give them that interpretation. In the Kansas case, there was no issue as to whether an affidavit of mailing was adequate to prove receipt; indeed, the record was "void of any evidence" that the creditor "was ever notified" of the probate, by mailing or otherwise. *In re Estate of Reynolds,* 266 Kan. 449, 970 P.2d 537, 545 (1998). Nor was there a live dispute as to mailing versus receipt in the Mississippi case. There, the court presumed that a mailed notice was a received notice; it described the affidavit of mailing as listing "creditors *who received notice by mail." In re Estate of Petrick,* 635 So.2d 1389, 1390 (Miss.1994) (emphasis added).

¶ 23 Washington Federal's essential argument on appeal is that Favretto's affidavit was inadequate to prove that the estate mailed notice. Washington Federal argues Favretto's use of the wording "have given, or caused to have given" creates ambiguity as to *who* actually placed the document into the mail, and *whether* such a person ever did, in fact, mail the document.

[4] ¶ 24 Klein contends that Washington Federal failed to preserve a challenge to the adequacy of Favretto's affidavit. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sourakli v. Kyriakos, Inc.,* 144 Wash.App. 501, 509, 182 P.3d 985 (2008), *review denied,* 165 Wash.2d 1017, 199 P.3d 411 (2009).

¶ 25 Klein is correct that Washington Federal's position on appeal has evolved from its position in the trial court. Washington Federal's summary judgment opposition brief did not mention Favretto's name, and it made only an oblique reference to her affidavit.

> [E]videntiary issues exist with respect to the P.R.'s ostensible proof of his attorney's assistant's actions. *Indeed, Mr. Klein's Declaration is internally inconsistent, indicating that both his lawyer, and his* ****57*** *lawyer's assistant "gave ... direct notice," and/or "given, or caused to have given," such notice to WaFed.*
>
> It is not up to the Court or WaFed to read between the lines and attempt to ascertain which of the multiple possibilities actually occurred—if any; rather it is the Estate's burden to prove the material facts. Even were the Estate to belatedly attempt establishing a foundation for its P.R.'s knowledge of WaFed's ostensible service, given the existing contradictions in his testimony that evidence should be accorded very little weight.

Clerk's Papers at 170 (some emphasis added) (alteration in original) (footnotes omitted). Washington Federal's motion for reconsideration similarly failed to confront Favretto's affidavit directly.

[5] ¶ 26 For the sake of argument, we will assume the challenge to Favretto's affidavit was not waived. The question, then, becomes whether her affidavit established prima facie proof of "mailing the notice" to Washington Federal as required by RCW 11.40.020(c). Favretto declared, "I have given, or caused to have given, the creditors listed on said Exhibit A, actual notice by mailing to the creditor's last known address, by regular first class mail, postage prepaid, a true and correct copy of the notice to creditors filed herein."

¶ 27 Zeroing in on the phrase, "or caused to have given," Washington Federal argues it means that Favretto is unable to claim personal knowledge that the document was mailed:

> Even accepting the affidavit at face value, the letter and notice may well have been given to someone else to mail or handle—but there is no declaration from any such person as to their actions or confirming mailing. That alone establishes the existence of a genuine issue of material fact as to whether "actual notice" was given.

Brief of Appellant at 27 (emphasis omitted). According to Washington Federal, Favretto's affidavit raises a reasonable inference that no one accomplished the mailing.

¶ 28 We reject this argument. It is not uncommon for declarations of mailing to use phrases signifying that the declarant has "caused" an important document to be mailed. Use of this passive voice construction abounds in statutes that describe a party's obligation to give notice. *See, e.g.,* RCW 61.24.040(1)(b) ("At least ninety days before the sale, ... the trustee shall ... *cause* a copy of the notice of sale ... *to be transmitted* ") (emphasis added); RCW 23B.15.100(3) ("the secretary of state shall immediately *cause* a copy thereof *to be forwarded* by certified mail") (emphasis added).

¶ 29 What these usages recognize is that "mailing" a notice is not a single, complete act. Mailing a notice refers to a series of linked actions, any one of which, hypothetically, is fallible. To prove mailing in accordance with RCW 11.40.020(c), if it is not enough for a legal assistant to say that she "caused" actual notice to be given by mailing, then what is enough? Must she say that she personally took the document to the mail room? Or that she personally put it on the mail truck or in an official postbox? No. The familiar standard of "reasonably calculated to apprise" encompasses the remote possibility that any one of these links may break down in a given case. The office messenger may drop the envelope into the dustbin on the way to the mail room; the wind may blow it off the truck into the street; or a careless postal employee may direct it to the dead letter office. The fact that mailed notice satisfies due process reflects a judgment that such mistakes are very rare.

¶ 30 So, when a legal assistant declares that she has "given, or caused to have given" a creditor actual notice by mailing, it is reasonable to accept her statement as prima facie proof of mailing. To refute such a declaration, a creditor must do more than swear that the mail never arrived.

¶ 31 We conclude Washington Federal has not raised a genuine issue of material fact as to the mailing of the notice to creditors on January 28, 2011. The trial court did not err in concluding that the creditor claim is time barred.

¶ 32 The promissory note contains an attorney fee provision. The trial court awarded the estate attorney fees and costs under this provision totaling $12,045. The estate is similarly***58** entitled to an award of attorney fees as the prevailing party on appeal, subject to compliance with RAP 18.1.

¶ 33 Affirmed.

WE CONCUR: LAU and COX, JJ.

Wash.App. Div. 1,2013.
Washington Federal Sav. v. Klein
311 P.3d 53

END OF DOCUMENT

Appendix D

FILED

12 MAR 26 PM 3:44

KING COUNTY
SUPERIOR COURT CLERK

HONORABLE JIM ROGERS
March 30, 2012 at 2:00 p.m.
WITH oral argument
CASE NUMBER: 11-2-42403-1 SEA

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

WASHINGTON FEDERAL SAVINGS,

Plaintiff,

v.

In the Matter of the Estate of ROBERT KLEIN, MICHAEL P. KLEIN, Personal Representative,

Defendants.

Case No.: 11-2-42403-1SEA

DECLARATION OF GEORGE SMITH

I, George Smith, am over the age of 18, have personal knowledge of all the facts stated herein and declare as follows:

1. I served as counsel for Michael Klein, Personal Representative of the Estate of Robert Klein in *In re the Matter of Robert Klein*, King County Superior Court Case No. 09-4-06471-4 SEA (the "probate case").

2. In capacity I performed tasks at the direction of and with the knowledge of Michael Klein, the Personal Representative of the Estate of Robert Klein. These tasks were performed in furtherance of fulfilling Mr. Klein's duties as Personal Representative and of probating the Estate of Robert Klein. I would direct my staff to carry these tasks out. These tasks included the actions described below.

STOKES LAWRENCE, P.S.
800 FIFTH AVENUE, SUITE 4000
SEATTLE, WASHINGTON 98104-3179
(206) 626-6000

3. I drafted and filed a "Probate Notice to Creditors (RCW 11.40.010 & 051)." This notice was filed in the probate case on January 10, 2010, by my staff at my direction and the direction and knowledge of Michael Klein. It is filed as Docket item # 9 in the probate case. A true and correct copy of this notice as filed appears as **Exhibit A** hereto.

4. I drafted and caused to be served on January 28, 2011 a letter from me to Washington Federal Savings, Attn: Ms. Barbara Peten, and enclosed with it a copy of the Probate Notice to Creditors (RCW 11.40.010 & 051) (i.e., Exhibit A to this declaration). A true and correct copy of this letter and its enclosure appears as **Exhibit B** hereto.

5. I directed Anne Favretto of my office to prepare and file an Affidavit of Mailing Probate Notice to Creditors on that same day. Ms. Favretto swears (over the signature of a notary) that "On January 28, 2011, I have given, or caused to have given, the creditors listed on said Exhibit A, actual notice by mailing to the creditor's last known address, by regular first class mail, postage prepaid, a true and correct copy of the notice to creditors filed herein." Exhibit A to this document lists "Washington Federal Savings, Attn: Barbara Peten, Loan Servicing Assistant, 425 Pike Street, Seattle, WA 98101-7930." Ms. Favretto filed this document on January 28, 2011. It is filed as Docket item # 14 in the probate case. A true and correct copy of this affidavit as filed appears as **Exhibit C** hereto.

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

EXECUTED at Bellevue, Washington this 26th day of March, 2012.

George Smith

STOKES LAWRENCE, P.S.
800 FIFTH AVENUE, SUITE 4000
SEATTLE, WASHINGTON 98104-3179
(206) 626-6000

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

WASHINGTON FEDERAL SAVINGS,

Plaintiff,

v.

In the Matter of the Estate of ROBERT KLEIN, MICHAEL P. KLEIN, Personal Representative,

Defendants.

Case No.: 11-2-42403-1SEA

GR 17 AFFIDAVIT OF JOAN E. HEMPHILL

I, Joan E. Hemphill, am over the age of 18, declare that I have examined the signature of George Smith on his declaration consisting of 2 pages of text and with his signature appearing on page 2. It is complete and legible.

STOKES LAWRENCE, P.S.
800 FIFTH AVENUE, SUITE 4000
SEATTLE, WASHINGTON 98104-3179
(206) 626-6000

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

EXECUTED at Seattle, Washington this 26th day of March, 2012.

STOKES LAWRENCE, P.S.

By: Joan E. Hemphill

Joan E. Hemphill (WSBA #40931)
800 Fifth Avenue, Suite 4000
Seattle, WA 98104
Phone: 206-626-6000
Facsimile: 206-464-1496
Attorneys for Defendant Michael P. Klein, Personal Representative of the Estate of Robert Klein

EXHIBIT A

FILED

10 JAN 06 AM 8:30

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 09-4-06471-4 SEA

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

In Re the Matter of ROBERT KLEIN, Deceased.	NO. 09-4-06471-4 SEA PROBATE NOTICE TO CREDITORS (RCW 11.40.010 & 051)

The personal representative named below has been appointed and has qualified as personal representative of this estate. Persons having claims against the deceased must, prior to the time such claims would be barred by any otherwise applicable statute of limitations, serve their claims on the personal representative or the attorneys of record at the address stated below and file an executed copy of the claim with the Clerk of this Court within four months after the date of first publication of this notice or within four months after the date of the filing of the copy of this Notice with the Clerk of the Court, whichever is later or, except under those provisions included in RCW 11.40.051 or RCW 11.40.060, the claim will be forever barred. This bar is effective as to claims against both probate assets and non-probate assets of the decedent.

Date of First Publication:	January 7, 2010
Personal Representative:	Michael P. Klein
Attorney for Personal Representative:	GEORGE L. SMITH, WSBA #10769
Address for Mailing or Service:	SMITH & ZUCCARINI, P.S. 2155 – 112th Avenue N.E. Bellevue, Washington 98004
Telephone:	(425) 453-4455

LAW OFFICES OF
SMITH & ZUCCARINI, P.S.
2155 112TH AVENUE N.E.
BELLEVUE, WASHINGTON 98004
TELEPHONE (425) 453-4455
FACSIMILE (425) 453 4434
TOLL FREE 800 945 4481

EXHIBIT B

THE LAW FIRM OF

SMITH & ZUCCARINI, P.S.

• Business • Tax • Estates • Trusts • Guardianships •

George L. Smith
g.smith@smithzuccarini.com

2155 - 112th AVENUE N.E.
BELLEVUE, WASHINGTON 98004

425 453 4455
FAX 425 453 4454
TOLL FREE 800 945 4481
www.smithzuccarini.com

January 28, 2011

Washington Federal Savings
Attn: Ms. Barbara Peten
Loan Servicing Assistant
425 Pike Street
Seattle, WA 98101-7930

Re: *Estate of Robert Klein, Deceased*
King County Superior Court Cause No. 09-4-06471-4 SEA
Loan #050 200 318358-9

Dear Ms. Peten:

Enclosed is a copy of Probate Notice to Creditors filed in the Estate of Robert Klein. Dr. Klein died on December 11, 2009. On behalf of the personal representative, Michael P. Klein, we are providing notice to you by the provisions of RCW 11.40.030.

By law a claim is barred forever unless it is presented within the later of: (1) thirty days after the personal representative served or mailed the notice to the creditor as provided under RCW 11.40.020(1)(c); or (2) four months after the date of first publication of the notice.

Very truly yours,

SMITH & ZUCCARINI, P.S.

George L. Smith

GLS:af
Enclosure:
- Probate Notice to Creditors

Cc: Mr. Michael P. Klein, Personal Representative

Mr. Michael P. Klein,
Personal Representative
Estate of Robert Klein
13400 Phelps Rd. NE
Bainbridge Island, WA. 98110

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

In Re the Matter of ROBERT KLEIN, Deceased.	NO. 09-4-06471-4 SEA PROBATE NOTICE TO CREDITORS (RCW 11.40.010 & 051)

The personal representative named below has been appointed and has qualified as personal representative of this estate. Persons having claims against the deceased must, prior to the time such claims would be barred by any otherwise applicable statute of limitations, serve their claims on the personal representative or the attorneys of record at the address stated below and file an executed copy of the claim with the Clerk of this Court within four months after the date of first publication of this notice or within four months after the date of the filing of the copy of this Notice with the Clerk of the Court, whichever is later or, except under those provisions included in RCW 11.40.051 or RCW 11.40.060, the claim will be forever barred. This bar is effective as to claims against both probate assets and non-probate assets of the decedent.

Date of First Publication:	January 7, 2010
Personal Representative:	Michael P. Klein
Attorney for Personal Representative:	GEORGE L. SMITH, WSBA #10769
Address for Mailing or Service:	SMITH & ZUCCARINI, P.S. 2155 – 112th Avenue N.E. Bellevue, Washington 98004
Telephone:	(425) 453-4455

LAW OFFICES OF
SMITH & ZUCCARINI, P.S.
2155 112TH AVENUE N.E.
BELLEVUE, WASHINGTON 98004
TELEPHONE (425) 453-4455
FACSIMILE (425) 453-4464
TOLL FREE 800 945 4461

EXHIBIT C

FILED

11 JAN 28 AM 11:02

KING COUNTY
SUPERIOR COURT CLERK
E-FILED
CASE NUMBER: 09-4-06471-4 SEA

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

In Re the Matter of ROBERT KLEIN, Deceased.	NO. 09-4-06471-4 SEA AFFIDAVIT OF MAILING PROBATE NOTICE TO CREDITORS

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Anne Favretto, first being duly sworn on oath, states that this Affidavit is made on behalf of the personal representative.

On January 28, 2011, I have given, or caused to have given, the creditors listed on said Exhibit A, actual notice by mailing to the creditor's last known address, by regular first class mail, postage prepaid, a true and correct copy of the notice to creditors filed herein.

Anne Favretto

SUBSCRIBED AND SWORN to before me this 28th day of January, 2011.

ERICA M. HAM
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
2-19-14

(Signature of Notary)

Erica M. Ham
(Legibly Print or Stamp Name of Notary)

Notary public in and for the state of Washington, residing at Bellevue
My commission expires: 02-19-14.

LAW OFFICES OF
SMITH & ZUCCARINI, P.S.
7135 - 112TH AVENUE N.E.
BELLEVUE, WASHINGTON 98001
TELEPHONE (425) 453-4455
FACSIMILE (425) 453-4454

EXHIBIT A

CitiMortgage Inc.
Attn: Research Services
P. O. Box 9438
Gaithersburg, MD 20898-9438

Washington Federal Savings
Attn: Ms. Barbara Peten
Loan Servicing Assistant
425 Pike Street
Seattle, WA 98101-7930

LAW OFFICES OF
SMITH & ZUCCARINI, P.S.
2155 - 112TH AVENUE N.E.
BELLEVUE, WASHINGTON 98004
TELEPHONE (425) 453-4455
FACSIMILE (425) 453-4454

Appendix E

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

In re the Matter of the: ESTATE OF ROBERT KLEIN, Deceased.	NO. 09-4-06471-4 SEA **CREDITOR'S CLAIM OF WASHINGTON FEDERAL SAVINGS** **RCW 11.40.070**

Washington Federal Savings, whose address is 425 Pike Street, Seattle, Washington, 98101, Creditor of the above-entitled estate, by and through its attorneys of record, David A. Weibel, Barbara L. Bollero and Bishop, White, Marshall & Weibel, P.S., hereby states that the above-named Estate is indebted to Washington Federal Savings as follows:

1. The estate is indebted to said creditor in the amount of $356,088.31, as of May 9, 2011, for a secured loan, plus fees, costs and interest accruing thereafter, as provided for in the Note and Deed of Trust, redacted copies of which are attached hereto and incorporated herein by this reference.

2. TOTAL: $356,088.31, as of May 9, 2011, plus interest, fees and costs accruing thereafter.

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 OLIVE WAY, SUITE 1201
SEATTLE, WASHINGTON 98101-1801
206/622-5306 FAX: 206/622-0354

3. That said claim is

☐ a. Contingent.

☐ b. Unliquidated in that _____.

☐ c. Unsecured.

☑ d. Secured, in part, by real estate.

This claim does not release either collateral or the liability of any person. Claimant reserves the right at any time to realize by judicial proceedings or otherwise on any collateral which secures the payment of this obligation.

DATED this 10th day of May, 2011.

BISHOP, WHITE, MARSHALL
& WEIBEL, P.S.

Barbara L. Bollero

David A. Weibel, WSBA #24031
Barbara L. Bollero, WSBA #28906
Attorneys for Claimant
Washington Federal Savings

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 OLIVE WAY, SUITE 1201
SEATTLE, WASHINGTON 98101-1801
206/622-5306 FAX: 206/622-0354

DECLARATION OF SERVICE

I declare, under penalty of perjury under the laws of the State of Washington and the United States of America, that on the 10th day of May, 2011, I caused a copy of the foregoing Creditor's Claim to be served on the following parties as follows:

Scott A. W. Johnson 800 Fifth Avenue, Suite 4000 Seattle, WA 98104-3179 Attorney for Estate	[ ] By U. S. Mail [✓] By Legal Messenger [ ] By Facsimile [✓] By Email
Michael P. Klein 13400 Phelps Road NE Bainbridge Island, WA 98110	[✓] By U. S. Mail [ ] By Legal Messenger [ ] By Facsimile [ ] By Email

Dated this 10th day of May, 2011, at Seattle, Washington.

Ana I. Todakonzie

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.
720 OLIVE WAY, SUITE 1201
SEATTLE, WASHINGTON 98101-1801
206/622-5306 FAX: 206/622-0354