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NO. 91074-0

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SUPREME COURT OF THE STATE OF WASHINGTON

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NO. 44244-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

In re the Dorothy P. Mettle Trust

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ANSWER TO 2<sup>ND</sup> SHORTENED PETITION FOR REVIEW

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**I. RESTATEMENT OF THE CASE**

The Respondent, Gregg Mettle (“Gregg”)<sup>1</sup>, is the Trustee of the Dorothy P. Mettle Revocable Living Trust (“Trust”) and the Personal Representative of the Estate of Dorothy P. Mettle (“Estate”) in the underlying Superior Court and Court of Appeals’ matters. The restatement of the case and facts relevant to such are contained in the Restatement of Facts section, below.

**II. RESTATEMENT OF THE ISSUES**

Guy Mettle (“Guy”)<sup>2</sup> raises so many issues in his 2<sup>nd</sup> Shortened Petition for Review that it is impractical to address each of those issues in this Answer. The applicable issues arising from the Court of Appeals’ unpublished decision in *In re: Estate of Dorothy P. Mettle*, No. 44244-2-II, filed June 24, 2014 (the “2014 Opinion”) relate to the following orders/subject matters: (a) denial of Guy’s motions to compel production of documents and perpetuate testimony; (b) determining Gregg did not act improperly with respect to distributions by the Trust and/or Estate including the timing of distributions, (c) the denial of Guy’s request to

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<sup>1</sup> The Mettle brothers, Gregg, Guy and John, are referred to by their first names throughout this brief. No disrespect is intended by this informal reference.

<sup>2</sup> See footnote #1.

require a supersedeas bond, (d) the dismissal of and/or failure to provide relief to Guy with respect to his motion for an accounting; (e) denial of Guy's motion for the recusal of the trial court judge and the Court of Appeals' judges; and (f) ordering an award of attorney fees to the Trust/Estate from Guy's distribution with no award of attorney fees to Guy. The Court of Appeals properly decided each of these issues as set forth in the 2014 Opinion.

### **III. RESTATEMENT OF FACTS**

The underlying case involves the estate of decedent Dorothy P. Mettle ("Estate"). Mrs. Mettle, a resident of Pierce County, Washington, executed her Last Will and Testament on September 15, 1997, and a First Codicil dated September 26, 2000 ("Will"). CP 4, 7-13.

Mrs. Mettle died on December 10, 2002. CP 4, CP 140. At the time of her death, Mrs. Mettle's gross estate consisted of assets held in her name and held in the name of her revocable trust, the Dorothy P. Mettle Revocable Living Trust ("Trust"), also dated September 15, 1997, and amended on September 26, 2000. CP 130. The combined value of the Trust and Estate at the time of her death was approximately \$954,614.00. CP 331. Mrs. Mettle is survived by three sons, Guy, Gregg and John, all of whom are equal beneficiaries of the Trust. CP 5, 7, 124. Dorothy's son, Gregg, was named as personal representative of the Estate. CP 11. Gregg was also named as the successor trustee of the Trust. CP 130. Mrs.

Mettle's Will provides that the Estate is to be administered without intervention of the court. CP 8.

Immediately prior to her death, Mrs. Mettle's affairs were under the supervision of the guardianship court in Pierce County Superior Court Cause No. 00-4-01533-2. CP 330–333, 477. Gregg and his brother, John, were Mrs. Mettle's court-appointed co-guardians. CP 342, 477. Additionally, at the time Mrs. Mettle was declared incapacitated, Gregg became the acting successor Trustee of the Trust. CP 130, 478. All personal property in Mrs. Mettle's Estate was disposed of in the guardianship action. CP 336. The co-guardians' Final Report was approved on September 5, 2003. At the close of the guardianship, the Estate's only asset was a Columbia Bank account, and the only Trust asset was a Merrill Lynch account. CP 31-32.

On September 10, 2003, Gregg, by and through his attorneys, Eisenhower & Carlson and David B. Petrich, filed a Petition for an Order: 1. Admitting Will to Probate, 2. Appointing Personal Representative, and 3. Adjudicating Solvency of Estate. CP 16-18. Pursuant to the Court's Order appointing Gregg as personal representative, Gregg was granted non intervention powers. CP 17. Mrs. Mettle's Will directed that the assets in her Estate be transferred to the trustee and placed in the Trust. CP 8.

On October 6, 2004, seeking to complete the administration of the Estate, Gregg filed a Notice of Filing of Declaration of Completion of Probate as well as a Declaration of Completion of Probate. CP 33-34. Thereafter, on November 1, 2004, Guy filed a Petition for Accounting and

Approval of Fees challenging Gregg's proposed completion of probate and prolonging the administration and closure of the Estate. CP 40-41. As a result, the probate was not completed, and Gregg continued to serve as personal representative. CP 33.

Approximately one month later, in December of 2004, Gregg, as trustee, distributed from the Trust, \$600,000.00, or \$200,000.00 to each of the three beneficiaries. CP 328. Gregg directed the Merrill Lynch office in Tacoma to transmit Guy's \$200,000.00 distribution by mailing the distribution check to Guy at his 2783 Martin Road, #203, Columbus, Ohio address. CP 482, 539-40. This was the address to which Guy's attorney at the time, Beth Jensen, directed the check to be mailed. CP 541. Apparently, the distribution check did not reach Guy as the address provided was incorrect. *Id.* The distribution check mailed in December 2004, was never negotiated. *Id.* Gregg, by and through his attorney, Mr. Petrich, communicated three options for providing Guy with his distribution. *Id.* Eventually, Guy received the \$200,000.00 distribution check and negotiated it.

At that time, Mr. Petrich willingly worked with Guy's attorney, Ms. Jensen to provide the Merrill Lynch statements and other information reflecting the amounts held in the Trust as well as matters relating to the Trust and Estate. CP 539, 545-46, 548-51, 554-55.

During Gregg's administration of the Estate, two significant legal issues arose relating to the payment and potential payment of taxes from the Estate, causing Gregg to wait for their resolution before closing the

Estate. The first issue involved Gregg's payment of estate taxes to the Department of Revenue in the amount of \$30,000.00. CP 26, 29, 31, 547.

Specifically, after payment of such taxes, attorney Petrich became aware that the Washington State Supreme Court granted direct review from the trial court to determine issues relating to the payment of estate taxes to the state, which impacted Mrs. Mettle's Estate. CP 547; *See Estate of Hemphill v. Washington State Department of Revenue*, 153 Wn.2d 544, 105 P.3d 391(2005). Ultimately, given the ruling in *Estate of Hemphill, supra*, in September of 2005, the Estate received a refund of estate taxes previously paid to the Department of Revenue in the amount of \$27,445.00. CP 52. 482, 539-41, 548.

The second legal issue delaying closure of the Estate involved Gregg's decision to wait until the statute of limitations had expired with respect to the decedent's individual federal income tax returns before making additional Trust distributions. CP 481. This statute of limitations expired on or about April 15, 2006. CP 481.

The most significant source of delay in closing the Estate and making all distributions from the Trust rested with Guy. From the time the court appointed Gregg as personal representative and trustee, three different attorneys entered notices of appearance (and subsequently notices of withdrawal) in the estate matter on Guy's behalf. Attorney Beth Jensen entered a Notice of Appearance on December 9, 2003, and a Notice of Intent to Withdraw on March 7, 2005. CP 23, 42-43. Attorney Terrence Posey entered a Notice of Appearance on June 14, 2005, and a



Notice of Withdrawal on March 7, 2008. CP 46, 49-50. Finally, the Spencer Law Firm entered a Notice of Appearance on June 3, 2008, and withdrew pursuant to Court order on June 6, 2008. CP 295, 355-56.

Attorney Posey's declaration in support of his withdrawal, filed March 28, 2008, sheds light upon Guy's intractability in the proceedings.

Paragraph 3 of Mr. Posey's Declaration states:

Mr. Mettle and I had significant differences of opinion regarding strategy for most of the time I represented him. The Petition that he refers to in his Objection to my withdrawal was finished and given to him well over a year ago. However, we have disagreed on the attachments and exhibits to file with the Petition. Prior to my Notice of Withdrawal, the last contact that I had with Mr. Mettle was a telephone conference on July 9, 2007 in which I again explained my professional opinion to him regarding the Petition. He told me that he would consider it and get back to me. He did not contact me in any way between July 9, 2007 and my Notice of Withdrawal. He also has not made a payment on his bill for my services in 14 months.

CP 160-61 (underline added).

The record reflects Guy's pattern of retaining attorneys, not cooperating with his chosen counsel and prolonging the proceedings by filing with the court repetitive, unsupported and defamatory pleadings. Guy's actions caused extreme delay in resolving the Estate and Trust. CP 87-94, 101-103, 104-154, 282-284.

On March 10, 2008, Gregg filed a Petition for Order Approving Final Accounting and Decree of Distribution. CP 51-54. On that same date, attorney Petrich filed a Declaration of David B. Petrich Regarding

Attorney Fees. CP 55-56. Thereafter, attorney Petrich filed a Revised Declaration of David B. Petrich Regarding Attorney Fees. CP 486-87. Attorney Petrich's Declaration(s) attach every billing statement detailing all of his work in relation to the guardianship, Estate and Trust as well as the details of his billable hourly rate. CP 57-84, 489-530.

Also on March 10, 2008, Gregg filed a Petition to Approve Trustee's Interim Accounting in the Trust case, Pierce County Superior Court Cause No. 08-4-00411-5. The Petition to Approve Trustee's Interim Accounting detailed the Trust account for the period December 10, 2002 through December 31, 2007. This Petition relating to the Trust reflects the following Trust activity and status:

Starting Balance:	\$888,792.22
Disbursements:	(\$600,000.00)
Appreciation:	\$92,824.24
Additions:	<u>\$12,368.35</u>
Ending Balance:	\$393,984.81

*Id.* The starting balance in the Trust reflects the figure reported as the ending balance in the Guardian's Final Report, which was approved by the Pierce County Superior Court in Cause No. 00-4-01533-2. *Id.*<sup>3</sup> Again, the disbursement amount of \$600,000.00 reflects the three \$200,000.00 disbursement checks sent to Gregg, John and Guy as Trust beneficiaries in December 2004. *Id.* The increase to the Trust of \$92,824.24 reflects

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<sup>3</sup> Although Guy appealed the Guardian's Final Report to the Division II Court of Appeals, his appeal was dismissed on March 22, 2004 for lack of prosecution.

appreciation to the account, and the \$12,368.35 "addition" resulted from the transfer of Mrs. Mettle's Charles Schwab account into the Trust. *Id.* On March 31, 2008, the trial court consolidated Cause No. 08-4-00411-5 with Cause No. 03-4-01245-1. *Id.*

Thereafter, on June 27, 2008, the Honorable Thomas Larkin heard the Personal Representative's Final Accounting and the Trustee's Interim Accounting. Verbatim Transcript of Proceedings (6/27/08). On that same date, Judge Larkin entered an Order Approving Final Account and Decree of Distribution ("Order Approving Final Account") and an Order and Decree Approving Trustee's Interim Accounting ("Order Approving Trustee's Interim Accounting"). CP 626-628; 629-630.

The Order Approving Final Account ordered that the balance of the property in the Estate be delivered to Gregg as Trustee of the Dorothy P. Mettle Revocable Living Trust. CP 626-628. The Order Approving Trustee's Interim Accounting approved the interim accounting and ordered that the Trustee could consolidate all trust assets into a non-interest bearing account at Merrill Lynch. CP 629-630. The Order Approving Trustee's Interim Accounting also provides that the interim distribution may be delayed until either the statutory period for appealing the Order had expired or any appeal of the Order had been resolved. *Id.*

Guy filed additional motions, all of which the trial court denied. Guy appealed the trial court's decisions and the Court of Appeals affirmed these decisions. *See In re: Estate of Mettle*, No. 38243-1-II, filed March 29, 2011 (the "2011 Opinion"). Regarding the additional motions, these

included the October 2, 2008, Motion for Recusal of Honorable Judge Thomas Larkin, as well as Guy's December 5, 2008, Motion to Compel. In 2010, Guy sought an order of indigency in connection with his appeal, and alleged that Gregg engaged in kidnapping, elder abuse, extortion, civil fraud, bank fraud, check fraud, and perjury" in order to steal Guy's inheritance. CP 905. Guy submitted records showing that he received food stamps from the State of Ohio to support his claim of indigency and the trial court denied his motion.

In 2011, Guy filed a motion seeking an accounting from the Trust and Estate to include attorney billing records. At the hearing, Guy admitted that Gregg provided him (and he received) all of the information he sought. The trial court determined that Guy had "withdrawn" his motion and entered an Order Recognizing Guy Mettle's Withdrawal of his Motion for Accounting and Billing Information" to which Guy objected. CP 1185-86.

In 2012, Gregg sought the trial court's approval to wind up the Trust including his final accounting, administrative and attorney fees and a reduction in Guy's final distribution, which the trial court approved. Guy's "second" appeal followed.

It should be noted that the record reflects and Guy does not deny that throughout the course of the litigation, he never filed a judicial proceeding controverting specific issues relating to the Trust or Estate.

When litigating in the Court of Appeals, Guy also sought the recusal of Judges Armstrong, Quinn-Brintnall, and Penoyar. The 2014

Opinion reflects that the Court of Appeals affirmed the trial court's decisions, denied Guy's request for attorney fees on appeal, and granted the Trust/Estate's request for an award of attorney fees. *See* 2014 Opinion. The Court of Appeals ordered that the Trust/Estate's award of attorney fees may be deducted from any distribution due to Guy. *Id.*

Finally, in its 2014 Opinion, the Court of Appeals refused to consider numerous issues that were decided in Guy's prior appeal and disposed of in its 2011 Opinion because such questions constituted the law of the case. *See In re: the Estate of Dorothy Mettle*, No. 44244-2-II (the "2014 Opinion").

#### IV. ARGUMENT

##### 1. Guy fails to meet the requirements for discretionary review in the Supreme Court.

Guy's 2nd Shortened Petition for Review cites to no fewer than sixty-nine "issues" allegedly relating to the 2014 Opinion for which he seeks review. However, Guy fails to present reasoned argument and relevant law demonstrating any of the criteria required for this Court's acceptance of review under applicable Rules of Appellate Procedure. In fact, many of the "issues" Guy raises were the subject of the 2011 Opinion and are not the subject of the instant 2<sup>nd</sup> Shortened Petition for Review. These include, but are not limited to, the issues as to when a beneficiary can present interlocutory issues to the Supreme Court, whether the trustee,

attorneys and the judges comprise a racketeering gang that steal from estates and fleece beneficiaries, and damages in criminal profiteering cases. *See* 2<sup>nd</sup> Shortened Petition for Review, pp. 10, 13.

As this Court is well aware, RAP 13.4(b)(1) – (4) sets forth the criteria for seeking review of a Court of Appeals’ decision. In this case, Guy’s 2<sup>nd</sup> Shortened Petition for Review fails to meet the standards required by this Rule as follows.

1. Guy fails to present applicable authority or reasoned argument demonstrating that the decision of the Court of Appeals is in conflict with a decision of the Supreme Court.
2. Guy fails to present applicable authority or reasoned argument demonstrating that the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.
3. Guy fails to present applicable authority or reasoned argument demonstrating that a significant question of law under the Constitution of the State of Washington or the United States is involved.
4. Guy fails to present reasoned argument demonstrating that the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b)(1) – (4).

Regarding the issues decided by the Court of Appeals in its 2014 Opinion, including the issues described above in Section II, Guy fails to present applicable legal authority or reasoned argument (and in most instances any argument whatsoever) demonstrating that the Court of

Appeals' decision meets the criteria required for discretionary review by this Court. Accordingly, this Court should deny Guy's request for acceptance of review under RAP 13.4(a).

**2. The Trust/Estate is entitled to an award of attorney fees and costs on appeal.**

Pursuant to RCW 11.96A.150(1), RAP 18.9 and RAP 18.1, the Estate/Trust requests an award of attorney fees and costs for responding to Guy's appeal matter(s) associated with this appeal (including the numerous motions filed, letters issued and other actions taken).

With respect to the Estate/Trust's request for attorney fees, the Trust and Dispute Resolution Act relates to trust and estate matters and specifically provides for an award of attorneys' fees and expenses on appeal, as follows:

Either the superior court or *any court on appeal may*, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) from any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any non probate asset that is the subject of the proceedings. The court may order the costs to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150(1) (emphasis added). As noted above, this section specifically applies to appellate proceedings involving estate and trust matters and gives the court broad discretion in awarding fees. *See*

RCW 11.96A.150(2). See *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 183 P.3d 317 (2008) (awarding attorney fees on appeal pursuant to RCW 11.96A.150(1) to avoid settlor of trust's actions to deplete trust and frustrate trust's purpose).

Respondent also requests an award of attorney fees and costs pursuant to RAP 18.9(a), which provides, in relevant part:

The appellate court . . . on motion of a party may order a party or counsel . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay . . . The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party.

RAP 18.9(a).

In *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 754 P.2d 1243 (1988), the court of appeals awarded fees pursuant to RAP 18.9(a) where the appeal presented no debatable issues upon which reasonable minds might differ and was so devoid of merit that there was no reasonable possibility of reversal. *Id.* at 581.

In this case, where the Estate/Trust has incurred attorney fees and costs in answering Guy's 2<sup>nd</sup> Shortened Petition for Review and in addressing other matters filed after the 2014 Opinion. Thus, an award of attorney fees and costs is proper. This request is particularly compelling



where Guy's 2<sup>nd</sup> Shortened Petition for Review not only contains issues and contentions not applicable to the 2014 Opinion, but also where Guy fails to provide reasoned legal analysis or relevant legal authority to support his assertions as to issues relating to the 2014 Opinion. Under these unique circumstances, an award of attorney fees is appropriate.

Further, the expenditure of attorney fees and costs incurred in responding to these motions does not benefit the Estate/Trust in any way, but instead reduces assets that would otherwise be equally divided among the three beneficiaries. Thus, Gregg and his brother, John, are damaged financially by Guy's appeal, in the form of a reduced distribution. Accordingly, in the interests of fairness and equity, Guy should be ordered to pay for the attorney fees and costs expended by the Estate/Trust in responding to this appeal. Further, an award of attorney fees and costs against Guy should be paid from any remaining trust distribution to Guy. If the remaining trust distribution to Guy does not fully cover the award of attorney fees and costs against Guy, then the remaining fees and costs should be paid by Guy to the other two trust beneficiaries.


## V. CONCLUSION

Based on the foregoing, Gregg respectfully requests that this Court deny Guy's 2<sup>nd</sup> Shortened Petition for Review and order Guy to pay the


Estate and Trust's attorney fees and costs associated with his appeals in this case pursuant to RCW 11.96A.150(1), RAP 18.9 and RAP 18.1.

RESPECTFULLY SUBMITTED this 2nd day of July, 2015.

EISENHOWER CARLSON PLLC

By:   
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LAW OFFICE OF JENNIFER A. WING,  
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**DECLARATION OF SERVICE**

Cindy Rochelle states:

On the 2nd day of July, 2015, I sent via FedEx, Next Day Delivery, for filing with the Supreme Court of the State of Washington the foregoing ANSWER TO 2<sup>ND</sup> SHORTENED PETITION FOR REVIEW and I also served a copy of said document on the following party as indicated below:

<b>Party Served</b>	<b>Manner of Service</b>
Guy Mettle P.O. Box 2491 Westerville, OH 43086-2491	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Via Overnight Courier <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via U.S. Mail, postage prepaid

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

Executed at Tacoma, Washington, this 2nd day of July, 2015.

  
CINDY ROCHELLE