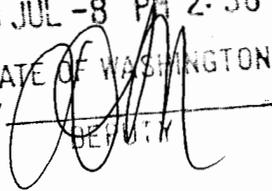


FILED  
COURT OF APPEALS  
DIVISION II

08 JUL -8 PM 2:30

STATE OF WASHINGTON  
BY 

NO. 36682-7-II

R. SIDNEY SHAW, PERSONAL REPRESENTATIVE OF THE  
ESTATE OF GARY DELGUZZI AND DAVID L. MARTIN,

APPELLANTS

v.

IN RE THE ESTATE OF JACK DELGUZZI,

RESPONDENT

APPELLANT'S REPLY

BRIEF

CHARLES CRUIKSHANK, WSB 6682

108 South Washington St. #306

Seattle, Washington 98104

(206)624-6761

ATTORNEY FOR APPELLANTS

May 27, 2008

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Court rules serve, among other reasons, to level the playing field so that all of the parties are governed by the same criteria and to ensure due process and other substantive and procedural standards are uniform. The Washington Civil Rules and Rules of Appellate Procedure have been in development since late in the 19<sup>th</sup> century and continue to evolve to those ends. Overall, they are the best we have and as good as they get.

When a Respondent to an appeal chooses to ignore the Rules of Appellate Procedure and substantive rules, such as the Evidence Rules, the other parties are frequently thrown into a quandary:

Will the court, on its own, sanction the party who makes these unwarranted assaults on procedure and submits pleadings that are insulting to the rules,

or,

Must the Appellant permit these intentional and egregious attempts by the Respondent to distract him and this appellate court from the issues that have been properly appealed and designated by the appellant?

By attacking the Respondent's procedures that are obviously, certainly and undeniably improper and that were employed here in the Respondent's Brief, the case threatens to spin into a procedural dispute rather than remaining one that is substantive. Once the chaff is removed from the Respondent's brief not much is left.

The Appellant chooses to take the approach that directs the court's attention to his properly designated Assignments of Error and the Issues Related Thereto and to suggest that this Court of Appeals is not, and by its precedents, RAP and other Rules, should not be, in a position to

incorporate the rest of the Respondent's universe into its consideration of the Assignments and Issues and that the unauthenticated, irrelevant, and chaotic Respondent's Appendices and argument that is without support in the record should be ignored and also sanctioned.

Absent a cross appeal, which was not made by the Respondent, the Appellant's Assignments and Issues must define the scope of appeal. The Respondents' lamentations about the remainder of the world and how unfairly she has been treated will be best and properly served by the trial court and its future decisions and if Mr. Zeno is unhappy with those results, perhaps he will properly bring them before this appellate body in due course and time after first studying the Rules of Appellate Procedure.

The Respondent failed to address the overriding characteristic of this probate, the conflicts of interest, real and potential, and an additional conflict that he instituted and sponsored by nomination of his friend, Ms Kathryn Ellis, as the successor administrator for the purpose of controlling the closure of the estate in an attempt to conceal and limit additional damages that otherwise would be the liability of his client.

The Appellant brought this conflict to the attention of the trial court at the time of Ms. Ellis' appointment, but the court did not recognize the non-waivable conflict of interest arising from having the successor fiduciary of the estate nominated for appointment by the prior administrator, which prior administrator was responsible for wholesale looting and waste of Gary's Delguzzi's separate assets and those of the

estate of his father.

Now that this conflict has bloomed, matured and thus burdened Ms. Ellis with damages that properly should have responsibility of Mr. Zeno's client, he now, late, appears to have reservations about his abuse of his friendship with Ms Ellis.

Had Ms Ellis done her job properly and investigated and reported the transgressions of Mr. Wilbert and marshaled all of the available assets after she consulted with the attorneys, accountants, and the many others who had that knowledge, and of which there are many, and gathered the assets, which are very significant and substantial, she may have offended her long friendship with Mr. Zeno, as his client would have had to pay the price of the Wilbert family's looting.

In neglecting to properly carry out her duties, she has suffered professional and financial responsibility for what Mr. Zeno's clients have done, and for which damages she was charged with mitigating. It is no wonder that Mr. Zeno wishes to applaud her, although it is his efforts and those of his clients that kept her in the dark and imposed a very high financial, as well as professional, risk on her by abuses of the friendship.

For each dollar of value in missing or under-reported and converted assets that Ms. Ellis refused and failed to marshal and distribute, Mr. Zeno's client is relieved of a corresponding amount of liability.

Mr. Zeno has been associated with this case since 1996 and has represented as many as ten of the Wilbert family members and entities. He

knew the large financial risk that accompanied this case post-Wilbert where the IRS's assessment of the Delguzzi net taxable estate in 1982 was 9.6 million dollars and where Mr. Wilbert and his accountant Craig Kleinman, in 1997, claimed that the estate been insolvent from its beginning.

He thrust Ms. Ellis into that vortex to benefit his client, and was willing to take the risk, or more accurately, for Ms. Ellis to take the risk. In relying upon her friendship with Mr. Zeno and in doing his bidding, Ms. Ellis has done herself a great disservice.

The Respondent's conclusionary arguments that have no support with references to the record will not dispel the appalling cloud of falsehoods and misrepresentations that Mr. Wilbert and his accountant and attorneys participated assisting him in preparing and presenting to the court. Mr. Wilbert's books of account for the estate of Jack were so "cooked" as to be unrecognizable when compared with each other. Mr. Kleinman's report, prepared by him over a period of months both in Denver, where he maintained his office, and in Seattle where he came to prepare Mr. Wilbert's comprehensive accounting of 1997, bears very little relationship to Mr. Wilbert's several other sets of books of account for the estate. For example, significant differences can be seen to be so stark as to not even seem to be addressing the same set of circumstances. Appendix 1 hereto presents a table summarizing some of these comparisons as addressed and evidence in Appellant Brief.

The Costa Rica holdings of the estate as described and allegedly transferred by Mr. Wilbert in his Supplement to the Final Accounting, as compared to his Twelve Year Report (Appendix 2), where those same assets are alleged to be Gary's by virtue of his loans and securitization of estate debt and where Mr. Wilbert and Mr. Kleinman reported the estate owned all of the Costa Rica properties and Gary never had loaned money to the estate.

Malcolm Island, valued by Wilbert at \$13,250.00 and later sold for \$325,000.00 is but another example of the chicanery and trickery.

There has been no explanation of the partnership interests and tenancy-in-common holdings of Gary Delguzzi that he had enjoyed with his father while alive and after which, that he owned as a partner, tenant-in-common and creditor of the estate, which all disappeared despite having been brought to the court's attention and despite requests to Ms. Ellis to secure those funds in a constructive trust until the details could be sorted out.

The list could go on but perhaps should best be completed under direct and close supervision at the trial court. Now that Mr. Wilbert is no longer available to create and foster financial chaos, and with estate records that were secured by Administrator Martin in 2004 this messy problem probate can be analyzed, quantified and cleaned up in an objective and economical fashion.

**DENIAL OF THE DELGUZZI MOTION  
TO CONSOLIDATE HIS CLAIMS**

As to the somewhat incomprehensible allegations of the Respondent that the Appellant seeks by this appeal to create a “hybrid appellate-superior court case” related to the failure of the trial court to consolidate the 1996 Petition with the 2006 complaint On December 7, 2007, Mr. Zeno, in his June 2007 Motion for Change of Venue (CP 1416, p. 3, ll. 6-13), a copy of which is attached, admitted that the Delguzzi Complaint in Cause No. 06-2-01085-2 and the 1996 Complaint of Delguzzi in No. 8087 are:

. . . [M]ore or less the same, except that the Petition’s requests for non-monetary relief are moot. Both pleadings allege that William Wilbert engaged in “self dealing,” “conversion” and “embezzlement” while administering the Estate of Jack Delguzzi. Charles Cruikshank, who wrote and filed the Complaint for damages, has more information now than he did in 1996 when he wrote and filed the Petition. The 2006 complaint for damages is therefore more up-to-date and well-informed set of allegations than the 1996 petition.

All that is being sought by the Appellant is a remand to the Clallam County Superior Court with instructions to direct that court to consolidate the Petition and the Complaint so that they will seamlessly merge in King County under Cause No. 08-2-10290-4. To do anything else is to allow the Petition in Clallam County to remain an orphan and the Complaint in King County to go forward under its regular case schedule, with difficult and perhaps impossible *res judicata* effects to reconcile sometime in the future.

It makes no sense to so proceed. As the Respondent has admitted that the later complaint, now in King County, is simply a more current and updated version of the 1996 complaint, there is no good reason for not directing that the trial court require the consolidation so this trial of the matter can proceed in an orderly fashion.

The seminal case on consolidation is American Mobile Homes of Washington, Inc., V. Seattle-first National Bank, 796 P.2d 1276, 115 Wash. 2d 307(1990), holding, in summary:

When actions involving a common question of fact or law are pending before the court, it may order a joint hearing or trial of any and all matters in the issue in the action; it may order all the actions consolidated; ..." 115 Wash. 2d, Page 313.

The case further holds "It is an accepted principle that, when a court of competent jurisdiction has become possessed of a case, its authority continues, subject only to the appellate authority until the matter is finally and completely disposed of and no court of coordinate authority is at liberty to interfere with this action" [Emphasis Added] citing to Greenburger v. Superior Court, 134 Wash. 400, 401 235 Pac. 957 (1925), and it further explained this principal as follows:

The court which first gained jurisdiction of a cause retains the exclusive authority to deal with the action until the controversy is resolved. The reason for the doctrine is that it tends to prevent unseemly, expensive, and dangerous conflicts of jurisdiction and of process. Sherman v. Arveson, 96 Wash. 2d. 77, 80, 633 Pac. 2d 1335 (1981).

By the admission of the Respondent, the parties, causes of subject matter and relief between the parties are all the same in both matters now

as the 1996 petition has been refined and detailed to clarify or to eliminate claims that were based on information and belief when made and that have since been discovered to be different.

The Respondent's argument about creation of a hybrid appellate-superior court case is meaningless in light of her above admissions and the on issue, coherent and clear authority of this the Supreme Court. Justice will not be served if the current situation, with two parallel cases based on the same facts and with the same parties are permitted to continue in different counties.

As to the procedures that the Respondent bemoans and gnashes teeth over, another case seems to make short work of the long and otherwise tedious task of re-analysis of each the issues in this appeal, as the Supreme Court has already done so in 1942.

This Delguzzi probate case bears a remarkable resemblance in many regards, including, length, complexity, and its issues, to the Estate of Lars Peterson, 12 Wash.2d 686, 123 P.2d 733(1942).

Lars Peterson died in Seattle on September 20, 1924. The case was finally resolved by the Supreme Court on March 19, 1942. Mr. Peterson's one child, L.A. Peterson, died October 17, 1937, after many of the events addressed by the Supreme Court decision had transpired, but prior to the filing of the final report on his father's estate. It is mirrored in many respects by the Jack Delguzzi probate proceeding. The Supreme Court described that case as follows:

This case involves, first, an appeal, in the Estate of Lars Peterson, deceased, from an order (a) sustaining objections to the final report of the then acting administrator de bonis non (b) vacating formal allowances of fees to the attorney and to the original administrator of the estate; (c) making a considerably smaller allowance fees to the attorney and allowing no fee at all to the administrator; (d) setting aside certain transfers, assignment, and sales of property of the estate which had theretofore been made to the attorney and accepted by him in part payment of his original fees; (e) demanding the return to the estate of all property so acquired by the attorney; (f) directing the attorney to make an accounting of all income received and all disbursements made by him in connection with the property which had come into his possession; (g) removing the acting administrator de bonis non and appointing another person in his stead; and (h) making a certain additional allowance to the attorney for services in caring for the property of the estate while in his possession and under his control. Estate of Lars Peterson, supra, 692.

\* \* \* \*

In passing, we wish to observe that our probate statute, [citation omitted] makes it the duty of every administrator to settle the estate in his hands as rapidly and as quickly as possible without sacrifice to the estate. We are powerless, as the trial judge in this case probably also felt, to compel more speedy actions on the part of the administrator, as directed by the statute, with any specified time. He seems, however, to have been managing the estate as if he were the sole owner, or at least on a nonintervention will giving him sole authority. That was seven years ago, and the estate still has not been closed. Estate of Lars Peterson, supra, 704.

The meaning expressed above was echoed by Judge Costello in his Memorandum Decision of October 10, 1997, at page 2, where he wrote:

It appears to this Court, having heard the testimony and reviewed the documents made part of the record at the hearings in January and March, that this Estate is ready to be settled and closed, or at least as ready to be settled and closed as it will ever be. In orderly way to proceed is for the Court to address the issues contested light of the length of time that this Estate has been open and in light of the complexity of the Estate, it appears to this Court that the most and then allow the parties to attempt to reach an agreement regarding distribution in light of the Court's decision. In the event such an agreement cannot be reached, a further hearing to determine the appropriate plan of distribution will be held.

And, back to the Peterson decision:

The administration of Lars Peterson's estate finally entered its last phase in the latter part of 1938 when C.A.J. Taylor, as administrator de bonis non of that estate, filed his final report. To that report Neola Taylor Higgins and Mina Quillin, assignee of Chandos Garner, filed their objections,... and on March 14, 1939 [the court] entered decree approving the final account. Both objectors appealed, and the probates court's decree was reversed by this court In Re Peterson's Estate, 6 Wash.2d 294, 107 P.2d 580. Estate of Lars Peterson, supra, 709.

It is necessary to omit much of Peterson, as it is 32 pages long, although some additional parts of the holding are very much also at issue in the Delguzzi probate, particularly the finality of orders entered before the 'final' order, particularly:

If the order were merely an interim order, as it would be had it simply purported to fix the partial allowance of fees, it would be subject to vacation or modification on final accounting. This matter of interim orders and probate has recently been before this court, with particular reference to the nature and conclusiveness of periodic reports made by an administrator. In re Krueger Estate, 11 Wash.2d 239, 119 P.2d 312. In that case, we held that, in view of the purposes of such periodic reports and the informality with which they are customarily rendered and approved, the orders approving them cannot be regarded as conclusive of the matters contained therein, as against interested parties who had no notice of the hearings of which such reports were confirmed. That case not only held that such orders are merely prima facie correct, they also specifically recognized the right of interested parties without notice of the hearings to interpose objections on the final accounting and to demand a re-examination of matters previously approved in periodic reports. Estate of Lars Peterson, supra, 716.

Much as this court found in UPO-2, the 2001 second unpublished opinion of this court, which unequivocally held that res judicata and other doctrines preventing Gary Delguzzi from having a fair hearing and access to due process rights on matters in his 1996 Petition, were not barred by

the 1997 hearing by Wilbert in support of his Petition for Final Accounting and Decree of Distribution because of the denial of his rights to discovery.

The discovery of facts that the Appellant later acquired, came at very dear expense of time and resources, as all of his discovery motions were denied.

The big discovery break came in 2004, after Mr. Wilbert died, which released his stranglehold on some of the many estate files and records, which were recovered by Interim Administrator David Martin, CPA. More was learned from the discovery in the related King County litigation during 2007 which came from Mr. Wilbert's estate attorneys.

Prior to that, Gary Delguzzi, and then his estate, had been unable to obtain any significant discovery and had no opportunity to fairly litigate his claims, and therefore the same reasoning applies in this case as in the Krueger case as to the lack of finality of any of the orders entered pursuant to Mr. Wilbert's asymmetrical and dishonest presentations to the probate court.

Peterson went on to further clarify the finality issue as follows:

. . . The court itself is not estopped and can of its own motion remedy its earlier mistake. The probate court is not merely a referee in a contest between private disputants. Instead, it is the agency primarily charged with the important function of administering decedent's estates and of distributing to the proper parties in each case the balance left after paying the debts of the decedent, the expenses of his last illness and funeral, and the expenses of the administration. This done through its own duly appointed offices, acting, except in the case of non-intervention wills, under close supervision of the court.

Regardless of this particular position occupied by the

probate court, it should accept direct responsibility for the proper administration of every estate. It may derive assistance from the activities of private parties having conflicting interest in the estate, but this fact should not be allowed to relieve it of the ultimate responsibility. And this obligation of the court is heightened because of the large number of proceedings incident to administration which are entirely ex parte, throwing up on the court the duty of safeguarding the rights of interested parties who are not present to do so for themselves.

As a result of this peculiar status of the courts in probate proceedings, it becomes apparent during the course of administration that a mistake has been made at some earlier date, the court should immediately take steps to remedy the situation insofar as that is possible... it is the court which takes the initiative in striking down the invalid order, and the source of the information introduced in inducing the action is not material. The court may even act on facts supplied by total strangers to the estate appearing as friends of the court. But whatever the source of this information, once the court has determined that the facts are as represented, it should of its own motion take the proper steps to correct the situation. (Citing to In re Mignery, 11 Wash.2d 42, 118 P.2d 440.) In Re Estate of Lars Peterson, *supra*, 722-3.

The order with which we are here concerned, however, was not an interim order, nor did it partake of the nature of such an order. It purported to be a final order fixing the entire allowance for fees over and above what had already been allowed some years before. No such order should have been made, nor should ever be made, prior to the final accounting, for it is then that all the interested parties are given notice according to the statute and have the right to be heard upon all matter affecting the administration and distribution of the estate. In Re Estate of Lars Peterson, *supra*, 717.

\* \* \* \*

The parents further contend that the orders confirming the sales to McKnight are now res judicata as to the adequacy of the prices paid, the fairness of the sales, and all other objections which might have been offered against the entry of these orders.

... This section [of the statute] cannot operate to immunize the particular transactions here in question against the fact at this time and this manner. By these transfers, ... where the orders of confirmation were therefore induced, in large degree, by a mistake of facts or basic as to vitiate them entirely. In Re Estate of Lars Peterson, *supra*, 724.

Since the rights of innocent third persons are concerned, it is our conclusion that McKnight took and now holds the property received from the estate under a constructive trust for the benefit of Lars Peterson's estate, or more precisely, for the administrator de bonis non of that estate. While this case may not fit exactly into any of the established categories in which the cases were constructive trust had been imposed when normally classified, still it comes well within the general purpose for which thus trusts are created. That purpose has been well expressed by Mr. Justice Cardoza in Beattly v. Guggenheim Exploration Company, 225 N.Y. 380, 122 N.E. 378, as follows:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interests, equity converts him into a trustee.

In Re Estate of Lars Peterson, *supra*, 724.

While the Peterson estate decision gives the probate court broad and pervasive powers, current status of the laws confirm those powers with the enactment of TEDRA<sup>1</sup> in 2001.

In any event, for all of the above reasons, it is requested that as to all matters as to which this court finds are, or should be, not subject to further question and further evidence that this Court direct that the superior court enter orders and equitable instructions to restore the assets of Gary Delguzzi to him as the proper owner, requiring disgorgement of the fees of Administrator Wilbert and the attorneys who represented him as such to the estate and as to all others matters, where further factual findings are necessary, directing that the Superior Court take steps to

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<sup>1</sup> Washington's Trust and Estate Dispute Resolution Act (TEDRA), Chapter 11.96A RCW, and its predecessor, Chapter 11.96 RCW (repealed).

identify and quantify all such matters in an expeditious, efficient, and fiscally conservative fashion, in order to determine all the assets of the estate, wherever they are, and however they were transferred, their values, and restore them to their proper owners and or distributees.

Dated and signed on this July 7, 2008.



Charles Cruikshank WSB 6682

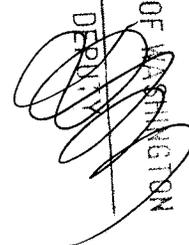
Certificate of Service

I certify that I caused to be filed and/or served by 1<sup>st</sup> class US mail, postage prepaid, a copy of the Appellant's Reply Brief on this July 7, 2008 upon the following persons/parties/entities.



G. Michael Zeno  
4020 Lake Wash. Blvd.100  
Kirkland, WA 98033

Kathryn A. Ellis  
600 Stewart Street. #620  
Seattle, WA98101-1261

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUL -8 PM 2:30  
STATE OF WASHINGTON  
BY  DEPT. V

**TABLE OF DIFFERENCES**  
**(Wilbert & Craig Kleinman CPA Reports)**

	Wilbert Declaration May 15, 1998	Kleinman Report September 30, 1996
Amounts of Wilbert's controlled entity & family member real estate commissions	\$169,685 <sup>1</sup>	\$372,160
Total administration fees paid to Wilbert	\$901,085	\$1,820,842
Fees & expenses billed and not paid to Wilbert by Sep. 30, 1996	\$1,644,542	\$683,691
Value of assets sold	Not Reported	\$8,749,332
Value received for assets sold	Not Reported	\$1,449,397
Difference: Value of assets less receipts.(Unaccounted for loss)	Not Reported	\$7,299,935
Interest payments Estate to Wilbert <sup>2</sup>	\$893,168 (alleged owed and <u>unpaid</u> )	\$111,797 (alleged owed and <u>paid</u> )
Loans by Wilbert, Cressman and Lockwood Foundation to Estate	Claimed in Wilbert's 1984 Annual Report to be \$800,000	Shown to be \$100,000 each from Wilbert and Cressman in 1985, with \$-0- loaned from Lockwood Foundation
Taxable value of Estate <sup>3</sup>	\$3,841,505 <sup>4</sup>	\$13,745

1. Amount admitted, but then not deducted by the Wilbert Declaration of May 15, 1998. Appendix 2, Exhibit C, and Exhibit E, thereto at p. 33 of 66.
2. Disallowed by Judge Costello's "Order Regarding Administrative Expense and Reimbursement Claims and Plan for Distribution" of June 6, 1998. Appendix 2, Exhibit B, p. 2, ¶1.d.
3. According the IRS Assessment in 1982, 4 years after Jack Delguzzi's death, it was \$9,593,408. Appendix 2, Exhibit Q.
4. Wilbert Affidavit filed on January 25, 1984 in Clallam County Case 8087. Restated Appendix 11, p. 3, ¶a.

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*The Honorable Leonard W. Costello*  
Wilbert's Motion for Change of Venue  
Hearing Date: June 29, 2007  
Hearing time: 1:30 p.m.

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

In re the Estate of Jack Delguzzi, )  
 )  
 Deceased )  
 )  
----- )  
 E. Sidney Shaw, Personal Representative )  
 Of the Estate of Gary Delguzzi, )  
 )  
 Plaintiff, )  
 vs )  
 )  
 Loretta D. Wilbert, Personal )  
 Representative of the Estate of William )  
 E. Wilbert, )  
 )  
 Defendant. )  
 )  
----- )

No. 8087

LORETTA WILBERT'S  
MOTION FOR CHANGE  
OF VENUE

----- )  
 E. Sidney Shaw, Personal Representative )  
 Of the Estate of Gary Delguzzi, )  
 )  
 Plaintiff, )  
 vs )  
 )  
 William E. Wilbert, Loretta D. Wilbert, )  
 et. al. )  
 )

No. 06-2-01085-2

Loretta Wilbert's Motion for Change of  
Venue - 1

**ZENO, DRAKE AND HIVELY, P.S.**  
4020 LAKE WASHINGTON BLVD. NE, #100  
KIRKLAND, WASHINGTON 98033  
(425) 822-1511  
Fax: (425) 822-1411

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Defendants.

I. RELIEF REQUESTED

An Order changing venue in the litigation between Sidney Shaw and Loretta Wilbert to King County Superior Court and awarding fees and costs to Wilbert.

II. STATEMENT OF FACTS

Gary Delguzzi sued William Wilbert and others in 1996. The pleading that initiated the suit was the "Petition for Orders Removing Administrator, Appointment of Successor, Requiring Surrender of all Books and Records of the Estate, Setting Date and Time of Hearing, Directing Issuance of Citation and Approving Form of Notice" dated July 16, 1996 ("the 1996 Petition"). The 1996 Petition sought damages as well as non-monetary relief. [Exhibit 1 to the Declaration of G. Michael Zeno, Jr.]

William Wilbert died in 2004, creating a vacancy in the position of personal representative of the Jack Delguzzi probate estate. From approximately August to October 2004, Cruikshank's agent David Martin held that post. During that time he filed a creditor's claim against the Estate of William Wilbert on behalf of the Estate of Jack Delguzzi. [Exhibit 2 to the Declaration of G. Michael Zeno, Jr.] Loretta Wilbert, as personal representative of the Estate of William Wilbert, rejected this creditor's claim on

1 or around November 7, 2006. Under RCW 11.40.100, this gave the holder of the claim  
2 30 days to file suit. Sidney Shaw did so on or around December 7, 2006. Although the  
3 creditor's claim had been filed in Wilbert's King County probate, Shaw filed his suit,  
4 entitled "Complaint for Damages," in Clallam County Superior Court under cause no. 06-  
5 2-01085-2. [Exhibit 3 to the Declaration of G. Michael Zeno, Jr.]

6 The 2006 Complaint for Damages and the 1996 Petition are more or less the  
7 same, except that the Petition's requests for non-monetary relief are moot. Both  
8 pleadings allege that William Wilbert engaged in "self-dealing," "conversion" and  
9 "embezzlement" while administering the Estate of Jack Delguzzi. Charles Cruikshank,  
10 who wrote and filed the Complaint for Damages, has more information now than he did  
11 in 1996, when he wrote and filed the Petition. The 2006 Complaint for Damages is  
12 therefore a more up-to-date and well-informed set of allegations than the 1996 Petition.  
13

### 14 III. ISSUES

15 A. Should venue for Clallam County Superior Court cause no. 06-2-01085-2 be  
16 changed to King County, where the defendant Loretta Wilbert resides?

17 B. Should venue for Clallam County Superior Court cause no. 06-2-01085-2 be  
18 changed to King County for the convenience of the witnesses, per RCW 4.12.030(3)?

19 C. Should venue for proceedings relating to the 1996 Petition, if it is an action  
20 distinct from Clallam County cause no. 06-2-01085-2, be changed to King County  
21 (a) so that the Jack Delguzzi Estate can be closed and (b) to avoid duplicate  
22 lawsuits?

Loretta Wilbert's Motion for Change of  
Venue - 3

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1  
2 **D. Should Shaw pay the costs and attorneys fees for changing venue, per RCW**  
3 **4.12.090(1)?**

4 **IV. EVIDENCE RELIED UPON**

5 The Declaration of G. Michael Zeno, Jr. dated June 22, 2007 and matters on file.

6  
7 **V. ARGUMENT**

8 **A. Venue for Clallam County Superior Court cause no. 06-2-01085-2 should be**  
9 **changed to King County, where the defendant Loretta Wilbert resides.**

10 Litigation over creditor claims in probate is governed by the general venue rules  
11 of RCW 4.12, rather than by the special probate venue rules. *Schluneger v. Seattle-First*  
12 *National Bank*, 48 Wn.2d 188 (1956); *Bailey v. Schramm*, 38 Wash.2d 719, 722, 231  
13 P.2d 333 (1951); *City of Spokane v. Costello*, 57 Wash. 183, 106 P. 764 (1910).

14 In general, an action must be brought in the county where the defendant resides.  
15 RCW 4.12.025(1). There are some exceptions to this rule, but none apply here. Loretta  
16 Wilbert, the defendant in Clallam County Superior Court cause no. 06-2-01085-2, resides  
17 in King County.

18 Under RCW 4.12.030(1), when "the county designated in the complaint is not the  
19 proper county," venue should be changed. See *Cole v. Sands*, 12 Wn.App 199 (1974),  
20 where the trial court was reversed for failing to change venue to the county where the  
21 defendant resided.

22  
Loretta Wilbert's Motion for Change of  
Venue - 4

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1           Venue for Clallam County Superior Court cause no. 06-2-01085-2 should be  
2 changed to King County, where the defendant resides.

3 **B. Venue for Clallam County Superior Court cause no. 06-2-01085-2 should be**  
4 **changed to King County for the convenience of the witnesses, per RCW 4.12.030(3).**

5           RCW 4.12.030(3) authorizes a change in venue if “the convenience of the  
6 witnesses or the ends of justice would be forwarded by the change.” Although the Court  
7 may exercise discretion in applying RCW 4.12.030(3), that discretion must not be used so  
8 arbitrarily as to “deny to a party the benefit of the statute.” *State ex. rel. Ross v. Superior*  
9 *Court of Klickitat County*, 132 Wash.102, 107 (1924).<sup>1</sup>

10           The convenience of the witnesses will be served by changing venue to King  
11 County. The defendant Loretta Wilbert lives in King County. So does her daughter,  
12 Laurie Ann Wilbert, who has some knowledge about her father’s activity as administrator  
13 of the Jack Delguzzi Estate. Venue in Clallam County would be inconvenient for them.  
14 Similarly, the plaintiff Sidney Shaw, who lives in Michigan, would likely find King  
15 County a more convenient venue. Furthermore, Shaw, as personal representative of the  
16

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17  
18 <sup>1</sup> Here is the text of the opinion leading up to the quoted phrase: “It is, of course, somewhat  
19 within the discretion of the court whether it will or will not grant a change of venue on the ground  
20 of the convenience of witnesses. But discretion in this regard is never arbitrary. It must, like  
21 discretion in other matters, be based on reason. If it appears from the entire showing that the  
22 convenience of witnesses will be promoted by the change, the court cannot deny it on the ground  
of discretion, without an abuse of discretion. To hold otherwise would be to *deny to a party the*  
*benefit of the statute.*” *State ex. rel. Ross v. Superior Court of Klickitat County* at 107.

1 Estate of Gary Delguzzi, is already the plaintiff in a related lawsuit in King County, *Shaw*  
2 *v. Short & Cressman et. al.*, cause no. 06-2-27262-5. [Exhibit 4 to the Declaration of G.  
3 Michael Zeno, Jr.]

4 **C. Venue for proceedings relating to the 1996 Petition, if it is an action distinct from**  
5 **Clallam County cause no. 06-2-01085-2, should be changed to King County (a) so**  
6 **that the Jack Delguzzi Estate can be closed and (b) to avoid duplicate lawsuits.**

7 Venue for further proceedings with respect to the 1996 Petition (if it is an action  
8 distinct from Clallam County cause no. 06-2-01085-2) should be transferred to King  
9 County and consolidated with proceedings relating to the 2006 Complaint. The “ends of  
10 justice would be forwarded by the change,” per RCW 4.12.030(3), for the following  
11 reasons:

12 1. The Estate of Jack Delguzzi, Clallam County cause no. 8087, could finally be  
13 closed after 29 years.

14 Katherine Ellis has liquidated all the assets of the Jack Delguzzi Estate and is  
15 ready to close it. She has filed a motion to close the estate, scheduled to be heard on June  
16 29, 2007, the same day as the present motion. If Loretta Wilbert’s Motion to Change  
17 Venue is denied, so that further proceedings with respect to the 1996 Petition occur in  
18 Clallam County under cause no. 8086, then the Jack Delguzzi Estate cannot be closed.  
19 But keeping the Estate open would make no sense. There are no assets left to  
20  
21  
22

Loretta Wilbert's Motion for Change of  
Venue - 6

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1 administer.<sup>2</sup> There is nothing left for Katherine Ellis to do. There would be nothing for a  
2 successor personal representative to do, if one could find someone to take the job.  
3 (Cruikshank's alter ego, David Martin, would not be an acceptable choice, given his  
4 partiality and incompetence.)

5 The Estate of Jack Delguzzi has been open for 29 years. If Charles Cruikshank  
6 wishes to continue his quixotic quest, he does not need to keep the Estate of Jack  
7 Delguzzi open any longer in order to do so. It would serve the ends of justice to close  
8 this estate and transfer any remaining dispute to King County, where the probates of Gary  
9 Delguzzi and William Wilbert are pending, and where Shaw recently chose to file suit  
10 against the law firms that worked on the Jack Delguzzi Estate. [See Exhibit 4 to  
11 Declaration of G. Michael Zeno, Jr.]

12  
13 2. Further proceedings on the 1996 Petition and on the 2006 Complaint for  
14 Damages should be in the same action.

15 As noted above, Loretta Wilbert has a right under RCW 4.12.030(1) to have the  
16 venue of Clallam County Cause no. 06-2-01085-2 changed to King County, her county of  
17 residence. It would serve the ends of justice to have any further proceedings with respect  
18 to the 1996 Petition be part of the same case in the same county. Otherwise there would  
19 be two more-or-less identical lawsuits between the same two parties proceeding  
20

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21 <sup>2</sup> As the Court will recall, Sidney Shaw's claim against Loretta Wilbert is an asset of the  
22 Gary Delguzzi estate and not an asset of the Jack Delguzzi estate.

Loretta Wilbert's Motion for Change of  
Venue - 7

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1 simultaneously in different counties. This would be extremely uneconomical and would  
2 not forward the ends of justice.

3 **D. Shaw should pay the costs and attorneys fees for changing venue, per RCW**  
4 **4.12.090(1).**

5 As noted above, Loretta Wilbert is entitled to have venue in Clallam County cause  
6 no. 06-2-01085-2 changed to her county of residence, per RCW 4.12.030(1). In such a  
7 case, RCW 4.12.090(1) provides that the plaintiff who filed suit in the wrong county  
8 must "pay costs of transfer" and, "if the court finds that the plaintiff could have  
9 determined the county of proper venue with reasonable diligence, it shall order the  
10 plaintiff to pay the reasonable attorney's fee of the defendant for the changing of venue to  
11 the proper county." In the present case, Shaw and Cruikshank knew the county of proper  
12 venue. They knew Loretta Wilbert lived in King County. They knew, or should be  
13 presumed to have known, that the law required Loretta Wilbert to be sued in her county  
14 of residence. Accordingly, fees and costs should be awarded, in an amount to be  
15 determined in a subsequent fee application by Wilbert.  
16

17 DATED this 22nd day of June, 2007.

18 ZENO, DRAKE & HIVELY, P.S.

19 By   
20 G. Michael Zeno, Jr., WSBA #14589  
21 Attorneys for Loretta Wilbert  
22