

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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**COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 39067-1-II**

*In re: Estate of Corrine D. Wegner, deceased and Kenneth Wegner,
Personal Representative*

Respondents/Cross Appellants

v.

Maxine Elaine Tesche

Appellant/Cross-Respondent.

BRIEF OF RESPONDENT

SHANNON R. JONES, WSBA #28300
of Campbell, Dille, Barnett, Smith & Wiley, PLLC
317 South Meridian
P.O. Box 488
Puyallup, WA 98371
(253) 848-3513
Attorneys for Respondent/Cross-Appellant

Barry C. Kombol
Rainier Legal Center, Inc.
PO Box 100
Black Diamond, WA 98010
Attorneys for Appellant/Cross-Respondent

ORIGINAL

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**COURT OF APPEALS, DIVISION II
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In re: Estate of Corrine D. Wegner, deceased
and Kenneth Wegner, Personal
Representative,

Respondent/Cross-Appellant
and

Maxine Elaine Tesche,

Appellant/Cross-Respondent.

Case No. **39067-1-II**

Brief of Respondent/
Cross Appellant,
Estate of Corrine D.
Wegner, deceased and
Kenneth Wegner, PR

I. RESTATEMENT OF THE ISSUES.

Issue No 1: By conceding in argument, before this Court and the Superior Court, that the final order appealed from correctly interpreted RCW 11.18.200 to require unpaid claims and expenses of the Estate be paid from the decedent's one-half interest in the non-probate real property, the Appellant is bound by the law as adopted by the Superior Court.

Issue No. 2: Once the estate uses all of its available probate assets to pay expenses, claims, and fees, and the trial court has determined the validity of those expenses, all of the remaining unpaid expenses, claims and fees are properly charged to the non-probate real property under RCW 11.18.200.

Issue No. 3: The Appellant is not entitled to relief on her assignments of error nos. 3 (removal of Administrator), 4 (damages), and 5 (attorney fee

request), where there were no hearings held and no orders issued on these matters in the trial court.

Issue No. 4: The Appellant failed to set forth with specificity that portion of the Court Commissioner's Order sought to be revised and, pursuant to PCLR 7(g)(3), the Commissioner's ruling is therefore binding as if no revision motion was made.

Issue No. 5: The Estate is entitled to reasonable attorney fees on appeal.

II. RESPONDENT/CROSS APPELLANT'S ASSIGNMENTS OF ERROR.

Assignment of Error No. 1: The Respondent/Cross Appellant first assigns error to the trial court's ruling to reduce the Estate's attorney's fees to be charged to the non-probate real property from \$25,180.75 to \$8,968.18.

Assignment of Error No. 2: The Respondent/Cross Appellant next assigns error to the trial court's denial of the Administrator's fees.

III. COUNTER STATEMENT OF THE CASE.

A. Introduction.

Corrine Wegner (hereafter "Corrine") was 56 years old when she died unexpectedly on February 20, 2006. Corrine was a real estate agent for many years before her death. She was never married. She died without a Will and

her closest and legal heirs were her surviving siblings – Kenneth Wegner, Sharon Burgess, and Gina Sajjadi.

At the time of her death, Corrine’s main asset was real property at 1103/1105 Cole Street in Enumclaw, Washington (“the real property”). While Corrine’s family understood that Corrine owned the real property, it was later discovered to be owned by Corrine and Maxine Tesche, the Appellant (hereafter “Tesche”), “as joint tenants with right of survivorship.” At the forefront of this appeal is to what extent this real property is properly charged with the expenses of administering Corrine’s Estate.

B. Statement of Substantive Facts.

Corrine had a very modest estate. The total value of her personal property assets and cash was less than \$10,000.00. CP 199. The real property, on which there was a small home where Corrine lived and a larger home which Corrine rented to tenants, was worth approximately \$400,000.00 at the time Corrine died, subject to a first and second deed of trust with a balance owing of \$134,000.00. CP 202, lines 12-15, CP 200 and 301. The real property was purchased in 1994. CP 209.

Several months into the probate, it was determined that secured and unsecured creditor claims would total approximately \$231,652.56. CP 209.

Ultimately, unsecured creditor's claims were substantially reduced when creditors failed to make formal claims against the Estate in response to properly served probate creditor's notices. CP 315. Considering both probate and non-probate assets, Corrine's Estate was always solvent. CP 300-316.

Prior to her death, Corrine's family understood that Corrine was the sole owner of the real property and had borrowed money from someone out-of-state for the purchase. CP 208-211 and 325-327.

After Corrine's death, the family for the first time discovered that the real property was in Corrine and Tesche's names, as joint tenants with right of survivorship. CP 213. Tesche was not known to Corrine's family. CP 208. Corrine and Tesche evidently had a friendship at one time, but that relationship had ended prior to Corrine's death. CP 301.

Not long before her death, Corrine commented to her Aunt Turi that the person who loaned her the money to purchase the real property (Tesche) "had played a dirty trick regarding her deed," but that she hoped to pay off the loan from some anticipated real estate commissions. CP 326.

Besides the comments made by Corrine to her Aunt Turi, there was additional evidence that Corrine and Tesche's actual interests in the real property were not accurately reflected in the Deed. As admitted by Tesche

in a sworn statement to the trial court, Tesche played no role in managing the real property – (1) Corrine lived at the real property, while Tesche resided in Nevada, (2) Corrine was the one who paid expenses associated with the real property, including the utilities, and (3) Corrine rented out the larger home on the property, collected the rents (“[Corrine] got all of the benefits from the [real] property”), and received all the proceeds of loans obtained and secured by the real property. CP 357.

The evidence thus known to the Administrator¹ supported a claim for “equitable mortgage” against Tesche; that the actual purpose of placing Tesche’s name on the Deed had been solely to secure the initial purchase loan. CP 164.

Tesche received the rental income from the larger home beginning in March of 2006, per agreement of the attorneys, and the Administrator vacated the smaller home in June of 2006. CP 419, lines 16-20. Although Tesche would later submit photos to allege the property was left in unacceptable condition when she allegedly took possession 13 months after Corrine died, there was no garbage strewn around when the Administrator vacated, and the

¹ In Corrine’s intestate probate proceeding, her brother, Kenneth Wegner, was appointed “Administrator” of her estate. Although the trial court record refers to him also as the “Personal Representative,” which is consistent with RCW 11.02.005(1). For purposes of this brief, he will be referred to as “Administrator.”

property was not at all as depicted in Tesche's photos. CP 419, lines 20-23. The date Tesche took physical possession of the small house is disputed, but there is no dispute that Tesche had possession of the larger home shortly after Corrine's death.

In April 2006, the Administrator commenced an action against Tesche alleging (1) equitable mortgage, (2) that the parties held the real property as tenants in common, (3) for an accounting for the real property expenses paid solely by Corrine, and (4) that Corrine's non-probate real property asset bear the reasonable pro-rata costs of the probate administration. CP 164-165, 194-197. The action was commenced under the Trust and Estate Dispute Resolution Act (TEDRA). Id.

After filing the action, the Administrator and the Estate's attorney spent considerable time and effort investigating the real property claims. Approximately 300 boxes of Corrine's real estate records and documents were reviewed to determine if there were any writings to substantiate Corrine's comments to her Aunt Turi, and the true nature of title to the real property. CP 302 and CP 419, line 5. Discovery was requested of Tesche, but she refused to respond. CP 302. In the end, the discovery process failed to uncover any documentary evidence to support Corrine's verbal statements to

her aunt. CP 302, lines 14-19, and CP 308, lines 12-23. A decision was made to voluntarily dismiss the three claims involving equitable mortgage, tenancy in common, and an accounting. CP 295. The Estate did not dismiss its claim that Corrine's interest in the real property be assessed its fair share of administrative expenses and creditor claims. CP 295.

C. Statement of Procedural Facts.

Kenneth Wegner was appointed Administrator of Corrine's Estate on March 6, 2006. CP 171-172. On April 12, 2006, Kenneth promptly filed the Estate's TEDRA Petition to adjudicate title to the real property against Tesche. CP 163. That Petition was amended on May 25, 2006. CP 194-197. Attorney Barry Kombol appeared for Tesche in the TEDRA action, but never filed an Answer nor made any counterclaim. CP 293.

On May 11, 2007, the Estate filed a motion for partial summary judgment, requesting a ruling that Corrine's interest in the real property be subject to payment of creditors claims and administrative expenses, fees and costs. CP 201-207. A cross-motion for dismissal or, alternatively, a change of venue, was filed by Tesche. CP 236-241.

The Court concluded that it had jurisdiction over the parties and subject matter of the action, and that the Estate's filing of a Lis Pendens on the real

property was appropriate, and denied all motions for summary judgment. CP 287-288. On the same date, the Court consolidated the Estate's action to adjudicate title to the real property with the Probate proceeding. CP 289-290. There was no objection to consolidation by the Appellant and there has been no appeal made here of these orders.

Although the TEDRA action could have proceeded to trial (summary judgment was denied) on the basis of Corrine's statements to her Aunt Turi, and the general circumstances of the parties' relationship, the decision was made to voluntarily dismiss all claims except for the claim to charge Corrine's interest with administrative expenses and creditor's claims. CP 302. Legal expenses to further pursue the real property claim would be significant, and there was substantial uncertainty as to the outcome. CP 308.

A motion to dismiss was presented and approved by the Court. CP 291-297. At the time of filing this motion for dismissal, more than a year after commencement of the proceeding, Tesche had never filed a formal answer to the Petition nor a cross-complaint. Tesche filed no objection to the voluntary non-suit and no request for attorney fees. Tesche's attorney consented to and signed the Order for Voluntary Dismissal of Portions of Claims. CP 295-297.

The Administrator then prepared and filed his Final Report. He requested that the Estate be closed and that Corrine's interest in the real property be subject to payment of the remaining creditor claims, plus administrative fees and expenses. CP 303. He requested the Court impose a lien on the real property and require Tesche to either pay the required expenses within 6 months of the date of the order, or the Estate could file further pleadings and require a referee be appointed to sell the real property so the expenses could be paid. CP 303-304.

Tesche opposed the Estate's request for administrative expenses and fees. CP 330-353. She did not dispute that creditor's claims should be paid from Corrine's interest in the real property, nor file any authority disputing the court's power to enforce payment by requiring a sale of the property. The Estate did provide the trial court with an unpublished opinion, In re Estate of Smith, 117 Wn.App. 1059, Not Reported in P.3d 2003 WL 21652730 (2003), where a probate court had ordered the sale of real property owned as tenants in common.

After the final report was filed, Tesche filed a separate motion requesting a citation against Kenneth Wegner, to remove him as Administrator, and for damages. CP 328-329. She provided a second motion to the Estate's

attorney, requesting fees under CR 11, but that motion is not in the trial court records and was evidently never filed with the trial court. Neither of these motions was noted for hearing in the trial court.

At the hearing on the Final Report, the Court Commissioner Pro-Tem entered findings of fact including (1) that the allegations related to the real property title required investigation; (2) that Corrine Wegner owned a one-half interest in the real property as a joint tenant with right of survivorship with Maxine Tesche; (3) that the attorney fees of \$24,335.15 and costs of \$845.60 were reasonably incurred and to be paid prior to closing the estate; (4) that the Estate owed creditor's claims, expenses of administration, and attorney fees of \$39,925.17, the only asset available for payment of which was the real property; and (5) that the Estate was in a position to be closed. CP 396-400.

At the hearing on the Final Report, the Court Commissioner concluded, at law, that Corrine's one-half interest in the real property was subject to the creditor claims and expenses of administration. CP 400. The attorney's fees totaled \$24,355.15 and were attested to by detailed affidavit, showing all services performed at the attorney's hourly rate. CP 319-324. Tesche objected generally to fees, but did not refer to any specific time entries in the

attorney fee affidavit. CP 337-339.

The Court Commissioner ordered that creditor's claims be paid in full, but determined that the amount of claims and expenses of administration paid by Tesche from Corrine's one-half interest in the real property would be only \$16,212.58. CP 400. Creditors' claims and expenses totaled \$8,807.42, including a loan from the Administrator. CP 399. Therefore, the total award of \$16,212.58 for creditor claims combined with costs of administration left only \$8,968.18 for attorney fees and court costs, discounting fees incurred by more than one-half. The Court denied the Administrator his requested fees. CP 400-403.

Tesche filed a Motion for Revision on December 26, 2008. CP 404. The motion did not specify, as required by local court rule PCLR 7(g)(3), which portion of the Order Approving Final Report was sought to be revised or what, if any, findings were objected to.

The Estate filed a Motion for Revision after receiving Appellant's motion, requesting revision specifically of that portion of the Commissioner's ruling which denied Administrator fees and substantially reduced the total amount of administrative attorney fees awarded. CP 405-417.

In conjunction with the Estate's Motion for Revision, a declaration was

filed in support of the Administrator's request for fees. CP 418-420. This declaration was not before the Court Commissioner because it was expected that the Administrator would provide this information by sworn testimony at the hearing on his final report. (RP May 21, 2009, P. 22, L. 22-25, P. 23, L. 1-2), 418-420. The Commissioner had not permitted any testimony at that hearing because it was in the late afternoon and the docket was extremely crowded. (RP May 21, 2009, P. 23, L. 11-24).²

The Judge denied both motions for revision, adopting the Court Commissioner's ruling. CP 421-423.

IV. ARGUMENT

Issue 1: By conceding in argument, before this Court and the Superior Court, that the final order appealed from correctly interpreted RCW 11.18.200 to require the Decedent's one-half interest in the non-probate real property be charged with the unpaid claims and expenses of the estate, Appellant is bound by the law adopted by the court.

A. Standard of Review.

The Appellant argues that the issues on appeal are subject to *de novo* review. This is incorrect. The proper standard on review is manifest abuse of

² The Court Commissioner's hearing was not transcribed because there was no court reporter and the audio recording was insufficient quality to prepare a good transcript. (RP May 21, 2009, P. 32, L. 13-18).

discretion.

The Appellant correctly states that construction of a statute is a question of law which is reviewed *de novo*. But if a statute is clear and unambiguous on its face, then the Court will not construe the statute, but need only apply it. Rettowski v. Dept of Ecology, 128 Wn.2d 508, 515, 910 P.2d 462 (1996); Harris v. WA State Dept of Labor & Ind., 120 Wn.2d 461, 474, 843 P.2d 1056, (1993), string citation omitted.

All parties agree that RCW 11.18.200 applies to this case and the language of the statute is clear and unambiguous. This appeal concerns the reasonableness of attorney fees incurred during the administration of this Estate, and what is the fair share of those fees to be charged to non-probate real property. It is irrelevant that some of the fees incurred were for pursuit of TEDRA claims which were eventually voluntarily dismissed.

The reasonableness of an award of attorney fees is reviewed by the appellate court on an abuse of discretion standard, not *de novo*. Rettowski, supra, citing Progressive Animal Welfare Soc'y v. UW, 114 Wn.2d 677, 688, 790 P.2d 604 (1990). The appellate court "will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion." In re Estate of Black, 116 Wn.App. 476, 489, 66 P.2d 670

(2003), string citation omitted.

The Appellant assigns error to the Court's "application" of RCW 11.18.200³, but in truth agrees that the statute "applies." The Appellant's substantive objection is to the reasonableness of the Court Commissioner's fee award and whether the fees charged against the non-probate real property were its "fair share." The Court Commissioner's decision to award fees to the Estate from the real property was proper,⁴ and not an abuse of discretion.

B. The Appellant concedes the Court properly charged the real property with liability for the expenses of administration under RCW 11.18.200.

Appellant's brief at page 28 states: "Maxine Tesche has never asserted (nor does she assert in this appeal) that the Enumclaw real estate is free of the claim of \$4,521.76,[. . .], or the Multi-Care medical claim or Valley Radiologist's claim." Under RCW 11.18.200, those creditor claims are the only obligations of the surviving joint tenant, absent a finding in the court below that a fee or administrative expense was "reasonably incurred."

In closing argument before Judge McCarthy, Appellant's attorney, Barry Kombol stated:

³ As well as RCW 11.42.085, which was not direct authority for the award, as analyzed hereinbelow.

⁴ Except as to the amount, which the Estate appeals.

“ . . . RCW 11.18.200, which is what is being relied upon totally [states] ‘ . . . a beneficiary of a non-probate asset, subject to the satisfaction of the general liabilities . . . ’ That’s the \$8,000 of debt ‘ . . . takes the assets subject to liabilities, claims, estate taxes . . . ’ Okay. That’s no doubt about it. You have – that’s the law[. . .] ‘ . . . subject to liabilities and claims’ That would be \$9,000.00. We concede that.” (RP May 21, 2009, p. 13, lines 21-25, p.14, lines 1-8).

Appellant, through her counsel, Barry Kombol, did not dispute the efficacy of RCW 11.18.200 in the trial court, and is therefore estopped from claiming to the contrary on appeal.⁵ Based on Appellant’s admissions, the issue raised on appeal is the **fair share** of the reasonable attorney fees to be born by the non-probate real property owned by decedent prior to her death.

Furthermore, Appellant’s first assignment of error, contending the trial court’s ruling was based on RCW 11.42.085, is disingenuous and not supported by the record. The trial court’s ruling related to payment of the \$8,807.42 in creditor’s claims is not being contested.

⁵ “[J]udicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (internal quotation marks omitted) (quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007)).

Issue 2: Once the estate uses all of its available probate assets to pay expenses, claims, and fees, and the trial court has determined the validity of those expenses, all of the remaining unpaid expenses, claims and fees are properly charged to the non-probate property under RCW 11.18.200.

RCW 11.18.200 requires that Tesche, as beneficiary of a non-probate asset (the real property)⁶, take that asset:

“[S]ubject to liabilities, claims, estate taxes, and the **fair share** of expenses of administration **reasonably incurred** by the personal representative in the transfer of or administration upon the asset [. . .]” RCW 11.18.200(1), emphasis added.

The statute further provides:

“The beneficiary of such an asset is liable to account to the personal representative **to the extent necessary** to satisfy liabilities, claims, the asset's fair share of expenses of administration, and the asset's share of estate taxes under *chapter 83.110 RCW [. . .]” Emphasis added.

A. The elements of RCW 11.18.200: “Fair Share,” “Reasonably Incurred,” and “To the Extent Necessary.”

To determine the Estate’s and the non-probate asset’s “fair share” of expenses, it is useful to examine hypothetical solvent and insolvent estates to which the statute would apply.

Example 1. Estate has probate assets worth \$300,000.00 and non-

⁶ There is no dispute that Corrine’s interest in the real property as joint tenant with right of survivorship was a “non-probate” asset of her Estate. See RCW 11.96A.030(3); RCW 11.02.005(15).

probate assets worth \$600,000.00. Estate is sued for \$1,000,000.00. The estate incurs \$500,000.00 of attorney fees, but successfully defends the suit.

The fees are deemed reasonable by the court, and the owner of the non-probate estate objects. Even though the attorney fees were not incurred in “administering on” the asset, the asset was subject to a claim which was later determined to be invalid. In looking at the 2nd part of the language of the statute, it would be reasonable for the court to determine that a “fair share” should be determined by adding the probate and the non-probate assets together, then using a fraction to determine the amount to be paid. The Estate’s share would be $\$300,000.00/\$900,000.00$ or $1/3$, and the non-probate asset would be charged with $2/3$ of the fees.

Example 2. Estate has no assets and decedent passed \$1,000,000.00 in non-probate property to heirs. A creditor starts a probate and loans \$100,000.00 to the estate to hire an independent executor, who in turn hires an attorney. The creditor sues the estate to obtain a judgment against the estate, and attachment against the non-probate asset. Creditor obtains a \$400,000.00 judgment. The executor of the estate asks the court to approve the executor and attorney fees as reasonable, which the court does. The executor then asks that the non-probate assets be used entirely to pay the

reasonable attorney fees and executor fees in the probate, as well as for defending the suit. The non-probate asset beneficiary objects because there was no benefit to them in the estate administration. Since the estate has no assets other than the non-probate assets with which to pay the fees, it is not possible to pro-rate a “fair share” between the non-probate assets and probate assets. In a case like this, it is necessary to consider that portion of the statute which requires the non-probate asset beneficiary be liable to account **“to the extent necessary”** to satisfy liabilities, claims, the asset’s fair share of expenses of administration. The non-probate asset is properly charged with all fees because that is the **extent necessary** to cover those expenses.

In this case, the Appellant objects to the reasonableness of the fees based on the fact that a lawsuit was brought against the Appellant, but after considerable investigation and time expended, dismissed. But the question of “reasonableness” of the attorney fees was adjudicated by the trial court, and determined to be \$24,335.15 plus costs of \$845.60. CP 399, lines 15-26, and CP 400, lines 16-18. The court made findings that, after adding the claims and fixed expenses, the total owed by the Estate was \$41,488.17. CP 399, line 26. The Estate had \$1,563.00 on hand and, applying that amount to the total the balance owed by the estate, left \$39,925.17 to be paid. CP 400, lines 1-2.

After making its findings, the court equitably determined that the “fair share” to be paid by Appellant from the decedent’s non-probate asset was only \$16,212.58. CP 400, lines 8-23. From that money, the estate must first pay the creditors in full, which will leave only \$8,968.18 to be applied toward attorney fees and costs. The court’s determination was in error.

The intent of the statute is not only that the non-probate asset be charged its fair share of attorney fees and costs reasonably incurred, but that the non-probate asset be charged those expenses “**to the extent necessary.**” The court below has determined that *all* of the attorney fees were reasonably incurred and even that the estate had a duty to investigate and file suit in this matter. CP 398. If no investigation had been conducted, there could have been allegations of breach of professional duty against both the Administrator and the estate’s attorney. In order to collect what the court has determined to be the legitimate expenses of Corrine’s estate, the non-probate asset must be charged with the full amount of those expenses, because that is the “extent necessary” where there are no other assets from which to collect those expenses.

If legitimate estate expenses cannot be fully collected from non-probate assets under RCW 11.18.200, particularly where there are no probate assets

from which to otherwise collect such expenses, it will have a chilling effect on investigation and pursuit of future legitimate claims.

Here, Corrine's estate would be insolvent were it not for the non-probate asset which, under Washington law, must be considered in determining solvency. RCW 11.68.011. That non-probate asset should be charged with all expenses reasonably incurred.

B. "Administer and Transfer."

RCW 11.28.200 references liabilities, claims, estate taxes, and the fair share of expenses of administration reasonably incurred "in the transfer of or administration upon the asset." The Appellant alleges the Administrator here did not "administer or transfer" the real property, ignoring the statute's plain language and reading the clause as if it were independent from the remainder of the statute.

Where a statute does not define a term, but is otherwise unambiguous, terms used in the statute will have their ordinary, dictionary meaning. See, for instance, Rettowski, supra, at 515-516.

The terms "transfer of" and "administration upon" are not defined in RCW 11.18.200(1), but are commonplace. To "transfer" means "to cause to pass from one person to another." *Webster's Universal College Dictionary*

835 (2001). To “administer” means “to direct or manage” or “to manage or dispose of (an estate or trust) as executor, administrator, or trustee.” Id. at 11.

The non-probate real property was an asset of Corrine Wegner’s Estate. This is undisputed. That an Administrator may need to “administer upon” or take actions related to “transfer of” this type of non-probate asset is recognized plainly in RCW 11.18.200; why else would costs of administration and transfer be expressly permitted to be charged against the decedent’s interest in the non-probate asset? The actions taken by the Administrator and his counsel to administer and transfer the real property are well-documented and set forth in detail in the lower court record. While the Appellant claims the Administrator has failed to point to any expense incurred in “administering” the real property, the Appellant wholly ignores the Declaration of Hollis H. Barnett, the contents of which declaration were not objected to below. CP 319-324. That Declaration included a detailed itemization of expenses incurred to investigate and pursue claims to the Estate’s major asset – the real property. The majority of fees incurred, based on this Declaration, were incurred in pursuit and investigation of the real property claims.

C. The Estate’s claim for equitable mortgage was supported in fact and at law.

The Appellant contends that there was no legal support for the estate's "equitable mortgage" claim, and to that end spends time briefing the doctrine of "equitable conversion." Appellant's brief at pp. 22-26. The Appellant relies upon In re Estate of Phillips, 124 Wn.2d 80, 874 P.2d 154 (1994) as analogous to this action. The doctrine of equitable conversion was never argued by the Estate and Phillips is completely dissimilar to this action.

The Estate's brief entitled "Memorandum Re Deed Treated as Mortgage" was filed and considered by the Court Commissioner. CP 317-318. That Memorandum was also considered by Judge McCarthy before signing the final order, although had not been read by Judge McCarthy at the time of oral argument. CP 451, lines 7-8. That Memorandum sets forth several cases which support the Estate's legal theory of "equitable mortgage" – Scandinavian American State Bank v. Downs et ux, 72 Wash. 79, 129 P. 894 (1913), Tesdahl v. Collins, 2 Wn.2d 76, 97 P.2d 649 (1939), and Gossett v. Farmers Ins. Co. of WA, 133 Wn.2d 954, 948 P.2d 1264 (1997). All of this authority was presented to the lower court, without any contrary law supplied by the Appellant; therefore, Appellant's argument that there was no legal basis provided by the Estate to support the equitable mortgage claim is disingenuous.

The primary fact on which the Estate relied in bringing the Petition to adjudicate title suit was Corrine's statement to her aunt several months before her death indicating the Appellant had played a "dirty trick" on her, but that she thought she would be able to pay off her loan to Tesche with money she thought she would receive from her commissions. CP 326, lines 12-19. Corrine never mentioned Appellant's ownership interest in the property to any of her relatives, and they all thought she was the only owner of the property. The Appellant never resided at the property, lived out of state, and never collected any rents or handled the books of the property. There is no record of any correspondence between the parties one way or the other. It was obvious before her death that Corrine looked very unfavorably toward the Appellant based upon the statement to her aunt. Corrine's major asset was the real property, which had equity of approximately \$266,000.00.

The Administrator and estate's attorney spent numerous hours going through over 300 boxes of real estate files (Corrine kept records from all of her real estate transactions), looking for any correspondence that would support her verbal statements. CP 419, lines 4-6. There was very little money in the estate and, after paying the funeral and some costs of administration (part of which were advanced by Corrine's brother), there was

no money available to fund the lawsuit. A decision was thus made by the Administrator, after consulting with Corrine's two sisters who were also heirs, to take a voluntary nonsuit. The additional legal expense of going forward with the suit would eat up a substantial amount of the real property's equity in any event.

Commissioner Pro-Tem Joe Quaintance, who presided at the initial hearing on the final report made specific findings of facts concerning the above, and specifically found:

“There were reasonable grounds for the estate to bring its initial lawsuit against Maxine Elaine Tesche, and the legal actions, including discovery, briefings, court appearances and orders entered, were all reasonably [sic] incurred expenses in the administration of the estate.” CP 398, lines 16-19.

The Appellant's reliance on In re Estate of Phillips, 124 Wn.2d 80, 874 P.2d 154 (1994) as analogous to the instant action is misplaced. The legal issue addressed in Phillips was whether a joint tenancy with right of survivorship was severed when all parties to that tenancy executed an earnest money agreement to sell the property to a third party. Phillips also mentioned “equitable conversion.” The Phillips court decided that execution of an earnest money agreement between the joint tenants does not convert a survivorship relationship to a tenancy in common. There was no purchase

agreement to a third party signed by both Corrine and Tesche prior to Corrine's death in this case, nor was there any claim for "equitable conversion." There is just no similarity between Phillips and this action.

In sum, the Estate's action for equitable mortgage was well pleaded in fact and at law and there is no basis for the Appellant to claim otherwise.

D. The Estate is entitled to collect all attorney fees, including administrator's expenses, from the non-probate real property.

The Estate has cross-appealed those portions of the lower court's decisions, with specificity as to findings and conclusions (CP 439-452), which reduced the combined fees and claims award to only \$16,212.58, and denied recovery of any Administrator fees. The lower court erred in arbitrarily reducing the attorney fee award by more than one-half, and denying all Administrator fees, under the standards set forth in RCW 11.18.200.

i. Standard of Review.

The court should review the commissioner's findings pertaining to the amount of administrative fees awarded for substantial evidence. In re Estate of Larson, 36 Wn.App. 196, 200-01, 674 P.2d 669 (1983), reversed on other grounds. This review should also take into consideration the fair share of

expenses to be apportioned the non-probate real property.

ii. Attorney fees attested to by affidavit were reasonable.

In re Estate of Peterson, 12 Wash.2d 686, 728, 123 P.2d 733 (1942), sets forth the criteria to be considered in evaluating attorney fee requests in probate proceedings:

“In fixing the amount to be allowed as a fee for the attorney of a decedent's personal representative, the court should consider the amount and nature of the services rendered, the time required in performing them, the diligence with which they have been executed, the value of the estate, the novelty and difficulty of the legal questions involved, the skill and training required in handling them, the good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance.”

In this case, the detailed affidavit of Hollis H. Barnett substantiated fees incurred in the total amount of \$23,335.15 through the date of the final reporting. CP 319-324. There was no objection by any of the heirs to the fees charged. The Court Commissioner found that the fees were reasonable and that the Estate's attorney had reasonable grounds to bring the petition to adjudicate title. CP 398.

Despite its findings of reasonableness, the court then concluded that the decedent's one-half interest in the real property would only bear approximately one-third of the estate's attorney fees. This meant that the

remaining 2/3 in fees, though determined to have been “reasonably incurred,” could not be paid because there were no other assets available to pay them. The court’s determination was arbitrary and inconsistent with RCW 11.18.200.

RCW 11.76.110 sets forth the order of payment of debts, and requires that all cost of administration (which includes attorney fees) be paid first prior to paying creditors or other expenses.

Although a court’s award of reasonable attorney fees will not be overturned except for manifest abuse, in this case the court found that the total attorney fees and costs (\$24,335.15 and \$845.60) were reasonable, then equitably held that Corrine’s one-half interest in the real property would only pay one-third of those expenses. There is a conflict between the court’s findings and order, and RCW 11.18.200. To accord with the lower court’s findings and RCW 11.18.200, the non-probate asset’s fair share of expenses reasonably incurred should have been 100% of the attorney fees as this was “the extent necessary” to satisfy the reasonable fees incurred where there were no other assets available to pay the fees.

iii. The Administrator was entitled to fees.

RCW 11.48.210 provides in part as follows:

“. . . the personal representative, when no compensation is provided in the Will . . . shall be allowed such compensation for his services as the Court shall deem just and reasonable. . . . such compensation may be allowed at the final account; . . . If the Court finds that the personal representative has failed to discharge his duties as such in any respect, it may deny him any compensation whatsoever or may reduce the compensation which would otherwise be allowed.”

The commissioner’s order had numerous Findings concerning the personal representative’s reasonable activities which benefitted the Estate and made no findings that the personal representative failed to discharge any of his duties.

The Administrator owed a duty to pursue the real property claims for the heirs. An Administrator owes a fiduciary duty to the heirs of the estate and must conform to the laws governing trustees. See In re Estate of Vance, 11 Wash.App. 375, 381, 522 P.2d 1172 (1974), referring to personal representatives and RCW 11.68.070. The Administrator is entitled to request a reasonable fee for his services in administering the Estate. RCW 11.68.100(2). Corrine’s heirs did not object to the fees and costs incurred to pursue the real property claims, including the fees requested by the Administrator. While Tesche objected, she is not an heir and offers no

authority to suggest that the Administrator owes a duty to her as beneficiary of a non-probate asset under the circumstances of this case.

The Administrator requested fees of \$7,500.00 in his final report. CP 303. He was prepared to give testimony at the hearing on this report, in support of his request. (RP May 21, 2009, P. 22, L. 22-25, P. 23, L. 1-2). 418-420. It is expressly permitted in the probate statutes that the Court take live testimony at the hearing on the final report, to determine whether the Administrator's actions should be approved. RCW 11.76.050. Unfortunately, the Administrator was denied that opportunity at the hearing because of a crowded court docket.

At the hearing, the Appellant presented testimony and a number of photos showing garbage strewn around the smaller home on the real property, where Corrine had lived. CP 354 and 368. In reply, the estate's attorney requested testimony be taken from the Administrator, but that request was denied. The photos put the Administrator in a bad light and probably had a substantial impact on the Commissioner's decision not to award administrator fees.

Had he been permitted, the Administrator at the final hearing would have testified as set forth in his later filed affidavit. CP 418-420. The Appellant received all of the rent from the larger rental home beginning with the month

of March 2006, per agreement of the attorneys, and the Administrator vacated the small home in June of 2006. CP 419, lines 15-19. At that time, there was no garbage strewn around, and the home was not as depicted in Tesche's photos. CP 419, lines 20-24. Appellant lived in Nevada and obviously had not come back to Washington to check on the property until the photos were taken. There was no record made of the dates of the photos submitted. While Appellant contends she did not have possession of the real property until thirteen months after the decedent's death (CP 360, lines 16-18), the Estate contends that control was given to Appellant by June of 2006. CP 419, lines 15-16. The Administrator did nothing to damage the property. The Appellant could have made arrangements for someone in Washington to keep an eye on the property while she was in Nevada, but evidently failed to do so. The photos she submitted showed no structural damage in any event, so the actual damage sustained, if any, would only have been labor costs for clean-up.

The Commissioner's findings support an award of Administrator fees and the Administrator's affidavit, substantiating the 150-200 hours worth of work he performed (CP 418-420), supports a reasonable administrator fee award of \$7,500.00.

Issue 3: There were no hearings held and no orders issued in the trial court concerning Appellant's assignments of error nos. 3 (removal of Administrator), 4 (damages), and 5 (attorneys fee) and Appellant is therefore not entitled to relief on those issues.

A. The motions were never noted, and no orders issued.

Appellant never filed an answer to the original or amended petition to adjudicate title to the real property, nor any type of cross-claim asking for any relief against the Estate until after the Estate filed its Petition to close the Estate and scheduled a hearing for December 22, 2008. CP 293. On December 17, 2008, after receipt of the final report and note for hearing, and only 5 days before that hearing, Appellant filed the following documents: (1) Memorandum of Authorities in Opposition to P.R.'s Petition for Approval (CP 57), (2) Certified Declaration of Maxine Tesche (CP 81), (3) Certified Declaration of David Moe (CP 114), and (4) Declaration of Barry Kombol in Opposition to P.R.'s Petition for Approval of Fees (CP 103).

In addition, Appellant provided two motions to the Estate which were not in response to the Estate's Petition to finalize the estate, but which requested money damages, a monetary attorney fee award under CR 11, and removal of the Administrator. The two motions were: (1) Motion for Citation to Issue to Kenneth Wegner for Removal as P.R. and to Pay Respondent's

Damages (CP 55), and (2) Motion for Hearing on CR 11 Violations (which apparently was not filed with the superior court and is not a part of the record on appeal). These two motions were not accompanied by a note for hearing. In fact, they could not have been noted for hearing on December 22, 2008 based the filing date. Pierce County Superior Court Local Rule 7 requires all motions be noted on the 6th court day before the day set for hearing.

There was no argument on the Appellant's motions before the Commissioner, and the Commissioner's Order Approving Final Report nowhere addresses the motions. CP 395-403. No order was ever entered by the Commissioner concerning these motions. In argument before Judge McCarthy on revision, Appellant's attorney, Barry Kombol, conceded the motions had not been noted for argument, although addressed them nonetheless. His obvious purpose to improperly inject emotion in support of Appellant's position:

"Finally, I made a motion. It was never considered. Made a motion before the hearing with respect to damages Ms. Tesche incurred as a result of the PR's misconduct. That was pending. Has not been heard. Doesn't have to be noted. But it's before the court [. . .]" (RP May 21, 2009, p. 39, lines 18-22).

"Finally, I have a motion before the Court for CR 11 sanctions against the PR and his attorney. Has not been heard, and I ask the Court to schedule that, or, I mean, I will note it in front of this department as replacing

Judge Steiner⁷ for sanctions unless the Court is prepared to enter a ruling today in respect to my motions for admission of or incorporation, motion for removal and citation and motion for attorney's fees." (RP May 21, 2009, p. 37, L. 2-10).

Hollis Barnett, attorney for the Estate, never filed responsive pleadings to the two motions because they were not noted for hearing. He did have to respond in argument to some extent due to the prejudicial statements made by Mr. Kombol. Mr. Barnett did not waive objection to the motions when he filed a response to Mr Kombol's pleadings on December 18, 2008:

"Separate motion for removal of the personal representative and for attorney fee sanctions under CR11 were filed by Tesche but not noted for hearing, and are not before the court. Although the estate had to address some of the issues raised it does not waive the notice requirements and does not consent to hearing them at this scheduled hearing." CP 393, lines 25-26, CP 394, lines 1-3.

The three issues raised by the Appellant as assignments of error nos. 3, 4 and 5, were by admission of Appellant's attorney, Barry Kombol, never noted for hearing and were not heard by the lower court; there is no order entered on the motions on which to appeal to this court; and, these assignments of error have thus unnecessarily taken up the court and counsel's time in responding to his brief.

⁷

The motions for revisions were heard before Judge McCarthy, whose department was assigned the probate case from Judge Steiner.

B. The Appellant was not entitled to any affirmative relief even had her motions been properly noted.

Without waiving the Estate's objections as set forth above, including the absence of any appealable record from the trial court, the Estate will briefly address the Appellant's substantive arguments in support of her assignments of error nos. 3, 4, and 5.

First, the Appellant was not entitled to a citation for removal of the Administrator: (1) the Appellant is not among those persons identified by RCW 11.68.070 to whom the Administrator owes a fiduciary duty and who can request an Administrator's removal, (2) the Estate was never insolvent considering the value of both probate and non-probate assets per RCW 11.68.011, and (3) the Appellant's authorities cited on the issue of the personal representatives removal are not on point (In re Estate of Wollen, 88 Wn.App. 1008, Not Reported in P.2d (1997), is unpublished and not legal authority under RCW 2.06.040 and GR 14.1; Estate of Mathwig, 68 Wn.App. 472, 843 P.2d 1112 (1993), involved a request for fees at legal rates for work that was clerical or nonlegal, which is not part of the facts presented here; and in Clawson's Estate, 3 Wn.2d 509, 101 P.2d 968 (1940), there was no ancillary litigation involving estate assets ongoing at the time of the personal representative's removal).

Second, the Appellant is not entitled to fees incurred below under RCW 11.96A.150, RCW 4.84.185 and/or CR 11. RCW 11.18.200 applies to the instant case, and RCW 11.96A.150 was never argued below, nor did that statute form the basis for the Estate's fee award. CR 11 may be invoked only where claims are frivolous and without basis in law or fact. The Appellant's motion for summary dismissal of the Estate's Petition to adjudicate title to the real property was denied. There was sufficient evidence to move to trial on that Petition, let alone overcome a CR 11 sanction.

Issue No. 4: Appellant failed to set forth with specificity that portion of the Court Commissioner's Order sought to be revised and, pursuant to PCLR 7(g)(3), the Commissioner's ruling is therefore binding as if no revision motion was made.

PCLR 7(g)(3) requires that motions for revision of Court Commissioner's rulings "state with specificity any portion of the commissioner's order or judgment sought to be revised, identifying those portions by paragraph or page and line numbers." Furthermore, "Any portion not so specified shall be binding as if no revision motion has been made."

The Appellant's motion for revision before Judge McCarthy requested:

"Revision of the Order of Court Commissioner Joe Quaintance entered ... December 22, 2008 ... upon the records of the case, and the findings [of] *sic* fact and conclusions of law entered by the Court Commissioner."
CP 404.

The Appellant's motion did not identify any portion of the court's order with specificity; therefore, the Appellant's was bound by the Commissioner's ruling as if no revision were requested.

Issue No. 5: Is the Estate or the Appellant entitled to reasonable attorney fees on appeal?

Under RAP 18.1, if the applicable law grants a party the right to recover reasonable attorney fees or expenses on review, then the party must request those fees in its brief. The Estate was properly awarded fees below and the authority for that award is cited at length above. RCW 11.96A.150(1) additionally provides for a discretionary award of fees on appeal:

“Either the superior court **or the court of appeals** may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From a party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate 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.”

The lower court's ruling specifically contemplated future award of attorney fees to the estate if the fees awarded below were not collected from Tesche or from sale of the property within 6 months. Of course, due to this appeal, no fees have been paid. The Order Approving Final Report provided:

“Should it be necessary for the estate to file a petition for appointment of referee, then the estate shall be entitled to all reasonable attorney fees

incurred after the date of entry of the decree herein until receipt of the judgment lien payment in full . . .” CP 402, lines 6-9.

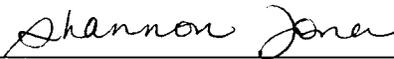
The Estate requests that the Court exercise its discretion to award attorney’s fees for this appeal in an amount to be shown by affidavit filed in accordance with RAP 18.1(d) and deny the Appellant any fees or costs.

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V. CONCLUSION.

The plain language of RCW 11.18.200 requires the Appellant take the non-probate real property subject to claims of the estate *and costs and expenses of administration*. The Appellant conceded at oral argument below that all creditor's claims were properly charged to the non-probate asset. She even conceded that the estate's attorney fees were properly charged to that asset "If they can show [the fees], they may be entitled to ask the Court for some fair share." (RP May 21, 2009, p. 36, lines 1-3). Her position on appeal that no fees are properly chargeable to the non-probate asset is untenable. RCW 11.18.200 requires the "fair share" of expenses "to the extent necessary" be charged to the non-probate asset, and where there are no other assets to satisfy fees reasonably incurred, that share is necessarily 100% of the fees determined to be reasonable.

Respectfully Submitted this 25 day of November, 2009.



Hollis H. Barnett, WSBA #2858
Shannon R. Jones, WSBA #28300

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY E
DEPUTY

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In Re: Estate of Corrine Wegner, Deceased
and Kenneth Wegner, P.R.,

Respondent and Cross
Appellant,

and

Maxine Elaine Tesche,

Appellant and Cross
Respondent

No. 39067-1-II

**AFFIDAVIT OF
SERVICE/MAILING**

MELINDA L. LEACH, being first duly sworn on oath, deposes and says:

That on the 25th day of November, 2009, I cause to be sent by ABC Legal Messengers for delivery the original Brief of Respondent/Cross Appellant, Estate of Corrine D. Wegner, deceased and Kenneth Wegner, PR, to the Court of Appeals, Division II for filing and a true and correct copy to the attorney for Appellant/Cross Respondent as follows:

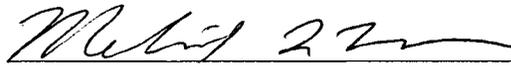
Court of Appeals
Division II
950 Broadway, Suite 300
Tacoma, WA 98402

That on the 25th day of November, 2009, I cause to be sent by U.S. Mail a

ORIGINAL

true and correct copy of the Brief of Respondent/Cross Appellant, Estate of
Corrine D. Wegner, deceased and Kenneth Wegner, PR, to the attorney for
Appellant/Cross Respondent as follows:

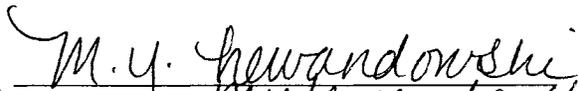
Barry C. Kombol
Rainier Legal Center, Inc.
31615 Third Ave.
Black Diamond, WA 98010



MELINDA L. LEACH

SUBSCRIBED AND SWORN to before me this 15th day of November,
2009.




Printed Name: M. Y. Lewandowski
NOTARY PUBLIC in and for the State of
Washington residing at Puyallup
My commission expires: 10/15/12

Affidavit of Mailing

G:\DATA\DHHP\Wegner\Court of Appeals, Division Two\AAffidavit of Mailing 11-17-09.wpd