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NO. 44244-2-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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IN RE THE ESTATE OF DOROTHY P. METTLE

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**RESPONDENT'S BRIEF**

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**TABLE OF CONTENTS**

	<b>Page</b>
<b>I. IDENTITY OF RESPONDENT</b> .....	1
<b>II. RESPONSE TO ASSIGNMENTS OF ERROR</b> .....	1
<b>III. STATEMENT OF THE CASE</b> .....	5
<b>IV. ARGUMENT</b> .....	11
A. Standard of Review.....	11
B. Guy’s Shortened Opening Brief Fails to Comply with Applicable Rules of Appellate Procedure and should not be Considered.....	14
C. Guy Mettle’s Requested Relief is Inappropriate and Without Legal Basis or Support.....	15
D. <i>In re the Estate of Dorothy P. Mettle, supra</i> , is the Law of the Case and Guy is Barred from Re- litigating Matters Previously Decided by this Court.....	16
E. The Trial Court Did Not Err in Denying Guy’s Motion for Recusal of the Honorable Judge Thomas Larkin.....	18
F. The Trial Court Did Not Err in Denying Guy’s Motion to Compel Production of Documents.....	22
G. The Trial Court Did Not Err in entering its Order Recognizing Guy Mettle’s Withdrawal of his Motion for Accounting and Billing Information .....	25
H. The Trial Court Did Not Err in Entering its Order Denying Guy Mettle’s Motion for Distribution of Unsequestered Funds .....	27
I. The Trial Court Did Not Err in Entering its Order Denying Indigency.....	28
J. The Trial Court Did Not Err When it Did Not Require the Trustee to Post a Bond.....	32

K.	The Trial Court Did Not Err in Entering its Order and Decree Approving Trustee’s Final Accounting .....	34
1.	Trial Court Refused to Enforce the Interim Distribution Order of June 27, 2008.....	34
2.	Approval of Trust Accounting with regard to Charles Schwab Account Fund.....	35
3.	Approval of Attorney’s Fees and Costs .....	35
L.	The Estate Is Entitled to an Award of Attorney’s Fees and Costs on Appeal .....	37
V.	<b>CONCLUSION</b> .....	40

## TABLE OF AUTHORITIES

### Cases

<i>Bartlett v. Betlach</i> , 136 Wn.App. 8, 146 P.3d 1235 (2006).....	12
<i>Beard's Estate</i> , 60 Wn.2d 127, 372 P.2d 530 (1962).....	13
<i>Estate of Black</i> , 116 Wn.App. 476, 483, 66 P.3d 670 (2003) <i>aff'd on other grounds</i> , 153 Wn.2d 152,102, P.3d 796 (2004) .....	11
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983) ) .....	36
<i>Marriage of Brown</i> , 159 Wn.App. 931, 939, 247 P.3d 466 (2011) ) .....	26
<i>Brown v. Spokane County Fire Protection Dist. No. 1</i> , 100 Wn.2d 188, 668 P.2d 571 (1983) ) .....	26
<i>Camer v. Seattle Post-Intelligencer</i> , 45 Wn.App. 29, 36, 723 P.2d 1195 (1986).....	14
<i>Christensen v. Grant County Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 306, 96 P.3d 957 (2004) ) .....	17
<i>City of Lakewood v. Koenig</i> , 160 Wn.App. 883, 250 P.3d 113 (2011) )	13
<i>Clark v. Fowler</i> , 61 Wn.2d 211, 377 P.2d 998 (1963) ) .....	17
<i>Marriage of Farr</i> , 87 Wn.App. 177, 188, 940 P.2d 679 (1997) <i>review denied</i> , 134,Wn.2d 1014 (1998).....	13, 19
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693,712, 732, P.2d 974 (1987) .....	12
<i>Greene v. Rothschild</i> , 68 Wn.2d 1, 414 P.2d 1013 (1966) .....	17
<i>Dependency of Grove</i> , 127 Wn.2d 221, 237, 897 P.2d 1252 (1995) .....	29, 31
<i>Marriage of Kovacs</i> , 121 Wn.2d 795, 801, 854 P.2d 629 (1993).....	13

<i>Estate of <b>Larson</b></i> , 103 Wn.2d 517, 521, 694 P.2d 1051 (1985).....	12
<i>Marriage of <b>Lawrence</b></i> , 105 Wn.App. 683, 686 fn. 1, 20 P.2d 972 (2001) .....	13
<i>Irrevocable Trust of <b>McKean</b></i> , 144 Wn.App. 333, 183 P.3d 317 (2008).	38
<i>In re the Estate of Dorothy P. <b>Mettle</b></i> , No. 38243-1-II (3/29/11) (unpublished) .....	3, 4, 5, 7, 16, 17, 21, 27, 28, 35, 37
<i><b>Mitchell</b> v. Washington State Dept. of Corrections</i> , 164 Wn.App. 597, 277 P.3d 670 (2011) .....	26
<i><b>Rhinehart</b> v. Seattle Times Co.</i> , 51 Wn.App. 561, 581 754 P.2d 1243 (1988).....	39
<i>Estate of <b>Riddell</b></i> , 138 Wn.App. 485, 492, 157 P.3d 888 (2007) .....	11, 12
<i><b>Sherman</b> v. State</i> , 128 Wn.2d 164, 205, 905 P.2d 355 (1995) .....	19
<i><b>Sorenson</b> v. Pyeatt</i> , 158 Wn.2d 523, 528, 146 P.3d 1172 (2006) .....	14
<i><b>State</b> v. <b>Bilal</b></i> , 77 Wn.App. 720, 722, 893 P.2d 674 (1995) .....	19
<i>Estate of <b>Stein</b></i> , 789 Wn.App. 251, 259, 896 P.2d 740 (1995) .....	12
<i><b>Wendle</b> v. Farrow</i> , 102 Wn.2d 380, 382, 686 P.2d 480 (1984) .....	14

**Statutes**

RCW 4.12.040(1) .....	18
RCW § 11.28.250 .....	13
RCW § 11.96A.115.....	23
RCW § 11.96A.020(1)(z)(b).....	11
RCW § 11.96A.020(2) .....	11
RCW § 11.96A.060.....	28
RCW § 11.96A.150(1) .....	37, 38, 40
RCW § 11.96A.150(2) .....	38

**Regulations and Rules**

CR 27(b) and (c) .....	24
RAP 2.3(c) .....	2
RAP 7.2(a) .....	23
RAP 18.1.....	37, 40
RAP 18.9.....	37, 38, 39, 40

**Other Authorities**

3 Karl B. Tegland, <i>Washington Practice: Rules Practice CR 27</i> at 104-05 (7 <sup>th</sup> ed.) .....	24
14A Karl B. Tegland, <i>Washington Practice: Civil Procedure</i> , § 35:55 at 508 (1 <sup>st</sup> ed. 2003) .....	17
Code of Judicial Conduct 3(d)(1) .....	19
Code of Judicial Conduct 3(d)(1)(a).....	19

## **I. IDENTITY OF RESPONDENT**

Respondent, Gregg Mettle, in his capacity as the court appointed Personal Representative of the Estate of Dorothy P. Mettle and the Trustee of the Dorothy P. Mettle Revocable Living Trust, by way of Response to Appellant's Shortened Opening Brief, states as follows.

## **II. RESPONSE TO ASSIGNMENT OF ERRORS**

Appellant, Guy Mettle ("Guy")<sup>1</sup>, appeals numerous issues arising from the Pierce County Superior Court, the Honorable Thomas P. Larkin's various Orders including the following: (1) Order and Decree Approving Trustee's Interim Accounting and Order Approving Final Account and Decree of Distribution (6/27/08); (2) Order on Motion for Reconsideration (8/1/08); (3) Order Denying Guy Mettle's Motion for Recusal (10/24/08); (4) Order Denying Guy Mettle's Motion for Distribution of Unsequestered Funds (11/14/08); (5) Order Denying Guy Mettle's Motion to Compel Production of Documents (12/5/08); (6) Order Denying Guy Mettle's Motion for Indigency and Striking Motion for Accounting (10/8/10); (7) Order Recognizing Guy Mettle's Withdrawal of His Motion for Accounting and Billing Information (5/6/11); (8) Order Regarding Guy Mettle's (1) Motion to Allow Overlength Motion to Compel Discovery, 2012 (2) Motion to Compel Discovery, 2012 & (3) Motion for

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<sup>1</sup> Respondent refers to appellant, Mr. Guy Mettle, as "Guy" throughout its brief for the sake of clarity, given that respondent's last name is also Mettle.

Distribution, 2012 (9/21/12); and (9) Order and Decree Approving Trustee's Final Accounting (10/26/12).

Guy also assigns error to ten of the appellate courts' (Court of Appeals and Supreme Court) denials of his motions for discretionary review. *See Appellant's Shortened Opening Brief*, pp. 14-15. Gregg does not address this Court's denial of Guy's motions for discretionary review given that Guy has an opportunity to obtain review of the trial court decision or issues pertaining to those decisions, which were the subject of his motions for discretionary review. Rule of Appellate Procedure ("RAP") 2.3(c).

Further, Guy's appeal brief identifies so many "assigned errors" and issues relating thereto that it is impossible to identify and address all of them in this Response. First, the Respondent, Gregg Mettle ("Gregg"),<sup>2</sup> as trustee and personal representative, contends that each and every assignment of error and issue relating thereto is devoid of merit and/or without legal support or authority. Second, Gregg sets forth the following response to Guy's assignments of error that appear most relevant to issues relating to the administration of the estate and trust at issue.

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<sup>2</sup> Respondent refers to Trustee and Personal Representative, Gregg Mettle, as "Gregg" throughout this brief for the sake of clarity, given that appellant's last name is also Mettle.

Response to Assignments of Error/Issues Relating Thereto.

1. The trial court did not err in entering its June 27, 2008 Order Approving Final Account and Decree of Distribution. Alleged errors were addressed in *In re the Estate of Dorothy P. Mettle*, No. 38243-1-II (3/29/11) (unpublished) (hereinafter *In re the Estate of Mettle*).

2. The trial court did not err in entering its Order and Decree Approving Trustee's Interim Accounting. Alleged errors were addressed in *In re the Estate of Mettle, supra*.

3. The trial court did not err in entering its Order on Motion for Reconsideration. Alleged errors were addressed in *In re the Estate of Mettle, supra*.

4. The trial court did not err in denying Guy's Motion for Distribution of Funds and in denying Guy's Motion for Distribution of Unsequestered Funds. Conditioning the distribution upon the exhaustion of any appeal or appeal period is within the trial court's plenary power. Alleged errors were addressed in *In re the Estate of Mettle, supra*.

5. The trial court did not err in denying Guy's Motion for Accounting and in entering its Order Recognizing Guy Mettle's Withdrawal of His Motion for Accounting and Billing Information. Issues as to the Trustee/Personal Representative's duties were addressed in *In re the Estate of Mettle, supra*.

6. The trial court did not err in finding that the trustee's activities were reasonable.

7. The trial court did not err in entering its Order Denying Guy Mettle's Motion for Recusal. Guy is unable to demonstrate that the trial court or its decisions were not impartial, biased or unfair.

8. The trial court did not err in entering its Order Denying Guy Mettle's Motion for Indigency. Guy cannot show that he has a constitutional or statutory right to payment of his expenses on review, or that he was prejudiced by the trial court's failure to enter specific findings as to indigency issues.

9. The trial court did not err in entering its Order Denying Guy Mettle's Motion to Compel Production of Documents. The trial court did not have authority to consider Guy's request for the production of documents pending appeal.

10. The trial court did not err in denying Guy's request for a bond to secure or "protect" his delayed distribution pending appeal.

11. The trial court did not err in entering the Order and Decree Approving Trustee's Final Accounting. The trustee's accounting is complete and proper under established law.

12. The trial court did not err in denying Guy's requested relief including, but not limited to, removal of Gregg as trustee and personal representative, removal of attorney Petrich, blocking distributions to personal representative and trustee and other actions against Gregg. Alleged errors were addressed in *In re the Estate of Mettle, supra*, and Guy does not demonstrate any facts supporting this relief based upon

Gregg's actions after Guy filed his appeal in Court of Appeals No. 38243-1-II.

### III. STATEMENT OF THE CASE

This case involves the estate of decedent Dorothy P. Mettle ("estate"). The factual background is summarized by this Court in its decision in *In re the Estate of Mettle, supra*. Given such, Gregg does not recite those facts here, but details the history of the litigation transpiring after Guy filed his August 26, 2008 Notice of Appeal.<sup>3</sup>

After Guy filed his August 26, 2008 Notice of Appeal of the Order Approving Final Accounting and Decree of Distribution and the Order and Decree Approving Trustee's Interim Accounting, Guy filed additional motions in the trial court over the next four years. Guy appeals the trial court's Order and Decree Approving Trustee's Final Accounting as well as a number of the trial court's orders associated with Guy's motions including the following:

**October 6, 2008: Motion for Trustee Surety.** On October 6, 2008, Guy filed a Motion for Trustee's Surety. CP 626-30. Guy sought an order requiring the trustee to post a bond to secure or "cover" the potential amount of loss arising from Guy's delayed distribution. *Id.*

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<sup>3</sup> The decision in *In re the Estate of Mettle, supra*, related to the issues associated with the following trial court orders: June 27, 2008 Order Approving Final Accounting and Decree of Distribution, CP 494-96; June 27, 2008 Order and Decree Approving Trustee's Interim Accounting, CP 497-98; August 1, 2008 Order on Motion for Reconsideration, CP 566-67.

The trial court did not hear Guy's motion due to the pending appeal in Court of Appeals No. 38243-1-II. The trial court's Memorandum of Journal Entry dated October 24, 2008 states that the "court does not have jurisdiction to hear further motions regarding the Court's previous rulings in this case since the matter has been filed with the Court of Appeals." CP 1915-16. Thereafter, Guy sought relief of the trial court's decision (or lack thereof) in this Court, which was denied.

**October 24, 2008:** Order Denying Guy Mettle's Motion for Recusal. On October 2, 2008, Guy filed a Motion for Recusal of Honorable Judge Thomas Larkin. CP 607-25. Guy contends that Judge Larkin and attorney Petrich entered into an ex parte agreement, which resulted in the inclusion of language in the Court's June 27, 2008 Order and Decree Approving Trustee's Interim Accounting, which effectively delayed Guy's distribution. *Id.* Guy also bases his recusal request upon Judge Larkin's entry of rulings allegedly comprising of a "long string of known judicial errors." These rulings were adverse to Guy. *Id.* On October 24, 2008, the trial court entered its Order Denying Guy Mettle's Motion for Recusal. CP 759-60.

**November 14, 2008:** Order Denying Guy Mettle's Motion for Distribution of Unsequestered Funds. On September 22, 2008, Guy filed his Motion for Distribution of Unsequestered Funds. CP 602-06. The trial court entered its Order Denying Guy Mettle's Motion for Distribution of Unsequestered Funds on November 14, 2008. CP 847-48.

Incidentally, several months prior to this motion and order, on August 14, 2008, Guy filed a Motion for Distribution. CP 577-81. The trial court entered its August 22, 2008 Order on Motion for Distribution denying Guy's requested distribution. CP 582-83. Both of Guy's motions challenged the trial court's previous orders of June 27, 2008, one of which included language conditioning disbursement upon the resolution of any appeal to ensure that there were sufficient assets in the trust to satisfy attorney's fees expended by the trust in subsequent litigation, including appeals. CP 602-06; CP 577-81. The trial court's June 27, 2008 orders, which were the subject of Guy's earlier appeal, resulted in this Court's decision in *In re the Estate of Mettle, supra*, and upheld the trial court's inclusion of language conditioning the distribution upon the resolution of any appeals.

**On December 5, 2008: Order Denying Guy Mettle's Motion to Compel Production of Documents.** On August 6, 2008, Guy served a request for production upon the estate to which the estate did not respond. CP 1921-23. On November 13, 2008, Guy filed a Motion to Compel the Production of Documents. CP 764-843. Guy's motion sought the production of volumes of documents relating to a variety of issues including guardianship matters as well as communications occurring prior to Mrs. Mettle's guardianship. CP 1921-23. On December 5, 2008, the trial court entered its Order Denying Guy Mettle's Motion to Compel Production of Documents. CP 890-91.

**October 8, 2010:** Order Denying Motion for Indigency and Striking Motion for Accounting. On June 8, 2010, Guy filed a Motion for Indigency. CP 904-09. On October 8, 2010, the court considered Guy's Motion for Indigency and entered its Order Denying Motion for Indigency and Striking Motion for Accounting. CP 918. The trial court's Order did not contain specific findings as to Guy's ability to pay for expenses on appeal. CP 918.

**May 6, 2011:** Order Recognizing Guy Mettle's Withdrawal of his Motion for Accounting and Billing Information. On April 6, 2011, Guy filed a Motion for Accounting and Billing Information. CP 976-984<sup>4</sup>. Guy sought, in relevant part (1) annual accounting(s) for the trust to be provided within 5 days of the order, (2) an accounting of the PR/trustee's attorney's fees and costs for 2008 through 2011, (3) a separate accounting for the trust and estate, (4) an award of his attorney's fees and costs and (5) denial of the PR/trustee's request for attorney's fees and costs. *Id.*

On April 12, 2011, Gregg filed the Personal Representative & Trustee's Response to Guy Mettle's Motion for Accounting & Billing Information and the Declaration of Jennifer A. Wing in Support of Response. CP 985-88; CP 989-1039. Gregg asserted, in part, that the PR/trustee was not obligated to provide an accounting (1) with respect to the estate because of the Court of Appeals' prior holding that Gregg was not required to do so, and (2) with respect to the trust, because the trustee

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<sup>4</sup> On April 11, 2011, Guy filed the same Motion for Accounting and Billing Information. CP 1041-1049

previously filed accountings and there had been no significant non-routine transactions requiring accounting about which Guy was not aware. Id. Specifically, with regard to the trust, the only “non-routine transactions” occurring after the court’s approval of the trustee’s interim accounting were for attorney’s fees and costs relating to Guy’s litigation, for which Guy received statements in connection with Gregg’s attorney’s affidavit filed in support of his award of attorney’s fees and costs in this Court (filed on April 8, 2011). CP 989-1039.

Thereafter, on April 28, 2011, in spite of Gregg’s position that he was not required to provide an accounting for the estate or the trust, Gregg filed an Accounting for the Estate of Dorothy P. Mettle and the Dorothy P. Mettle Trust for the Period of January 1, 2010 through December 31, 2010 (“Accounting”). CP 1060-1143. Gregg did so to avoid additional, unnecessary litigation and further expense to the trust and estate. CP 1218-30; RP (5/06/11). Gregg’s Accounting provided a detailed record of the balances in the Columbia Bank and Merrill Lynch accounts as well as a record of attorney’s fees and accounting fees for 2010. The Accounting clearly distinguishes between the estate and trust accounts. CP 1060-1143.

The next day, on April 29, 2011, Gregg’s attorneys filed with the trial court the Supplemental Declaration of David B. Petrich Regarding Guy Mettle’s Motion for Accounting, wherein Mr. Petrich filed complete, un-redacted attorney’s fees statements for the period of July 28, 2008 through March 31, 2011. CP 1151-84. These un-redacted attorney’s fee

statements reflect all work performed on behalf of the trust and estate for that period. *Id.*

On May 6, 2011, after oral argument of the parties, the trial court entered an Order Recognizing Guy Mettle's Withdrawal of his Motion for Accounting and Billing Information. CP 1185-86. The Court's Order states and recognizes:

Guy Mettle is in receipt of the Personal Representative/Trustee's Accounting for the period of January 1, 2010 through December 31, 2010 as well as Eisenhower & Carlson's unredacted billing statements from July 28, 2008 through March 31, 2011.

*Id.*

During oral argument before the trial court, while Guy did not affirmatively withdraw his motion, he recognized, on the record and prior to entry of the trial court's order, his receipt of the accounting and billing statements including un-redacted statements. CP 1218-30; RP (05/06/11).

**October 26, 2012: Order and Decree Approving Trustee's Final Accounting.** On October 3, 2012, Gregg filed his Petition to Approve Trustee's Final Accounting. CP 1598-1655. The Petition, in relevant part, summarized the history of the trustee's actions, provided an accounting of trust assets (including distributions and balances), attached all supporting asset statements, and contained other relevant information relating to Gregg's administration of the trust. CP 44-210. Gregg requested that the trial court approve the attorney's fees and costs incurred and authorize Guy's distribution to be reduced by the amount of such fees and costs. CP

1598-1655. On October 26, 2012, the trial court approved Gregg's final accounting including his attorney's fee and cost request and entered its Order and Decree Approving Trustee's Final Accounting. CP 1751-54.

On November 26, 2012, Guy filed his Notice of Appeal to Court of Appeals Division 2 of Trust Decree, Final Accounting, and Interlocutory Orders. CP 1755-1775.

#### IV. ARGUMENT

##### A. Standard of Review.

RCW 11.96A.020 confers plenary power on the probate court. The court has "full and ample" power and authority to administer and settle trust and estate matters. RCW 11.96A.020(1)(z)(b); *In re Estate of Riddell*, 138 Wn.App. 485, 492, 157 P.3d 888 (2007). If TEDRA is not applicable, insufficient or doubtful with regard to the administration or settlement of trust and estate matters, the trial court may proceed "in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court." RCW 11.96A.020(2).

In general, because proceedings for probate of wills are equitable, the appellate court reviews the entire trial court record de novo. *In re Estate of Black*, 116 Wn.App. 476, 483, 66 P.3d 670 (2003), *aff'd on other*

*grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). In trust matters, the appellate court's review is also de novo except where factual questions are presented, in which case, the court defers to the trial court's factual findings regarding trust but reviewing its decision to deny equitable relief de novo. See *In re Riddell*, 138 Wn.App. 485, 491, 157 P.3d 888 (2007). The overriding consideration in Washington probate proceedings is the determination of the decedent's wishes. *In re Estate of Stein*, 78 Wn. App. 251, 259, 896 P.2d 740 (1995).

With regard to the award of attorney's fees in probate and trust matters, the appellate court reviews the trial court's order for abuse of discretion. *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985)(courts will not interfere with allowance of attorney fees in probate matters unless facts and circumstances clearly show abuse of discretion); *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987).

Further, a trial court's decision in a trustee removal case will seldom be reversed absent a manifest abuse of discretion. *Fred Hutchinson Cancer Research Ctr.*, 107 Wn.2d at 716; See *Bartlett v. Betlach*, 136 Wn.App. 8, 146 P.3d 1235 (2006) (citations omitted)(trust beneficiaries' removal of trustee for reasonable cause must be necessary to

save the trust). Similarly, the trial court has broad discretion in deciding whether to remove a personal representative. *In re Beard's Estate*, 60 Wn.2d 127, 372 P.2d 530 (1962); *See* RCW 11.28.250.

As to issues of recusal, the appellate court reviews a trial court's denial of a motion for recusal for an abuse of discretion. *In re Marriage of Farr*, 87 Wn.App. 177, 188, 940 P.2d 679 (1997), *rev. denied*, 134 Wn.2d 1014 (1998). Likewise, the appellate court reviews a trial court's grant or denial of discovery motions for an abuse of discretion standard. *City of Lakewood v. Koenig*, 160 Wn.App. 883, 250 P.3d 113 (2011).

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). "A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." *In re Marriage of Lawrence*, 105 Wn. App. 683, 686 fn. 1, 20 P.3d 972 (2001) (*citing State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)).

Further, on appellate review, contentions that are unsupported by argument or citation of legal authority will not be considered. *Camer v. Seattle Post-Intelligencer*, 45 Wn.App. 29, 36, 723 P.2d 1195 (1986) (citing RAP 10.3(a)(5)(6), *rev. denied*, 107 Wn.2d 1020, *cert. denied*, 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 677 (1987)). Unchallenged factual findings are verities on appeal. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 528, 146 P.3d 1172 (2006). Finally, the appellate court may affirm the trial court's judgment upon any theory established by the pleadings and supported by the evidence before the court. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

**B. Guy's Shortened Opening Brief Fails to Comply with Applicable Rules of Appellate Procedure and Should Not Be Considered.**

Guy's Shortened Opening Brief fails to comply with applicable Rules of Appellate Procedure including RAP 10.3(a)(5) and (6), as he fails to provide reference to the record for each factual assertion and fails to provide *relevant* legal authority and reference to each of the relevant portions of the record. Accordingly, this Court should not consider Guy's appeal. If this Court considers Guy's appeal, where Guy's brief fails to clearly challenge the trial court's factual findings in its orders that are the subject of this appeal, these factual findings are verities on appeal

and the conclusions of law flowing therefrom should be affirmed.

In this case, this Court should affirm the trial court as the record reflects that the trial court did not err when it approved Gregg's Petition to Approve Trustee's Final Accounting and entered the numerous orders that are subject of Guy's appeal. Gregg also seeks an award of attorney's fees on as set forth in Section L, below.

**C. Guy Mettle's Requested Relief Is Inappropriate and Without Legal Basis or Support.**

Guy seeks numerous forms of relief in Appellant's Shortened Opening Brief including, but not limited to, recusing Judge Larkin, ordering Guy's distribution, requiring the trustee to pay interest to the beneficiaries, awarding Guy damages of \$3,000,000, replacing the trustee, investigating local attorneys and judges and other relief.

Guy Mettle also advances many allegations against Gregg and his attorneys, including advancing a personal vendetta against Guy, racketeering, engaging in ex parte communications between Judge Larkin and attorney Petrich, and other allegations relating to participation in a "gang of criminal profiteers." Absolutely none of these assertions is supported by the record and all are highly prejudicial to Gregg and his attorneys, and inappropriate under the circumstances. Each and every one of these assertions should be disregarded by this Court and Guy should be admonished for his baseless, inflammatory and inappropriate assertions.

D. **In re the Estate of Mettle, supra, is the Law of the Case and Guy is Barred from Re-Litigating Matters Previously Decided by this Court.**

Guy seeks review of several trial court orders and issues decided by this Court in *In re the Estate of Mettle, supra*. These include the following:

- Order and Decree Approving Trustee's Interim Accounting (6/27/08);
- Order Approving Final Account and Decree of Distribution (6/27/08);
- Order on Motion for Reconsideration (8/1/08).

Encompassed in this court's previous review of the foregoing orders are issues Guy raised in his responses to the petitions for final accounting of the estate and interim accounting of the trust. These include Guy's requests for affirmative relief such as removal of Gregg as personal representative and trustee, the termination of Gregg's counsel due to bad faith, the requirement that counsel post a surety bond, the disgorgement of payments to Gregg's counsel, the prohibition of distributions to John and Gregg, and the immediate payment of Guy's distribution. *In re the Estate of Mettle, supra*, at 11. It is Gregg's position that this Court's ruling in *In re the Estate of Mettle, supra*, is binding and Guy is precluded from re-litigating these issues in the instant appeal under the law of the case

doctrine and principles of collateral estoppel.

It is well established that after the appellate court has enunciated rules or principles of law applicable in a case, generally, the court will not re-examine those matters already determined. *Clark v. Fowler*, 61 Wn.2d 211, 377 P.2d 998 (1963); *Greene v. Rothschild*, 68 Wn.2d 1, 414 P.2d 1013 (1966); 14A Karl B. Tegland, *Washington Practice: Civil Procedure*, § 35:55 at 508 (1<sup>st</sup> ed. 2003). Accordingly, with regard to the foregoing orders and related issues, the court's holding in *In re the Estate of Mettle, supra*, is the law of the case and Guy is precluded from re-litigating those issues.

Guy is also precluded from re-litigating these issues under the doctrine of collateral estoppel. This doctrine maybe applied to preclude consideration of issues that have actually been litigated and necessarily and finally determined in an earlier proceeding. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004). In this case, the four elements of collateral estoppel are met, namely (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom the doctrine is asserted was a party to the earlier proceedings and (4) application would not work an injustice

against the party against whom it is applied. *Id.* at 307 (citations omitted). Thus, with regard to any issues determined in the earlier appeal that arose from trial court final orders, Guy is precluded from raising those issues in this appeal.

**E. The Trial Court did not Err in Denying Guy's Motion for Recusal of the Honorable Judge Thomas Larkin.**

Guy filed his Motion for Recusal of Honorable Judge Thomas Larkin on October 2, 2008. Guy alleged that Judge Larkin and attorney Petrich entered into an ex parte agreement resulting in language in a court order that delayed Guy's distribution. Guy also claimed that Judge Larkin's adverse rulings evidence the trial court's bias against Guy. Guy's assertions find no basis of support in the record and the trial court did not abuse its discretion in denying his request for recusal.

It is imperative that a judicial proceeding is fair. RCW 4.12.040 provides that "[n]o judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." RCW 4.12.040(1). In such a case, the judge is required to transfer the case to another department of the same court. *Id.*

Further, the Code of Judicial Conduct (CJC), sets forth a number

of canons regarding judicial conduct including that judges "should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." CJC 3(D)(1). Instances where such a requirement applies includes where a judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning a proceeding. CJC 3(D)(1)(a).

It is well established that a proceeding before a court must appear to be fair and is valid only if a "reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing." *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674 (1995)(quoting *State v. Ladenberg*, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992)(abrogated on other grounds in *State v. Finch*, 137 Wn.2d 792, 975 P.2d 967 (1999)).

The test to determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that "a reasonable person knows and understands all the relevant facts." *Sherman v. State*, 128 Wn.2d 164, 205, 905 P.2d 355 (1995). As previously noted, the appellate court reviews the trial court's decision regarding recusal under an abuse of discretion standard. *In re Marriage of Farr*, 87 Wn.App. at 188.

In this case, the record is devoid of any evidence demonstrating that any of the trial court's rulings adverse to Guy were the result of bias or prejudice concerning him. Guy fails to demonstrate that the trial court had personal knowledge of disputed evidentiary facts concerning the proceeding and fails to cite to any legal authority holding that a court's alleged erroneous rulings alone support a finding or presumption of prejudice warranting recusal. In this case, Guy presents no evidence showing that, under the circumstances, a reasonably prudent and disinterested observer would not conclude that all parties obtained a fair, impartial and neutral hearing.

For example, Guy's assertion that Judge Larkin engaged in an ex parte communication with attorney Petrich and thus, should have recused himself, lacks support in the record. Specifically, Guy complains that Paragraph 4 of the Order and Decree Approving Trustee's Interim Accounting stating "[t]hat the interim distribution proposed by the Trustee is authorized and that such distribution may be delayed until the statutory period for appealing this Order has expired or until any appeal of this Order has been resolved" was entered "ex parte". However, Guy fails to proffer any evidence supporting this contention. This is because no such evidence exists. Guy argues that he did not receive any notice of the entry

of the Order and Decree Approving Trustee's Interim Accounting, but the record overwhelmingly shows otherwise. Guy received notice of the June 27, 2008 hearing, submitted materials in opposition to the motion and argued his position at the June 27, 2008 hearing.<sup>5</sup> *In re the Estate of Dorothy P. Mettle, supra, at 14.* The record demonstrates that the Order and Decree Approving Trustee's Interim Accounting and the Order Approving Final Account and Decree of Distribution were both entered in open court with full participation of and in the presence of attorney Petrich and Guy Mettle. *Id. at 14.* Thus, the underlying justification supporting Petitioner's motion for recusal, that is, the alleged entry of an ex parte order, is unsupported.

Additionally, Guy appears to argue that the trial court "sequestered" his inheritance by conditioning the interim distribution upon the exhaustion of an appeal period or appeal proceedings and thus, Judge Larkin should have recused himself. However, *In re the Estate of Dorothy P. Mettle, supra*, this Court affirmed the trial court's order containing this

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<sup>5</sup> Respondent provided Mr. Guy Mettle with notice of the Motion for Order Approving Final Account and the Motion for Order Approving Trustee's Interim Accounting. Specifically, the trial court file reflects the May 1, 2008 filing of an Affidavit of Service regarding the Note for Motion and relevant, supporting pleadings. CP 1905-06. Thereafter, the motion was re-scheduled. The Superior Court file reflects the June 10, 2008 filing of a Declaration of Mailing wherein Mr. Petrich's office mailed notice of the hearing to Mr. Guy Mettle. CP 1907-08.

provision and thus, Guy cannot show that the trial court's decision was either erroneous or demonstrates bias or lacks impartiality. *In re the Estate of Dorothy P. Mettle, supra*, at 10. Again, Guy fails to demonstrate that the court's lawful order was adopted and entered as a result of bias or prejudice against him. Under the circumstances, a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing. Accordingly, Judge Larkin's denial of Guy's motion for recusal was not an abuse of discretion and does not constitute error.

**F. The Trial Court did not Err in Denying Guy's Motion to Compel Production of Documents.**

On August 6, 2008, Guy served a request for production upon the estate. CP 1921-23. The estate did not respond and, on November 13, 2008, Guy filed a Motion to Compel the Production of Documents. CP 764-843. On December 5, 2008, the trial court entered its Order Denying Guy Mettle's Motion to Compel Production of Documents. CP 890-91. Guy's Motion to Compel relied upon CR 27(b), CR 26, CR 34 and CR 37. CP 764-843. However, under the circumstances, none of these rules apply and the trial court properly denied Guy's motion.

Chapter 11.96A RCW, the Trust and Estate Dispute Resolution Act ("TEDRA"), addresses the circumstances under which discovery is permitted in trust and estate matters. That statute allows discovery in two circumstances, namely, when a TEDRA summons and complaint placing

one or more specific issues in controversy is filed and, second, if the court orders discovery based upon a showing of good cause. *See* RCW 11.96A.115.

In this case, Guy did not file such a complaint, thus requiring him to show good cause in order to conduct discovery. Guy failed to make a showing of good cause based upon, at least in part, the fact that his requests sought documents relating to guardianship issues as well as documents prior to his mother's guardianship, which had long been resolved in prior litigation.

Further, even if Guy was able to show good cause, such would have been meaningless as the trial court matter was the subject of an appeal at the time of Guy's motion and thus, the trial court did not have the authority under RAP 7.2 to grant Guy's motion for the production of documents.

RAP 7.2(a) provides, in relevant part:

Generally. After review is accepted by the appellate court, the trial court has authority to act in a case only to the extent provided in this rule, unless the appellate court limits or expands that authority as provided in rule 8.3.

None of the exceptions to RAP 7.2(a) apply to Guy's request and the trial court did not err in denying Guy's Motion to Compel discovery based upon this provision.

As to Guy's assertion that the trial court erred in denying Guy's request for the production of documents under CR 27(b) and (c), Guy's argument fails as CR 27(b) and (c) are not applicable.

CR 27(b) and (c) provide, in relevant part:

**(b) Perpetuation Pending Appeal.** If an appeal has been taken from a judgment of a superior court or before the taking of an appeal if the time therefore has not expired, the superior court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the superior court.

**(c) Perpetuation by Action.** This rule does not limit the power of the court to entertain an action to perpetuate testimony.

CR 27(b) allows only for the taking of depositions of witnesses when an appeal is pending and does not allow for the production of documents pending appeal. See 3 Karl B. Tegland, *Washington Practice: Rules Practice* CR 27 at 104-05 (7<sup>th</sup> ed.). Nothing in the record reflects that Guy requested to take the depositions of witnesses, let alone specify the names and addresses of the persons to be examined and the substance of the testimony expected to be elicited or the reason for perpetuating their testimony as required by CR 27(b). Guy only requested that the estate/trust produce documents, and CR 27(b) does not provide for the production of documents pending appeal. Thus, the trial court did not err in denying Guy' Motion to Compel Production of Documents.

**G. The Trial Court did not Err in entering its Order Recognizing Guy Mettle's Withdrawal of his Motion for Accounting and Billing Information.**

Guy also contends that the trial court erred in entering its May 6, 2011 Order Recognizing Guy Mettle's Withdrawal of his Motion for Accounting and Billing Information. Guy asserts that he was forced to "withdraw" his motion even though he had not done so. He also contends that the trial court erred in not requiring Gregg to segregate the accounting of the trust and estate and in refusing to award him attorney fees and costs.

The trial court's May 6<sup>th</sup> Order recognized that Guy received the Personal Representative/Trustee's accounting for the period of January 1, 2010 through December 31, 2010 as well as un-redacted billing statements from July 28, 2008 through March 31, 2010.<sup>6</sup> At the court hearing, Guy acknowledged receipt of Gregg's disclosure, including un-redacted billing statements. CP 1218-1230; RP (5/6/11). While the trial court concluded that Guy was effectively withdrawing his motion and directed counsel to

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<sup>6</sup> In *In the Estate of Dorothy P. Mettle, supra*, this Court recognized that Gregg's Petition to Approve Trustee's Interim Accounting included a detailed accounting of the trust for the period of December 10, 2002 through December 31, 2007. *Id.* at 2. This Court also acknowledged that Gregg's counsel "submitted declarations regarding attorney fees that attached every billing statement concerning the guardianship, estate and trust, as well as the details of his billable hourly rate." *Id.* at 2. The record also provides that Gregg filed an Accounting for the Estate of Dorothy P. Mettle and the Dorothy P. Mettle Trust for the Period of January 1, 2008 through December 31, 2009. CP 923-74.

include language in the Order to reflect the withdrawal, Guy, in fact, did not withdraw his motion.

However, even though the trial court's order did not accurately reflect Guy's position as to the withdrawal of his motion and should have been either denied or dismissed, Guy can show no prejudice by this inaccurate reference in the Order. *See Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 668 P.2d 571 (1983) (error without prejudice is harmless and is not grounds for reversal).

Guy also argues that the trial court erred in failing to require Gregg to segregate the estate and trust accountings and in denying Guy's request for attorney's fees and costs. However, where Gregg was not required to provide trust and estate accountings under applicable law including *In re the Estate of Dorothy P. Mettle, supra*, at 3- 4, the trial court did not err in denying Guy's request to segregate the estate and trust accountings.

With regard to the issues of attorney's fees and costs, as a pro se, Guy is not entitled to attorney's fees and he did not make any showing or provide a legal basis for an award of costs. *See In re Marriage of Brown*, 159 Wn.App. 931, 939, 247 P.3d 466 (2011) (pro se litigants not entitled to attorney fees for work in representing themselves); *Mitchell v. Washington State Dept. of Corrections*, 164 Wn.App. 597, 277 P.3d 670

(2011). Finally, with regard to the assertion that the trial court did not order disclosure of “secret attorney work”, Gregg’s disclosure of unredacted billing statements prior to the hearing rendered Guy’s request moot. Accordingly, the trial court did not err in entering its Order.

**H. The Trial Court did not Err in Entering its Order Denying Guy Mettle’s Motion for Distribution of Unsequestered Funds**

On September 22, 2008, Guy filed a Motion for Distribution of Unsequestered Funds claiming that the trial court’s August 1, 2008 and August 22, 2008 orders effectively sequestered Guy’s inheritance.<sup>7</sup> Guy sought a distribution of funds within five days of the hearing and requested that the court also “sequester” similar amounts for co-beneficiaries, Gregg and John. Guy’s motion also refers to an alleged “ex parte” contact between Judge Larkin and attorney Petrich, which Guy claims resulted in the inclusion of the clause in the Order and Decree Approving Trustee’s Interim Accounting thereby allowing for the delayed distribution. On November 14, 2008, the trial court denied Guy’s motion.

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<sup>7</sup> The trial court’s August 1, 2008 Order on Motion for Reconsideration denied Guy’s requested reconsideration of the trial court’s June 27, 2008 Orders, which were the subject of Guy’s earlier appeal and resulted in this Court’s decision in *In re Estate of Mettle, supra*. On August 14, 2008, Guy filed his Motion for Distribution resulting in the trial court’s August 22, 2008 Order on Motion for Distribution denying Guy’s requested distribution. Thereafter, on September 22, 2008, Guy filed a similar motion entitled Motion for Distribution of Unsequestered Funds resulting in a trial court order dated November 14, 2008 entitled Order Denying Guy Mettle’s Motion for Distribution of Unsequestered Funds.

Guy argues that the trial court erred by failing to immediately order distribution of funds to Guy and by authorizing Gregg to withhold distributions until the appeal period expired and all appeals were exhausted. However, in *In re the Estate of Dorothy P. Mettle, supra*, this Court addressed the trial court's order authorizing the delay of distributions pending final resolution of the appellate process. Specifically, this Court recognized the trial court's plenary authority in trust proceedings citing to RCW 11.96A.060 providing that the court may issue orders "that might be considered proper or necessary in the exercise of jurisdiction or powers given or intended to be given by this title". *Id.* at 10. The trial court's Order Denying Guy Mettle's Motion for Distribution of Unsequestered Funds was proper given the trial court's plenary powers, which were recognized in *In re the Estate of Dorothy P. Mettle, supra*. Where the trial court denied the distribution of Guy's inheritance in order to preserve such funds for potential continued litigation including appeals, it did not abuse its discretion and did not err in entering its November 14, 2008 Order.

I. **The Trial Court did not Err in Entering its Order Denying Indigency.**

On June 8, 2010, Guy filed a Motion for Indigency seeking a court order authorizing indigent status so that all of the expenses of appellate

review would be paid. CP 904-09. On October 8, 2010, the trial court denied Guy's request and entered an Order Denying Motion for Indigency and Striking Motion for Accounting. CP 918.

Guy claims that the trial court erred in denying his request for indigent status and the payment of expenses on review based upon constitutional and statutory rights. While the trial court order denying Guy's request did not contain specific findings as to his indigent status including findings as to the funds or source of funds available to him as required by RAP 15.2, Guy cannot demonstrate error as he has no constitutional or statutory rights to counsel or to the payment of expenses in an estate/trust case.

The constitutional right to legal representation is limited to cases in which the moving party's physical liberty or a fundamental liberty interest is at stake. *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). In contrast, where a case involves only financial interests, such interest is not "fundamental" and does not afford the right to counsel at public expense. *Id.* There is no due process right to a civil appeal, whether express or inferred. *Id.* at 239. As a result, the ordinary civil litigant is not entitled to pursue an appeal at public expense. The *Grove* court held: "We hold there is no constitutional right to appeal at public expense in civil cases in which only property or financial interests are threatened. Where there is no constitutional or statutory right to counsel at public expense and *where there is no constitutional or statutory right to a*

*waiver of fees and payment of costs, there is no right, simply because of the fact of indigency, to appointment of counsel on appeal or to waiver of fees and payment of costs.” Id. at 240 (italics added).*

In this case, the interests at stake are purely financial; Guy simply disputes the distribution of his mother’s estate. Guy’s physical liberty is not in peril, regardless of the outcome of that purely financial issue. Therefore, Guy cannot establish a constitutional right to review at public expense and his contention that an inheritance is a constitutional right finds no support in Washington law. In fact, the very authority upon which Guy relies does not support this proposition. Guy’s quotation of *In re Colbert's Estate*, 44 Mont. 259, 119 P. 791, 792 (1911), is erroneous. Guy cites *Colbert's Estate* for the proposition that there is a “constitutional right of inheritance.” See *Appellant's Shortened Opening Brief*, at 85. That was not the holding of the court. Instead, the court was merely quoting the appellant’s brief in that case. Contrary to Guy’s assertion, the court held that the right of inheritance is statutory, not constitutional. *Id.* at 793 (“The right to inherit, resting as it does in public policy, is dependent entirely upon the will of the Legislature, except in so far as its power is restricted by constitutional provisions. Therefore no one has the natural right to be the future heir of a living person.”). Because the issues raised in Guy’s appeal are not constitutional and do not concern physical liberty or any other fundamental right, the trial court properly held that Guy does not have a right to pursue his appeal at public expense.

In rare cases, where justice demands it, courts may exercise their inherent power to waive fees and costs of litigation in civil cases. *Grove*, 127 Wn.2d at 241. However, to fall within this very limited exception, Guy must prove that he is indigent, that he exercised good faith in bringing the appeal, that the appeal raises issues of probable merit, and that there has been a miscarriage of justice. *Id.* Guy cannot satisfy this stringent standard.

First, there is no evidence that would support a finding of good faith in bringing the request. Specifically, the record before the trial court supports that Guy filed many pleadings without any factual or legal basis and acted in a manner that delayed the closure of the estate and trust. *See In re the Estate of Dorothy P. Mettle, supra*, at 2-4, 8, 12. Further, Guy cannot demonstrate a miscarriage of justice. The fact that Guy's motions before the court were not successful does not constitute a miscarriage of justice. If there is a miscarriage of justice in this case, it was perpetrated by (not against) Guy. Finally, Guy was not prejudiced by the trial court's ruling. Guy has had a full opportunity to be heard in the trial court and on appeal. In fact, he was able to advance the costs necessary for pursuing his legal remedies.

Guy's motion for indigency also cites to Chapter 10.101 RCW and [www.courts.wa.gov/court\\_rules/fa=court\\_rules.proposed](http://www.courts.wa.gov/court_rules/fa=court_rules.proposed) in support of his request. Chapter 10.101 RCW applies to the delivery of public defense services in criminal matters, which is not applicable in this case.

Regarding Guy's reliance upon the website reference in his motion, Guy relies upon a proposed rule to support his request, which is also not applicable and cannot support an order of indigency. CP 904-09. Accordingly, Guy cannot meet any of the requirements for indigent status and the payment of expenses on appeal.

Next, citing to RAP 15.2(c), Guy complains that the trial court failed to enter specific findings in denying his request. Here, the trial court denied the motion for indigency, but did not make findings regarding whether Guy was indeed indigent. CP 918. Even if the trial court's determination was in error, any such error did not prejudice Guy because he cannot demonstrate any constitutional or statutory basis for his request.<sup>8</sup> Guy remains unable to demonstrate any constitutional or statutory basis for his request, and the trial court did not err in denying his request.

**J. The Trial Court did not Err when it Did Not Require the Trustee to Post a Bond.**

On October 6, 2008, Guy filed a Motion for Trustee's Surety seeking a trial court order requiring the trustee to post a bond to cover the amount of loss arising from Guy's delayed distribution. CP 626-30. Specifically, Guy requested that the trial court order Gregg to post a surety

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<sup>8</sup> Incidentally, the appellate courts properly completed their review function under RAP 15.2(d) by way of the State Supreme Court Commissioner Goff's May 26, 2011 Ruling Denying Review. In that review, Commissioner Goff reviewed Guy's request as if the trial court had determined that Guy was indigent pursuant to RAP 15.2(c)(2) and determined that Guy's request failed for lack of a constitutional right to pursue his appeal at public expense.

in cash or cash equivalent for one hundred percent of the trust plus twenty-five percent to “cover additional costs, loses, liabilities, and penalties that they are likely to incur.” CP 628. Guy argued that the provision in the trial court’s June 27, 2008 Order and Decree Approving Trustee’s Interim Accounting allowing for the delayed distribution pending exhaustion of the appeal period and the completion of an appeal was erroneous and placed his inheritance at undue risk during the economic crisis.

The trial court determined that it did not have jurisdiction to hear Guy’s motion given his impending appeal. CP 1915-16. Even if the court had jurisdiction to consider Guy’s motion pursuant to RAP 7.2(h) (“the trial court has authority to act on matters of supersedeas, stays, and bonds as provided in Rules 8.1 and 8.4 . . .”), Guy failed to demonstrate how his inheritance was at risk where Gregg held trust funds in low-risk investment vehicles with the trust balance actually increasing under his administration. *See In re the Estate of Dorothy P. Mettle, supra*, at 10. Guy also fails to show that he was prejudiced by the trial court’s refusal to hear the motion and refusal to order Gregg to post a bond. RAP 8.1(h) provided Guy a right to object to the trial court’s refusal to order a supersedeas bond, a right that he exercised. Accordingly, Guy cannot demonstrate that he suffered prejudice as a result of the trial court’s

determination or that the trial court abused its discretion in refusing to require a bond. The trial court's action should be affirmed.

**K. Trial Court did not Err in Entering its Order and Decree Approving Trustee's Final Accounting.**

Gregg filed his Petition to Approve Trustee's Final Accounting on October 3, 2012. CP 1598-1655. On October 26, 2012, the trial court entered its Order and Decree Approving Trustee's Final Accounting. CP 1751-54. Guy claims that the trial court erred with regard to the following issues.

***1. Trial Court Refused to Enforce the Interim Distribution Order of June 27, 2008***

Guy complains about the trial court's Order and Decree Approving Trustee's Final Accounting in that it does not allow for Guy's interim distribution because the Order contains a provision allowing for a delayed distribution pending the expiration of any appeal period or the exhaustion of an appeal. CP 1753. This provision is similar to the provision in the June 27, 2008 Order and Decree Approving Trustee's Interim Accounting, which was one of the subjects of Guy's previous appeal and which provision was upheld in *In re: the Estate of Dorothy P. Mettle, supra*. See CP 498. Thus, Guy's assertion of error fails.

## ***2. Approval of Trust Accounting with Regard to Charles Schwab Account Funds***

Guy also contends that the trial court erred in approving the trustee's accounting without requiring "source documents" to explain an alleged missing \$50,000 from the trust's Charles Schwab account. The record on review clearly reflects that Gregg's Petition to Approve Trustee's Interim Accounting contained information about the Charles Schwab account. CP 7-9. In his appeal under Court of Appeal No. 38243-1-II, Guy raised issues as to the alleged "missing" Charles Schwab funds, but could not substantiate his claims. This Court addressed all issues arising from the trial court's June 27, 2008 Order and Decree Approving Trustee's Interim Accounting in *In re: Estate of Mettle, supra*, and did not find credible Guy's assertions regarding alleged missing funds. This Court affirmed the trial court's Order and Decree Approving Trustee's Interim Accounting. Guy's complaints about the alleged missing funds were decided in the prior appeal and he is estopped from raising those issues here.

## ***3. Approval of Attorney's Fees and Costs***

The Order and Decree Approving Trustee's Final Accounting also approves Gregg's attorney's fees and costs incurred in connection with his

administration of the trust and orders Guy's distribution be reduced by that amount. CP 1752. The record in support of Gregg's Petition to Approve Trustee's Final Accounting includes the October 3, 2012 Declaration of David B. Petrich detailing the entire billing history of all Mettle matters, including trust matters. CP 1656-1727. Attorney Petrich's declaration describes the manner in which his firm establishes billing rates and sets forth the various timekeeper's education and experience. CP 1656-59. The trial court reviewed counsel's declaration and attached billing statements and determined the fees to be reasonable under the *Lodestar* analysis. See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983).

The trial court also ordered that the \$24,430.87 in attorney fees and costs for the period of May 1, 2011 through May 31, 2012 be deducted from Guy's distribution. CP 1751-54. Under TEDRA, the trial court had authority to award attorney's fees, and to order such fees to be paid from the assets of the estate or trust. RCW 11.96A.150(1). In ordering a reduction of Guy's distribution to pay fees and costs, the trial court was authorized to "consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved." *Id.* Given Guy's actions in delaying

closure of the trust to include filing baseless motions as to issues decided in his prior appeal as well as refusing to strike motions after having received relevant billing and accounting documents, the trial court did not abuse its discretion in entering its attorney fee and cost award and in ordering that it be paid from Guy's distribution.

Guy also argues that the trial court erred in approving the deduction of \$53,866.23 from his distribution, but acknowledges that in Court of Appeals No. 38243-1-II, he was ordered to pay \$53,866.23 in attorney's fees, which were to be transferred from his distribution. *In re: the Estate of Dorothy P. Mettle, supra*, at 15.

In light of the record below, the trial court did not abuse its discretion in entering its Order and Decree Approving Trustee's Final Accounting.

**L. The Estate Is Entitled to An Award of Attorney's Fees and Costs on Appeal.**

Pursuant to RCW 11.96A.150(1), RAP 18.9 and RAP 18.1, Gregg requests an award of attorney's fees and costs for responding to Guy's appeal matter(s) in the appellate court.

With respect to Gregg's request for attorney's fees and costs, TEDRA, relates to trust and estate matters and specifically provides for an award of attorneys' fees and expenses on appeal, as follows:

Either the superior court or *any court on appeal may*, in its

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

RCW 11.96A.150(1) (emphasis added). As noted above, this section specifically applies to appellate proceedings involving estate and trust matters and gives the court broad discretion in awarding fees. *See* RCW 11.96A.150(2). *See In re Irrevocable Trust of McKean*, 144 Wn.App. 333, 183 P.3d 317 (2008)(awarding attorney's fees on appeal pursuant to RCW 11.96A.150(1) to avoid settlor of trust's actions to deplete trust and frustrate trust's purpose).

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

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

RAP 18.9(a).

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

In this case, where the trust/estate has incurred attorney's fees and costs in responding to Guy's appeal, an award of attorney's fees and costs is proper. This request is particularly compelling where Guy's appeal is not supported by any factual basis in the trial court record or any citation to relevant legal authority and/or legal analysis. Under these unique circumstances, an award of attorney's fees is appropriate.

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

If Guy contends that he is unable to pay such fees and costs at this

the foregoing reasons, an award of attorney's fees and costs in favor of the trust/estate to be paid by Guy, personally, is warranted.

**V. CONCLUSION**

For the reasons set forth above, Gregg respectfully requests that this Court affirm the trial court in all respects with regard to all of the orders that are the subject of Guy's appeal and order Guy to pay the trust/estate's attorney's fees and costs associated with his appeals in this case pursuant to RCW 11.96A.150(1), RAP 18.9 and RAP 18.1.

RESPECTFULLY SUBMITTED this 17th day of October, 2013.

LAW OFFICE OF JENNIFER A. WING, PLLC

By:   
Jennifer A. Wing, WSBA # 27655  
Of Attorneys for Respondent

EISENHOWER & CARLSON, PLLC

By: \_\_\_\_\_  
David B. Petrich, WSBA # 18711  
Of Attorneys for Respondent

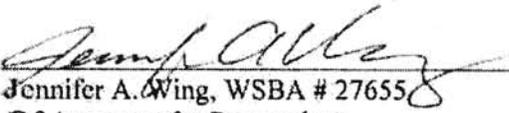
the foregoing reasons, an award of attorney's fees and costs in favor of the trust/estate to be paid by Guy, personally, is warranted.

V. CONCLUSION

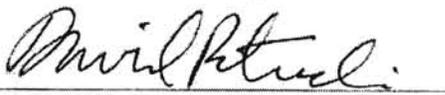
For the reasons set forth above, Gregg respectfully requests that this Court affirm the trial court in all respects with regard to all of the orders that are the subject of Guy's appeal and order Guy to pay the trust/estate's attorney's fees and costs associated with his appeals in this case pursuant to RCW 11.96A.150(1), RAP 18.9 and RAP 18.1.

RESPECTFULLY SUBMITTED this 17th day of October, 2013.

LAW OFFICE OF JENNIFER A. WING, PLLC

By:   
Jennifer A. Wing, WSBA # 27655  
Of Attorneys for Respondent

EISENHOWER & CARLSON, PLLC

By:   
David B. Petrich, WSBA # 18711  
Of Attorneys for Respondent

DECLARATION REGARDING ELECTRONIC SIGNATURE

I, Julie M. Lawless, declare under penalty of perjury under the laws of the State of Washington, that the foregoing electronic document attached to this declaration, which consists of forty-one (41) pages including this declaration page, is a complete and legible image that I have examined personally and that was received by me via

EMAIL at the following address: [julie@jwinglaw.com](mailto:julie@jwinglaw.com).

DATED this 18<sup>th</sup> day of October, 2013, at Tacoma, Washington.

  
\_\_\_\_\_  
Julie M. Lawless

COURT OF APPEALS  
DIVISION II

2013 OCT 21 AM 11:44

STATE OF WASHINGTON

CERTIFICATE OF SERVICE

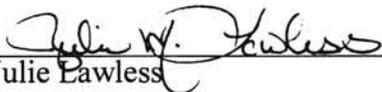
I hereby certify that on the 18 day of October, 2013, I served Appellant with a copy of the foregoing document by depositing with the United States Postal Service, first class mail with postage affixed and pre-paid, a true and correct copy of the foregoing Respondent's Brief for delivery at the following address:

Guy Mettle  
Post Office Box 2491  
Westerville OH 43086-2491

I arranged for the original of the foregoing document to be filed with the Court of Appeals, Division II, by hand delivery to the following address:

Clerk of the Court  
Washington State Court of Appeals, Division II  
950 Broadway, #300  
Tacoma, WA 98402

DATED this 18 day of October, 2013.

  
\_\_\_\_\_  
Julie Lawless