

COURT OF APPEALS
DIVISION I

2014 OCT 29 PM 1:15

STATE OF WASHINGTON

DEPUTY

No. 46251-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

PAULINE FORSBERG and LESLIE FORSBERG,

Appellants,

v.

PATRICIA L. FORSBERG, in her representative capacity as Trustee of the Patricia L. Forsberg Spousal Trust and in her individual capacity; REBECCA and JAMES HINKEN, and their marital community; PARIS (aka PENELOPE) and FRED LUJAN, and their marital community; DEBORAH and MICHAEL SOMERS, and their marital community; and all persons or parties unknown claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY
THE HONORABLE ERIK ROHRER

BRIEF OF RESPONDENTS

SMITH GOODFRIEND, P.S.

PLATT IRWIN LAW FIRM

By: Valerie A. Villacin
WSBA No. 34515

By: Simon Barnhart
WSBA No. 34207

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

403 South Peabody St.
Port Angeles, WA 98362
(360) 457-3327

Attorneys for Respondents

PM 10/27/14

TABLE OF CONTENTS

I.	RESTATEMENT OF ISSUES	1
II.	RESTATEMENT OF FACTS.....	2
	A. Patricia and Walter Forsberg agreed that all their property would be converted to community property when the first spouse died.	2
	B. Their mutual wills provide that the residue of the first spouse’s estate be placed in Trust for the survivor’s sole benefit, and upon the death of the survivor, any remaining Trust assets and the residue of the survivor’s estate be distributed in pre-established percentages to their children.	4
	C. After Walter died in July 2009, Patricia, as Personal Representative of his Estate, distributed his interest in their property consistent with his Will and their Agreement. Probate of Walter’s Estate was closed in 2011 without objection.	6
	D. A year after Walter’s Estate was closed, Patricia transferred certain real properties that had been confirmed to her as her share of the community property to her children and spouses. Over a year after that, Walter’s daughters sued Patricia and her children.	12
	E. The trial court dismissed Walter’s daughters claims as time-barred, because they were not brought before the probate of the Estate closed.	14

III.	RESPONSE ARGUMENT.....	15
A.	RCW 11.68.110 bars this action challenging Patricia’s acts as Walter’s Personal Representative.	15
1.	Walter’s daughters cannot challenge how Patricia distributed Walter’s Estate after her discharge as Personal Representative.	15
2.	Patricia’s distribution of the combined assets was approved and became a final decree of distribution after the time passed for any objection.	18
3.	The daughters’ claims against Patricia all arise from actions that she took as Personal Representative of Walter’s Estate, and are subject to the time limit of RCW 11.68.110.	23
B.	The Agreement and Wills did not limit Patricia’s control over her half interest in the community property that passed directly to her during her lifetime.	28
1.	Patricia and Walter intended for the surviving spouse to receive half of the combined estate directly.	28
2.	Under the plain language of the Wills, the division of the combined estates upon the survivor’s death is of the “remaining” property.	34
3.	No limits were placed on the surviving spouse’s use of the property received directly as her half of the community property during her lifetime.	35

C. The trial court properly awarded attorney fees to Patricia and her children for having to defend against untimely claims related to the disposition of Estate assets.41

D. This Court should deny appellants' request for attorney fees, and award attorney fees to respondents for having to respond to this appeal. 42

IV. CONCLUSION 43

TABLE OF AUTHORITIES

STATE CASES

<i>Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship</i> , 158 Wn. App. 203, 242 P.3d 1 (2010), <i>rev. denied</i> , 171 Wn.2d 1014 (2011).....	30
<i>Edmonds v. Ashe</i> , 13 Wn. App. 690, 537 P.2d 812 (1975)	31
<i>Erickson v. Reinbold</i> , 6 Wn. App. 407, 493 P.2d 794 (1972)	22
<i>Estate of Black</i> , 116 Wn. App. 476, 66 P.3d 670 (2003), <i>aff'd on other grounds</i> , 153 Wn.2d 152, 102 P.3d 796 (2004)	43
<i>Estate of Campbell</i> , 87 Wn. App. 506, 942 P.2d 1008 (1997).....	28
<i>Estate of Dunn</i> , 31 Wn.2d 512, 197 P.2d 606 (1948) (App. Br. 34)	36-37
<i>Estate of Evans</i> , 181 Wn. App. 436, 326 P.3d 755 (2014).....	41
<i>Estate of Haviland</i> , 177 Wn.2d 68, 301 P.3d 31 (2013)	25
<i>Estate of Jaussaud</i> , 71 Wn.2d 87, 426 P.2d 602 (1967).....	23
<i>Estate of Vance</i> , 11 Wn. App. 375, 522 P.2d 1172 (1974).....	32
<i>Holmes v. Holmes</i> , 65 Wn.2d 230, 396 P.2d 633 (1964)	36-37
<i>Kitsap Bank v. Denley</i> , 177 Wn. App. 559, 312 P.3d 711 (2013).....	41

<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.3d 632 (1998)	42
<i>Marriage of Brown</i> , 98 Wn.2d 46, 653 P.2d 602 (1982)	27
<i>Martin v. Wilbert</i> , 162 Wn. App. 90, 253 P.3d 108, <i>rev. denied</i> , 173 Wn.2d 1002 (2011)	22
<i>Meryhew v. Gillingham</i> , 77 Wn. App. 752, 893 P.2d 692 (1995), <i>rev. denied</i> , 128 Wn.2d 1012 (1996)	16-17
<i>Newell v. Ayers</i> , 23 Wn. App. 767, 598 P.2d 3, <i>rev. denied</i> , 92 Wn.2d 1036 (1979).....	37-39
<i>Norris v. Norris</i> , 95 Wn.2d 124, 622 P.2d 816 (1980)	22
<i>Olsen v. Olsen</i> , 189 Misc. 1046, 70 N.Y.S.2d 838 (1947)	37-39
<i>Peoples Nat. Bank of Wash. in Seattle v. Jarvis</i> , 58 Wn.2d 627, 364 P.2d 436 (1961)	33
<i>Pitzer v. Union Bank of California</i> , 141 Wn.2d 539, 9 P.3d 805 (2000).....	27
<i>Reed v. Campbell</i> , 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858, <i>reh'g denied</i> , 478 U.S. 1031 (1986)	27
<i>Vail v. Toftness</i> , 51 Wn. App. 318, 753 P.2d 553 (1988)	30

STATUTES

RCW 11.02.070	<i>passim</i>
RCW 11.04.250	25
RCW 11.11.070.....	41

RCW 11.12.230	28
RCW 11.28.240	7
RCW 11.68.110	<i>passim</i>
RCW 11.96A.070	1, 15, 23
RCW 11.96A.150.....	41-43
RCW 11.98.070	33
RCW 11.98.078	32
RCW 26.16.030.....	19

OTHER AUTHORITIES

26B Cheryl Mitchell and Ferd Mitchell, Washington Practice: Probate Law and Practice (2014)	20-21
---	-------

I. RESTATEMENT OF ISSUES

1. RCW 11.96A.070(2) provides that any action against a personal representative must be brought before his or her discharge. RCW 11.68.110 provides that unless a party objects within 30 days of filing of a Declaration of Completion of Probate, the personal representative will be automatically discharged, and all of the personal representative's actions made before filing the Declaration will be "deemed approved," and the Declaration will be the equivalent of a final "decree of distribution." More than two years after the Declaration of Completion was filed for the Estate of Walter Forsberg, his daughters filed an action against Walter's widow, Patricia Forsberg, who acted as Personal Representative for his Estate. At the core of the daughters' action is the manner in which Patricia, in her capacity as Personal Representative, distributed the assets of the Estate. Did the trial court err in dismissing the daughters' claims as time barred under RCW 11.96A.070(2) and RCW 11.68.110?

2. Patricia and Walter Forsberg created an estate plan that converted all of their property into community property upon the death of the first spouse. When Walter died, his half interest in the community property funded a Trust for Patricia's benefit, and

Patricia's half interest was confirmed directly to her. Nothing in any of the estate planning documents limited the survivor's use and control over those assets owned individually by the survivor during his or her lifetime. Pursuant to the terms of their mutual wills, upon the death of the surviving spouse any "remaining" property in the Trust and the "remaining" property held by the survivor would be distributed to their children based upon pre-determined percentages. Did the trial court err in concluding that Patricia could exercise full "dominion and control" over her individual assets during her lifetime?

II. RESTATEMENT OF FACTS

A. **Patricia and Walter Forsberg agreed that all their property would be converted to community property when the first spouse died.**

When Patricia and Walter Forsberg married in 1975, each owned separate property, including real property and cash and investment accounts. (CP 258, 280, 289-96) The appellants are Walter's daughters from a previous marriage: Pauline and Leslie Forsberg. (CP 280) In addition to Patricia, the respondents are her children from a previous marriage and their spouses: Deborah and Michael Somers; Penelope and Fred Lujan; and Rebecca and James Hinken. (CP 258-59, 280)

In 2003, after 28 years of marriage, Patricia and Walter entered into the Forsberg Property Agreement (the “Property Agreement”) as part of their estate planning. (CP 280-96) By then, Patricia’s separate property consisted of three parcels of unimproved real property and cash and investment accounts. (CP 294-96) Walter’s separate property consisted of commercial real property, residential real property, unimproved real property, and cash and investment accounts. (CP 289-93) In the Property Agreement, Patricia and Walter acknowledged their separate property estates and their community property, which included unimproved real property, cash accounts, vehicles, and farm equipment, but placed no value on the properties. (CP 280, 285-88) Patricia and Walter agreed that all of their property, including their individual separate properties, would become community property upon the death of the first spouse. (CP 281) Accordingly, the surviving spouse and the estate of the deceased spouse would each own a half interest in all of the property. RCW 11.02.070: “upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse [] and the other one-half share shall be subject to testamentary disposition by the decedent.”

B. Their mutual wills provide that the residue of the first spouse's estate be placed in Trust for the survivor's sole benefit, and upon the death of the survivor, any remaining Trust assets and the residue of the survivor's estate be distributed in pre-established percentages to their children.

Patricia and Walter also agreed to execute mutual wills. (CP 281) In their wills, each spouse directed that his or her interest in the combined assets be placed in a Trust for the surviving spouse as the beneficiary. (See CP 306) Specifically, each will provides that the "residue of my estate," defined as "all probate estate property which I own at the time of my death" be given to "my Trustee to be administered as one or more separate shares of the Trust for Surviving Spouse." (CP 306) As appellants acknowledge (App. Br. 7), by "operation of law," "the other half of the property would be "confirmed to the surviving spouse." RCW 11.02.070.

Each spouse appointed the other as Trustee for the Trust to provide for the "health, support and maintenance in [the surviving spouse's] accustomed manner of living." (CP 306) The surviving spouse was entitled to any and all income from the Trust, and could take from the principal if Trust income was insufficient to provide for the surviving spouse. (CP 306-07) Upon the death of the surviving spouse, the Trust was to terminate and the "remaining"

Trust property to be distributed to their respective children “in proportion to [each spouse’s] relative ownership of property prior to its becoming community property.” (CP 281, 307) The “percentage of relative ownership” was to be calculated based on the value of the property in the combined estate when the first spouse died (CP 281), using the value of half the community property plus the value of the spouse’s separate property as the numerator and the combined value of the entire estate as the denominator. (See CP 300) Under the terms of the surviving spouse’s will, the residue of the survivor’s estate would likewise be distributed to their respective children “in proportion to [each spouse’s] relative ownership of property prior to its becoming community property.” (CP 306, 307)

The mutual wills also specifically provided that upon the surviving spouse’s death, Walter’s children receive certain real property described as the “Forsberg Farm,” and that Patricia’s children would receive certain real property described as the “Teepee property.” (CP 282, 307-08) With the exception of these specific bequests, Walter and Patricia agreed that the surviving spouse could dispose of his or her percentage of relative ownership of the combined property as he or she chooses. (CP 282)

No limitation was placed on the surviving spouse's use of their interest in the community property or of the property held in the Trust during his or her lifetime. The surviving spouse as Trustee was granted "continuing, absolute, discretionary power to deal with any property, real or personal, held in the trust estate or in any trust, as freely as Trustor might in the handling of Trustor's own affairs." (CP 309) The Trustee was not required to prepare an accounting for the Trust, and "no person dealing with the Trustee shall be required to inquire into the propriety of any of Trustee's actions." (CP 309, 310) "Every action taken in good faith by Trustee shall be conclusive and binding upon all persons interest in the property of the trust." (CP 310)

Patricia and Walter agreed not to modify or revoke their wills without the other's written consent, and to be bound by the Property Agreement, which could be enforced by the parties, their children, and their children's issue. (CP 282)

C. After Walter died in July 2009, Patricia, as Personal Representative of his Estate, distributed his interest in their property consistent with his Will and their Agreement. Probate of Walter's Estate was closed in 2011 without objection.

Walter died on July 1, 2009. (CP 154) Patricia was named as the Personal Representative of Walter's estate and granted

nonintervention authority in the administration of the Estate. (CP 154) Because there was a Trust involved, Walter's Will allowed the Personal Representative to "exercise, to the extent applicable in administering my estate, all of the other power, authority and discretion granted to any Trustee under my Will." (CP 303) Walter's daughters, Pauline and Leslie, through retained counsel, filed a Request for Special Notice and for Inventory and Appraisal under RCW 11.28.240. (CP 174-75)

Pursuant to the Property Agreement, all property owned by Patricia and Walter became community property upon his death, and Patricia and Walter's Estate each became individual owners of half. (CP 281) RCW 11.02.070 ("upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse [] and the other one-half share shall be subject to testamentary disposition by the decedent."). As required by the Property Agreement, Patricia had the estate valued in accordance to the assets' character prior to Walter's death, to establish each spouse's percentage of relative ownership of the now combined community estate. (CP 298-300) Of the total combined estate of \$6,770,886.13, Walter's separate property was worth \$4,915,209.89, Patricia's separate property was worth

\$1,732,263.18, and the community property was worth \$123,413.06. (CP 300) Therefore, Walter's percentage of relative ownership of the combined estate was 73.5% and Patricia's percentage of relative ownership was 26.5%. (CP 300)

Walter's Estate and Patricia now each owned a half interest in the now community property under RCW 11.02.070. Patricia, in her capacity as Personal Representative to "do all that [she] thinks necessary or desirable in administering [Walter's] estate," executed an Allocation Agreement between the Estate and Patricia individually distributing certain assets to the Trust and allowing Patricia to take other assets of equal value directly, as her half share of the community property, "free and clear of any claims of the other." (CP 303, 328, 411) Patricia signed the Allocation Agreement in her capacity as the Personal Representative of Walter's Estate and individually as Walter's surviving spouse on March 16, 2011. (CP 338)

The Allocation Agreement described which community assets were allocated to Walter's Estate to equal half the value of the community estate, and which assets were distributed directly to Patricia. (CP 328-40, 411-12) Among the assets retained in Walter's Estate and funding the Trust were more than \$500,000 in

cash and securities and real property valued at \$2,714,800, including the Forsberg Farm that ultimately was to be distributed to his daughters. (CP 282, 329-33, 411-12) The remaining assets, including certain real properties that had previously been Walter's separate property, were distributed directly to Patricia as her half share of the community property. (CP 334-37, 411-12)

Patricia gave Walter's daughters and their attorney the Allocation Agreement at the same time she filed and served her Declaration of Completion, signaling the closing of the probate, on June 9, 2011. (CP 154-59, 410-14) The Declaration of Completion set out two minor bequests made by Walter in his Will and named Patricia as Trustee and beneficiary of the "residue" of Walter's Estate – the half of the community property allocated to his Estate under the Allocation Agreement. (CP 155) In the Notice accompanying the Declaration, Walter's daughters were advised that unless they served an objection within thirty days, "the acts that the Personal Representative performed before the Declaration of Completion of Probate was filed will be deemed approved, and the Personal Representative will be automatically discharged without further order of the Court." (CP 158)

In the cover letter that accompanied the Allocation Agreement and Declaration of Completion, Patricia advised Walter's daughters that she had authority to use the assets distributed directly to her "as she pleases during her lifetime," and was entitled to the income of the Trust and its principal as may be necessary:

Pursuant to the terms of the Trust, Patti is entitled to receive all income from the Trust assets, together with distributions from the principal of the Trust as may be necessary. As for those assets that have been distributed outright to her, Patti is entitled to use them as she pleases during her lifetime.

(CP 412) Patricia also explained that upon her death, the assets remaining in the Trust and those assets then still owned individually by Patricia would be distributed according to the calculated relative percentages:

When Patti passes way, the total remaining estate, consisting of what is left of the assets of the trust and the assets that went directly to Patti, shall be combined and then distributed to both of you and to Patti's children in accordance with each spouse's original relative ownership interests in the total estate.

(CP 411)

As stated above, when Patti passes away, whatever remains of the Trust assets and those assets in her name will be recombined and redistributed to the

surviving children according to the 73.5%/26.5% relative interests we calculated.

(CP 412)

Patricia offered to distribute Walter's half share of the combined estate held in Trust to his daughters immediately, so that they would not have to wait until Patricia's death to get their interest in their father's estate. (CP 412) Patricia thought Walter's daughters might prefer immediate possession and control over the assets in the Trust at their present value, rather than waiting to receive their portion of what would remain after Patricia died:

Patti is willing to enter into an agreement with you so that the assets of the Trust are disbursed to the two of you and she would no longer be entitled to receive the Trust income or to spend Trust principal for her living expenses. Instead, Patti would be limited to living off the assets that she received outright when the estate was allocated between her and the Trust.

(CP 412)

Neither Walter's daughters nor their attorney responded to Patricia's offer¹, or objected to Patricia's implementation of the estate plan, the Allocation Agreement, or the Declaration of Completion of Walter's Estate. (CP 143) Walter's Estate was closed and Patricia was discharged as personal representative on July 9,

¹ Patricia had made a similar offer a year earlier that was also ignored. (See CP 404-08)

2011 – 30 days after the Declaration of Completion was filed. RCW 11.68.110.

D. A year after Walter’s Estate was closed, Patricia transferred certain real properties that had been confirmed to her as her share of the community property to her children and spouses. Over a year after that, Walter’s daughters sued Patricia and her children.

On July 12, 2012, consistent with Patricia’s statements to Walter’s daughters before the probate closed that she could do “as she pleases” with the assets distributed directly to her, Patricia transferred cash and three parcels of real property she had received as her half share of the community property to her children and their spouses. (CP 219, 265) In total, Patricia transferred approximately \$1.4 million in assets – less than half of Patricia’s interest in the community property that had passed directly to her when Walter died (\$3.442 million), and also less than 26.5% of her relative percentage of ownership of the value of the combined assets when Walter died (\$1.794 million). (See CP 86-88, 300, 334-35, 337)

On September 25, 2013, over two years after Walter’s Estate closed without objection, Walter’s daughters sued Patricia, and her children and their spouses, alleging that Patricia improperly funded

the Trust by entering into the Allocation Agreement transferring 50% of the combined assets to the Trust. (CP 256, 349) Walter's daughters also alleged breach of contract, sought a determination that Patricia breached her fiduciary duty by improperly funding the Trust and by "giving away property that should have been titled and transferred to the Trust," and orders requiring Patricia to fund the Trust with all of the property owned by both Walter and Patricia when Walter died, vacating the deeds to the properties transferred to Patricia's children, and quieting title to the properties to the Trust. (CP 257-58, 274-76)

Walter's daughters admitted they had previously received the Allocation Agreement outlining the distribution of assets between Walter's Estate and Patricia, as well as the Declaration of Completion of Probate, but that they did not object to either. (CP 264-65) Walter's daughters also admitted that they had not objected when Patricia had previously told them that she could use the assets distributed directly to her "as she pleases during her lifetime." (CP 264)

E. The trial court dismissed Walter's daughters claims as time-barred, because they were not brought before the probate of the Estate closed.

Patricia sought partial summary judgment dismissing this action as time-barred under RCW 11.68.110 because Walter's daughters failed to object to the Declaration of Completion of Walter's Estate within 30 days of filing. (CP 140-48, 176-77) Walter's daughters sought partial summary judgment that Patricia's transfers of real property to her children were void because they violated the mutual wills and the Property Agreement. (CP 119-33) After a hearing on both motions, Clallam County Superior Judge Erik Rohrer dismissed the daughters' action for breach of contract, declaratory judgment, specific performance, injunctive relief, vacation of deeds, and quiet title, with prejudice, and awarded attorney fees to the respondents. (CP 16-19)

The trial court concluded that Walter's daughters' challenge to how Patricia distributed the Estate assets was time-barred by RCW 11.68.110. (CP 24) The trial court also concluded that, even if the claims were not time-barred, relevant law and facts did not support the claim that Patricia improperly "gave away" certain assets because the Property Agreement characterized all of Patricia and Walter's property as community on the day Walter died. (CP

26) “One-half of this community property passed directly to Patricia Forsberg and the other half was put into a trust for Patricia Forsberg’s benefit.” (CP 26) Patricia was “not giving away property that should have been transferred to trust, but is simply exercising dominion and control over her one-half interest in the estate in accordance with the Will, the [Property Agreement] and applicable Washington law.” (CP 26)

III. RESPONSE ARGUMENT

A. RCW 11.68.110 bars this action challenging Patricia’s acts as Walter’s Personal Representative.

1. Walter’s daughters cannot challenge how Patricia distributed Walter’s Estate after her discharge as Personal Representative.

Walter’s daughters did not seek court intervention after Patricia filed the Declaration of Completion of the probate of Walter’s Estate, distributing assets directly to Patricia as her half share of the community property “free and clear of any claim” of the Estate. (CP 265, 328) Their claims are barred by RCW 11.96A.070(2) and RCW 11.68.110. RCW 11.96A.070(2) provides that any action against a personal representative for alleged breach of fiduciary duty must be brought before discharge of the personal representative. RCW 11.68.110 provides that unless a party objects

within 30 days of the filing of a Declaration of Completion of the Probate, the personal representative will be “automatically discharged without further order of the court” and the Declaration of Completion “shall, at that time, be the equivalent of the entry of a decree of distribution in accordance with chapter 11.76 RCW.” See *Meryhew v. Gillingham*, 77 Wn. App. 752, 753-54, 893 P.2d 692 (1995), *rev. denied*, 128 Wn.2d 1012 (1996).

Meryhew considered a claim against an attorney who served as personal representative in the nonintervention probate of the plaintiff’s mother’s estate made more than a year after the Declaration of Completion was filed. The plaintiff complained that the attorney had not inventoried and appraised the estate property before closing the probate and challenged the attorney’s billing practices in charging the estate for his services. The appellate court affirmed the trial court’s dismissal of these claims under RCW 11.68.110 because the attorney had been automatically discharged as personal representative when plaintiff failed to timely object to the Declaration of Completion, and the plaintiff’s claims were

impermissible collateral attacks on the probate of an estate that had already been closed. *Meryhew*, 77 Wn. App. at 754.²

Likewise here, the claims brought by Walter's daughters are time barred and impermissible collateral attacks on the probate of Walter's Estate, which had been closed more than two years before this action was filed. The Declaration of Completion was filed on June 9, 2011, and the statutory Notice accompanying the Declaration and served on the daughters warned them that "unless you file a petition with the Court requesting the Court to approve the reasonableness of the fees, or for an accounting or both [] the acts that the Personal Representative performed before the Declaration of Completion of Probate was filed will be deemed approved, and the Personal Representative will be automatically discharged." (CP 158-59) Walter's daughters did not timely object to the Declaration within 30 days, and instead filed this action more than two years later. Because this action against Patricia was brought after she was already discharged as Personal

² The *Meryhew* court, however, held that a separate legal malpractice claim was not barred against the personal representative in his role as attorney for the beneficiary. The court held that that claim was governed by the 3-year attorney malpractice statute of limitation, rather than the probate statute of limitations. Nevertheless, the court held that the malpractice claim cannot be used as a "vehicle for asserting damages alleged to have resulted to the [] Estate." 77 Wn. App. at 756.

Representative of Walter's Estate, the claims were untimely and the trial court properly dismissed the claims with prejudice.

2. Patricia's distribution of the combined assets was approved and became a final decree of distribution after the time passed for any objection.

Among the actions taken by Patricia that were "deemed approved" by her discharge as Walter's Personal Representative was her execution of the Allocation Agreement, which distributed certain assets to Patricia and retained certain assets to fund the Trust, "free and clear of any claim" by the other. (CP 328-40) It is wholly disingenuous for Walter's daughters to claim that they were somehow misled into believing that all of Patricia and Walter's combined assets were distributed to the Trust because the Declaration of Completion had not named Patricia individually as a beneficiary and did not "incorporate" the Allocation Agreement. (App. Br. 16, 21-22)

The Allocation Agreement, which the daughters admit they received, clearly sets out which assets were retained by the Estate to fund the Trust, and which assets (of equal value) were distributed to Patricia directly as her share of the community property under RCW 11.02.070 "free and clear of any claim" of the Estate. (CP 264,

328) The Declaration of Completion, filed two months later, sets out that the “residue” of Walter’s estate, after two minor specific bequests, was distributed to the Trust with Patricia as Trustee. (CP 155) Furthermore, Walter could not, by his Will, purport to fund the Trust with Patricia’s half share of the community property. RCW 26.16.030 (“neither person shall devise or bequeath by will more than one-half of the community property”). If Walter’s daughters disagreed with how the Trust was funded, or which assets were distributed to Patricia individually, they could have (and should have) objected when the Declaration of Completion was filed.

Walter’s daughters claim they are not bound by the Allocation Agreement because it was never filed in Walter’s probate or incorporated in the Declaration of Completion. (App. Br. 16-18) But it is not the Declaration itself that binds Walter’s daughters. Instead, they are bound by the actions taken by the Personal Representative before her discharge, which were “deemed approved” unless challenged within 30 days after the filing of the Declaration. RCW 11.68.110 (unless a petition is filed within thirty days after the Declaration of Completion is filed requesting an

accounting, “the acts of the personal representative will be deemed approved”). (CP 158-59)

This was a nonintervention probate. “A Personal Representative who has nonintervention powers is provided substantial authority to act without reporting to the heirs involved in the probate. The burden is on the heirs to argue whether they should be provided further information.” 26B Cheryl Mitchell and Ferd Mitchell, Washington Practice: Probate Law and Practice, § 3.11 (2014). In other words, a nonintervention Personal Representative is not required to file an accounting of how the assets were distributed to close the probate unless a demand is made. RCW 11.68.110. To close a nonintervention probate, a Personal Representative may, as Patricia did here, file a “Declaration of Completion of Probate of Testate Estate” and “Notice of Filing Declaration of Completion of Probate of Testate Estate,” “providing heirs with 30 days to challenge the actions taken, or the action of the Personal Representative are presumed approved.” 26B Cheryl Mitchell and Ferd Mitchell, Washington Practice: Probate Law and Practice, § 3.11 (2014).

The Declaration of Completion need not include a formal accounting of how the assets were distributed (although one was

effectively provided here). RCW 11.68.110 only requires that the Declaration of Completion set forth the basic facts regarding the estate, including: a) the date of the decedent's death and his residence at the time of death; b) whether or not the decedent died intestate or testate, and if testate, the date of the last will and testament; c) that each creditor's claims has been paid; d) the personal representative has completed the administration of the estate without court intervention, and the estate is ready to be closed; e) the names and addresses of heirs if the decedent died intestate; and f) the amount of fees paid.

A Personal Representative may provide only this "minimum information [] or this information may be supplemented with a Notice of Final Accounting and Intention to Distribute Assets." 26B Cheryl Mitchell and Ferd Mitchell, *Washington Practice: Probate Law and Practice*, § 4.61 (2014). But in either event, if a party with notice does not object to the Declaration of Completion, the Estate is closed and the Declaration is deemed the equivalent of a Decree of Distribution. RCW 11.68.110.

Here, Walter's daughters were provided with more than the "minimum information," including a full accounting of which assets were left in the Estate as Walter's "residue" to fund the Trust, and

which assets passed directly to Patricia. (CP 328-40) Because Walter's daughters did not timely object to the Declaration of Completion, the distribution set out in the Allocation Agreement became the equivalent of a decree of distribution that they cannot now attack.

“Orders and decrees of distribution made by superior courts in probate proceedings upon due notice provided by statute are final adjudications having the effect of judgments *in rem* and are conclusive and binding upon all the world as well.” *Martin v. Wilbert*, 162 Wn. App. 90, 97, ¶ 11, 253 P.3d 108, *rev. denied*, 173 Wn.2d 1002 (2011) (*citations omitted*). A decree of distribution has res judicata effect over any action challenging the administration of the Estate, and “prevents relitigation of claims that were or should have been decided among the parties in an earlier proceeding.” *Norris v. Norris*, 95 Wn.2d 124, 130-31, 622 P.2d 816 (1980) (court could not consider impact of community property agreement when it could have and should have been raised in the probate of the wife's estate, which was by then closed); *Martin*, 162 Wn. App. at 96, ¶ 9, (holding that certain claims were barred by res judicata, because the claims against the Personal Representative could have been raised before the probate closed); *see also Erickson v.*

Reinbold, 6 Wn. App. 407, 414-15, 493 P.2d 794 (1972) (“when a determination of the intent of a testator has been made by a court of competent jurisdiction [] that determination is a final and conclusive judgment, binding upon all the parties having any interest in the estate”).

If Walter’s daughters disagreed with Patricia’s decisions as Personal Representative in dividing the combined Forsberg assets, or with Patricia’s assertion that she could use those assets distributed directly to her “as she pleases during her lifetime,” then they should have made their objection before the Declaration of Completion became the equivalent of a decree of distribution. *Estate of Jaussaud*, 71 Wn.2d 87, 91, 426 P.2d 602 (1967) (a decree of distribution is “res judicata of all matters raised, or which could have been raised, in the proceedings”). Because Walter’s daughter’s failed to object earlier, the assets distributed to Patricia individually were “free and clear” of any claims that they now make.

3. The daughters’ claims against Patricia all arise from actions that she took as Personal Representative of Walter’s Estate, and are subject to the time limit of RCW 11.68.110.

In order to avoid the statute of limitations under RCW 11.68.110 and RCW 11.96A.070(2), Walter’s daughters attempt on

appeal to reframe their claims by asserting that they “do not challenge actions Patricia took as personal representative.” (App. Br. 15, 18) But the trial court correctly concluded that their claims for breach of contract, declaratory judgment, specific performance, injunctive relief, vacation of deeds, and quiet title, all arise from the “manner in which Patricia Forsberg distributed the estate assets and are therefore barred by the 30-day limit imposed by RCW 11.68.110.” (CP 24)

The challenge below is best described in the Amended Petition, and arises from the complaint that upon Walter’s death, Patricia should have funded the Trust with all of the assets owned by Walter and Patricia. Walter’s daughters claim Patricia breached the Forsberg Property Agreement and Mutual Wills by “giving away property that should have been transferred and titled to the Trust:”

Petitioners, who are third party beneficiaries of the FPA, filed this action under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, because Patricia violated the terms and intent of the Forsberg Property Agreement by improperly funding the trust created by Walter’s Will (referred to as the “Spousal Trust.”) Instead of funding the Spousal Trust with all of Walter’s and Patricia’s property, as required by the FPA, Patricia signed an “Allocation Agreement” that transferred only 50% of the property to the Spousal Trust. Patricia further breached her fiduciary duties by giving away property

that should have been transferred and titled to the Trust...

(CP 257) But Patricia funded the Trust in her capacity as the Personal Representative of Walter's Estate, in a way that was consistent with the provision of Walter's Will that "if my spouse survives me by thirty (30) days, I give the residue of my estate to my Trustee to be administered as one or more shares of the Trust for Surviving Spouse." (CP 306)

Citing RCW 11.04.250, the daughters claim that title of any real property immediately vested in the Trustee when Walter died, therefore it is the Trustee's actions that they challenge. (App. Br. 19) But RCW 11.04.250 provides that while title in real estate vests immediately in the heirs or devisees upon the death of the decedent, "no person is a devisee until the will has been probated." *Estate of Haviland*, 177 Wn.2d 68, 79-80, ¶ 20, 301 P.3d 31 (2013). "While heirs have an interest in the property at death, that interest is subject to the administrator until the completion of probate." *Haviland*, 177 Wn.2d at 80, ¶ 21.

Here, although the Trustee may have had a vested interest in the property, it was still under the control of the Personal Representative until Walter's probate was closed. Patricia had

authority in her capacity as Personal Representative to “do all that my Personal Representative thinks necessary or desirable in administering my estate” and “exercise to the extent applicable in administering my estate, all of the other power, authority and discretion granted to my Trustee under my Will.” (CP 303) Walter’s Estate had not yet closed, and Patricia was acting in her capacity as Personal Representative when she signed the Allocation Agreement. Again, if Walter’s daughters did not believe that the Personal Representative had that authority to deal with the Trust assets, their time to challenge Patricia’s actions was before the probate closed, not two years later.

Walter’s daughters also claim their action is not time-barred because they are challenging actions taken by Patricia in her individual capacity by “giving away the community property she received by operation of law when Walter died.” (App. Br. 18, 20) But the Allocation Agreement distributed Patricia’s interest in community property “free and clear of any claims.” (CP 328) And in her capacity as the Personal Representative Patricia advised the daughters that she could “use as she pleases” the assets distributed directly to her. (CP 412) If Walter’s daughters disagreed with her decision as Personal Representative to distribute certain assets

directly to Patricia “free and clear” of any claims, to “use as she pleases during her lifetime,” they should have objected before Walter’s probate closed. (CP 328-40)

A closed estate is a final judgment. Courts will not disturb a final decree of probate without good reason. *See Pitzer v. Union Bank of California*, 141 Wn.2d 539, 550-551, 9 P.3d 805 (2000). Because of the strong interest in the finality of judgments, courts normally decline to reach back in time and evaluate alleged errors made during the administration of a closed estate:

After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate.

Pitzer, 141 Wn.2d at 551 (quoting *Reed v. Campbell*, 476 U.S. 852, 855-856, 106 S.Ct. 2234, 90 L.Ed.2d 858, *reh’g denied*, 478 U.S. 1031 (1986)); *see also Marriage of Brown*, 98 Wn.2d 46, 49, 653 P.2d 602 (1982) (in the conflict between the principles of finality in judgments and the validity of judgments, modern judicial development has been to favor finality rather than validity). The trial court properly dismissed Walter’s daughters’ claims, which

were a transparent attempt to re-open the probate of Walter's Estate.

B. The Agreement and Wills did not limit Patricia's control over her half interest in the community property that passed directly to her during her lifetime.

"The purpose and duty of the court in construing a will is to give effect to the testator's intent." *Estate of Campbell*, 87 Wn. App. 506, 510, 942 P.2d 1008 (1997); *see also* RCW 11.12.230 (all courts shall have due regard to the direction of the will and the true intent and meaning of the testator). "The will should be considered in its entirety and effect given to every part." *Campbell*, 87 Wn. App. at 510. Even if Walter's daughters' claims were not time barred, the trial court properly dismissed them as unsupported by "relevant law or facts" because Patricia acted consistent with the Forsbergs' estate plan. (CP 24, 26)

1. Patricia and Walter intended for the surviving spouse to receive half of the combined estate directly.

There is no dispute that prior to all of their property being converted to community property, Walter's percentage of relative ownership of the combined assets was 73.5% and Patricia's was 26.5%. (CP 300) It is also not disputed that under the plain terms

of the Property Agreement, Patricia and Walter wished to combine their assets and convert them to community property upon the death of the first spouse. (CP 280-81)

Walter's daughters claim that regardless of this recharacterization of assets to community property, "the agreements never refer to the property passing to the surviving spouse as a fee simple estate or grant the surviving spouse testamentary power over the property." (App. Br. 32) But it was not necessary for either the Property Agreement or Will to state such, because by operation of law under RCW 11.02.070, Patricia's one-half share of the community property was confirmed directly to her.

If Walter and Patricia had intended to preserve the assets that they owned based on their percentage of relative ownership during the survivor's lifetime, they could have easily done so by not converting them to community property. If they had not done so, then under the terms of his Will, Walter's 73.5% of the combined estate on his death would have been held in Trust for Patricia and Patricia's 26.5% would have passed to her directly. But since the parties clearly intended to convert all of their property to community property, then they understood and agreed that by

operation of law, half of their now combined estate would pass directly to the surviving spouse, who would have authority to exercise “dominion and control over her one-half interest in the estate.” (CP 26) RCW 11.02.070 (“upon the death of a decedent, a one-half share of the community property shall be confirmed to the surviving spouse [] and the other one-half share shall be subject to testamentary disposition by the decedent”); *Vail v. Toftness*, 51 Wn. App. 318, 321, 753 P.2d 553 (1988) (upon the death of the first spouse, the community is dissolved and the former community property becomes the separate property of the decedent's estate and the surviving spouse).

“One of the basic principles of contract law is that the general law in force at the time of the formation of the contract is a part thereof.” *Cornish Coll. of the Arts v. 1000 Virginia Ltd. P'ship*, 158 Wn. App. 203, 223, ¶ 37, 242 P.3d 1 (2010), *rev. denied*, 171 Wn.2d 1014 (2011) (citations omitted). The “universal law [is] that the statutes and laws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law.” *Cornish Coll. Of the Arts*, 158 Wn. App. at 223, ¶ 37. Therefore, it must be presumed that because Walter and Patricia specifically agreed that

their property would become community property, they intended for the surviving spouse to take half of the combined assets directly under RCW 11.02.070.

Walter's daughters claim that the mutual estate plan intended that the Trust and Patricia each individually own an undivided half interest in all of the property jointly, and that even after Walter's death the community property somehow remained community property. But "upon the death of a spouse the community entity is dissolved and the community character of property owned by the spouses ceases to exist. [] The property, in reality, becomes 'plainly separate.'" *Edmonds v. Ashe*, 13 Wn. App. 690, 695, 537 P.2d 812 (1975). There is nothing in either the Property Agreement or Walter's Will that required the Trust and Patricia to continue to hold property jointly. Therefore, Patricia in her capacity as Personal Representative properly did "all that [she] thinks necessary or desirable in administering [Walter's] estate," by entering into the Allocation Agreement distributing certain assets to the Trust and allowing Patricia to take other assets of equal value directly as her half share of the community property. (CP 303, 328, 411)

Even assuming that Patricia acted in her capacity as Trustee in retaining certain assets in Trust and distributing other assets of equal value to Patricia directly, as Walter's daughters urge, this was not inconsistent with the Property Agreement or Walter's Will. RCW 11.98.078(2)(a) (a Trustee can enter into a transaction with herself if "authorized by the terms of the trust"). The Trustee was provided with "absolute, discretionary power to deal with any property, real or personal, held in the trust or in any trust, as freely as Trustor might in the handling of Trustor's own affairs." (CP 309) These powers may be exercised "without prior approval of any court or judicial authority." (CP 310) Among those powers was the Trustee's ability to distribute principal to Patricia as the sole beneficiary of the Trust. (CP 306-07) By granting these broad powers to Patricia as Trustee of a Trust in which she is the sole beneficiary, Walter conferred upon Patricia a right to deal with herself with respect to trust property, which must be honored. *Estate of Vance*, 11 Wn. App. 375, 384-85, 522 P.2d 1172 (1974) (a testator may authorize his trustee to deal with himself even though it may involve a conflict of interest or work to the detriment of the heirs).

Under RCW 11.98.070(15), trustees have discretion to “select any part of the trust estate in satisfaction of any partition or distribution, in kind, in money or both; make nonpro rata distributions of property in kind; allocate particular assets or portions of them or undivided interests in them to any one or more of the beneficiaries.” It is not for the court to question the discretionary acts of Patricia as Trustee. *Peoples Nat. Bank of Wash. in Seattle v. Jarvis*, 58 Wn.2d 627, 630, 364 P.2d 436, 439 (1961). To do so, would have this Court “substitute their discretion for that of the trustee. This the court cannot do in the absence of an abuse of discretion, for, where discretion is conferred upon a trustee, the exercise thereof is not subject to control by the court *except to prevent an abuse of such discretion.*” *Jarvis*, 58 Wn.2d at 630 (emphasis in original).

Here, Patricia’s actions were consistent with the powers granted to her under Walter’s Will. Patricia did not abuse her discretion as Trustee in retaining certain assets in Trust and distributing other assets of equal value to Patricia, especially, because Patricia preserved those assets in Trust that Walter intended his daughters to receive.

2. Under the plain language of the Wills, the division of the combined estates upon the survivor's death is of the "remaining" property.

There is no dispute that Patricia and Walter agreed to devise their property to their respective children pursuant to a specified formula. (App. Br. 23) But as the trial court properly concluded, "the combining of the estates and the 73.5%/26.5% allocations (reflecting the relative ownership interests of the parties prior to when it became community property) occurs only after Patricia Forsberg's death." (CP 25) In other words, it is only the "remaining estate – consisting of Patricia Forsberg's remaining property and the remaining trust assets – [that is] to be combined and then distributed in a manner proportional with Walter and Patricia Forsberg's original ownership interest in the estate." (CP 25)

Walter's daughters argue that the distribution formula was intended to "extend to all property" Walter and Patricia owned "without limitation." (App. Br. 26 (emphasis in original), 27: "The FPA does not state the distribution formula only applies to property owned at the death of the second spouse, as the trial court held.") But while it is true that the distribution formula was calculated based on all of the property owned by Walter and Patricia when

Walter died, the distribution itself is only of the property “remaining” when Patricia dies. Both Wills state that “upon the death of the Trustor’s spouse the Trust for the surviving spouse shall terminate and all *remaining* property shall be distributed.” (CP 306, 307, emphasis added) Therefore, under the plain terms of the Property Agreement, the “ultimate distribution of the combined estates” – the remaining Trust estate and Patricia’s remaining separate estate – will be distributed to their children in proportion to their percentage of relative ownership as established when Walter died. Thus, it is not correct when the daughters claim that they will “receive less than Walter’s percentage of relative ownership” when Patricia dies. (App. Br. 25) The daughters will receive exactly that – 73.5% of the remaining Trust assets and remaining separate assets held by Patricia on her death.

3. No limits were placed on the surviving spouse’s use of the property received directly as her half of the community property during her lifetime.

Unlike the principal of the Trust (holding Walter’s share of community property), which could only be invaded if “necessary” if the net income from the Trust was insufficient to provide for the surviving spouse, no limits were placed on Patricia’s lifetime use of

her half share of the community property. The only limitation was that upon Patricia's death, she was bound to distribute Walter's percentage of relative ownership of the remaining assets to Walter's children. (CP 282) See *Estate of Dunn*, 31 Wn.2d 512, 197 P.2d 606 (1948) (App. Br. 34); *Holmes v. Holmes*, 65 Wn.2d 230, 396 P.2d 633 (1964) (App. Br. 31).

In *Dunn*, the husband and wife executed a community property agreement that also served as mutual wills. The husband and wife agreed that upon the first spouse's death, his or her share of community property would go to the surviving spouse. Upon the death of the surviving spouse, the remaining property would go to a Trustee, who would hold the property for the benefit of their children. The Court held that that under these circumstances, the husband merely held a life estate in the wife's share of the community property with a vested remainder to the children. *Dunn*, 31 Wn.2d at 530. The Court also acknowledged, however, that the husband still owned his half of the community property, and "during his lifetime, he was in full possession of his own property, with the right to enjoy and dispose of the same at his pleasure." *Dunn*, 31 Wn.2d at 530. The only limitation on the husband's control over his community property was he was

“without power to make any different testamentary disposition of his share by new will.” *Dunn*, 31 Wn.2d at 530.

Similarly in *Holmes v. Holmes*, 65 Wn.2d 230, 396 P.2d 633 (1964) (App. Br. 31), the husband devised a life estate to his wife, which would upon her death pass to 11 remaindermen in equal shares. The court held that while the wife could dispose of property by sale, she cannot “ignore the limitation placed upon her estate” and “does not have testamentary power over the balance of the estate.” *Holmes*, 65 Wn.2d at 236.

Here, while Patricia was arguably given a life estate in Walter’s half share of the community property held in Trust, she separately and independently holds her half share of the community property. Therefore, while she may not be able to freely transfer property out of the Trust, she can, as the trial court concluded, “exercise dominion and control” over her own property during her lifetime. (CP 26) Her only limitation is that Patricia cannot create a new will that would dispose of her share of the property different than was agreed in the Property Agreement.

This case is unlike *Newell v. Ayers*, 23 Wn. App. 767, 598 P.2d 3, *rev. denied*, 92 Wn.2d 1036 (1979) and *Olsen v. Olsen*, 189 Misc. 1046, 70 N.Y.S.2d 838 (1947) on which appellants rely heavily

to claim that Patricia's transfer of approximately 20% of the combined property was improper. (App. Br. 28-30) In *Newell*, the husband and wife agreed that all of the community property would pass to the survivor and upon the survivor's death, the property would pass to their children in equal shares. In poor health, the husband as surviving spouse began liquidating his estate, transferring 90% of the property – which would have included the wife's half share that passed to him by operation of the Will – to his only child, leaving nothing to be distributed to his wife's children. After his death, the wife's children sued to recover the funds from the husband's child. Under those circumstances, the court affirmed the trial court's determination that the transfers were void because the husband had intended to avoid the agreed disposition under the mutual wills, by leaving nothing for his wife's daughter.

In *Olsen*, husband and wife executed mutual wills devising to the other their residuary estate, and after the death of the surviving spouse, to wife's daughter and the husband's three sons in equal shares. After the wife died, the husband transferred assets to his sons only and made a new will leaving the wife's daughter with nothing. After the husband died, the daughter sued to obtain a trust for her quarter share of the residue. The New York court

found that husband's action in essentially cutting off the wife's daughter "defeat[ed] the purpose of the agreement." *Olsen*, 70 N.Y.S.2d 838 (1947).

Here, however, the transfers made by Patricia do not exceed her half share of the community property that was confirmed to her. In other words, unlike in *Newell* and *Olsen*, Patricia as surviving spouse did not transfer any portion of what would have been Walter's share of the community property, over which he had testamentary capacity. Instead, as the trial court acknowledged, Patricia exercised her "dominion and control" over assets that passed directly to her by operation of law – not by Walter's Will. RCW 11.02.070 (CP 26) Also, the actions in both *Newell* and *Olsen* were brought after the surviving spouse's death, based on evidence that there was no property remaining to distribute to the other spouse's children as intended by the mutual wills. In this case, Patricia is still alive, and there are still substantial assets available for distribution upon Patricia's death – including Walter's half share of the community property held in Trust, including those specific properties that Walter intended for his daughters to take.

Walter's daughters claim that the provision of the Property Agreement stating that "husband and wife shall not modify or

revoke the terms of this Agreement or their Last Will and Testament after the death of the other, provided, however, the surviving spouse may dispose of his or her percentage of relative ownership as he or she chooses,” somehow limits Patricia’s control over the assets distributed directly to her during her lifetime. (App. Br. 27-28) But the paragraph in which this provision is located addresses the parties’ intent to devise certain properties to their children upon the death of the surviving spouse. Thus, it only deals with the surviving spouse’s ability to devise his or her estate on death, not the manner that it can be used during the survivor’s lifetime. In other words, so long as certain properties go to the children, and 73.5% of the property goes to Walter’s children, Patricia can change the beneficiaries of her 26.5% of the estate.

Patricia’s control over those properties distributed directly to her as her share of the community property is also not limited by the provision of Walter’s Will stating that “the terms of this will and the Forsberg Property Agreement shall control over any non-probate transfer arrangement.” (App. Br. 28, *citing* CP 308) This provision was intended to call back to a similar provision of the Property Agreement that acknowledged that Patricia and Walter owned “a number of bank and brokerage accounts that may be held

jointly, with or without right of survivorship. The percentage of relative ownership of each of these accounts shall be based solely on the terms of this Agreement, and Husband and Wife's Last Will and Testament and this Agreement shall control the manner in which such property is distributed." (CP 282) Nothing in this provision purports to control the manner in which Patricia can use or dispose of her individual property during her lifetime.

C. The trial court properly awarded attorney fees to Patricia and her children for having to defend against untimely claims related to the disposition of Estate assets.

This Court reviews a trial court's award of attorney fees under RCW 11.96A.150 for abuse of discretion. *Estate of Evans*, 181 Wn. App. 436, 451, ¶ 42, 326 P.3d 755, 763 (2014). A trial court abuses its discretion only if its decision rests on unreasonable or untenable grounds. *Evans*, 181 Wn. App. at 451, ¶ 42. Here, the trial court did not abuse its discretion in awarding fees to the respondents after concluding that appellants' claims were time-barred and unsupported by relevant law or facts. (CP 19, 24) See *Kitsap Bank v. Denley*, 177 Wn. App. 559, 312 P.3d 711 (2013) (affirming award of fees when Estate's claim to certain funds was time barred by the statute of limitations in RCW 11.11.070).

Appellants' reliance on *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.3d 632 (1998) to claim that the award of fees must be vacated "because the appellate court does not have an adequate record upon which to review the award" is misplaced. (App. Br. 41) In *Mahler*, the issue was the reasonableness of the *amount* of the fees awarded, not whether the fees should be awarded. The Court held that "courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought." *Mahler*, 135 Wn.2d at 434-35 (emphasis in original). Here, the trial court has not yet entered a judgment and has not yet ruled on an amount of fees. Therefore *Mahler* does not apply.

D. This Court should deny appellants' request for attorney fees, and award attorney fees to respondents for having to respond to this appeal.

This Court should award respondents' attorneys fees under TEDRA for the expenses incurred in defending the trial court's clear and well-reasoned decision. RCW 11.96A.150(1) provides that "either the trial court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings . . . The court may order the costs, including reasonable attorneys' fees, 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 expressly authorizes the Court of Appeals to make an independent decision on the question of fees to any party.” *Estate of Black*, 116 Wn. App. 476, 492, 66 P.3d 670 (2003), *aff'd on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004). Here, respondents should be awarded attorney fees for having to defend the trial court’s decision properly dismissing appellants’ belated claims arising from actions Patricia took as Personal Representative of Walter’s Estate. No fees should be awarded to appellants because they are the ones who created the need for this litigation by failing to raise their challenges to distribution of Estate assets before Walter’s Estate was closed. Under these circumstances, it would be inequitable to require respondents to pay appellants’ fees.

IV. CONCLUSION

This Court should affirm the dismissal of appellants’ claims, award respondents their fees on appeal, and remand for a determination of trial court fees to respondents.

Dated this 27th day of October, 2014.

SMITH GOODFRIEND, P.S.

PLATT IRWIN LAW FIRM

By:  _____

Valerie A. Villacin
WSBA No. 34515

By:  FOR _____

Simon Barnhart
WSBA No. 34207

Attorneys for Respondents

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 27, 2014, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Simon Barnhart Platt Irwin Law Firm 403 South Peabody Street Port Angeles, WA 98362	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Suzanne C. Howle Carol Vaughn Thomson & Howle 601 Union Street, Suite 3232 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 27th day of October,
2014.



Victoria K. Vigoren