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DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

CASE NO. 46738-1-II

IN THE COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

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AIKEN, ST. LOUIS & SILJEG, P.S.,

Appellant,

vs.

JENNIFER LINTH,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR CLALLAM COUNTY  
CAUSE NO. 12-2-00972-7

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**APPELLANT'S REPLY BRIEF**

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## I. INTRODUCTION

This reply brief is submitted on behalf of the appellant Aiken, St. Louis & Siljeg, P.S. (the “Aiken Firm”). The respondent is referred to herein as Ms. Linth. Ms. Linth’s 45 page brief does not address the four issues presented for review related to the attorney lien statute. Instead, Ms. Linth devotes her brief to challenging the lien action, arguing about defenses to the lien and criticizing the underlying settlement of the trust action.

The Superior Court ruled that the Aiken Firm has a valid lien for compensation. (CP 098). The validity of the lien is resolved and not before the Court. This appeal is taken because the Superior Court disallowed lien remedies provided by statute effectively nullifying the lien.

Ms. Linth has not cross-appealed from the ruling that the lien is valid. Accordingly, Ms. Linth’s contentions about the validity of the lien and her objections to the lien enforcement action are not subject to appellate review. Additionally, Ms. Linth made none of these arguments to the Superior Court. An appellate court will not consider issues raised for the first time on appeal.

## II. RIGHT OF REVIEW AND STANDARD OF REVIEW

### A. Right of Review.

Ms. Linth argues that the case is “improperly in the Court of Appeals” despite acknowledging that the “Court has accepted appeal as a matter of right . . . .” See Brief of Respondent at 29-33. This case is properly

before the Court of Appeals pursuant to the authority of RAP 2.2(a)(3) and *Ferguson Firm v. Teller & Associates*, 178 Wn. App. 622, 316 P.3d 509 (2013).

The *Ferguson* case likewise was on appeal related to the application of the attorney lien statute. In *Ferguson*, the Court of Appeals ruled that the case was properly before it pursuant to RAP 2.2(a)(3) because the lower court ruling related to the application of the lien statute affected a substantial right to monetary relief and effectively determined the action with respect to the attorney lien. *Id.* at 628-29. The same circumstance is present here.

In this action, the lower court has effectively ruled that the action is not subject to the lien remedies provided by RCW 60.40 *et seq.* This affects a substantial right of the Aiken Firm, prevents enforcement of the lien and effectively discontinues the action. There is no point in pursuing further proceedings if there is no available lien remedy.

**B. Standard of Review.**

This appeal presents issues related to the interpretation of the attorney lien statute, RCW 60.40 *et seq.* Specifically, issues one through three are issues of statutory construction. The meaning of a statute is a question of law that is reviewed *de novo*. *Hoggatt v. Flores*, 185 Wn. App. 764, 772, \_\_\_ P.3d \_\_\_ (2015).

The fourth issue is whether there is any genuine fact issue over the amount of the lien. The Superior Court's conclusion that there is a fact issue is a conclusion of law made from the written record. This presents a

question of law that may be reviewed *de novo*. The appellate court may independently review evidence consisting of documents and non-testimonial evidence. *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wn. App. 881, 887, 658 P.2d 1267 (1983); *Danielson v. City of Seattle*, 45 Wn. App. 235, 240, 724 P.2d 1115 (1986), *aff'd* 108 Wn.2d 788, 742 P.2d 717 (1986).

### III. REBUTTAL ARGUMENT

#### A. The Plain Meaning Rule Controls the Statutory Interpretation Issues – Issues One and Two.

The “plain meaning rule” applies to the attorney lien statute because it is clear and unambiguous. *Smith v. Moran, Windes & Wong*, 145 Wn. App. 459, 463, 187 P.3d 275 (2008). RCW 60.40.010(1)(d)(emphasis added) provides that an attorney has a lien “[u]pon an action . . . **and** its proceeds . . . .” RCW 60.40.010(2) provides that “[a]ttorneys have the same right and power over actions to enforce their liens under subsection (1)(d) . . . as their clients have for the amount due thereon to them.” “Applying the plain words of the statute to the undisputed facts of this case, we conclude that an attorney’s lien for compensation . . . arose by operation of law upon this . . . action and its proceeds. . . . The lien attached to this action and any proceeds of the action, specifically settlement funds.” *Id.* at 466. See also *Ferguson Firm v. Teller & Associates*, 178 Wn. App. 622, 316 P.3d 509 (2013) (“ . . . we must give effect to that plain meaning as an expression of legislative intent.”)

Ms. Linth’s appellate brief is remarkable in lacking any discussion of the attorney lien statute or the authority cited above whatsoever. Her brief

never cites to the attorney lien statutes. She never cites any other case authority on the subject.

A topic heading for this issue is not found until page 36 of a 45 page brief. Her statement at that page is that Judge Rohrer “elegantly” explained the meaning of the statute in “erudite terms.” Brief of Respondent at 36. The most that can be culled from this is that Ms. Linth adopts the analysis of Judge Rohrer without offering anything further. We have addressed Judge Rohrer’s analysis in the opening brief.

Ms. Linth states the Aiken Firm disregards “other provisions of the statute.” *Id.* at 37. What other provisions? These are never specified. Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration. *Markel American Ins. Co. v. Dagmar’s Marina*, 139 Wn. App. 469, 481-82, 161 P.3d 1029 (2007).

Ms. Linth suggests without citation to any authority, that the attorney lien statute is limited to certain types of actions (that she does not specify) and does not apply to actions involving trust disputes despite the statute’s general language applicable to any action. Brief of Respondent at 37. When no authority is cited in support of a proposition, the appellate court may assume there is none. *Kirby v. Washington State Employment Security Department*, 185 Wn. App. 706, 728, \_\_\_ P.3d \_\_\_ (2014).

**B. The Statutory Right or Power to Have a New Trustee Appointed to Perform the Settlement Agreement (the Third Issue).**

The third issue presented for review is whether exercise of lien rights pursuant to RCW 60.40.010(2) authorizes the Aiken Firm to seek appointment of a new impartial trustee who will perform the settlement agreement. A new independent trustee is necessary for two reasons. *First*, the duty of the trustee is to perform the NJDRA. Ms. Linth has refused to perform it. In fact, she has moved to vacate it in breach of her trustee duties. *Second*, an independent trustee is necessary if the Court of Appeals concludes that there is any fact issue over the amount of the lien. An impartial trustee may review the evidence and determine initially whether the lien claim should be allowed or compromised. RCW 11.98.070 (11) & (35). The Superior Court can resolve any remaining dispute.

A trustee may be removed for reasonable cause. The authority is cited in the opening brief at pages 32 through 34. Ms. Linth offers no argument or authority in opposition on the removal issue except her adoption of Judge Rohrer's analysis that the lien remedy is limited to proceeds in the possession of the client.

**C. Standing to Challenge the Lien.**

If there is a remand to the Superior Court for any further proceedings, the Court of Appeals should address Ms. Linth's standing to participate in any further proceedings. The appellate court may address issues likely to

arise on remand. *State v. Allen*, 182 Wn.2d 364, 369, \_\_\_\_ P.3d \_\_\_\_ (2015). Ms. Linth's lack of standing was addressed in the opening brief at page 32.

Ms. Linth did voluntarily waive and extinguish her rights under the NJDRA. See discussion and citation to the record in the opening brief at page 32. She so acknowledged this fact in the proceedings below: **“I have no interest in or claim to the proceeds of any potential sale of Green Point. My rights were extinguished in a Summary Judgment Order dated August 17, 2012.”** Declaration of Jennifer Linth in Response to Motion for Enforcement of Lien at 3 (CP 304).

In opposing the Aiken Firm's motion to enforce the lien, Ms. Linth argued that lien rights on proceeds payable to her do not exist because proceeds will never be available to her given her disclaimer or waiver of the right to receive them. (CP 313).

It is basic common law that a gift can be refused by the donee. No gift can be forced on anyone. In this case, the Defendant, a beneficiary, has refused to accept the gift of proceeds from the sale of the property. Pursuant to Summary Judgment, Defendant's rights to receive proceeds from Green Point have been extinguished. It is a valid court Order. Court Orders are presumed valid. So, even if the property were sold, there would be no funds coming to the Defendant anyway. (CP 313).

She knowingly waived her interest in the NJDRA after being advised that her waiver could not waive the Aiken Firm's lien rights. (CP 294); (CP 283-284). RCW 60.40.010(4) provides that the attorney lien is

unaffected by settlement between other parties until the lien of the attorney is satisfied in full. Ms. Linth can no more waive the property rights secured by the attorney lien statute anymore than she could waive a lender's security interest by waiving any interest in the collateral.

Ms. Linth is unaffected by the lien enforcement action because the lien claim is payable out of settlement proceeds that she has disclaimed. Ms. Linth has no legally protectable interest in the issue. Individuals who have elected to opt out of a settlement are not parties and have no standing. See authorities cited at page 32 of the opening brief. Ms. Linth's brief does not respond to any of these points.

**D. The Lien Amount (Issue Four).**

The Aiken Firm's opening brief stated with citation to the record and legal authority that the amount of the lien was determinable in a sum certain. Brief of Appellant at 29-32. The record includes the monthly invoices containing a detailed daily description of the tasks performed over the years, the hours spent with contemporaneous recording of time, the hourly rate and a summary of the bills and the payment history. (CP 326-331); (CP 407-408); (CP 410-608) The undisputed facts are that Ms. Linth received and paid the Aiken Firm's bills until approximately June 2002. (CP 407). At that time, she explained she had insufficient means to make any further payment. (CP 328).

As the Superior Court noted, "[i]n 2002, due to financial issues, the Aiken Firm began providing legal services on the same terms except that

payment would be deferred until a settlement was reached by the various entities with conflicting claims to trust assets and the property known as Green Point was sold. Ms. Linth received monthly invoices from the Aiken Firm itemizing the charges for legal services provided and did not state any objection to the invoices.” Memorandum Opinion at 2-3 (CP 016-017). A party’s retention of the invoices without objection for an unreasonably long time is a manifestation of assent. It is a promise by the debtor to pay the sum indicated. *Sunnyside Valley Irrigation District v. Roza Irrigation District*, 124 Wn.2d 312, 315, 877 P.2d 1283 (1994). Ms. Linth’s appellate brief does not address these facts or this legal authority.

The difficulty, the risk and the results obtained are factors to consider in evaluating the lien amount. RPC 1.5(a). Ms. Linth acknowledges the “dire estate tax consequences” presented by her life estate in Green Point. Brief of Respondent at 5. The entire case was “plagued by a looming estate tax liability . . . .” *Id.* at 5 n.1. “[T]he interim life estate for Ms. Linth and her mother materially reduced what would otherwise be a considerable estate tax deduction, the upshot of which was estate tax liability.” *Id.* In other words, if the life estate was established, then Green Point would have to be sold to pay the tax liability.

Ms. Plant had a flawed estate plan. She attempted to provide a life estate in the property, uses of the property by a non-existent Foundation, cash distributions to various persons and charities, and a wildlife or ecological preserve. Accomplishing all of these things was not economically feasible given her assets and the financial obligations

created by such a plan. Commissioner Knebes, the presiding judicial officer, recognized that the situation begged for “a creative solution” and the “most likely scenario at trial would be enforcement of the Trust without the amendment” – meaning no life estate for Ms. Linth. (CP 328); (CP 191).

Ms. Linth confronted high risk, high costs and the likelihood that even if she prevailed in hotly contested litigation the property would still have to be sold to cover estate taxes, income taxes, interest and legal fees. Thus, on June 27, 2002 following mediation, Ms. Linth wrote to advise the Aiken Firm that she recognized that she may have to take a cash settlement for the value of her life estate although it was not her first choice. (CP 281); (CP 287-288). She requested the Aiken Firm seek a cash settlement that would include funds to cover her legal fees. (CP 287). She suggested a guaranteed minimum of \$600,000.00. (CP 287).

The NJDRA includes the \$600,000.00 requested distribution to Ms. Linth as a first priority after selling costs, taxes and trust administration expenses. NJDRA at 11, line 20 (CP 354). However, the Aiken Firm negotiated a greater amount for Ms. Linth. In addition to the \$600,000.00, she was to receive \$100,000.00 to return the cash bequest to her that she had partially spent on legal fees. NJDRA at 12, line 16 (CP 355). She also was to receive 65% of the remaining sale proceeds after other distributions were made. NJDRA at 12, line 23 and at 13, line 1-2 (CP 355-56).

This 65% of the remainder was a substantial sum. It entitled her, together with the other distributions, to receive the majority share of \$3.9 million in estimated sale proceeds.<sup>1</sup> She went from zero net worth to a net worth of a very substantial amount that could take care of her for the rest of her life.

Additionally, Ms. Linth was entitled to other nonmonetary benefits under the NJDRA. She received a right for herself to own a portion of the Green Point Property known as the Option Parcel or Carve-Out Parcel. NJDRA at 5 (CP 348). During negotiations, Ms. Linth also insisted on the resignation of the then current Trustee, Dan Doran, and the appointment of her brother-in-law Glen Smith as the Successor Trustee. This condition to the NJDRA generated much discord with the other parties, but it was eventually resolved with Glen Smith appointed as Ms. Linth requested. NJDRA at 8, line 21 (CP 351).

Further, Ms. Linth was entitled to reside rent-free at Green Point until the property sold. NJDRA at 13, line 15. (CP 356). Ms. Linth accepted this benefit and has continually resided at Green Point rent-free for the nearly 10 years since approval of the NJDRA. She also was entitled to the rental income from the guest house. (CP 356). Finally, the NJDRA authorized the \$10,000.00 cash distributions to her mother, to her nephew, to her niece and to her church. NJDRA at 14, line 20 (CP 357).

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<sup>1</sup> There was an offer on Green Point for \$3.7 million. (CP 329). In addition, the North Olympic Land Trust purchased the conservation easement for \$200,000.00. (CP 330).

In sum, Ms. Linth acknowledged that she was the “major beneficiary” of the NJDRA. Declaration of Jennifer Linth at 2 (CP 109). The legal fees of the Aiken Firm are modest measured against the result obtained and the risk at trial that Ms. Linth would lose everything and be left with huge debt.

The Aiken Firm maintained constant communication with Ms. Linth about the details of the negotiations that were indeed “hard-fought” as she describes it. (CP 282). In December 2003, knowing of the substantial time and effort the Aiken Firm had committed to this task, Ms. Linth stated “*please know that you will be rewarded for your work when the settlement is reached and the property is sold.*” (CP 282).

In 2006, when a sale of Green Point appeared imminent at \$3.7 million, the Aiken Firm gave notice of its lien rights against sale proceeds to Glen Smith, the Successor Trustee, with a copy to Ms. Linth. (CP 329). She acknowledged the lien and thanked counsel. (CP 329); (CP 554). In 2012, when it became necessary to bring the lien enforcement action, Ms. Linth requested patience about payment and asked for faith in the hard-fought effort on her behalf. (CP 284); (CP 297). The Aiken Firm was patient and waited another year that produced nothing.

Twice the debt/lien was stated in an express liquidated amount with manifest assent to the obligation. First, with delivery and receipt without objection of the detailed invoices sent every month for the seven years of service. This is, as a matter of law, an unreasonably long time to withhold any objection. Second, with the delivery of the lien notice that was

acknowledged with expressions of gratitude. The record reflects repeated acknowledgement of the debt and assurances of payment. This is a sufficient record to resolve the amount of the lien in a sum certain.

The amount of a reasonable attorney fee is a question of law for the court to independently decide in the exercise of its discretion. *Hough v. Stockbridge*, 152 Wn. App. 328, 347, 216 P.3d 1077 (2009). It is not a question of fact for a jury. *Id.* “The determination of the fee award should not become an unduly burdensome proceeding for the court or the parties.” *Absher Constr. Co. v. Kent School District*, 79 Wn. App. 841, 848, 905 P.2d 1229 (1995). There is no requirement for a full evidentiary hearing. *Metropolitan Mortgage v. Becker*, 64 Wn. App. 626, 634, 825 P.2d 357 (1992).

During the Superior Court proceedings, Ms. Linth did not identify anything in the billing record that was excessive, duplicative or wasteful. An award is not an abuse of discretion, if the opposing party cannot provide specifics as to what was excessive beyond generalized statements. *Albertson’s, Inc. v. Employment Security Department*, 102 Wn. App. 29, 48, 15 P.3d 153 (2000). Ms. Linth simply offers rhetorical or argumentative assertions that either nothing or a lesser amount is due.

Even if the amount of the lien cannot be decided on this record, the further proceedings to resolve the question need not be cumbersome. The lien statute does not set out a specific procedure for lien enforcement. *King County v. Seawest Inv. Associates*, 141 Wn. App. 304, 315, 170 P.3d 53 (2007). “Thus, it places the question of how to properly adjudicate the

lien with the court, requiring it to fashion some ‘form of proceeding by which the matters might be properly adjudicated.’ *Id.* “The trial court is authorized to fashion an appropriate remedy.”

“A proceeding to enforce a lien is an equitable proceeding. Courts have broad discretion when fashioning equitable remedies, and we review those remedies for an abuse of discretion.” *Id.* at 214. It follows, therefore, that it is a problem for the court and not a jury. *In re Wren’s Estate*, 163 Wn. 65, 77 (1931) (lien claim is of equitable cognizance and not a jury problem). The amount of the lien may be determined summarily as is the case with attorney fee awards generally.

The successor trustee may review the dispute as a preliminary matter. The trustee has the power to pay or compromise the claim. If there remains disagreement between the Aiken Firm and the trustee over the amount of the lien, then the Superior Court can resolve the issue. If this Court remands for such a factual determination, then the remand should provide instruction to the lower court on the procedures so this case does not come back to the appellate court. Proposed instructions are set forth in Section IV below.

**E. Ms. Linth’s Miscellaneous Arguments Unrelated to the Issues on Appeal.**

Ms. Linth presents argument against the commencement of lien enforcement action on theories of collateral estoppel, the advocate/witness rule (RPC 3.7), “ripeness for review,” and judicial estoppel. See Brief of Respondent at 22-35. She also presents argument about the validity of the

lien based on alleged defenses of statute of limitations, statute of frauds, existence of a contract, amount and reasonableness of fees and fiduciary duty of trustee to Green Point Foundation. Brief of Respondent at 39-43.

None of these arguments were presented to the Superior Court except the issue as to the amount or reasonableness of the fees. The Superior Court considered all the arguments that Ms. Linth did make about the validity of the lien and rejected them. The Superior Court found that “the Aiken Firm has a valid attorney’s lien for compensation on the related trust action (Clallam County Cause No. 08-2-00095-1).” (CP 098). Further, that the Aiken Firm has a lien on \$29,999.95 in proceeds already distributed to Ms. Linth, subject to a determination of the total amount of attorney fees owed. (CP 099). The Superior Court ruled that the only issue left for resolution is “the limited factual issue of the amount of the lien . . . .” (CP 095).

Thus, the motion to enforce the lien was granted in part and denied in part. Ms. Linth has not cross-appealed from that part of the decision rejecting her various alleged defenses to the validity of the lien. If she wanted relief from that part of the decision, then it was incumbent on her to file a timely notice of cross-appeal pursuant to RAP 5.2(f).

The Court of Appeals will affirm rulings of the Superior Court that are not presented for review on cross-appeal. *B&R Sales, Inc. v. Department of Labor & Industries*, 186 Wn. App. 367, 371 n.1., \_\_\_ P.3d \_\_\_ (2015). A court is without jurisdiction to hear an appeal if the notice of appeal is not timely filed. *Malott v. Randall*, 8 Wn. App. 418, 423, 506 P.2d 1296

(1973) *reversed on other grounds* 83 Wn.2d 259, 517 P.2d 605 (1974). A cross appeal not timely filed will not be considered. *Saddler v. State*, 66 Wn.2d 215, 401 P.2d 848 (1965); *Starzewski v. Unigard Insurance Co.*, 61 Wn. App. 267, 271, 810 P.2d 58 (1991).

Furthermore, as indicated above, these contentions are being raised for the first time on appeal except as indicated below. Ms. Linth's brief in opposition to the motion in Superior Court did not raise any of these contentions except the fact issue over the amount of the lien and the "spendthrift" provision issue. (CP 308-316). The Superior Court denied Ms. Linth's request for a continuance for reasons stated in the opinion at page 3. (CP 090). The Superior Court allowed Ms. Linth one week to submit supplemental material. (CP 271-72). Ms. Linth submitted a supplemental declaration that did not raise any of these contentions raised on appeal (except repetitive argument on the amount of fees and the spendthrift issue). (CP 264-270).

This Court need not consider contentions not raised in the lower court. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). "An issue, theory or argument not presented at trial will not be considered on appeal." *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978). In sum, these contentions need not be considered because (1) there is no cross appeal; and, (2) the contentions were not raised in the trial court.

There is no merit to these contentions even if they were perfected for review. For example, Ms. Linth claims collateral estoppel applies. She does not provide a record even sufficient to review the issue. However, in

2010, 5 years after the settlement, after substantial performance and after accepting the benefits of the court-approved settlement, Ms. Linth inexplicably moved to set aside the NJDRA. The Aiken Firm moved to intervene in support of the NJDRA. The Superior Court denied Ms. Linth's motion to vacate and also denied intervention. The Superior Court did not address any attorney lien issues. It was not the issue before the Superior Court; the issue was grounds for vacating the NJDRA. In denying intervention, the Superior Court in passing observed that the Aiken Firm was free to pursue its collection remedies in another action. Exhibit A at page 4, line 16 (Appendix to Brief of Respondent).

The motion to intervene was a procedural motion related to the trust action. The intervention motion did not present any claim related to the validity of the lien or the scope of the attorney lien remedy. It only pointed out that the Aiken Firm had an interest in the NJDRA sufficient to meet requirements for intervention. There was no adjudication on the merits related to lien rights and no final judgment. The lien action was not filed until 2012.

The argument based on RPC 3.7 is equally absurd. Brief of Respondent at 27-29. The advocate/witness rule has no application here. The Aiken Firm is not representing Ms. Linth in this action or asserting rights or claims on her behalf or even against her. The Aiken Firm is representing its own legally protected lien rights. It seeks no judgment against Ms. Linth. Rather, the Aiken Firm is asserting its lien against the

settlement of the action. There is no dual role whatsoever and no potential for confusion.

The judicial estoppel argument at pages 34 through 36 is based on the statement that “Mr. Olson told the trial court in the estate litigation, by declaration, that all parties to the settlement agreement were responsible for their own legal fees ‘preserving the existing cash assets of the Trust for other purposes,’ and stated that his firm had worked ‘without compensation’ for some three years because of the firm’s dedication to Ms. Linth and her mother.” *Id.* at 34 citing Declaration of William A. Olson in Support of Settlement (CP 333-340).

The statement is correct and consistent with the lien enforcement action. Ms. Linth, and all other parties, are responsible for their own legal fees. This preserved existing trust cash assets (at the time approximately \$200,000.00) for anticipated expenses to hold the property and maintain it pending sale, to cover appraisals and other selling costs, to cover professional fees and trustee fees for the Trust, and to create the Carve-Out Parcel for Ms. Linth.

Also, the Aiken Firm did work for three years (and more years after 2005) without compensation to obtain the settlement and secure its performance for Ms. Linth. Moreover, the Aiken Firm was dedicated to Ms. Linth. It did not abandon her when she did not have financial means to pay for legal services. It committed to see the task through conclusion. This was communicated to Ms. Linth in March 2002 at a time when she was still able to pay the monthly bills but running low on funds. (CP 035).

After mediation failed in June 2002, and Ms. Linth could no longer pay the bills, the Aiken Firm stayed on task to finish the job and deferred payment until the property was sold.

The cited declaration described the tremendous cost of putting the settlement together and the “substantial investment of time and money” into it by the Aiken Firm and others. (CP 334). The declaration explained that a compromise solution had to generate sufficient funds to make distributions to the beneficiaries in sufficient amounts to pay the legal expense, selling costs and taxes. (CP 335). The declaration stated that the Aiken Firm had spent over 700 hours (at that time in 2005 and much more now 10 years later) in putting together the settlement at substantial expense. (CP 340).

Ms. Linth argues that a spendthrift provision of the Evelyn Plant Trust defeats the lien. Brief of Respondent at 17, 21 & 37. She does not identify the trust provision, cites no authority for the contention and offers no reasoned argument. In any event, the trust provisions are irrelevant to this action.

The sale proceeds are distributable to Ms. Linth pursuant to the terms of the NJDRA outside any trust document. The NJDRA supersedes the Trust. Furthermore, the Evelyn Plant Trust terms were never applicable to Ms. Linth because her cash bequest and her interest in Green Point were not gifted to her in trust. Upon Ms. Plant’s death, these gifts were gifted to her outright.

Ms. Linth raises a contention about the statute of limitations. Brief of Respondent at 40-41. This was not an issue she raised in the lower court. Her brief in opposition to the motion to enforce the lien merely stated she is not waiving the statute of limitations defense. (CP 316). She presented no authority or any reasoning supporting application of any statute of limitations. It was incumbent on her to raise the defense at that time. She cannot respond to the motion by “reserving” defenses and then asserting them later if things go bad. In any event, her argument was that the motion was premature (because the property had not been sold) not that the action was late. (CP 308).

Furthermore, Ms. Linth, in 2009, was representing that she had the property on the market and was attempting to sell it in compliance with the agreement. (CP 330). She brought her motion to vacate in April 2010 disavowing the agreement. (CO 330). The lien enforcement action was commenced in July 2012 well within any applicable limitation period.

Ms. Linth contends the “statute of frauds may come into play.” Brief of Respondent at 41. It is not in play because she did not raise it below. (CP 308-316). This is true of other contentions she tosses into her brief. Brief of Respondent at 39-44. She did not brief these contentions for the lower court with citation to authority or reasoned argument. She did not seek a ruling on them. She has not assigned error to any adverse ruling on properly presented issues. She has provided no record to permit review. These contentions are not appropriate for appellate review.

**F. Other Inappropriate and Misleading Argument.**

Ms. Linth (perhaps more accurately Ms. Linth's counsel) writes critically of the NJDRA stating that the Aiken Firm's focus drifted away from the First Amendment concept (providing for the life estate for Ms. Linth) under the Trust. Brief of Respondent at 8. The focus never changed from protecting the value of her life estate which was achieved while protecting her from the risk of losing it in litigation. The mediation, in June 2002, was productive and promoted work towards Ms. Plant's objectives of "serving charitable purposes and taking care of Jenny and her mother . . . . Were Jenny and her mother to have a place on the Eastern part of the property and were the balance sold, the proceeds could be allocated among the parties in any number of fashions conducive to a settlement." (CP 335).

Ms. Linth, following the mediation, recognized the need to take a cash settlement for her life estate and sell the property to cover the distributions to settle the dispute and to cover the financial obligations including the "dire tax consequences." "[I]t was not possible to preserve a life estate for Jennifer and Carolyn in the main residence, maintain the property as an ecological or wildlife preserve or youth camp [the Foundation idea], and still have sufficient other assets to settle the dispute, pay the tax obligations and other expenses." (CP 335).

Ms. Plant's general intent was accomplished through the NJDRA. "Her general intent for the Linths' use of her property [was] met by carving out a portion of the Eastern part of the property for Jennifer and

Carolyn Linth's ownership, even though this [was] not a life estate in the main residence. Similarly, Mrs. Plant's ecological interests [were] recognized in the Western half of the property that is subject to either existing regulatory restrictions against development or a conservation easement [in favor of the North Olympic Land Trust]." (CP 336). The settlement also provided cash for distribution to her favored religious charities. (CP 336). It also ended the litigation which would deplete her estate to the detriment of everyone.

Ms. Linth's appellate brief inaccurately states that Ms. Linth never agreed with this settlement approach. See, e.g., Brief of Respondent at 31. She approved pursuing the cash settlement in June 2002. She kept her attorneys working on it for three years thereafter. On December 14, 2004, as it was coming together, she was advised that if she was having reservations about the settlement "[w]e can arrange for other counsel to review the settlement for you and give you another opinion if you wish." (CP 102). She declined. (CP 102).

Her attorneys reviewed the proposed NJDRA with her in detail at a meeting on December 20, 2004 at her church. She asked her pastor to attend, two of her friends from the community and her two brothers, John and David. (CP 291). She did not sign the NJDRA, but rather took it under advisement.

Three days later, on December 23, 2004, she signed the NJDRA outside the presence of her attorneys, before a notary of her choosing at a location of her choosing. (CP 291). She attended two court hearings

related to approval of the NJDRA. (CP 291). The first was in May 2005, five months after she signed the agreement; the other was in October 2005, ten months after she signed the agreement. (CP 291). On neither occasion did she speak out in opposition to the NJDRA. Following court approval, in October 2005, she thanked her attorneys for their effort in getting it done. There was no mention of any problem with it until 4 years later when she inexplicably moved to vacate it in 2009.

Ms. Linth's appellate brief also misrepresents facts about the potential malpractice action against attorney Carl Gay related to the defects in the First Amendment causing this dispute. The Aiken Firm declined to handle the case. The Aiken Firm also did not draft the malpractice complaint. It was drafted by the Tousley Brain Stephens law firm in Seattle who also declined to handle the case. The Aiken Firm felt that the monetary benefits to Ms. Linth from the NJDRA, while unknown until sale of Green Point, could be substantial enough to mitigate any damage from the drafting errors.

The Aiken Firm prepared language in the NJDRA to reserve the claim for Ms. Linth if she elected to pursue it. (CP 359). The claim was reserved against both Dan Doran, the Trustee, and Carl Gay, the attorney for the Trustee. (CP 359). Pursuant to the agreement attached as Exhibit E to the NJDRA, Mr. Doran agreed to cooperate with the prosecution of any claim against Carl Gay. He agreed to join as a party, if necessary, in the event a direct action was not possible by any of the beneficiaries (because they were not the "client"). He also assigned to the Successor

Trustee all claims of the Trustee against Mr. Gay. Thus, the potential claim was perfected to avoid any defense based on a lack of duty to the beneficiaries.

The Aiken Firm had no involvement in Ms. Linth's filing of the malpractice claim *pro se* years later. The Aiken Firm also had no involvement in her choice of counsel who later took over the case for her. The Aiken Firm was never consulted about the malpractice action and would have declined to become involved in any event.

**G. Request for Sanctions or Fees.**

Ms. Linth's request for sanctions or fees (at pages 44-45) does not meet the requirements of RAP 18.1(b). "The rule requires more than a bald request for attorney fees on appeal. . . . Argument and citation to authority are required under the rule to advise the court of the appropriate grounds for an award of attorney fees as costs." *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9 (2012). This requirement is mandatory. *Id.*

**IV. CONCLUSION**

The Superior Court has ruled that the Aiken Firm has a valid lien for compensation against the settlement proceeds from the trust action. That ruling is not before the Court of Appeals because there is no cross-appeal. The Superior Court, however, has erroneously ruled that the Aiken Firm has no remedy for enforcement of its lien other than to pursue any proceeds that are actually distributed and received by Ms. Linth. This part

of the ruling should be reversed and the case remanded to the Superior Court for further proceedings.

It is respectfully requested that this Court provide instructions to the Superior Court for handling of the case on remand. Proposed instructions are as follows:

1. Ms. Linth should be removed as Trustee and another person appointed who is independent and impartial;
2. The Successor Trustee should honor and promptly perform the court-approved NJDRA, including specifically sale of the Green Point property, subject to the outcome of the appeal pending under Case No. 41285-3-II;
3. The Superior Court should enter an order confirming the amount of the lien in the principal sum of \$198,965.99; and
4. The lien may be satisfied out of the future proceeds from the sale of the Green Point property under the NJDRA.

Alternatively, if this Court rules that there is an unresolved factual issue about the amount of the lien, then the proposed instructions on remand should be as follows:

1. Ms. Linth should be removed as Trustee and another person appointed who is independent and impartial;
2. The Successor Trustee should honor and promptly perform the court-approved NJDRA, including specifically sale of the Green Point property, subject to the outcome of the appeal pending under Case No.41285-3-II;

3. The Successor Trustee has the authority to allow, disallow or compromise the lien claim;

4. If the matter is not resolved by the Successor Trustee, then the Superior Court should resolve the dispute between the Successor Trustee and the Aiken Firm over the amount of the lien de novo pursuant to the same legal authority and procedures applicable to attorney fee awards. This is not a jury problem. The issue should be resolved without protracted and complicated proceedings;

5. The Superior Court may, in its discretion, conduct an evidentiary hearing and receive live testimony but it is not required to do so;

6. Ms. Linth may participate as a witness in any Superior Court proceeding, either by declaration/affidavit form or by live testimony if offered by the Successor Trustee and if received by the Superior Court, but does not have standing as a party because she has disclaimed her interest under the NJDRA.

Respectfully submitted this 9 day of July, 2015.

AIKEN, ST. LOUIS & SILJEG, P.S.

By   
William A. Olson, WSBA 09588  
Attorneys for Aiken, St. Louis &  
Siljeg, P.S.

CASE NO. 46738-1-II

IN THE COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

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AIKEN, ST. LOUIS & SILJEG. P.S.,

Appellant,

vs.

JENNIFER LINTH,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR CLALLAM COUNTY  
CAUSE NO. 12-2-00972-7

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**CERTIFICATE OF SERVICE**

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AIKEN, ST. LOUIS & SILJEG, P.S.

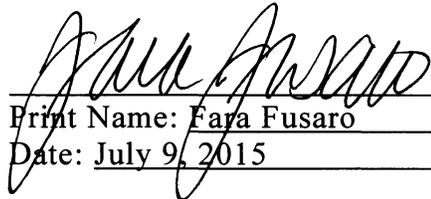
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I certify, under penalty of perjury under the laws of the State of Washington, that on the date noted below, I sent by e-mail and first class mail, postage prepaid, copies of Appellant's Reply Brief and Certificate of Service to:

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