

NO. 46738-1-II

**IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION TWO**

**AIKEN, ST. LOUIS & SILJEG, P.S.,
Appellant,
v.
JENNIFER LINTH,
Respondent.**

**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR CLALLAM COUNTY**

CAUSE # 12-2-00972-7

The Honorable Erik Rohrer

**MOTIONS TO DISMISS AND
RESPONDENT'S BRIEF**

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I. INTRODUCTION

This Court should consider summarily dismissing this appeal for four reasons: collateral estoppel, infringements of RPC 4.7, ripeness and judicial estoppel. Otherwise, the trial court should be affirmed and the matter remanded so that Ms. Linth can defend the action on the merits. Finally, the court should consider an award of fees and/or costs to Ms. Linth either as prevailing party or as sanctions for responding to this matter in this Court.

II. RESPONSE TO ASSIGNMENTS OF ERROR

Response to Assignments of Error

1. The trial court properly interpreted and applied the attorney lien statute in this setting, denying appellant's attempts to force a sale of Green Point under either the original trust documents or under the terms of the court-approved TEDRA settlement.
2. The trial court properly ruled that Ms. Linth was entitled to further judicial proceedings concerning a series of salient, material factual issues that must be resolved by further hearings or trial in the trial court, rendering this appeal premature.

Issues Pertaining to Assignments of Error and Motions to Dismiss

1. Whether some or all of this appeal is foreclosed by collateral estoppel because the Clallam County Superior Court and this Court, in another related matter, rendered final decisions against Appellant?

2. Whether the appeal is subject to being dismissed, stricken or limited because the Appellant is and has been engaging in litigation in which Appellant's counsel is a witness in violation of RPC 3.7, to the prejudice of the Respondent and the tribunal?
3. Whether this appeal should be dismissed or stayed because it is not ripe for review?
4. Whether this appeal should be dismissed, stricken or limited under principles of judicial estoppel?
5. Whether the attorney lien statute on an action allows an attorney to supersede the interests of a client in a trust setting, including one which includes a spendthrift provision?
6. Whether the attorney lien at issue here, for money, attaches to the trust corpus – real estate -- which is still subject to unresolved claims from other non-client beneficiaries?
7. Whether the attorney lien at issue here, for money, attaches derivatively to the trust corpus -- real estate – that existed in the trust prior to the engagement of the attorney services at issue?
8. Whether the statutory lien provision on “an action” allows the attorney with unpaid fees to derivatively compel the trustee to sell trust assets to satisfy the lien?

9. Whether the terms of the court-approved TEDRA settlement agreement in this case override competing obligations of the Trustee under the trust, including the spendthrift provisions?
10. Whether the terms of an obsolete TEDRA agreement should be used as a fulcrum to liquidate trust property to satisfy the lien demands of a beneficiary's counsel in opposition and contradiction to the trustor's intent?
11. Whether a trustee has a fiduciary obligation to preserve specific trust property specifically earmarked for the benefit of a trust beneficiary, notwithstanding a TEDRA agreement, when that trust beneficiary was purposefully, consciously and deliberately excluded from the TEDRA settlement process?
12. Whether a creditor of a trust beneficiary can become a quasi-trust beneficiary under the terms of a TEDRA settlement agreement pursuant to the attorney lien statute?
13. Whether a trustee has a fiduciary obligation to a creditor of a trust beneficiary?
14. Whether this Court should consider an award of costs and attorney fees in this matter against the Appellant?

III. STATEMENT OF THE CASE

The Trust and First Amendment. Prior to her death on January 1, 2001, Evelyn Plant created a trust with testamentary provisions for most of her property. The trust provided for distributions to approximately 10 different beneficiaries. She was without children. Jennifer Linth was a close, trusted friend who provided extensive companionship and care to her for 30 years, especially in the last years of her life. The trust provided for a substantial gift to Ms. Linth. The trust has a spendthrift provision:

No share or interest in principal or income of this trust shall be liable for the debts of any beneficiary, nor be subject to be taken by a beneficiary's creditors through any process whatsoever, nor be an asset in the bankruptcy of any beneficiary

CP 305; CP 318. Shortly after signing the original trust Mrs. Plant signed an amendment to create a charitable foundation bearing her name that would ultimately receive one of the trust's primary assets, the property generally known as Green Point. That amendment also called for Ms. Linth to have a life estate at Green Point. The amendment replaced a charitable organization called Crista Ministries with the foundation.

After Mrs. Plant passed a protracted estate dispute emerged over the validity of the Original Trust and the First Amendment as defectively drafted by the original trust and estate attorney, Carl L. Gay. Crista Ministries, in particular, though clearly disinherited, took the position that

the First Amendment failed and the residual interest in Green Point passed to it, as originally stated in the Trust.

Olson's representation of Linth. Mr. Olson and Ms. Linth began an attorney client relationship around this time, in early 2001 Olson was hired as a litigator, when certain dire estate tax consequences of the drafting of the Trust and First Amendment were coming to light.¹ These consequences were caused by Mr. Gay's flawed estate planning representation of Mrs. Plant, including specifically his negligent draftsmanship of the operative documents. Olson and Linth did not then or ever create a written fee agreement nor any document by which Ms. Linth granted any part of her interest – by consensual lien or assignment – in the trust. CP 265. Nonetheless, Ms. Linth began receiving invoices from Mr. Olson for work performed, which were paid through June of 2002. Funds for this work, incidentally, came from a \$100,000 trust distribution to Ms. Linth which had occurred earlier. Billings at that time, which were paid, were approximately \$54,000.

Coincidentally, in June 2002, a mediation of the dispute was scheduled, which apparently Mr. Olson could not attend. Instead he

¹ Specifically, the entire estate plan was plagued by a looming estate tax liability, apparently unknown or underappreciated by Mr. Gay relating to the charitable remainder interest; the 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. As substantial funds had already been released by Mr. Gay, a crisis quickly evolved.

submitted a detailed letter to the mediator about the dispute and advocating for a solution. At that time and later, Jennifer Linth repeatedly asked Mr. Olson to find a solution that would include the completion of that foundation plan as she knew that was the primary intent of Mrs. Plant. CP 245-262, 303, 306. The mediation letter in June 2002 was faithful to that client directive. Mr. Olson advocated for the validity of the First Amendment and the related formation of the Foundation along with the preservation of the interests Ms. Linth as that was consistent with the intent of Mrs. Plant. CP 199. He also then promoted the idea of the malpractice action as a being of unquestionable validity, first by offering and identifying the operative legal precedents, and then by offering his professional opinion on their application:

The basic duties that a trustee owes to trust beneficiaries are well established and stated in any number of treatises including the Restatement (Second) of Trusts (2§169-185), William F. Fratcher, II Scott on Trusts §§ 169-185 (4th ed. 1987) and Bogert, The Law of Trusts and Trustees § 841 et seq. (1997 ed.). The most fundamental duty of the trustee is to carry out the directions of the trust as expressed in the terms of the trust. Bogert, supra at § 841. Counsel likewise owes a

duty of reasonable care to the trust beneficiaries. See *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994); *Stangland v. Brock*, 109 Wn.2d 675, 747 P.2d 461 (1987); *Behr v. Cody*, 119 Wn.2d 337, 832 P.2d 71 (1992); *In re Guardianship of Karan*, 110 Wn. App. 76, ___ P.2d ___ (2002). The attorney owes this duty to the trust beneficiaries, who are not his clients, because his services were intended to affect their interests. *Behr v. Cody*, supra at 365 (explaining the multi-factor test for determining whether a duty exists). Simply stated, “it is foreseeable that the beneficiaries may be harmed if the will is drafted improperly” *Stangland v. Brock*, supra at 681. The intended beneficiaries would have received benefits but for the attorney’s negligence.

Here, if the trust amendment fails because the plan is not attached or because the instrument was executed improperly, then the trustee and his counsel have clearly breached the standard of care. Mrs. Plant executed the amendment knowing the plan was not attached, but not regarding it as essential because her trustee had the authority to develop it. The trustee knew the plan was not attached and had four months, from August 23, 2000 to December 31, 2000, to complete the task prior to Mrs. Plant’s death. Mr. Deenan was actively involved with Foundation preparations and paid Mrs. Smith from trust assets for her work and expenses in furtherance of The Franklin and Evelyn Plant Green Point Foundation. Attorney Carl Gray, likewise, knew the plan was not attached because he had the executed amendment in his possession until Mrs. Plant’s death. If the plan was essential to giving legal effect to the amendment, then it was incumbent upon him to advise the trustee of this necessity and ensure that it was promptly completed. Neither the attorney nor the trustee acted diligently on this task if it was essential. They must bear the responsibility for their carelessness. This includes liability for the legal expense of defending the validity of the amendment even if the challenge to its validity fails.

CP 212-13 (highlighting added). He also advocated for the exclusion of Crista Ministries. CP 211.

The mediation failed and Olson then began acting as “lead attorney” to broker a deal between the competing factions. How he arrived at the conclusion that he could or should act in such fashion is somewhat curious, except that he persistently relates that Mr. Treadwell, the 2002 mediator, and others suggested there must be some “creative solution.” In any case, as indicated above, Ms. Linth sought to have the same position advanced, namely the viability and validity of the First Amendment and the passage of the property to the Foundation.

In the meantime, perhaps coincidentally in June 2002, Mr. Olson continued to issue bills for the work he was ostensibly performing for Ms.

Linth, albeit without her approval or endorsement. Ms. Linth did not pay any of those bills because she was out of money, but also because she was fundamentally disagreeing with the representation. Olson's focus for resolution somehow drifted and shifted away from the First Amendment/Foundation concept and toward the idea of a sale of the Green Point property to produce a fund to payoff all the interested parties, including Crista Ministries. CP 266; 268. Olson's law firm was not part of the discussion or otherwise listed. He also continued to promote the idea that Ms. Linth could surely secure recovery for her damages through a malpractice action against Mr. Gay. CP 266.

Adoption of Settlement Agreement. By 2005 Mr. Olson's primary work product came to be the settlement agreement. CP 344. It contradicted or abandoned in large part the advocacy he had displayed at the 2002 mediation with respect to the First Amendment/Foundation and Crista Ministries. CP 266. In particular, Crista Ministries which all agreed had been disinherited by Mrs. Plant, was to receive a substantial cash payout from the sale of Green Point. The Foundation interest in the property was abandoned and ignored. The document provided for the continued existence of the Trust for related matters, and suggested that all contrary terms of the Trust and First Amendment were to be ignored. CP 360. The agreement reserved Ms. Linth's right to bring a malpractice

action against Mr. Gay, the attorney who had defectively drafted the Trust and First Amendment. CP 359.

On April 14, 2005 Ms. Linth signed off on the agreement, but under protest, with an attached integral writing, which she considered to be an integral part of her signature. CP 250, 323-25. She told Olson that she wanted her written protestations to remain attached to her signature page when he presented the agreement to the court. Olson refused, telling her he believed the judge would not endorse the agreement. CP 267-68; 303.

A Clallam County Superior Court Commissioner signed an order endorsing the settlement agreement on October 13, 2005. CP 403. Before presentation, Mr. Olson took it upon himself to submit a long eight page declaration to the court in support of the settlement agreement which urged the court to accept it because it was the best deal, all around, for everyone involved. CP 333. His declaration did mention the protests of Ms. Linth concerning the settlement, CP 334, acknowledged that Ms. Linth's "commitment to Mrs. Plant" was not "easily set aside" and "[p]erhaps the best service to Mrs. Plant's memory is this resolution of the controversy with the conviction that she would want this to be resolved so that life can move on with the benefits she sought to bestow that are doable in the present situation." Id. He advocated the settlement to the

court “to generate sufficient funds to pay selling costs, taxes, legal expense and provide sufficiently for the contesting parties to achieve the settlement” and “[o]ngoing litigation would consume and deplete the trust assets to the detriment of everyone.” *Id.* at 335. Olson repeatedly related that all the beneficiaries had participated in the settlement but that financial issues required settlement, and further related that no legal fees were being charged to the trust to preserve the trust corpus:

7. The settlement provides for the sale of Green Point and an allocation of the proceeds in a manner acceptable to everyone even if preferences may have been otherwise. . . . **The parties to the settlement are bearing their own legal expenses preserving the existing cash assets of the Trust for other purposes.**

8. This settlement strikes a balance, making necessary adjustments to get some principal features of Mrs. Plant’s plan to work. Even though Mrs. Plant’s intent for her selected beneficiaries is not met precisely in the manner she contemplated, her intent to benefit these parties is recognized. . . . Nonetheless, her intent is recognized, as best it can, while making the deviations necessary to solve the financial problems that she would want solved to accomplish the compromise settlement.

9. The beneficiaries of the Trust came together, after great effort, and worked out the best possible solution to a controversy that cannot be resolved to everyone’s complete satisfaction. It avoids continuing litigation; it prevents dissipation and waste of the Trust assets; and, it secure benefits for all interested parties. . . . Mrs. Plant undoubtedly would support this compromise to avoid the depletion or consumption of her estate by litigation costs and taxes to meet her concern for those who were special to her during her life.

CP 336-37 (emphasis added). As to his own fees, Mr. Olson closed by telling the court that he had worked “without compensation”:

Since 2002 to the present time, I and other attorneys in this firm have spent over 700 hours in putting together the settlement at substantial expense. This work has been undertaken without compensation since June 2002, because of our commitment to Jennifer and Carolyn Linth.

CP 340. This declaration did not directly address or mention the specific First Amendment/Foundation issue, nor the accrued \$200,000 in fees, nor that he was harboring a lien claim for them, nor that he believed that lien would allow him to force a sale of Green Point, or that prior to that, under the terms of the Trust, he could not do so. Id. Similarly, according to Ms. Linth, and contrary to the “factual” assertions of Mr. Olson before the trial court and this court, there was never any discussion of the possibility that his looming legal fee claim would be paid from Ms. Linth’s share of proceeds from Green Point. CP 32. Similarly, there is no evidence that Mr. Olson had any discussion with her about the existence of the attorney lien statute, nor of his desire to commandeer her interest in Green Point so that he could get paid. Id. She states the opposite, that the malpractice claim was to be a source of payment. Id.

Filing of lien by Olson. On October 30, 2006, Mr. Olson announced his lien claim by filing it with the court and sending a copy to

the Trustee. CP 174; 329. He filed an amended lien on March 13, 2008. CP 556-57, “on money in the hands of an adverse party”:

NOTICE IS HEREBY GIVEN that the undersigned attorney claims a lien under RCW 56-04-0107 concerning for a lien on money in the hands of an adverse party in an action or proceeding, being amounts due from year to Jennifer Linth and Carolyn Linth on a claim allowed in the action entitled *Linth v. Douglas et al.*, Clallam County Superior Court Cause No. 04-2-00918-7. I claim a lien for unpaid fees and costs for services rendered to Jennifer Linth and Carolyn Linth in that action in the amount of \$2,944.33 for services rendered from time 12/2007 through February 28, 2008, inclusive of interest. This notice amends the previously served attorney's lien dated October 30, 2006.

Filing of pro se malpractice claim by Linth and dismissal. In 2009, armed with the malpractice complaint provided by Mr. Olson, and assured of its viability and validity by Mr. Olson, as illustrated above, Ms. Linth filed against Mr. Gay *pro se*. The trial court in that matter granted summary judgment *against* Ms. Linth based upon the legal argument that Mr. Gay owed no legal duty to Ms. Linth because she was not his client, directly contradicting the advice she had received from Mr. Olson, with express reference to the same authorities. CP 152-66. That decision was appealed to this court and is currently under consideration, as oral argument occurred in May 2015.

Motion to vacate order adopting settlement; intervention motion by Olson. Ms. Linth was appointed Trustee in July 2008 by Judge Verser when the prior Trustee resigned. At that time she began to become privy to a plethora of documents maintained by the prior trustees which had

been withheld from her and her counsel, including Mr. Olson. Because of the issues surrounding the development of the settlement negotiations, and her coerced signing of the settlement agreement in 2005, including Mr. Olson's failure to present her written protestations to the judicial officer entering the order approving it in 2006, and the manner in which the order adopting the agreement was presented to the court commissioner in 2006, in 2010 Ms. Linth filed a motion to vacate that order. Mr. Olson learned of the motion and sought to intervene in the action so that he could object to the motion to vacate and to force a sale of Green Point because of his lien claim. Judge Verser denied the motion to vacate, allowed Ms. Linth to become Trustee, and denied the motion to intervene by Mr. Olson. CP 274; Exhibit A.² Mr. Olson advanced the same arguments there that are advanced here, namely that the attorney lien statute allows him to be the alter ego of his client, pursuant to the lien and settlement agreement, allowing him to demand and force a sale of the property, but further, that the trustee was obligated to sell the property for him to pay his fees, and pay him, notwithstanding anything else that might be occurring in the business of the trust, and notwithstanding the terms of the trust or even the

² The Verser opinion was not made part of the clerk's papers in this matter, predictably, though it is referenced indirectly by Appellant's submission of his declaration in this matter incorporating by reference his own declaration submitted to Judge Verser. CP 290. Respondent previously submitted the Verser opinion to this court as part of a separate motion

intent of the trustor. Judge Verser expressly denied the Olson motion, stating that it would be a curious thing indeed if Mr. Olson were somehow able to step into the shoes of Ms. Linth his client, and essentially subsume her interest in the case. Id.

Aiken, St. Louis & Siljeg, P.S. wishes to intervene as the firm believes the Linths owe it more than \$300,000 in legal fees. The Linths do not have \$300,000 and thus the firm will not be paid unless and until the Linths receive their portion of the process [sic] of the sale of Green Point. CR 24, Although broad, does not provide a basis to allow a law firm that is owed money from former clients to intervene as a party to a lawsuit involving those clients. The law firm is free to exercise its collection remedies, however becoming a party, particularly a party adverse to the former client's wishes, in the very lawsuit in which the fees were incurred is not one of those remedies. The motion of Aiken, St. Louis & Silvjeg, P.S. to intervene is DENIED. The court will not consider the fact that the law firm wants to be paid from the Linth's share of the proceeds from the possible sale of Green Point in determining if the NJDRA should be vacated.

Olson took no appeal. Id. Nor did the Olson bring anything akin to his current motion to enforce lien.

Intervention at the Court of Appeals. His next action was before this Court. Ms. Linth did appeal the Verser decision denying the motion to vacate. That appeal remains outstanding before this Court. This Court granted a series of stays of the appellate proceedings in that action to allow the trustee to seek settlements with most of the other parties to the

to dismiss; the motion was denied by the Commissioner with instructions to address the issue within this Respondent's brief

settlement agreement (see below). This has occurred to date with all but one. Olson filed a motion to intervene with this Court in that action again (the second time), advancing the same arguments presented to Judge Verser and in this appeal, namely that 1) his intervention should be allowed because 2) further delay in those proceedings impaired his ability to attempt to enforce the lien by forcing the sale and 3) that he was by virtue of the lien able to do so. A commissioner of this Court denied the motion, citing to the earlier intervention denial by the Judge Verser, from which no appeal was taken, deeming it to be a final judgment. Ex. B. The Appellant here then – in that case – sought review of the Commissioner’s decision by a panel of this court. The panel concurred with the Commissioner. Ex. C.

Filing of current action. On October 15, 2012, Olson filed his complaint in Clallam County, designating three separate claims for relief, though in title it was style as being declaratory relief. CP 637. The first, expressly for declaratory judgment, asserted that “declaratory relief” would terminate the controversy, that a contract existed that was subject to some form of interpretation under the declaratory judgment statute, RCW 7.24.030, and further that “Plaintiff is entitled to” some form of declaratory judgment concerning Ms. Linth’s obligations to the law firm. CP 643. The second claim related specifically and expressly to the

attorney lien and its supposed attachment to assets inside the trust. Id. It asserted some entitlement to “an order” enforcing the lien. Id. The third claim was as to Ms. Linth’s role as a trustee, asserting entitlement to “restraining order or injunctive order” to compel the enforcement of the lien. CP 644.

The complaint sought recovery for attorney fees that were unpaid since June of 2002. It listed their accrual annually: 2002 \$27,290.99; 2003 \$57329.50; 2004 \$37861.00; 2005 \$60075.00; 2006 \$4225.00; 2007 \$9007.00; 2008 \$2568.00; 2009 \$609.50. CP 641-42; 328.

The Motion to Enforce Attorney Lien. On March 24, 2014 Olson filed his “Plaintiff’s Motion for Enforcement of Attorney’s Lien,” asking the court to summarily conclude that the \$300,000 lien claim was valid and should be enforced, in total, and that Ms. Linth should be replaced as trustee so the property could be sold to pay the \$300,000. CP 628. The “motion” did not seek any relief in the form of a judgment. It was supported by a declaration of Mr. Olson providing his personal narrative of the history of his relationship with Ms. Linth and his work on the case and summarily offering that there was an agreement which constituted a contract and further that Ms. Linth agreed to all of the charges on all of the invoices because she had received them. CP 326.

On April 9, 2014 Ms. Linth responded with briefing and her own declaration containing significant narrative refuting much of what Mr. Olson presented as fact. CP 302. Her reply contained a variety of responses to the motion. One was that the matter was not ripe for review because the property had not been sold. CP 308. Another was that the case was set on short notice, and without opportunity to conduct discovery. CP 309. Another was to point out to the court that there were a series of factual issues, including the validity and related amount of the fee claims being asserted and that no judgment had been secured. Id. at 309-11. Another was to assert that “[t]his matter cannot be resolved by motion.” Id. Ms. Linth also noted that the relief sought by the motion was refuted by the spendthrift provision in the trust, notwithstanding any *arguably* overriding terms in the dispute resolution agreement. Another was that some or all of Olson’s claims were barred by the applicable statute of limitations. CP 316. Ms. Linth also submitted a declaration from local attorney Craig Ritchie, who was familiar with the case, which opined that the Olson fee claim was not reasonable. CP 196.

On April 10, 2014 Mr. Olson submitted another declaration in rebuttal, along with a reply brief. CP 273. Though addressing a number of issues raised by Ms. Linth, the statute of limitations was not one of them. Id. Olson asked the court to strike the Ritchie declaration. CP 188.

A hearing on the motion was conducted on April 11, 2014 before Judge Rohrer. CP 88, 271. After argument, Judge Rohrer took the matter under advisement, allowing Ms. Linth to provide a supplemental declaration, which she later did on April 18, 2014. Id.; CP 264. Following that, Mr. Olson submitted yet another brief, CP 183, and then another declaration. CP 100.

Filing of Answer by Jennifer Linth. On April 17, 2014 Ms. Linth filed an answer with the court, with affirmative defenses to the complaint which included the statute of limitations, and counterclaims. CP 220.

Memorandum Opinion & Order. Judge Rohrer issued a “Memorandum Opinion & Order” on July 1, 2014 denying the motion for various reasons. CP 88. He disagreed with the subrogation-type argument under the statute, saying the terms of the statute were best understood by reference to principles of double taxation, especially viewing the legislative history; he ruled that the lien extended only to money actually received by Ms. Linth and not to the trust corpus (Green Point); and finally, he ruled that there were a series of factual issues that required further hearing or trial, including but not limited to the terms of any agreement between Olson and Linth, and the appropriate amount of the lien. Id. He denied the motion to strike the Ritchie declaration. CP 94.

The judge did not otherwise label the decision as one of summary judgment or of a declaratory judgment.

Motion for reconsideration & decision. Olson moved for reconsideration on July 9, 2014 with a series of specific rebuttals to the trial court reasoning on its interpretation of the lien statute. CP 40. The court denied reconsideration on August 21, 2014, issuing a second “Memorandum Opinion & Order” which refuted the reconsideration arguments point-by-point. CP 27. Again, the ruling was not called summary judgment and it was not called declaratory judgment.

Filing of Notice of Appeal. Mr. Olson filed a notice of appeal to this Court on September 25, 2014, identifying the foregoing rulings as the operative decisions, and attaching copies. CP 5. There was never any trial or hearing on the underlying issues identified by Judge Rohrer: the existence and scope of the contract, the amount of the fees, the statute of limitations, the counterclaims. No judgment in any form has been issued in this case. Similarly, there has been no certification of some final judgment under CR 54 by the trial court. Despite all of this, this Court allowed review to proceed as a matter of right.

Obsolence of settlement agreement; formation of Foundation. As much of this was going on, Ms. Linth as Trustee was able to resolve the claims of all other named parties to the settlement agreement save one, at

this point, all with the approval of this Court, which stayed proceedings on the review of the Verser decision.³ CP 104. As a result there is virtually no reason to sell the property to fulfill the terms of the settlement agreement. CP 306. According to Mr. Olson's 2006 declaration, the primary purpose for the settlement agreement was to fulfill as nearly as possible the intent of Mrs. Plant. The Green Point Foundation has been legitimately formed as a fully-qualified 501(c) charitable entity with a separate and independent board of directors. The Foundation has advised Ms. Linth as Trustee that it expects her to transfer the property to it because that is what Mrs. Plant wanted according to the First Amendment. Thus, the injustice and continued vigilance and insistence on the settlement agreement to pay Mr. Olson is contrary to what Mrs. Plant wanted, contrary to what Ms. Linth is duty bound to do, according to law, and contrary even to what Mr. Olson in 2006 announced was the purpose of the entire process.

IV. SUMMARY OF ARGUMENT

First, this Court should consider denying the appeal summarily, by motion to dismiss or otherwise 1) under principles of collateral estoppel; 2) for certain RPC violations – acting as lawyer and witness in the same proceeding; 3) because the matter is not ripe for appeal; and 4) because of

³ A motion for approval of payment to the last will soon be filed with the Superior Court.

judicial estoppel, notwithstanding the fact that review has apparently been accepted. Second, because the trial court correctly ruled on the appropriate construction and application of the attorney lien statute, its ruling should be affirmed. Third, the appeal should be rejected because it would deprive Ms. Linth of certain defenses that were presented in the trial court because of this appeal. Fourth, the proposed sale by the trust to pay a beneficiary's legal bills would violate certain terms of the trust which were not affected by the underlying settlement agreement, including the spendthrift clause. Fifth, the Appellant a court-ordered sale of Green Point now would serve little purpose in terms of fulfilling the mandate of the settlement agreement, as there has been substantial performance through a series intervening cash settlements and trial court orders eliminating the claims of all parties of the agreement. The court ordered sale would also ultimately frustrate the intent of Mrs. Plant to give her property to a foundation in her name, which now exists and is now ready to receive it from the Trustee, and which was specifically excluded from the settlement agreement by all parties and participants, particularly Mr. Olson who deemed himself the lead counsel. Sixth, , the proposed sale would arguably be a breach of fiduciary duty as the Trustee owes no duty to creditors of beneficiaries, but does to trust beneficiaries, including the Green Point Foundation. Seventh, the lien statute itself does not apply on its face to the trust corpus. The corpus existed before the

litigation existed and is not therefore a product of any action of Mr. Olson; it belonged then and now to all trust beneficiaries which now specifically includes the Foundation. Finally, this court should consider an award of costs and attorney fees to the Respondent in this matter, either according to rule as the prevailing party or as sanctions for the obstreperous, egregious conduct of the Appellant of bringing this matter forward below and in this court.

V. ARGUMENT

1. This court should consider dismissing or limiting the appeal pursuant to the motions set forth below.

i. Collateral estoppel

When a judgment that disposes of all claims and all parties is not appealed in 30 days, it directly precludes all further proceedings in the same case, except clarification and enforcement proceedings, and it collaterally precludes other suits based on the same claim. Kemmer v. Keiski, 116 WnApp. 924, 68 P.3d 1138 (2003). “The doctrine of collateral estoppel, or issue preclusion, bars relitigation of an issue after the party estopped had a full and fair opportunity to present its case.” Barlindal v. City of Bonney Lake. 84 Wn App 135, 142, 925 P.2d 1289 (1996). The purpose underlying collateral estoppel is to advance the policy of ending disputes, to promote judicial economy, and to prevent harassment and inconvenience to litigants. Id. Four requirements are necessary: (1) the issue presented must be

identical to the one previously decided; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior adjudication; and (4) the application the doctrine must not work an injustice. This Court should apply collateral estoppel to foreclose further litigation of this issue in this or any other court because all four requirements have or are occurring.

Identical issues. Olson raised this issue (or issues) before Judge Verser in 2010. He there sought intervention status in the estate litigation, as a party, to enforce his statutory lien. There he wanted to force an immediate sale of Green Point according to the terms of the settlement agreement. There he asked that Ms. Linth not be permitted to serve as Trustee. There he asserted that he was entitled to do so *because* of the lien statute, that he was in-effect subrogated or something akin to subrogation to the rights of Ms. Linth because his legal bills had gone unpaid. There as here he is arguing, alternatively, that he is some kind of third party beneficiary of the settlement agreement, though he was certainly not a party to it. There as here he argued that the court was duty bound to allow him to do all these things because of the lien claim and the lien statute. Further, he argued then as now that the Trustee has a superior duty to creditors of trust beneficiaries than to the beneficiaries themselves, or, more importantly, to

Mrs. Plant, who wanted her property to be used for charitable purposes.

Most importantly, Judge Verser specifically ruled against Mr. Olson's argument alleging his ability to invade the trust so that he could be paid. Although couched in terms of CR 24, Judge Verser unquestionably ruled that Olson and his law firm could not be considered "a party, particularly a party adverse to the former client's wishes, in the very lawsuit in which the fees were incurred".

The issue presented to this Court in the second intervention motion was identical: "let us in because we have a right to make the trustee sell Green Point so we can get paid." The motion to intervene at Division Two was fashioned to reach the same result as the motion before Judge Verser, with the same arguments. Further delay of the estate proceedings is unfair because they were not getting paid. As pointed out above, the learned Commissioner and Judges from this court all reached the same result. The collective wisdom of all – Judge Verser, the Commissioner and the Panel – was to reject those arguments.

The issue presented to Judge Rohrer -- and now this Court – is *déjà vu* all over again, again. Olson is still trying to get inside the trust, with quasi-beneficiary status, to force the sale of Green Point. He is trying to make himself a *de facto* party when Judge Verser, and this Court clearly ruled that he could not. He is trying to open another door with the same key

that didn't work before. Despite those rulings he is continuing to make those same assertions through this litigation, and now through this Court.

Prior judgment must be final. Mr. Olson sought no review of the decision made by Verser. The Commissioner of this court later ruled that a final judgment was thereby rendered. Similarly, there was no appeal of the decision of the panel of this Court to deny Olson's request for appellate intervention. The finality of the Verser decision was amplified. Under such circumstances all three decisions should be designated as final judgments.

Same party. The party here is the Olson law firm. The party then was the Olson law firm.

Injustice. There is no injustice in applying the doctrine here. The issue has been the same since 2010 when Judge Verser originally heard it. At that time Mr. Olson submitted briefing and was allowed to argue his theory fully. Following that he had full opportunity to seek review, but elected not to. Mr. Olson took another run at it with the intervention motion in this Court and lost. *He did appeal* the Commissioner's ruling, but again lost before the panel. As things stand right now, just looking at these judicial officers, five separate judges have examined this issue on three separate occasions.⁴ Each of them has reached the same result. There can be no unfairness in having five judges consider and reject the same issue in

across these multiple proceedings, times and forums.

On the flip side of this, of course, is the policy of collateral estoppel related to the responding party. Now, once again, Jennifer Linth is having to respond to these allegations, counting here three separate occasions, with all the attendant costs. Even if couched in slightly different terms, the fulcrum issue is the same over and over and over again. The question that should be considered here, especially, in the context of the existing appeal, is how many times Ms. Linth (and the trust) should be run through this gauntlet. There most certainly has been a cost to responding to these repeated attacks. The collateral estoppel equities at this point weigh heavily in her favor.

None of this analysis includes, incidentally, the fact that this appeal involves yet another rejection of the same theory, except this time articulated in far more detail, a sixth judicial officer in essence affirming the other five. Judge Rohrer reached the same decision as everyone else who looked at this set of issues. He too decided that the Appellant cannot throw the Trustee out and require a sale of the property *because of* the settlement agreement. He too decided that the attorney lien statute does not reach so far, that it applies to proceeds of the sale of trust property and not the corpus itself, and implicitly that the trustee has no duty of any type toward the

⁴ Judge Verser denied a motion for reconsideration also. Ex. A.

Appellant, a creditor of the Jennifer Linth *as a beneficiary* of the trust.

This Court should consider dismissing this appeal because Mr. Olson has taken multiple bites at this apple and has consistently come up with a worm. It is patently unfair to Ms. Linth – and the Trust at this point - - to be dragged through this argument. Collateral estoppel principles require dismissal of the appeal.

ii. Violations of RPC 3.7, 1.5 and 1.7

RPC 3.7 generally prohibits a lawyer from serving as a witness in a case for two reasons. One is that the tribunal and the opposing party may object because of the resulting confusion naturally occurring because of the merging of the two roles. A second, especially when the matter involves some prior representation of a client, is that there is some actual or potential conflict. In this case, according to RPC 3.7, the attorney must avoid conflicts under RPC 1.7. In some cases, the conflict can be waived, usually in writing. Otherwise, the attorney may be disqualified from the representation.

Mr. Olson represented Ms. Linth in the underlying matter. There is no evidence here that he has secured any form of a waiver from her now, much less a written one, allowing him to represent himself against her. Moreover, he is clearly testifying not only in the trial court but also here, as to certain material issues that do not have to do with “the nature and value”

of legal services; he is presenting certain tenuous legal arguments “as fact” by way of his declarations, and thereby compelling repeated replies from Ms. Linth. Their understanding, if it can even be called that, was verbal only, by admission of both parties. As with any assertion of any oral contract, the terms of conditions of it are subject to considerable debate.

The only way to resolve and reconcile these competing assertions is through a contested hearing before a neutral fact finder, not through summary assertions by Mr. Olson, especially those that contain legal conclusions. Mr. Olson is combining the two roles, causing dismay and disadvantage to Ms. Linth and no doubt to this court. Until such time as these conflicts are resolved, that is, until Ms. Linth provides a waiver of any conflict of interest to Mr. Olson, he should be foreclosed from representing himself, which is what he is doing. Similarly, because the court is said to “have objection” to this same practice for the same reasons, this court should issue a suitable order preventing Mr. Olson from advancing this matter, both here and in the trial court.

This very problem was identified by Judge Verser in his 2010 opinion, by the way, when he wrote “particularly a party adverse to the former client’s wishes, in the very lawsuit in which the fees were incurred”. At the end of the day, Ms. Linth has cause for objection under the rule, and is hereby exercising her right to raise it. Mr. Olson suffers from a unwaivable

conflict of interest. To the extent he has promoted this litigation and has advanced this appeal, the matter should be dismissed, stricken or limited. Alternately, the court here should consider some form of sanctions.

A final observation – and perhaps argument -- especially in the context of the lack of a written fee agreement, is that the arrangement that has been described by Mr. Olson, that of getting his money out of the sale of the Green Point property, looks suspiciously like some form of contingent agreement, notwithstanding his invoices. In fact it was and remains contingent as by his account, standing alone, he for some time, perhaps 3-4 years, expected his fee to be paid from the proceeds of Ms. Linth's interest in the trust, and specifically Green Point. Under such circumstances RPC 1.5(c) requires that the arrangement "be in a writing and signed by the client". Such document does not exist here. If nothing more, the requirement for such an agreement illustrates the propriety and wisdom, not to mention fairness, to a client in such setting, and supports the argument that Mr. Olson's overall approach to this matter – ostensibly altruistic – evolved to one with an exit strategy that would allow him, above all other things, to be paid.

iii. Ripeness: the case is improperly in the Court of Appeals

The concept of "ripeness" in appellate practice stems from several sources. Rule of Appeal 2.2 nominally allows appeals from final judgments

only, with certain express exceptions. Normally, failure to mention a particular proceeding indicates the Supreme Court's intent that the matter be reviewable solely under discretionary review guidelines. In re J.W., 111 Wn. App. 180, 43 P.3d 1273 (2002); In re Estate of Wood, 88 Wn. App. 973, 947 P.2d 782 (1997); In re Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). Further, the Supreme Court will not decide cases piecemeal. Curtis v. Interlake Realty, Inc., 62 Wn.2d 928, 385 P.2d 37 (1963). Finally, in cases where a final judgment occurs on fewer than all the claims an appeal may be had only after "express direction by the trial court . . . that there is no just reason for delay"; similarly, " a judgment that adjudicates less than all the claims . . . is subject only to discretionary review until a final judgment adjudicating all the claims, counts, rights, and liabilities of all the parties." RAP 2.2(d). The trial court may issue a partial final judgment under CR 54.

Similarly, denial of a motion for summary judgment is generally not an appealable order, and discretionary review of such orders is not ordinarily granted. Caulfield v. Kitsap County, 108 Wn. App. 242, 29 P.3d 738 (2001). A denial of a motion for summary judgment on the issue of liability alone, entered pursuant to CR 56(c), is not a final order and is not appealable. Gazin v. Hieber, 8 Wn.App. 104, 504 P.2d 1178 (1972). When, on motion for summary judgment, judgment is not rendered on whole case or for all relief asked and trial is necessary, such "partial summary judgment" is not

final appealable judgment, but is nothing more than interlocutory adjudication of factor necessary for final decision of litigation. Grill v. Meydenbauer Bay Yacht Club, 57 Wn.2d 800, 359 P.2d 1040 (1961).

This Court has accepted appeal as a matter of right here. The Respondent is asking this court to rethink that decision, however made. Indeed, because of the acceptance of review, there was never any prior opportunity to raise this objection.

The trial court below expressly found that there were issues of fact to be resolved requiring further trial or hearing, particularly the amount of fees that might be owed to Olson. CP 95. The Appellant filed a “notice of appeal” instead of a motion for discretionary review anyway. Yet there was no judgment of any type entered by the court, just two memorandum opinions and orders. Indeed, in what appears to be an attempt to avoid any chance for a contested hearing on the amount of the fees, the Appellant is advancing a series of arguments which appear designed to foreclose any viewpoint on this and other issues except his own, including those relating to his legal conclusions. Implicit in these is the value of the services provided to Ms. Linth, who as pointed out otherwise, never agreed with Mr. Olson’s decision to abandon the First Amendment/Foundation and instead act as self-appointed broker, mediator and arbiter of the Plant estate litigation, and the corresponding sale of Green Point. Likewise issues remain as to whether

Ms. Linth's signature on this document was coerced, or whether the submission of Mr. Olson's declaration to the court in support of the settlement was a betrayal of the objectives Ms. Linth was pursuing, and the reason why Ms. Linth approached Mr. Olson for assistance in the first place. Similarly, it may be very clearly argued that Mr. Olson pushed her to the sidelines to promote his own exit strategy, all the time attempting to induce her to accept it by portraying a difficult malpractice claim – which he would not handle – as a sure thing. Similarly, in terms of the lien itself, are the issues related to *any* application of the lien, as otherwise discussed herein. In this respect, with regard to these issues, it is of utmost importance for this Court to recognize that all authorities addressing this issue, that of attorney rights against clients, recognize that due process requires a sufficient opportunity for a contested hearing, for appropriate due process so that these issues can be actually heard by a neutral party. Olson here is ignoring such by bringing this appeal, demanding that all of these issues can be heard summarily by his own declaration, doubling down on his superior fiduciary position with respect to Ms. Linth, using the system with which he is so familiar, to compel his viewpoint. The lien constitutes a claim only and of itself, does not entitle its holder to anything specific, except notation and record of that claim; it is incumbent upon a lienholder to take appropriate

steps to enforce the lien, by whatever supplemental steps are necessary. It is not a judgment, and Mr. Olson has no judgment against Ms. Linth.

In terms of ripeness, this case looks suspiciously like like an appeal from a loss of a summary judgment motion. The trial court here said further hearing was needed to resolve issues of fact. The trial court set out its decision in the manner of summary judgment, listing all that was considered. Likewise, the trial court did not enter any judgment. It denied the so-called “motion to enforce” only. Likewise, following the decisions Olson did not seek a CR 54 ruling.

This Court should rule, notwithstanding the notice of appeal and acceptance of review to this point, that further review is inappropriate. None of the conditions necessary for direct review have been satisfied.

iv. Judicial estoppel

“[J]udicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008) (internal quotation marks omitted) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007)). A trial court's application of judicial estoppel is discretionary. *Id.* at 536; *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (exercising original jurisdiction). “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The court focuses on three core factors when deciding whether to apply judicial estoppel:

"(1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Miller, 164 Wn.2d at 539 (internal quotation marks omitted) (quoting *Arkison*, 160 Wn.2d at 538-39). The purpose of the doctrine is to preserve respect for judicial proceedings and to avoid inconsistency, duplicity, and waste of time. *Id.* at 540.

Mr. Olson asked the trial court to apply judicial estoppel against Ms. Linth concerning her statements about damages in the malpractice case based partially on his claims of legal fees against her, a position that was rejected by the trial court. CP 94. 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," CP 336, 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. He stated that the agreement was the best "for everyone" repeatedly, including very specifically his client Ms. Linth. These statements were made purposefully to induce the commissioner to endorse the settlement agreement. And they in fact did.

Mr. Olson did not disclose then that he thought he was owed \$200,000 (before interest etc) and that he intended to make Jennifer Linth pay him from the proceeds of the sale of the trust property, or further that he

was going to try to leverage the settlement agreement, if necessary, to get paid. He wrote the settlement agreement, in large part, and he was its primary proponent, as magnificently illustrated by the declaration. His statements in this regard were skilled, purposeful and deliberate.

The position he is now advocating contradicts his statements in that judicial proceeding. Now Mr. Olson is claiming very clearly that he has a personal interest in the settlement, and that he can personally enforce that agreement, and that the trust is responsible for his fees. He goes so far as to say that he is something along the lines of a virtual beneficiary because of the lien statute, or that he has some form of subrogated interest in the trust. Had Mr. Olson made such disclosures in his declaration, there is a significant question as to whether the court or other parties to the agreement would have agreed. If so, all other parties to the agreement, through their attorneys, would have perhaps made the same demands and thereby depleted the trust.

Finally, allowing Olson's current assertions about what he is owed works great injustice to both Ms. Linth and the Trust. Contrary to what was represented to the court commissioner, that all parties were addressing their own legal costs, now the Trust (and Mrs. Plant) is responsible for the alleged legal bills of Ms. Linth. Contrary to what Mr. Olson told the court commissioner, essentially that he had donated legal work to the cause of Ms. Linth and to Mrs. Plant, he asserts that they were indebted to him,

notwithstanding no written fee agreement and a bootstrap oral contract argument. Judicial estoppel should indeed be applied, but against Mr. Olson.

2. The trial court correctly ruled that the proposed statutory construction was incorrect.

This court should affirm the trial court on its interpretation and application of the lien statute in this setting, which happens to reject that offered by this appeal, which is not supported in law. As Judge Rohrer – and earlier Judge Verser -- explained in erudite terms, the purpose of the statute was not to give attorneys the ability to hijack their client's cases, especially in the context of trusts and estates. Rather it was to clarify the phenomenon of actual or potential double taxation in the realm of judgments that may or may not have attorney fee components. Again, there is yet no judgment nor even a motion for a summary judgment. As pointed out elsewhere here, just the opposite happened. Furthermore, there was no award of money, just a potential and contingent promise (or hope) of some money should the property sell. In any case, by stating that a lien existed in such cases and that the attorney, by virtue of the lien had a proprietary interest in such money judgments, notwithstanding the characteristics or components of such judgments with the controlling documents, the statute endeavored to clarify any resulting tax ambiguity that might otherwise occur. This is elegantly

explained by Judge Rohrer in both the first and second memorandum decisions, especially by his particular reference to the legislative history.

To the contrary, Mr. Olson has failed to identify any case applying this or any other similar statute from other jurisdictions dealing with a trust corpus and trust dispute. Instead he has offered continuously his own “plain reading” of the statute focusing on the word “action”, and disregarding other provisions of the statute which mete against his construction.

At least one reason why he has not and likely cannot find any such case relates to the terms of the trust and the general terms of trust law, especially that relating to spendthrift provisions. Mr. Olson’s only rebuff to the spendthrift argument is that it was somehow trumped by the settlement agreement. Yet that is not supported by a close reading of the agreement itself, which clearly works in concert with it. Moreover, Mr. Olson at the time made statements in his declaration preserving the integrity of the trust, notwithstanding the agreement. Further still, all things considered, Mr. Olson was the drafter of the trust; to the extent there *might be* some ambiguity, it surely should be interpreted against him. This would seem especially true where his purpose is self-serving and would wholly frustrate the intent of Mrs. Plant. By virtue of the legality of the trust, she continues to control the property. That is, coincidentally, what Judge Rohrer ruled, as there was evidence presented that money was transferred from the Trustee to

Ms. Linth while the lien was pending; as to that Judge Rohrer ruled the lien applied and the funds should have been distributed to Mr. Olson.

Further, by asserting that the lien statute allows him to force a sale of the trust property, Mr. Olson asserts that his work product secured the trust corpus for Ms. Linth. That is simply not true. He did not secure the trust corpus for her; it existed prior to the estate litigation, within the trust. To be specific, what Mr. Olson secured for Ms. Linth was her right to receive money from the sale of the trust if the trust property were sold – his interest is one step removed no matter how forceful he wishes to argue. In other words, the lien does not apply to the trust corpus and does not apply to the Green Point property.

Further still, Olson's lien claim for which he provided notice expressly applies to money in the hands of the Trustee. Money is not real property. On its face, thus, the lien claim does not reach Green Point. In point of fact, he has what he himself drafted and what he himself bargained for in producing both the settlement agreement and the lien, a contingent interest in the proceeds of the sale of Green Point – cash.

A further restriction on the application of the lien, as pointed out otherwise, is the *amount* of the lien, which is dependent on some legal determination of what money, if any, Ms. Linth owes to him. No judgment has been entered as to that amount, and it is subject to great dispute and

controversy, as otherwise argued here for a series of reasons, not the least of which is the passage of the statute of limitations.

3. Ms. Linth is entitled to present a series of defenses, any of which will likely eliminate or defray the fee claims.

The buffalo-style movement of this case to this Court has thwarted Ms. Linth's ability to defend herself. From this vantage point, it would appear that the motion to enforce and subsequent immediate appeal to this court was purposeful. By summarily presenting the matter according to his own narrative, before Judge Rohrer and now here, Olson avoids the inconvenience of the hearing or trial contemplated in Judge Rohrer's order, along with the accoutrements of discovery, cross examination and the like. The same may be said for the apparent forbearance of Mr. Olson in *not* seeking a CR 54 ruling from Judge Rohrer; the writing was on the wall and it was preferable to simply file the notice of appeal and see what might happen. His chances of getting a CR 54 ruling were decidedly poor. Thus, presumably, here we are in the Court of Appeals. Mr. Olson has filed the matter with this court in the hope that he can buffalo not only Ms. Linth, but also the trial court, with some overriding decision from this Court, such that Ms. Linth will be denied due process.

Yet that is expressly and specifically what Judge Rohrer decided. Now, instead of using resources toward that end, which Ms. Linth is entitled

to do, she must dedicate those same scant resources to this, because despite five or six judges telling Mr. Olson that his lien theory is wrong, he refuses to accept those judgments. The question here is whether there may be some other reason for that obstinance. It turns out that perhaps Ms. Linth may have a defense -- or two or three -- to much of this fee claim that eclipses all others.

Statute of limitations. This was raised by Ms. Linth in her briefing below and in her answer. Mr. Olson has provided no response. This appeal has prevented her from presenting it to the trial court.

Mr. Olson filed his complaint in October of 2012. According to his own pleadings including multiple declarations, his work on the case all but stopped in October of 2005, when the order adopting the settlement agreement was entered. Prior to that time, he had last received payment from Ms. Linth, by his sworn statements, in June of 2002.

The statute of limitations for Olson's claims such as these is six years. RCW 4.16.040(2); Tingey v. Haisch, 159 Wn.2d 652, 152 P.3d 1020 (2007)(balance owed by client to attorney for legal services performed on behalf of client on hourly fee basis without written fee agreement). By his own admission -- for better or worse -- he knew, realized and appreciated that he was not being paid beginning in June of 2002. His cause of action began to accrue then beginning an operative limitation period of six years hence.

This pattern repeated with each succeeding invoice, i.e. a discrete six years. Similarly, by filing in October of 2012, he could reach back only to October of 2006. Some \$10-15,000 in fees accrued after that time. The existence of the lien, along with its filing, does not toll the statute; the limitation period stops running only when a complaint is filed or a summons is served. U.S. Oil & Refining Co. v. Dep't Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981). There is no tolling agreement between Olson and Linth. Thus, the notion that Mr. Olson has presented to this Court and to the trial court, of being owed some \$300,000 with costs and interest, is dubious.

Statute of frauds. Notwithstanding Olson's summary statements about the existence of an oral contract, the statute of frauds may well come into play. According to Mr. Olson, this contract extended over 7-8 years. He acknowledges that it was oral, and never based on any writing signed by Ms. Linth. Presumptively the agreement, even if accurate verbally, is not enforceable, especially where Ms. Linth had not made any payments for such a length of time.

Existence of a contract. Mr. Olson has pronounced that a contract existed. Yet payment, which is apparently an integral part of that arrangement, did not occur for the ensuing three to four years, despite the invoicing. Similarly, it appears that there was considerable disconnect between the work being performed by Olson and the objectives of Ms. Linth.

Mr. Olson somehow transitioned into a broker of sorts, to the dismay of Ms. Linth, after the failed mediation. If the work performed after the mediation was not in pursuit of the client directed objectives, then the lien claim would be undercut substantially, if not completely. In such case, the entire rationale for claiming entitlement to a lien “over the action” itself would disappear. The lien assertion in such case illegitimate. There are thus genuine issues about contract formation and termination and potentially, breach of any contract that existed, and the related breadth of the claimed lien.

Amount and reasonableness of fees. Similarly, if in fact some form of contract existed, then in such case the amount of the lien is in issue. Attorney Craig Ritchie filed a declaration attesting that the Olson fee claim was unreasonable, which was allowed by Judge Rohrer over Mr. Olson’s objection. A trier of fact could conclude that the amount of the claimed fees ought to be reduced or eliminated for that reason alone. Again, to the extent the lien is built upon the fee, it would be diminished.

Fiduciary duty of Trustee to Green Point Foundation. As with the settlement agreement, Mr. Olson’s briefing continues to disregard the Green Point Foundation. Yet it exists and is making its claim, as a named beneficiary of the First Amendment to the Trust. It is critical that it was completely excluded from the settlement agreements and negotiations – primarily by Mr. Olson -- despite admonitions from learned counsel at the

time that it needed to be formed and included in the resolution. Equally important, the premise of the entire settlement agreement was that the Green Point property would be sold to create a cash fund to pay all the parties in the agreement. Ironically, the First Amendment said that the Foundation was to receive the property. Arguably it was defrauded by the entire process. In any case, it now exists and takes the position that the First Amendment gives it the right to the property, and has so advised the Trustee. The Foundation, without question, is a Trust beneficiary, directly, and not through some derivative legal formula such as that advanced by Mr. Olson. Accordingly, the Trustee as fiduciary is duty bound to reconcile, in some way, this very real problem. Selling the property to satisfy Mr. Olson fee claims, perhaps substantially less than what is claimed, seems to be a poor choice indeed.

4. Enforcement of the settlement agreement to pay these fees would betray the intent of Mrs. Plant.

Beyond the arguments set forth above, any sale of the Green Point property, especially some forced sale, would now be illogical for several reasons. The overall purpose of the settlement agreement was to achieve a fair reconciliation of all the competing interests in the property through the trust, except the Green Point Foundation. With one exception, the interests of all but one of those parties covered by the agreement have been completely legally resolved, either with cash settlements, or by operation of

law through the order extinguishing their rights under the agreement and trust. A resolution with the last is believed to be forthcoming.

The Green Point Foundation was purposefully excluded from the settlement procedure by some tacit agreement or process, the precise nature of which may never quite be understood. Regardless, it now exists to make its claim to the property under the First Amendment. According to the intent of Mrs. Plant, it should receive the property. The idea now that the property would be sold to satisfy the Olson claims is nearly perverse, especially coupled with what appear to be the significant legal problems associated with the Olson claim, as explained above. If dismissal and collateral estoppel are not ordered here, a better course of action would be to remand to matter to the trial court to address the significant lingering legal issues that should be addressed. After those questions are resolved then the notion of selling the property to pay such fees might be more properly addressed through something other than the proposed sale. For example, should Mr. Olson's fee claim be reduced to the post 2006 amounts of \$10-15,000 by the statute of limitations, a more immediate payoff might be possible.

5. The Court should consider sanctions or fees.

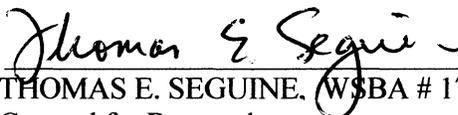
Ms. Linth and now the Trust have been forced to relitigate the issue of whether Mr. Olson can take over the trust at least five times. In each case Mr. Olson has lost. All have been for essentially the same or similar reasons

because each was a response to the same arguments. Now in this setting he is arguably engaged in litigation with Ms. Linth from which he suffers from an unwaivable conflict of interest. He has been told as much in not so many words from at least one judicial officer, Judge Verser. In this proceeding, specifically, it appears he has bootstrapped his way into the Court of Appeals, improperly, and much to his former client's disadvantage and without even attempting to secure a written waiver from her. The clear purpose of this tactic has been to foreclose Ms. Linth from a forum where she might be able to fairly litigate what may well turn out to be specious claims by Mr. Olson. Ms. Linth, as individual and trustee, therefore asks this court to consider an award of fees and costs to her and to the trust from Mr. Olson, the details of which would be submitted following appropriate order from the court, either as terms or sanctions or as prevailing party.

VI. CONCLUSION

The court correctly denied Appellant's motion to enforce the lien below. This matter should be dismissed with remand to the trial court with appropriate instructions on the issues set forth in this briefing.

DATED this 25th day of June, 2015.

By: 
THOMAS E. SEGUINE, WSBA # 17507
Counsel for Respondent

DECLARATION OF DELIVERY

I, Thomas E. Seguire, declare as follows:

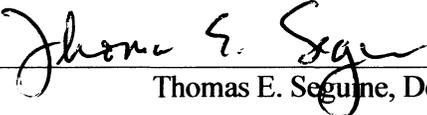
I sent for delivery by; [X] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to:

William Olson, Esq.
1200 Norton Building
801 Second Ave.
Seattle WA 98104

Court Administrator/Clerk
Washington Court of Appeals, Division Two
950 Broadway, Suite 300
Tacoma WA 98402-4454

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Mount Vernon, Washington this 15th day of June, 2015.



Thomas E. Seguire, Declarant

FILED
COURT OF APPEALS
DIVISION II
2015 JUN 16 PM 1:00
STATE OF WASHINGTON
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APPENDIX

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B - Motion to Modify Comm. Ruling - Oct. 10, 2014	11
C - Panel Order Denying Mtn Modify - Nov. 24, 2014	24

Ex. A
Verser Opinion
July 27, 2010

RECEIVED

AUG 04 2010
GREENWAY GUY & TULLOCH
ATTORNEYS AT LAW

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

THE EVELYN M. PLANT TRUST AND ESTATE
JENNIFER M. LINTH and CAROLYN LINTH,

Petitioners,

vs.

CRISTA MINISTRIES, a Washington non
profit corporation; STATE OF
WASHINGTON, NORTH OLYMPIC LAND TRUST,
et al.

Interested Parties.

Case No.: 08-2-00095-1

MEMORANDUM OPINION AND ORDER

This matter came on for hearing on May 7, 2010 to consider the issues raised by Petitioner Jennifer M. Linth's motion to vacate the court's order approving a Nonjudicial Dispute Resolution Agreement (NDRA hereinafter). Ms. Linth was represented by attorney Steven C. Gish. Crista Ministries appeared represented by attorney Todd A. Buskirk, of Buskirk Law, PLLC. North Olympic Land Trust appeared through its attorney, Gary R. Colley of the Platt Irwin Law Firm. The State of Washington filed a response to the motion, through attorney General Robert M. McKenna, Deputy Solicitor General, Jeffrey T. Even, and took no position regarding the pending motion to vacate the Order approving the NDRA.

In addition to the motion to vacate, the law firm of Aiken, St. Louis & Siljey, P.S., filed a response to the motion to vacate, moved to intervene as an interested party, and appeared through attorney William A. Olson.

CRANDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

MEMORANDUM OPINION AND ORDER - 1

1 The court considered the complete file in this matter including but
2 not limited to the declarations of Jonathan Podge, the declaration of Chuck
3 Bason, the declaration of Gary Colley with attachments, the declaration of
4 Jennifer Lintch with all attachments thereto, the declaration of Bret Keahn
5 with attachments thereto, the original and supplemental declaration of Craig
6 L. Miller, the responsive declaration of Jenny Lintch with attachments, the
7 declaration of William A. Olson with attachments, and the supplemental
8 declaration of William A. Olson, with attachments. The court also
9 considered the memoranda provided by counsel with attachments and the
10 responses.
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FACTS

Evelyn Plant passed away in January, 2001. She had substantial assets
 and many beneficiaries as the number of parties to this litigation
 demonstrates. Jennifer Lintch and her mother Carolyn Lintch were caretakers
 and friends of Ms. Plant for years prior to her death. Ms. Plant and
 Jennifer and Carolyn Lintch lived on an approximate 55 acre parcel of
 property east of Fort Angeles known as Green Point. There is no doubt that
 Ms. Plant intended to have Jennifer and Carolyn Lintch live on that property
 for their lifetimes and that she wanted the property to be preserved as an
 environmental classroom for students of all ages and attempted to accomplish
 those goals through a foundation known as the Green Point Foundation and
 through the Evelyn Plant Trust and the First Amendment to that trust.

Unfortunately after her death the situation was not as clear as she no
 doubt believed it to be. As is often the case litigation commenced to
 determine what would happen to Ms. Plant's property. For approximately four
 years the various parties claiming some interest in Ms. Plant's property
 litigated and negotiated. Jennifer Lintch and her mother Carolyn were
 represented by William Olson and the law firm of Aiken, St. Louis & Slijeg,
 P.S. That law firm, primarily through Mr. Olson, devoted significant time
 to the representation and claims to be owed in excess of \$300,000 for its
 efforts on behalf of the lintchs. The firm has filed an attorney's lien on
 the proceeds of the sale of Green Point which would be inherited by the
 lintchs. Thus the law firm claims to be an interested party in the current
 motion as it wants to insure that the Green Point property is sold, so the
 firm can eventually be paid from the share of the proceeds to be disbursed
 to the lintchs.

Christa Ministries also claimed a share of Ms. Plant's assets.
 Although it was clear that Ms. Plant did not want that particular
 organization to inherit, because of the possibility that the First Amendment
 to the Trust would be invalid, that organization joined in the dispute. If
 the First Amendment to the Trust was invalid, Christa Ministries stood to
 obtain Green Point. As a result of the MD&A Christa Ministries will receive
 \$160,000 when and if the Green Point property is sold.

CRADDOCK D. VERRER

JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

MEMORANDUM OPINION AND ORDER - 2

1 North Olympic Land Trust, another party named as a beneficiary in
2 Ms. Plant's will, asserted its interest in the Green Point property as that
3 of a conservation organization interested in establishing a conservation
4 easement over the property to insure preservation of its natural features
5 and to limit development as a natural area. As a result of the MNA the
6 Land Trust purchased a conservation easement over a large portion of the
7 Green Point property, paying the Evelyn Plant Trust over \$200,000 to
8 establish that conservation easement. The North Olympic Land Trust
9 conservation easement was paid for through the State of Washington Salmon
10 Recovery Funding Board and the conservation easement was assigned to the
11 State.
12

13 There were a number of other organizations and parties who claimed
14 cash interests in the estate property who have been paid off as a result of
15 the MNA or the sale of other assets and are no longer interested in this
16 litigation.
17

18 Ms. Plant also bequeathed property to her relatives Richard Porter and
19 his two children. In April, 2001 \$300,000 was placed in trust to fulfill the
20 bequest to the Porters. They were not concerned with the litigation
21 concerning the Green Point property which was the subject of the first
22 amendment to the Evelyn Plant Trust, which gave rise to this litigation and
23 the MNA.
24

25 After mediation in 2002, the parties, primarily Christa Ministries and
26 the Kinbas, continued negotiations. On December 23, 2004, Jennifer Kinch
27 signed the MNA. On April 14, 2005, before the court considered approving
28 the MNA Jennifer and Carolyn Kinch signed a "statement" which they wanted
29 considered as "an integral part of our signatures to the Non-Judicial
30 Dispute Resolution Agreement." [See attachment to declaration of Bret Keenan
31 - Notary]. In that statement Jennifer and Carolyn Kinch summarize their
32 feelings about the process leading to the MNA as a "disappointing, brutal
33 ordeal" which "represents a failure of our legal system." They
34 acknowledge that they signed the MNA as they "have a conscience and - need
35 and deserve peace of mind and want to get back to a sense of normalcy in our
36 daily lives."
37

38 There is no question in the court's mind that Jennifer and Carolyn
39 Kinch became involved in this "disheartening" process for the sole purpose
40 of exerting their best efforts to carry out the wishes of Evelyn Plant, and
41 not for their own benefit. Jennifer Kinch, in the words of her former
42 attorney is a "very fine, moral and spiritual person."
43

44 The matter was presented to the Superior Court for approval in May,
45 2005. North Olympic Land Trust moved to intervene and objected to the focus
46 of the conservation easement. The court issued its memorandum opinion on
47 June 15, 2005 permitting intervention, thus delaying the approval of the
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CRANDOCK D. VERGIER

JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

MEMORANDUM OPINION AND ORDER - 3

1 sale of Green Point she would purchase the "carve out" for her and her
2 mother's home.

3
4 Ms. Kinch asserts that all parties believed she would be able to
5 build her residence on the "carve out", but that as she cannot do so the
6 NMA is void and the court should vacate its order approving that
7 settlement. In support of her position that this plan is impossible to
8 perform, that there has been a mutual mistake, and that there is a failure
9 of consideration or frustration of purpose she provides the declarations of
10 a well respected attorney in land use areas, Craig Miller. The court knows
11 Mr. Miller having presided in several cases involving land use issues with
12 Mr. Miller as one of the attorneys. The court certainly respects his
13 expertise and his opinion in this area of the law. His final opinion is
14 that development may or may not be possible, and that it may or may not be
15 "expensive and time consuming" to obtain the necessary county approval for a
16 residence on the carve out property. Also he notes that there may have to
17 be some "reconfiguration" to address the Clallam County Shoreline Master
18 Program requirements. [Supplemental declaration of Craig L. Miller, p. 3].
19 Additionally Ms. Kinch provides the declaration of realtor Chuck Hagen who
20 has his doubts as to the possibility of selling Green Point subject to the
21 carve and a driveway assessment at the current four million dollar listing
22 price. While Mr. Hagen has his doubts that he can sell the property
23 subject to the driveway assessment and the carve out he does not discuss the
24 possibility of sale for less than the current four million dollar asking
25 price.
26

27 "A mistake is a belief not in accord with the facts." Chemical Bank
28 v. NPGSS, 102 Wa. 2d 874, 899, 691 P.2d 524 (1984). In determining whether
29 the "mistake" in this case has a material effect on the NMA such that the
30 NMA is void, the court must consider the possibility of reformation of the
31 agreement to determine if a residence can be built on the carve out when
32 Ms. Kinch actually purchases the carve out. Pageco v. Dept. of Social and
33 Health Services, 40 Wa. App. 40, 50-51, 185 P.3d 648 (2006). It may be that
34 there will have to be a reconfiguration of the property as suggested by
35 Mr. Miller. It may be that there will have to be a septic assessment granted.
36 It may be that the NMA will have to be reformed to provide for payment of
37 the expenses necessary to effectuate the permitting of a residence. It
38 may be impossible to build the residence. It may be that the property
39 cannot be sold at any price. However to declare the NMA void as suggested
40 by Ms. Kinch at this time when there is no clear and convincing evidence
41 that Ms. Kinch cannot build on the property, that the NMA cannot be
42 reformed to meet the possible contingencies suggested by Mr. Miller's
43 declarations, or that the property cannot be sold at a reduced price, would
44 be premature. Settlement agreements such as this NMA are viewed by the
45 courts with finality and such resolutions of disputes are highly favored by
46 the courts. Cregon Mutual Insurance Co. v. Barton, 109 Wa. App. 405, 414,
47 36 P.3d 1065 (2001). They are not to be set aside without the "clear,"
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CRADDOCK D. VERBER

JUDGE

Jefferson County Superior Court
P.O. Box 1220

Port Townsend, WA 98368

MEMORANDUM OPINION AND ORDER - 5

1 cogent and convincing evidence that the mistake was independently made by
2 both parties". Chemical Bank v. WPPSS, supra., at 102 Wa.2d 898.

3
4 For the foregoing reasons the court cannot, at this time, find that
5 the NDRA is void for mutual mistake, failure of consideration, frustration
6 of purpose, or impossibility of performance.

7
8 Failure to Include the Porters as parties to the Agreement

9
10 The Porters were not granted an interest in Green Point by the Trust
11 or Ms. Plant's will. They did inherit approximately \$300,000 which they
12 received from other assets of the estate. They were not indispensable
13 parties to the NDRA.

14
15 Duress, Coercion, Lack of Free Will

16
17 Ms. Linth makes a compelling argument that because the NDRA did not
18 reflect Ms. Plant's desires the court should "do the right thing" and vacate
19 the Order approving the NDRA. After a review of all of the material
20 submitted, it is extremely tempting for the court to vacate the order and
21 let the litigation, negotiation and controversy begin again. However, to do
22 so would require the court to ignore the facts and the law.

23
24 Ms. Linth had the agreement for three days, considered it with her
25 pastor and friends, and executed the agreement on December 23, 2004. The
26 agreement was not offered for court approval until May, 2005. On April 14,
27 2005, the Linths signed their addendum to the agreement which recognized
28 that the agreement did not reflect Ms. Plant's desires, that the law was
29 frustrating (to say the least), and that the ongoing litigation since 2001
30 had taken a toll on their spirits and their lives. The court can understand
31 that such litigation always is frustrating and seemingly unjust particularly
32 to innocent parties attempting to "do the right thing". However the fact
33 that Ms. Linth was frustrated with the process and exasperated by what she
34 viewed as manipulative deceit does not make her signature involuntarily
35 coerced. Ms. Linth had from December, 2004 until October, 2005 to object to
36 the court approval of the NDRA. The court can understand and does
37 appreciate her current expressions of dismay as the NDRA is contrary to
38 Ms. Plant's wishes. However the court must follow the law, and the court
39 cannot find that Ms. Linth was coerced or induced by fraud to make the
40 agreement, or that her execution of the agreement was not voluntary. To the
41 contrary the statement signed by the Linths in April, 2005, shows the Linths
42 entered into the agreement to terminate the litigation which had a
43 tremendously adverse impact on their lives, and which could have resulted in
44 an outcome which would have been even more adverse to Ms. Plant's wishes
45 than the NDRA provided. At least with the NDRA the Linths have the
46 opportunity to continue to reside on the property, (presumably) and most of

47
48
49 CRADDOCK D. VERBER
50 JUDGE

Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

1 the property is protected by the North Olympic Land Trust conservation
2 easement. So that Ms. Plant would have approved of these two outcomes.

3
4 ORDER

5
6 For the foregoing reasons, the Motion to Vacate the Order approving
7 the Non-judicial Dispute Resolution Agreement is DENIED.

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9 Dated this 27th day of July, 2010.

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Chadwick D. Verser, Judge

CHADWICK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1320
Port Townsend, WA 98368

1 MRA. The settlement was eventually approved by Order dated October 13,
2 2005. [CP 194, 195]. This is the Order Ms. Kinch wishes to vacate.

3
4 ISSUES AND ANALYSIS

5
6 Issue No. 1: Should Ms. Kinch's former law firm be allowed to intervene?
7

8 Alken, St. Louis & Biljeg, P.S. wishes to intervene as the firm
9 believes the Kinchs owe it more than \$300,000 in legal fees. The Kinchs do
10 not have \$300,000 and thus the firm will not be paid unless and until the
11 Kinchs receive their portion of the proceeds of the sale of Green Point.
12

13 CR 24, Although broad, does not provide a basis to allow a law firm
14 that is owed money from former clients to intervene as a party to a lawsuit
15 involving those clients. The law firm is free to exercise its collection
16 remedies, however becoming a party, particularly a party adverse to the
17 former client's wishes, in the very lawsuit in which the fees were incurred
18 is not one of those remedies.
19

20 The motion of Alken, St. Louis & Biljeg, P.S. to intervene is DENIED.
21 The court will not consider the fact that the law firm wants to be paid from
22 the Kinch's share of the proceeds from the possible sale of Green Point in
23 determining if the MRA should be vacated.
24

25 Issue No. 2: Can the court vacate the order approving the MRA for any of
26 the reasons set forth by Ms. Kinch?
27

28 Ms. Kinch argues several reasons in support of her motion to vacate
29 the order, and the court will attempt to address each of them.
30

31 CR 60(b) (4) and (11)

32
33 CR 60(b) (4) authorizes vacation of an order entered due to fraud.
34 Ms. Kinch does not and cannot show the nine elements of fraud in the entry
35 of the order approving the MRA.
36

37 CR 60(b) (11) authorizes vacation of an order for "any other reason
38 justifying relief" from the order. Here Ms. Kinch argues several theories
39 to justify relief:
40

41 Mutual Mistake, Failure of Consideration, Impossibility of Performance
42

43 Ms. Kinch correctly points out that the consideration to her in the
44 MRA is the ability for her to exercise an option to purchase the 2.8 acres
45 "carved out" of the original 55 acres of Green Point. She did give notice
46 of her intent to exercise that option giving timely notice that upon the
47

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49 GRADDOCK D. VESSER
50 JUDGE

Jefferson County Superior Court
P.O. Box 1230
Port Townsend, WA 98368

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

THE EVELYN M. PLANT TRUST AND ESTATE,
JENNIFER M. LINTH and CAROLYN LINTH,

Case No.: 08-2-00895-2

Petitioners,

ORDER DENYING MOTION FOR
RECONSIDERATION

vs.

CRISTA MINISTRIES, a Washington non
profit corporation; STATE OF
WASHINGTON, NORTH OLYMPIC LAND TRUST,
et: al.

Interested Parties.

Ms. Linth urges the court to reconsider its opinion which denied her
motion to vacate the order approving the NEPA in this case.

After careful consideration of the arguments raised by Ms. Linth in
her motion for reconsideration, and after review of the July 30, 2010
Memorandum Opinion and Order, the court must deny the motion for the reasons
given in the July 30, 2010 memorandum opinion and order.

Ms. Linth's Motion for Reconsideration is DENIED.

Dated this 14th day of September, 2010.


CRADDOCK D. VERSER, JUDGE

CRADDOCK D. VERSER
JUDGE
Jefferson County Superior Court
P.O. Box 1220
Port Townsend, WA 98368

ORDER - 1

Ex. B
Appellant's Motion to Modify
Commissioner's Ruling

CASE NO. 41285-3-II

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

JENNIFER LINTH, et AL.,

Appellant,

vs.

EVELYN PLANT TRUST & ESTATE,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR CLALLAM COUNTY
CAUSE NO. 08-2-00095-1

MOTION TO MODIFY RULING

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

By: WILLIAM A. OLSON
1200 Norton Building
801 Second Avenue
Seattle, WA 98104
(206) 624-2650

I. IDENTITY OF MOVING PARTY

Aiken, St. Louis & Silieg, P.S., (the "Aiken Firm") asks for relief designated in Part 2. This motion is made pursuant to the procedure set forth in RAP 17.7.

II. STATEMENT OF RELIEF SOUGHT

Modify ruling of the Commissioner filed on September 24, 2014 (copy attached). The ruling denied the Aiken Firm's motion for joinder as a necessary party to the appeal. The ruling also denied the Aiken Firm's motion to dismiss the appeal and to lift the August 15, 2014 stay on the enforcement of the Nonjudicial Dispute Resolution Agreement ("NJDRA") approved and entered by the Superior Court. This Court should authorize the joinder, dismiss the appeal and lift the stay to allow proceedings in the lower court to move forward. If joinder is allowed, but the appeal not dismissed, then the Aiken Firm requests leave to file a brief in opposition to this appeal on December 22, 2014 when the respondent's brief is due.

III. FACTS RELEVANT TO THE MOTION

The facts are set forth in Part III of the original motion to the Commissioner. Evelyn Plant died in 2001. She left a trust instrument that she sought to amend months before her death. The amendment was incomplete at the time of her death.

The incomplete trust amendment caused controversy among the several potential beneficiaries. After 4 years of effort, the parties settled their differences and entered into a NJDRA that was court-approved in October 2005 pursuant to TEDRA procedures. The NJDRA provides for sale of the real estate (known as the "Green Point Property") and distribution of the sale proceeds to the various beneficiaries in satisfaction of their claims. Each party was responsible for their own legal fees and costs from their respective distributions.

The Aiken Firm represented Jennifer Linth and Carolyn Linth (daughter and mother respectively). Carolyn Linth is now deceased. The Linths were the major beneficiaries of the NJDRA. The Linths retained two other Seattle law firms to work with the Aiken Firm on the resolution of the dispute. These two firms were Tousley Brains Stephens PLLC and Riddell Williams P.S.

Pursuant to the October 2005 NJDRA, the initial Trustee Dan Doran (now deceased) resigned and was replaced by Glen Smith who is Jennifer Linth's brother-in-law. Mr. Smith's responsibility as Successor Trustee was to perform the NJDRA, sell the Green Point Property and make the required distributions. In 2007, Mr. Smith sold a conservation easement on the property for \$200,000 and had a pending sale on the greater Green Point Property for \$3.7 million. Because of this pending sale, the Aiken Firm, Tousley Brain Stephens and Riddell Williams all gave written notice to Mr. Smith (with approval from Ms. Linth) of their lien holder interests on sale proceeds distributable to Ms. Linth. See

Exhibits 1 & 2 to Supplemental Declaration of William A. Olson
(submitted in reply to the original motion).

Jennifer Linth objected to Mr. Smith's proposed sale that was on the table in 2007. The sale ultimately fell through. Mr. Smith resigned in frustration. Ms. Linth had herself appointed as Second Successor Trustee. Between 2007 and 2009, she was reporting to the beneficiaries that she was making all efforts to sell the property to other potential buyers but presented no offers.

Inexplicably, 4 years after court-approval of the settlement and after substantial part performance, Ms. Linth filed a motion in the fall of 2009 to vacate the NJDRA. She withdrew the motion in 2009 only to refile it about a year later in 2010. The Aiken Firm moved to intervene in support of the NJDRA. In 2010, the Clallam County Superior Court upheld the NJDRA, denied Ms. Linth's motion to vacate and denied the Aiken Firm's motion to intervene.

Ms. Linth filed the present appeal from the denial of her motion to vacate in 2010. This appeal has been pending for about 4 years. In August 2012, Ms. Linth voluntarily waived and extinguished her interest in the NJDRA (personally and on behalf of the Estate of Carolyn Linth). See Exhibit 2 & 3 to Declaration of William A. Olson (submitted in support of original motion). Her waiver was entered as an Order of the Clallam County Superior Court supported by her declaration. *Id.* This event was never reported by Ms. Linth to the Court of Appeals in connection with this appeal.

The only remaining parties, interested in the performance of the NJDRA, are the law firm lien holders identified above and the Christian Broadcasting Network (CBN) -- an original beneficiary under the disputed trust instrument. All other parties have received distributions in satisfaction of their claims or waived any further interest.

The Aiken Firm has filed an action in Clallam County Superior Court, under Cause No. 12-2-00972-7 to enforce its lien rights. Exhibit 1 to Declaration of William A. Olson. The Aiken Firm seeks an order compelling sale of the property, distribution of sale proceeds, and appointment of a new trustee who will perform the NJDRA. In response to the Aiken Firm's Superior Court lien enforcement action, on July 31, 2014, Ms. Linth filed a motion in the Court of Appeals, under this case number, seeking a stay of the enforcement of the NJDRA pending resolution of this appeal.

On August 15, 2014, Commissioner Schmidt granted Ms. Linth's motion for a stay (by notation ruling) because it was unopposed. The Commissioner was not advised that the purpose of the motion was to place a procedural bar on the lien enforcement action. See the Linth Motion for Stay in Trial Court dated July 31, 2014. Immediately after receipt of the stay ruling, Ms. Linth's counsel emailed a copy of the stay ruling to the Aiken Firm and the Clallam County Superior Court judge presiding over the lien enforcement action.

The Aiken Firm promptly moved to join this appeal as a necessary party, dismiss the appeal as moot (because there are no interested or

affected parties who support the appeal) and a lifting of the stay. Commissioner Schmidt denied the motion on September 24, 2014. The Aiken Firm seeks modification of that ruling pursuant to this motion.

IV. GROUNDS FOR RELIEF AND ARGUMENT

(a) *Joinder/Intervention.* Pursuant to RAP 3.1, a party must be “aggrieved” to seek appellate review. *Ferguson Firm v. Teller & Associates*, 178 Wn. App. 622, 629, 316 P.3d 509 (2013). The Commissioner’s August 15, 2014 notation ruling granting a stay on enforcement of the NJDRA makes the Aiken Firm an “aggrieved party.” It restricts the Aiken Firm’s ability to prosecute its lien enforcement action in the Superior Court. “An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected.” *Ferguson Firm v. Teller & Associates*, *supra* 178 Wn. App. at 629. A person who is not formally a party to the case has standing when an order is entered that makes them an aggrieved party. *Id.* Here, the August 15, 2014 letter ruling does substantially affect the Aiken Firm’s lien rights. The Aiken Firm should be joined as a party and given opportunity to protect those rights.

Further, if the appellant here prevails, then the Aiken Firm would lose its lien on the proceeds distributable from the settlement of the action for the amount owed to it. The similar circumstance was present in *Brewster Cooperative Growers v. American Fruit Growers, Inc., et al.*, 19 Wn.2d 131, 132-33, 141 P.2d 871 (1943). The facts in *Brewster* were that

If the appellants were to prevail upon the appeal, the intervener would lose its interest in the judgment for the amount owed to it on its mortgages and the security of the mortgages would thereby be lost, since they covered the fruit involved in the action.” *Id.* In that circumstance, the Washington Supreme Court, in *Brewster*, stated “that the intervenor has an appealable interest in the action cannot be doubted.” “. . . [I]f the party to the action, who was not given notice of appeal, could be affected by the decision rendered in the appeal, such party to the action is a necessary party to the appeal and must be served with notice thereof.” *Id.*

The same conclusion applies here. Procedurally, *CR 21* “allows the court to add any party ‘at any stage of the action and on such terms as are just. This authority may also be exercised on appeal.” *State v. Law*, 39 Wn. App. 173, 176 n.2, 692 P.2d 863 (1984). The Aiken Firm has an interest sufficient to be joined as a necessary party, pursuant to *Brewster*, and is an “aggrieved party”, as defined in *Ferguson*, following the Commissioner’s August 15, 2014 notation ruling staying enforcement of the NJDRA (which operated to stay the Aiken Firm’s lien enforcement action).

The Commissioner’s notation ruling denying joinder cites no authority in support of the ruling. The stated reason for denying joinder is that the Aiken Firm “did not timely seek review of the trial court’s 2010 order denying its motion to intervene [in the superior court proceeding].” The Aiken Firm had no reason nor any right to pursue any appeal in 2010.

The Aiken Firm sought to intervene in Superior Court in 2010 to present support for the NJDRA in opposition to the motion to vacate. The Superior Court upheld the NJDRA (prompting Ms. Linth to appeal). The Aiken Firm was not an “aggrieved party” in 2010 because the relief it sought was granted. Ms. Linth apparently had an interest in appealing what she regarded as an adverse decision, but not the Aiken Firm.

In denying intervention, the Superior Court stated the Aiken Firm was free to pursue its claim for compensation in a separate action. Memorandum Opinion at 4, line 15 (attached to Declaration of Jennifer Linth). The Aiken Firm intended to do that in the future if it became necessary. However, at that time, it was not seeking to intervene to pursue a collection action; rather, it was seeking to intervene to protect the NJDRA that years of effort and major expense had gone into achieving.

There was no appeal as a matter of right under RAP 2.2(a)(3) because the decision did not effectively discontinue or determine a substantial right of the Aiken Firm. The Aiken Firm’s interest in the validity of the NJDRA was unaffected (because it was ruled valid) and the Aiken Firm’s interest in compensation was protected by the right to enforce its lien in a separate action if necessary. There was no grounds for an appeal as a matter of right nor any basis for discretionary review under RAP 2.3(b). There is no known procedural bar or preclusion principle that bars this motion in connection with the current developments.

(b) Dismissal of the Appeal. Ms. Linth is appealing the Clallam County Superior Court’s 2010 order and decision upholding the

NJDRA and denying her motion to vacate. In August 2012, she waived and extinguished all of her rights under the NJDRA. Exhibits 2 & 3 to William A. Olson Declaration. This event rendered the appeal moot and subject to dismissal on motion of a party pursuant to RAP 18.9(c).

Her appeal is moot because she has no remaining interest in the NJDRA whether it is valid or not. “Individuals who have elected to opt out of a settlement are not parties and have no standing to appeal.” *Aguirre v. AT&T Wireless*, 109 Wn. App. 80, 85, 33 P.2d 1110 (2001). Furthermore, as stated above, an appellant must be an “aggrieved party.” Ms. Linth has no proprietary, personal or pecuniary interest whatsoever in the NJDRA; she is not “aggrieved” by any decision of the lower court related to the NJDRA and she lacks standing to continue with the appeal.

The Commissioner’s notation ruling dated September 24, 2014, states that she has standing “as trustee.” The ruling cites no authority. The logic behind this conclusion is not easily apparent. As trustee, Ms. Linth acts in a representative capacity on behalf of the beneficiaries. Her responsibility is to act in support of the NJDRA on behalf of its beneficiaries and the other interested parties who have given the Trustee notice of their rights in the agreement.

The remaining parties interested in the performance of the NJDRA are the Christian Broadcasting Network and the 3 lien holders (the Aiken Firm, the Tousley Brain Firm and the Riddell Williams Firm). Each has a proprietary or pecuniary interest in the performance of the NJDRA. Ms.

Linth's duty is to perform the NJDRA in furtherance of their interests. She does not have standing to pursue an appeal contrary to the interests of those she serves. Furthermore, she has no standing simply by holding the office of trustee. *Estate of Wood*, 88 Wn. App. 973, 947 P.2d 782 (1997). A trustee or an administrator lacks standing to appeal "[w]hen the administrator has no interest in the probate action other than being the administrator," *Id.* at 976.

The Trustee's duty is to defend the trust against challenge not to challenge it. A trustee may have standing to appeal to defend the trust but not to attack it. See *In re Estate of Bernard*, ___ Wn. App. ___, 332 P.3d 480, 498-500 (2014). The trustee's duty to appeal "is to protect the interest of those whom he represents." *Id.* In this case, Ms. Linth does not have standing to pursue an appeal in violation of her fiduciary duty to support the NJDRA.

(c) Lifting the Stay. If the appeal is dismissed, then the stay is automatically lifted. If the appeal is not dismissed, then the stay should be lifted to allow the lien enforcement action to proceed without further delay. The Superior Court, in the lien enforcement action, has ordered Ms. Linth to provide an accounting of her actions as Trustee since 2009.

She is using the stay ruling to avoid producing that accounting. Following court-approval of the NJDRA in October 2005, a portion of the Green Point Property was sold as a conservation easement for \$200,000.00. There has been no accounting as to the use of these sale proceeds that should be available, in whole or in part, to satisfy lien

claims. Ms. Linth also has not disclosed the source of funds to pay the legal expense for this appeal and for the superior court proceedings post-2009 that she has generated. She should not be using trust funds for this purpose. The stay should not be used as an instrument for withholding this accounting.

V. CONCLUSION

This appeal has been pending for too long without purpose or merit. Joinder should be allowed and the appeal dismissed so this matter can be resolved pursuant to the settlement agreement reached 9 years ago that took 4 years of intense work to finalize. This further effort is wasteful of judicial resources and the additional expense and delay is undeserving.

Dated this _____ day of October, 2014.

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

By _____
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Siljeg, P.S.



Washington State Court of Appeals
Division Two

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General Orders, Calendar Dates, and General Information at <http://www.courts.wa.gov/courts> OFFICE HOURS: 9-12, 1-4.

September 24, 2014

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CASE #: 41285-3-II

Evelyn Plant Trust & Estate, Respondent v. Jennifer Linth, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The Aiken Firm's motion for joinder as a necessary party to this appeal is denied. It did not timely seek review of the trial court's 2010 order denying its motion to intervene in this proceeding. Its motions to dismiss the appeal and lift the trial court stay are denied. Appellant has standing as the trustee. However, because the pendency of this appeal is affecting the Aiken Firm's lien enforcement action in the trial court, Appellant is hereby notified that no further stays of this appeal will be granted. It has been pending for almost four years.

Very truly yours,

David C. Ponzoha
Court Clerk

Ex. C
Div. II Panel Decision
Denying Motion to Modify

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

EVELYN PLANT TRUST &
ESTATE,

Respondent,

v.

JENNIFER LINTH,

Appellant.

No. 41285-3-II

ORDER DENYING MOTION TO MODIFY

AIKEN, ST. LOUIS & SILJEG filed a motion to modify a Commissioner's ruling dated September 24, 2014, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 24th day of November, 2014.

PANEL: Jj. Bjorgen, Lee, Sutton

FOR THE COURT:

FILED
COURT OF APPEALS
DIVISION II
2014 NOV 24 PM 1:55
STATE OF WASHINGTON
BY DEPUTY

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

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