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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON**

**In re Estate of Anne Marie Roe**

**William Roe, Respondent re Cross Appeal and  
Kathleen Roe Bennis-Appellant**

**v.**

**Gerald F. Roe,  
Personal Representative of the Estate of Anne Marie Roe-  
Respondent and Cross Appellant**

**APPELLANT COURT CASE 345459  
SPOKANE COUNTY CAUSE NUMBER 14-4-00134-9**

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**APPELLANT BRIEF  
KATHLEEN BENNIS**

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## INTRODUCTION

Anne Roe's Personal Representative discovered a writing indicating that Kathleen Bennis borrowed \$12,009 from her parents back in 1991. He also discovered two checks, with "loan" written in the memo section, transferring \$4,300 to Kathleen Bennis. He also found 41 checks with "loan" written in the memo section, transferring \$49,150 to William Roe. The Personal Representative attempted to offset those amounts from Kathleen Bennis' and William Roe's net distributive Estate shares.

Kathleen Bennis and William Roe objected to the offsets and filed a TEDRA case claiming that the Estate bore the burden to prove that the advances were loans and not gifts, and were still outstanding.

Judge Cooney issued a bench ruling that checks with "loan" in the memo section are insufficient to overcome the presumption of parental gifting, but ruled that the writing signed by Bennis was sufficient to establish that Kathleen Bennis borrowed \$12,009 from her parents in 1991.

When the Estate presented its version of the Order on Summary Judgment, Kathleen Bennis argued that the court had not yet decided whether her parents forgave the debt, tendering a

declaration from her son, Brian Bennis, stating that he overheard Theodore Roe and Anne Roe forgive the debt after Kathleen Bennis' husband died in 1992. Judge Cooney signed the Estate's Order Granting Summary judgment against Kathleen Bennis for \$12,009. When Kathleen Bennis filed a Motion to Reconsider, Judge Cooney reviewed the briefing and agreed that debt forgiveness was indeed an outstanding issue that he had not considered. The Estate appealed. The appeal was dismissed as premature. Judge Cooney then considered whether Kathleen Bennis' parents forgave the debt. Kathleen Bennis retendered the Declarations filed at the presentment hearing and the Inventory from her father's estate that did not inventory a debt owed by Kathleen Bennis and urged that the Stipulated Facts, even if considered alone, inferred debt forgiveness. Judge Cooney issued a letter ruling saying:

(1) Both parties stipulated to grant the court full authority to resolve the matter on stipulated facts including the debt forgiveness issue; and

(2) The stipulated facts contain two issues relevant to the debt forgiveness issue:

(a) the decedent's will signed 22 years after the loan was made that does not reference the loan;

(b) with the exception of the \$2,800 payment made by Ms. Bennis prior to February 22, 1991, there was no evidence of any payments being made;

(3) Given that the Statute of Limitations does not apply to the common law right of retainer, the court concludes that some type of affirmative act must be present for loan forgiveness to apply.

Judge Cooney dismissed the inference of debt forgiveness, arising from 24 years of account inactivity, because inactivity is not an affirmative act and ruled that will revision within six months of death raised no inference that the debt had been forgiven.

Judge Cooney is in error because:

(1) The Stipulated Facts were to be applied only to the issue whether monetary transfers were gifts or loans. Debt forgiveness was not identified as an applicable issue. The Stipulated Facts did not preclude the Declarations of Brian Bennis and Kathleen Bennis re Debt Forgiveness; nor judicial notice of the Inventory in the Theodore Roe Estate, ER 201.

(2) The new rule of law, that only affirmative acts can imply debt forgiveness, because the Statute of Limitations does not apply to the common law right of retainer,

(a) is at odds with the doctrine that courts presume parental gifting;

(b) unprecedented; and

(c) unnecessary to protect the common law right of retainer.

(3) Kathleen Bennis was entitled to all inferences from the facts presented before the court. The court thus erred in granting the Estate's Motion for Summary Judgment, even if the evidence is limited to the Stipulated Facts, because 24 years of account inactivity and a Will revision within six months of death infer debt forgiveness.

(4) The Declaration of Brian Bennis and the Inventory from the Theodore Roe Estate unmistakably show the the debt was forgiven, thus Bennis' Motion for Summary Judgment should have been granted.

Kathleen Bennis asks the court to order Gerald Roe or the Probate Estate to pay her fees and for an order adjusting the Hennessey fees to reflect the amount in controversy and the results achieved in accordance with RPC 1.5(a)(4).

#### **ASSIGNMENTS OF ERROR**

The Court properly reconsidered its Order Granting the Estate's Motion for Summary Judgment, agreeing to decide

whether Kathleen Bennis' parents forgave her debt. In addressing the debt forgiveness issue the court erred as follows:

**First Assignment of Error:** The court erred by limiting the facts to those contained within the "Stipulated Facts." The Stipulated Facts did not apply to the debt forgiveness issue. This error encompasses the court's failure to consider the Declaration of Brian Bennis and Kathleen Bennis re debt forgiveness, and the Inventory from the Theodore Roe Estate as evidence.

**Second Assignment of Error:** The court erred when it adopted a new rule of law: "Given that the Statute of Limitations does not apply to the common law right of retainer, the court concludes that some type of affirmative act must be present for loan forgiveness to apply." The rule is inconsistent with the presumption of parental gifting and is not needed to protect the retainer doctrine.

**Third Assignment of Error:** The Court erred when it granted the Estate's Motion for Summary Judgment and denied Bennis' Motion for Summary Judgment.

## STATEMENT OF CASE

On June 24, 2014, attorney Greg Decker appeared for Kathleen Bennis and William Roe, CP 9-10, and filed an Objection to an unfiled Inventory that proposed to offset advances to Kathleen Bennis and William Roe against their Estate shares, CP 11-12.

On July 1, 2014, Gerald Roe filed a Declaration of Completion with a second unfiled inventory that also proposed debt offset advances in a different amount. CP 13-15.

On July 29, 2014, Kathleen Bennis and William Roe filed a Petition for Accounting and for an Order re Declaration of Completion of Probate, CP 28-30.

On July 29, 2014, Kathleen Bennis and William Roe filed a Petition under The Trust and Estate Dispute Resolution Act to Determine Petitioner's Distributive Share of Decedent's Estate, CP 18-22. At ¶ IV Plaintiffs asked the court to determine whether any such alleged loans occurred and whether they were valid and owing. CP 21. The TEDRA case was consolidated with the probate case, CP 35-36.

On October 24, 2014, the court entered a scheduling order that required the parties to disclose witnesses, CP 39. On January

16, 2015 and on January 27, 2015, the parties exchanged witness lists, CP 45-48.

On May 21, 2015, the parties stipulated to an order to continue the trial due to illness and the court ordered that if the parties agreed to stipulated facts and a briefing schedule that the case could be set for a hearing on the Motion Calendar CP 49-50. The new scheduling order did not require witness disclosure. CP 51-52.

On July 29, 2015, the Estate filed its Motion for Summary Judgment, CP 53-54, with a Memorandum in Support, CP 55-62. Kathleen Bennis and William Roe filed a Counter Motion for Summary Judgment, CP 63-64, and a Memorandum in Support and a Response to the Estate's Motion, CP 65-79. The Estate filed its reply brief on August 28, 2016, CP106-109.

The Motions were supported by "Stipulated Facts," CP 80-85, with attachments, CP 86-105.

**DISPUTE TO WHICH STIPULATION APPLIED:** The parties stipulated to a set of facts and defined the part of their dispute to which they applied.

¶ 14 The Personal representative had taken the position that the amount of the 40 checks, as set forth in ¶ 7 should be taken into account in settling the

estate of decedent as an offset against the share of William J. Roe.

¶ 15 The Personal Representative has also taken the position that the dollar amount of the loans to Kathleen Bennis evidenced by the wire transfer and checks as set forth in ¶ 11-14 should be taken into account in settling the estate of decedent as an offset against the share of Kathleen Bennis in the amount of \$16,309.

¶ 16 William J. Roe and Kathleen Bennis have objected to the Personal Representative offsetting the loan amounts as indicated herein alleging that the transfers were gifts and not loans.

¶ 17 The Stipulation defined Elizabeth's Gannon's position as agreeing with Gerald Roe.

**STIPULATED FACTS.** The facts that applied to the defined dispute were as follows:

Anne Marie Roe died a resident of Spokane County, Washington on January 12, 2014. Her Will dated July 10, 2013 was admitted to probate and Gerald Roe was appointed a non intervention Personal Representative in Spokane County Cause 13-4-00134-9. Stipulated Facts ¶ 1, CP 80.

Anne Roe willed Gerald Roe her interest in the family home, contents, a piano, and family car,<sup>1</sup> and certain bank accounts held in her name and Gerald Roe's name, and divided the remaining estate in four equal

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<sup>1</sup> Whether Anne owned all of the house, piano, and car or only the half that she did not disclaim in her husband's probate is being determined in another case involving the Theodore Roe Testamentary Trust Spokane County Cause No. Cause No. 14-4-00797-5. That question has no bearing on the present appeal.

shares among her children: Gerald Roe, Elizabeth Gannon, Kathleen Bennis and William Roe. CP 81, ¶ 2.

Between January 1, 1998 and decedent's death, Anne Roe issued 40 checks payable to William Roe with "Loan" written in the lower left corner in Decedent's hand totaling \$49,150. ¶ 6. William cashed each check, ¶ 8. CP 81-82.

An undated writing in Decedent's hand, signed by Kathleen Bennis acknowledged that on February 22, 1991, Theodore and Anne Roe transferred \$14,809 from their bank to Kathleen Bennis' bank. Kathleen Bennis paid \$2,800 of the loan. In the absence of other account activity the loan balance would be \$12,009. CP 82-83. ¶ 9

Bank statements revealed two additional checks payable to Bennis:

Check 4571 for \$3,000 dated June 14, 2008, and Check 4574 in the amount of \$1,300 dated January 31, 2009. Both checks had "Loan" written in the lower left hand corner. ¶ 11.

The stipulation went on @ ¶ 12:

The amount of loans that the Personal Representative alleges are owing by Kathleen Bennis, and for which an offset should be made are calculated as follows:

\$14,809	Advanced on 2/22/91
<u>-\$2,800</u>	<u>Acknowledged repayment</u>
12,009	Remaining balance owing on 2/22/91
+ 3000	Check No. 4571
<u>+ 1300</u>	<u>Check No. 4574</u>
\$16,309	Total owing by Kathleen Bennis

¶ 13 stated: The parties agree that there are no other writings regarding the alleged loans other than the

checks and the “loan” document signed by Kathleen Bennis.

**DEBT FORGIVENESS IDENTIFIED BY BOTH**

**PARTIES:** The TEDRA Complaint stated at ¶ IV:

For the reasons stated above the court should determine whether any such alleged loans occurred with regard to the Petitioners or the Respondent or any heir and whether there were any loans which can be established to be valid and owing to the estate, and therefore a valid deduction from any heir’s distributive share. CP 21.

The Estate’s Memorandum in Support of its Motion for Summary Judgment in a section entitled “Forgiveness of Loan” cited *Estate of Larson v. Griffith*, 71 Wn 2d 349 ( 1967), and argued that the burden of proving that the advance was paid or forgiven rested upon Kathleen Bennis and William Roe. The Estate argued that outside of self serving statements and speculation Bennis had no such evidence, CP 60.

Bennis and William Roe responded that the burden of proving that the advance was a loan and still outstanding rested upon the Estate:

As a consequence of the application of the Deadman Statute RCW 5.60.030, Ms. Bennis is not in a position to testify regarding whether the debt is still outstanding, repaid or forgiven. However, she can point the court to the fact that the document found by

the personal representative is 24 years old, was followed by additional checks from her mother, and was not referenced in her mother's Will written six months before Mrs. Roe's death. She (Anne Roe) clearly had the opportunity to reference the loan and set it off against the share of Kathleen Bennis if it remained outstanding when she wrote her final Will prior to her death. Bennis and William Roe Response, CP 76-77.

The Estate replied:

Here William Roe and Kathleen Bennis are relying upon a great deal of speculation in order to defeat summary judgment: (1) speculation that the loan had been repaid or forgiven due to the passage of time; (2) speculation that the loan was actually included in the will because of provisions in the will which benefited others; (3) speculation that the loan had been repaid or forgiven because it was not mentioned in the will (4) speculation that the transactions really weren't loans in the first place.

William Roe and Kathleen Bennis have not provided any direct evidence to support their position. They have not provided any direct evidence to support a position that (1) the loan was repaid; (2) the loan was forgiven (3) any provision in the will that had anything whatsoever to do with the loans; (4) the fact that the loan was not mentioned in the will means anything at all. CP 107.

Both parties treated debt forgiveness as an issue. Neither objected that the issue was outside of the pleadings or issues in the case. Both parties treated the issue as secondary, outside of the summary judgment proceeding.

**Summary Judgment:** Judge Cooney heard oral arguments on September 2, 2015. The attorneys focused upon the burden of proof and its impact upon whether the advances were loans or gifts. The Estate's attorney, Douglas Edwards, alluded to debt forgiveness saying:

There's no evidence that anything took place after that (1991) no evidence of repayment, no evidence of forgiveness..... VRP p. 8, l. 12-15.

Mr. Decker argued:

The question is in that 24 intervening years father had died, the mother had died, and that loan, the court will note, to Ms. Bennis would involve Mr. Roe and Mrs. Roe, the – who are both now deceased, and the 24 intervening years. Now does it make sense to believe that that loan is still outstanding? I don't know. The Court has to determine that. But the burden is on them all the way through to provide proof that eth debt is still outstanding. VRP, p. 13, l. 8-16

Mr. Decker pointed to the lack of any paper demanding payment VRP, p. 14 l. 1-7. Judge Cooney announced his decision with respect to Kathleen Bennis:

To summarize, with respect to Ms. Bennis, the Court does find that there was a loan made to Ms. Bennis, that the loan was outstanding at the time this action was commenced; that the Statue of Limitation does not apply as it's not a cause of action but rather a right of retainer, and under the right of retainer the estate may offset any disbursement to Ms. Bennis by the amount owed on that written loan which is

\$14,809 minus \$2,800. The court will allow the offset with Ms. Bennis. VRP, p. 22 l. 5-13

Rodney Reinbold substituted for Decker appearing for Kathleen Bennis on September 18, 2015, CP 111.

The Estate's proposed order did not address the debt forgiveness issue but would have precluded any further consideration of it:

Summary Judgment is hereby granted in favor of the Defendant on the issue of the loan to Kathleen Bennis with the remaining balance of \$12,009. CP 360.

Bennis proposed an order, CP 126, that preserved the debt forgiveness issue:

1. Partial Summary Judgment is granted in favor of Defendants on the issue of the loan to Kathleen Bennis, to wit: On the date of the above referenced undated memorandum, Kathleen Bennis owed \$12,009. The Estate may offset *any amount still owed* on said loan, if any, against Kathleen Bennis' net distribute share.

2. Whether Kathleen Bennis' debt was forgiven remains an unresolved issue. CP 128-131. In her memorandum in support of her proposed order;

Bennis argued:

The facts before the court, when the Motions and Cross Motions were argued, reveal a 24-year collection delay, Will revision six months before death that did not mention the debt, and parents with substantial wealth. The Declarations of Kathleen

Bennis and Brian Bennis re Debt Forgiveness which accompany this memorandum reveal that Kathleen's parents forgave the debt. The court's oral ruling did not directly address whether the debt was forgiven. Moreover, the material facts concerning the issue were largely outside of the stipulated facts. The issue is thus unresolved at this point. CP 120-121.

Kathleen Bennis filed the Declaration of Brian Bennis re Debt Forgiveness, CP 117, and her own Declaration, CP 113, with her proposed Order. Brian Bennis related that Kathleen Bennis and Joseph Bennis, Sr. divorced in 1988 when he was six. Kathleen Bennis moved to Chicago with her two sons and worked as a flight attendant. In 1991 Joseph Bennis Sr. was diagnosed with brain cancer followed by surgery that left him unable to speak, paralyzed on one side, and dependent upon nursing home care until his death the summer of 1992. Thereafter, Anne Roe and Theodore Roe visited Kathleen Bennis. Brian Bennis overheard their conversation when Kathleen Bennis' parents forgave the debt. After the Summary Judgment hearing and after Reinbold appeared in the case, Brian Bennis saw a copy of the Deadman Statute that Reinbold sent to his mother, recognized that he could testify, and provided a Declaration, CP 117-119.

Kathleen Bennis verified the background details within Brian's Declaration, CP 113-116.

The Estate moved to strike the Declarations of Kathleen Bennis and Brian Bennis and the other materials that Bennis had submitted, and moved for Sanctions and Terms CP 132-133, arguing that Kathleen Bennis was required by discovery requests, scheduling orders, and CR 56 (c), to provide the information before the Summary Judgment hearing CP 305-324.

Kathleen Bennis responded with an explanation of why she did not file the declarations before the hearing. See Declaration of Bennis re Debt Forgiveness, CP 113-115; and Declaration of Bennis Opposing Motion to Strike, CP 140-144. She explained that she read the Deadman Statute for the first time after the Summary Judgment hearing when Mr. Reinbold sent it to her. Before reading the statute she believed it precluded all witnesses from relating the debt forgiveness conversation with her parents. Kathleen Bennis related that she lived in the Chicago area, and that her impressions were caused by the fact that she was depending on her brother's attorney for long distance legal advice. She then explained the circumstances that discouraged her from seeking independent advice:

**Trust Removal Attempt:** Kathleen explained that a part of her father's estate passed into a testamentary trust when he died on December 25, 1997. The family trust was created to avoid estate taxes. Kathleen Bennis allowed her mother to control the trust administration while she was able. Anne Roe received all dividends and conserved the principal in an account maintained with a Spokane stock brokerage firm. This continued until Anne Roe's decline when Kathleen Bennis became more active. After Anne Roe's death, Kathleen Bennis distributed the cash assets. When Anne started to decline Kathleen visited the brokerage firm in Spokane to become informed concerning the details of the trust and became more actively involved. She continued to administer the trust just as her mother had administered it and after her mother's death paid the taxes and fees and divided the estate into four equal shares. CP 141. On June 26, 2013 Douglas Edwards wrote insisting that Kathleen Bennis resign as trustee in favor of Elizabeth Gannon, CP 148-149. Kathleen hired Diane Rudman who responded on July 29, 2013 that there was no legal reason for Kathleen Bennis' removal. The letter expressed Kathleen Bennis' concern that Gerald Roe was managing Anne Roe's person, medical care, and finances pursuant to a power of attorney while

refusing to discuss the details of her life with Kathleen Bennis or her brother William Roe, who lived in Spokane. The letter concluded that Kathleen Bennis was not convinced that her resignation would be in her mother's best interest, and she believed that she owed continued service to both of her parents. CP 151-153. Douglas Edwards sued Kathleen Bennis on January 1, 2014 seeking her removal, CP 141, Spokane Court Cause No. 14-5-00017-2. Anne Roe died 12 days later. Thereafter, Elizabeth Gannon, a sibling, filed suit against Kathleen asking her to account for her for administration over the life of the Trust, Gannon v. Roe 14-4-00797-5, referenced in Bennis' Declaration, CP 142.

**Bankruptcy Interference:** Thereafter, Douglas Edwards, attorney for Gerald Roe and the Estate of Anne Roe, followed up on information provided by Elizabeth Gannon that Kathleen Bennis had filed a Chapter 13 Bankruptcy. On March 3, 2014, Douglas Edwards wrote to the Bankruptcy Trustee that Kathleen Bennis was concealing an inheritance of \$107,000 (a federal crime pursuant to 18 USC 152). Gerald Roe hurried to notify the Trustee before Kathleen Bennis had any chance to adjust her Bankruptcy posture in light of the inheritance. Gerald Roe was appointed Personal Representative on January 12, 2014. The letter was written on

March 3, 2014, fifty days after appointment. The letter was written without communication with Kathleen Bennis or her attorneys and before her estate share had been determined. The Trustee immediately moved to amend Bennis' Confirmed Chapter 13 plan to force payment of \$51,750 to unsecured creditors from Kathleen's estate share. Kathleen Bennis dismissed her Bankruptcy rather than engage in questionable conduct. Kathleen Bennis did not then recognize that BR 1007(h) coupled with 11 USC 541(a) does not require disclosure of an inheritance resulting from a death six months post-petition or the divided case law, on the subject. If Gerald Roe had communicated with Kathleen Bennis and her attorneys, they would have discovered that the Bankruptcy Code permits a better outcome than the one experienced by Kathleen Bennis.

The actions challenging Kathleen's trust administration combined with accusations of misconduct in the administration of her Bankruptcy case, foreseeably intimidated her, impacted her finances, and discouraged her from hiring her own attorney. Kathleen Bennis thus accepted William Roe's offer to share his attorney. Kathleen Bennis, and more importantly Brian Bennis, did not understand the operation of the Deadman Statute until after the

Summary Judgment proceeding, when Mr. Reinbold shared a copy of the Statute with Kathleen and her family. Brian then related to his mother that he recalled the conversation and Mr. Reinbold shared it with the court when the Summary Judgment Orders were presented. See Declaration of Bennis Opposing Motion to Strike, CP 140-144.

Because the Estate proposed to sanction Mr. Reinbold, he filed his own Declaration, CP 137-139. Mr. Reinbold verified his examination of the Bankruptcy file from the Northern District of Illinois, and stated that the file revealed that Gerald Roe and his attorney intentionally interfered with Bennis' confirmed bankruptcy plan and related Reinbold's belief that Gerald had engaged in misconduct within the meaning of CR 59 because the conduct was an intentional interference with a reasonable business expectancy and because it was also a breach of the Personal Representative's duty to impartially administer the estate. Mr. Reinbold shared his belief that the misconduct foreseeably caused Ms. Bennis to accept a conflicted attorney which resulted in imperfect communication with Kathleen Bennis and her family.

On October 23, 2015 Judge Cooney entered the Estate's proposed Order on Summary Judgment, striking the Findings of

Fact as superfluous, and added a line striking the Declaration of Brian Bennis, CP 325-327.

**Motion to Reconsider:** On October 23, 2016, Kathleen Bennis filed a timely Motion to Reconsider, CP 168; supported by the Declaration of Kathleen Bennis re Debt Forgiveness, CP 113; Declaration of Brian Bennis re Debt Forgiveness, CP 117; Declaration of Rodney Reinbold re Motion to Strike, CP 137; and Declaration of Kathleen Bennis re motion to Strike, CP 140, that was filed before the presentment hearing.

Judge Cooney asked for briefing. The Estate argued among other things that:

A party cannot raise a new theory of law after a motion for summary judgment. CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before an adverse decision. Here, the motion for reconsideration simply provides a new theory of the case that the matter constituted a loan but that the loan was forgiven.

CP 180.

Kathleen Bennis replied providing references to briefs filed by both parties discussing debt forgiveness CP 330-332.

**Judge Cooney Orders Reconsideration:** Judge Cooney without argument issued a letter opinion on November 16, 2015 saying:

Ms. Bennis challenges whether there exists a genuine issue of material fact that the loans had been forgiven by the Decedent. In entering orders on competing motions for summary judgment the court was not invited by Ms. Bennis to make a determination as to whether a genuine issue of material fact exists as to the loan being forgiven. Rather the Court was asked to make a decision as to whether a genuine issue of material fact exists as to whether the payment from the Decedent to Ms. Bennis were loans or gifts and whether the state of limitations applied.

The Court never entered a decision as to whether the loans made to Ms. Bennis had been forgiven. This issue is secondary to the Court's ruling that the funds provided to Ms. Bennis constituted a loan rather than a gift. Therefore, the court will grant the motion for reconsideration on the sole issue as to whether the loan made to Ms. Bennis had been forgiven.

CP188-189. The Order Granting Bennis Motion to Reconsider was signed in December 8, 2015, CP 340-342.

**Estate's Premature Appeal:** On December 9, 2015 the Estate filed a Notice of Appeal, CP 355. Kathleen Bennis moved to dismiss the appeal as premature. The Court Commissioner wrote that briefing was required on whether the Appellant Court should order discretionary review. The Estate argued that Judge Cooney committed an obvious error by agreeing to consider the debt forgiveness issue because Bennis did not timely raise the issue. The Court of Appeals dismissed the appeal noting that both parties alluded to the issue in briefing. The Court of Appeals deferred

Kathleen and William's request for reasonable attorney fees to the superior court for consideration at the close of the proceedings, RCW 11.96A.150 and RAP 18.1(i). CP 365-367. This fee issue is still outstanding in the trial court.

**Order on Reconsideration:** In briefing Kathleen Bennis re-tendered the following Declarations:

Declaration of Kathleen Bennis Re Debt Forgiveness, CP 113;

Declaration of Brian Re Debt Forgiveness, CP 117;

Kathleen Bennis Declaration Re Motion to Strike, CP 140.

and asked the court to take judicial notice of the Inventory in the Theodore W. Roe Probate Estate, that did not list a debt from Kathleen Bennis, CP 239 I. 16-25. The inventory from the Theodore Roe Estate was appended to briefing, CP 254-257.

Judge Cooney issued a letter ruling without oral argument saying:

(1) Both parties stipulated to grant the court full authority to resolve the matter on stipulated facts including the debt forgiveness issue; and

(2) The stipulated facts contain two issues relevant to the debt forgiveness issue:

(a) the decedent's will signed 22 years after the loan was made that does not reference the loan;

(b) with the exception of the \$2,800 payment made by Ms. Bennis prior to February 22, 1991, there was no evidence of any payments being made; Judge Cooney thereafter continued”

(3) Given that the Statute of Limitations does not apply to the common law right of retainer, the court concludes that some type of affirmative act must be present for loan forgiveness to apply;

The court concluded the Will revision did not infer debt forgiveness. The inference of debt forgiveness arising from 22<sup>2</sup> years of account inactivity did not meet the court's requirement that Bennis prove an affirmative act. The Court thus entered an order denying Bennis' Motion to Reconsider on the ground that she did not provide evidence that the debt had been forgiven. The court denied the Estate's Motion to shift its fees onto Bennis under RCW 11.96A.150. CP 258-259.

On May 27, 2017 The court entered an order denying Bennis' Motion, CP 264-265.

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<sup>2</sup> It was actually 24 years.

**Second Appeal:** Bennis filed a Notice of Appeal on June 22, 2016, CP 277.

The Estate filed a Notice of Cross Appeal on June 30, 2016, CP 286.

The Estate dismissed its cross appeal that the check transfers to Kathleen and William Bennis were gifts and not loans but continues its cross appeal of the trial court's Order Denying the Estate's motion for fees, pursuant to RCW 11.96A.150.

## **ARGUMENT**

**First Assignment of Error: The court erred by limiting the facts to those contained within the "Stipulated Facts." The Stipulated Facts did not apply to the debt forgiveness issue. This error encompasses the court's failure to consider the Declaration of Brian Bennis and Kathleen Bennis re Debt Forgiveness, and the Inventory from the Theodore W. Roe Estate as evidence.**

**Issue 1. Judge Cooney appropriately granted Bennis' motion to Reconsider.**

Judge Cooney recognized that he entered Summary Judgment without deciding whether Theodore Roe and Anne Roe forgave Kathleen Bennis' debt. Judge Cooney said in his letter of November 16, 2015:

The Court never entered a decision as to whether the loans made to Ms. Bennis had been forgiven. This issue is secondary to the Court's ruling that the funds

provided to Ms. Bennis constituted a loan rather than a gift.

Therefore, the court will grant the motion for reconsideration on the sole issue as to whether the loan made to Ms. Bennis had been forgiven.

CP 189.

Failure to address a pivotal issue gives rise to reconsideration because, until corrected, the failure is an error in law CR 59(8); and because substantial justice has not been done CR 59(9). Judge Cooney thus appropriately granted Bennis' Motion to Reconsider to decide the debt forgiveness issue.

**Issue 2. The Stipulated Facts Did Not Bar Consideration of Additional Facts Inferring Debt Forgiveness.**

Judge Cooney ruled that Kathleen Bennis stipulated to apply the Stipulated Facts to resolve the debt forgiveness issue, CP 258. She entered into no such stipulation.

The text of the Stipulated Facts does not support Judge Cooney's conclusion. Kathleen defined her understanding of the dispute controlled by the Stipulation:

¶ 16 William J. Roe and Kathleen Bennis have objected to the Personal Representative offsetting the loan amounts as indicated herein **alleging that the transfers were gifts and not loans.**

CP 84 (my emphasis).

Judge Cooney treated Mr. Decker's summary judgment brief as an invitation to apply the Stipulated Facts to the debt forgiveness dispute. He quoted that part of the Petitioner's Memorandum re Summary Judgment that said:

This matter is a dispute involving distribution of assets of the estate and TEDRA grants this Court full authority to resolve the matter upon the Stipulated Facts submitted and applicable law. The parties have agreed that the Court will rule upon the issues presented in the parties Motion for Summary Judgment..... CP 258. *Judge Cooney's emphasis.*

The entire briefing paragraph in fact read:

The parties further agree that the Trust and Estate Dispute Resolution Act (TEDRA) provides this court with original subject matter jurisdiction over the probate and administration of wills and all matters related to trusts ( RCW 11.96.040). This matter is a dispute involving distribution of assets of the estate and TEDRA grants the court full authority to resolve the matter upon the Stipulated Facts submitted by the parties and applicable law. *The parties have agreed that the court will rule upon the issues in the parties ' Motions for Summary Judgment, then the parties will ask the Court to consider the issues of attorney's fees under RCW 11.96A.150 **AND any remaining issues between the parties with regard to final distribution.*** CP 68-69. (*my emphasis*).

Decker's brief identified three decision levels:

(1) The issues presented by the parties on summary judgment (*subject to resolution by applying the stipulated facts*).

(2) The court would then address attorney fees (*cannot be resolved by applying the stipulated facts*); and

(3) Any remaining issues between the parties with regard to final distribution (*cannot be resolved by application of the stipulated facts*).

Mr. Decker did not argue or agree that “any remaining issues between the parties” would be resolved by applying only the Stipulated Facts. The Estate’s Reply brief did not deny Decker’s description of the decision process.

In Judge Cooney’s letter of November 16, 2015, granting Ms. Bennis’ Motion to Reconsider, he clearly identified the debt forgiveness issue as an issue outside of the issues addressed by the parties’ Motions and Cross Motions for Summary Judgment.

Judge Cooney said:

In entering orders on competing motions for summary judgment the court was not invited by Ms. Bennis to make a determination as to whether a genuine issue of material fact exists as to the loan being forgiven. Rather the Court was asked to make a decision as to whether a genuine issue of material fact exists as to whether the payment from the Decedent to Ms. Bennis were loans or gifts and whether the state of limitations applied. CP 188.

Judge Cooney then went on to identify the issue as a “remaining issue.”

The Court never entered a decision as to whether the loans made to Ms. Bennis had been forgiven. This issue is secondary to the Court's ruling that the funds provided to Ms. Bennis constituted a loan rather than a gift. CP 189.

Mr. Decker's brief is not consistent with an invitation to modify the Stipulated Facts to make them applicable to the debt forgiveness issue. Decker's brief is more reasonably treated as a recognition that Ms. Bennis intended for the stipulation to apply to her allegation that the transfers were gifts and not loans, Stipulated Facts ¶ 16, and that only this issue was being presented in the Motions and Cross Motions for Summary Judgment, as Judge Cooney eventually found; and that the court would then consider "any remaining issues". The stipulation and brief do not say that the facts are limited those within the stipulation as the "any remaining issues and the stipulated facts have no logical connection to the debt forgiveness issue.

Moreover, courts should avoid treatment of oral or written arguments as unauthorized stipulations. Unauthorized stipulations do not resolve disputes, they multiply them. An unauthorized stipulation aggravates the dispute between the parties because a Washington lawyer cannot waive substantial rights by an

unauthorized stipulation *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 303-04, 616 P.2d 1223 (1980), giving rise to motions for reconsideration and other procedural quagmires. Unauthorized stipulations are also not consistent with the Code of Professional Conduct and give rise to attorney liability. Stipulations should be carefully limited to attorneys' statements that clearly evidence an intent to form an authorized stipulation. That is not the case here.

Kathleen Bennis stipulated to the Stipulated Facts to resolve her allegation that advances were gifts and loans, Stipulated Facts ¶ 16. They have no application to any other issues, including the debt forgiveness issue.

**Issue 3. The Declarations of Kathy Bennis and Brian Bennis should have been considered as evidence of debt forgiveness.**

Judge Cooney properly applied CR 59 to consider the debt forgiveness issue after he had entered Summary Judgment, as stated above. Thereafter the question of whether to consider the tendered declarations as evidence of debt forgiveness, against objections that they were untimely, required the court to apply CR 56(d) and CR 56(f).

CR 56(d) does not permit a court could to ignore the Declaration of Brian and Kathleen Bennis but provides:

If on motion under the rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, **by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted** CR 56(d), my emphasis.

The rule goes on to direct “such further proceedings as are just.” “Just proceedings” require consideration of untimely Declarations when there is a reasonable basis for the delay, *Coggle v. Snow*, 56 Wn. App. 499, 508, 784 P.2d 554 (1990) and CR 56 (f).

In *Coggle*, plaintiff’s medical malpractice case had lingered after filing for two years. Defendant moved for summary judgment. Plaintiff associated new counsel who asked for time to provide untimely declarations. When the court refused plaintiff moved for reconsideration and presented the untimely declarations. The court refused to consider them. The Court of Appeals reversed and addressed the trial court’s failure to consider the materials presented by new counsel on reconsideration:

It is unclear from the record whether the court considered the merits of the materials submitted by Coggle in support of his motion for reconsideration. If the court, after failing to grant the continuance, also refused to evaluate the declarations of Coggle and Dr.

Billingsley and their impact on the motion for summary judgment, then this was an abuse of discretion flowing from the court's initial denial of the motion for a continuance. In the alternative, if the court considered the declarations and concluded they did not raise an issue of material fact, then we hold, in accord with the following analysis, that the court erred as a matter of law and we reverse on that basis.

*Cogle v. Snow*, 56 Wash. App. 499, 508-09, 784 P.2d 554, 560 (1990).

*Coogle* was favorably cited in *Butler v. Joy*, 116 Wash. App. 291, 299-300, 65 P.3d 671, 675-76 (2003) where the court noted:

As noted in *Cogle*, [300] **it is hard to see "how justice is served by a draconian application of time limitations"**

*Butler v. Joy*, 116 Wash. App. 291, 299-300, 65 P.3d 671, 675-76 (2003). My own emphasis.

Ms. Bennis shared her brother's attorney and depended on Mr. Decker to present evidence that her parents forgave her debt. Instead, as Judge Cooney eventually recognized, the parties treated Ms. Bennis' claim that the debt had been forgiven as "a secondary issue," CP 189. When new counsel appeared he filed a motion notifying the court that it had not decided the debt forgiveness issue and tendered the declarations of Kathleen Bennis and Brian Bennis that were determinative of the debt forgiveness issue. CR 56 (d), CR 56 (f), *Coogle*, and *Butler* all required the

court to consider the declarations. The Declarations should have been considered when the trial court reconsidered the Debt forgiveness issue.

**Issue 4. The court may not exclude the Brian Bennis and Kathleen Bennis Declarations re Debt Forgiveness as sanctions for violating the scheduling order or because they were inconsistent with interrogatory answers.**

The Estate contended that the Bennis' Declarations should be excluded as a sanction for Bennis' failure to disclose Brian Bennis as a witness per the original Scheduling Order and because he was not identified as a witness in Interrogatory answers. The most recent Scheduling Order, in effect when the Summary Judgment was argued, contained no witness disclosure provision. The Court amended the Scheduling Order on May 21, 2015. CP 51.

Washington Courts do not allow witness exclusion as a sanction for failure to comply with a Scheduling Order or discovery without a showing of willfulness or bad faith:

Before the trial court can exclude a witness as a sanction for the failure to comply with a discovery time table, the court must consider, on the record, lesser sanctions. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), and the court must find that the disobedient party's refusal to obey a discovery order was willful or deliberate and that it substantially prejudiced the opponent's ability to prepare for trial. *Id.* Indeed, the court must find that the failure to comply amounted to "intentional

nondisclosure, willful violation of a court order, or other unconscionable conduct.” Id. (Internal quotation marks omitted) (quoting *Holman*, 107 Wn.2d at 706). [981] The failure to support a decision to exclude a witness with these essential findings is an abuse of discretion. Id. at 497.

*Peluso v. Barton Auto Dealerships, Inc.*, 138 Wash. App. 65, 72 (2007).

Kathleen Bennis did not engage an “intentional non-disclosure” or a “willful violation of a court order” or “other unconscionable conduct”. The unjustified actions of Gerald Roe and Elizabeth Gannon that challenged Kathleen Bennis’ trust administration, combined with vengeful accusations of misconduct in the administration of her Bankruptcy case foreseeably intimidated Kathleen Bennis and impacted her finances such that she accepted William’s offer to share a conflicted attorney. Kathleen Bennis did not understand the operation of the Deadman Statute until after the summary judgment proceeding, when she hired her own attorney, and thus did not discover that her son was a viable witness to prove that her parents forgave the debt in a conversation with Kathleen Bennis shortly after her husband’s death in 1992.

CR 56 (d) and CR 56 (f) *Coogle, Butler and Peluso* all show that Washington Courts are intent on justice and do not lightly subordinate that intent to facilitate procedure.

The trial of a lawsuit should be a sincere effort to arrive at the truth. It is no longer a game of chess in which the technique of the maneuver captures the prize." *Cabot v. Clearwater Construction Company, Fla.* 1956, 89 So. 2d 662, at p. 664, *Albright v. JM Fields Co* 196 So 2d 190 ( 1967).

The goal of the judiciary is rulings that are in the end consistent with actual facts and law. Justice required the court to consider the Declarations of Kathleen and Brian Bennis even if untimely submitted.

**Issue 5. The Inventory from the Theodore Roe Estate should have been judicially recognized as evidence of debt forgiveness.**

In her Reply Brief re Motion to Reconsider, Kathleen Bennis invoked ER 201 to ask the court to take judicial notice of the Inventory from her father's estate that did not list a debt from Kathy Bennis as an asset, CP 254-257. Both parents loaned the money to Kathleen Bennis m Theodore Roe died. Stipulated Facts ¶ 10, CP 83. The fact that Anne Roe did not inventory the debt when she served as Theodore Roe's Personal Representative shows that she did not believe that it was owed. ER 201 provides:

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

Wash. ER 201. Judicial records are within ER 201 *Avery v. Dep't of Soc. & Health Servs. (In re B.T)*, 150 Wash. 2d 409, 412, 78 P.3d 634, 635 (2003). Federal courts are in accord, *Dillard v. Roe*, 244 F.3d 758 (2001).

Kathleen Bennis asked the court to take judicial notice of the inventory and supplied a copy of the Inventory, CP 254-257. The inventory was an adjudicative fact at the heart of the judicial

determinations made in the Theodore Roe Estate. The court was required by ER 201 to notice the document and consider it as evidence. The timeliness of Bennis submission is not an excuse to ignore the evidence because ER 201(f) explicitly forbids that result. And if ER 201(f) does not resolve the timeliness issue then the arguments made under Issues 3 and 4, pertaining the declarations of Kathleen and Brian Bennis , do resolve them.

The Inventory from the Theodore Roe Estate was prepared by Anne Roe and conclusively shows that Anne Roe did not believe that the debt was owed.

**Second Assignment of Error: The court erred when it adopted a new rule of law: “Given that the Statute of Limitations does not apply to the common law right of retainer, the court concludes that some type of affirmative act must be present for loan forgiveness to apply.” The rule is inconsistent with the presumption of parental gifting and is not needed to protect the retainer doctrine.**

**Issue 6: The unprecedented rule of law that a debtor must prove debt forgiveness by proving a specific affirmative act is inconsistent with Washington’s presumption of parental gifting, and inconsistent with the rule of law that a party is entitled to inferences from established facts.**

The law presumes that unexplained asset transfers from parents to children are gifts. The presumption arises from recognition that normally parents make substantial gifts to their children, *Buckerfield’s Ltd. v. B.C. Goose & Duck Farm Ltd.*, 9 Wn.

App. 220, 224, 511 P.2d 1360 (1973), and *Lappin v. Lucurell*, 13 Wn. App. 277, 282 (Wash. Ct. App. 1975). Parents are as likely to make gifts in the form of debt forgiveness. The Stipulated Facts should have been considered in that light.

If Kathleen Bennis was not entitled consideration of evidence in light of the presumption that parents intend to make gifts to their children, then she was at least entitled an inference of a gift from facts that suggest it. In *Lappin v. Lucurell*, 13 Wn. App. 277, 284-285 (Wash. Ct. App. 1975) the court discussed the difference between presumption and an inference:

The beneficiary in *Lappin* was a nephew, not a child. A child would have been entitled to jury instruction that a transfer of funds is *presumed* to be a gift. The court instead instructed the jury that the transfer created an *inference* of a gift because the nephew was the natural object of the testator's bounty. The appellant court agreed that the relationship did give rise to such an inference but felt that the instruction would invade the jury's providence. These facts triggered a discussion of the distinction of inferences, presumptions, and burdens of proof applicable to gift cases which have here:

As nebulous as the distinction may occasionally be, inferences are one thing, and presumptions are another. Inferences are logical deductions or conclusions from an established fact. *Fannin v. Roe*, 62 Wn.2d 239, 242, 382 P.2d 264 (1963). Presumptions are assumptions of fact that the law requires to be made from another fact or group of facts found or otherwise established in an action. WPI 24.00, 6 Wash. Prac. and authorities cited therein. Inferences deal with mental processes whereas presumptions deal with legal processes. G. Stevens, Pattern Jury Instructions: [285] Some Suggestions on Use & the Problem of Presumptions, 41 Wash. L. Rev. 282, 290 (1966); WPI 24.00, 6 Wash. Prac. Inferences can get a party past a nonsuit,<sup>3</sup> but ordinarily a jury should not be instructed on them. WPI 24.00, 6 Wash. Prac.; L. Wiehl, Instructing a Jury in Washington, 36 Wash. L. Rev. 378, 404 (1961). In addition, while trial courts have traditionally been permitted in the proper case to instruct juries on established presumptions, instructing on matters of inference treads dangerously close to commenting on the facts and so invading the province of the jury. C. McCormick, Evidence § 345, at 826 (2d ed. Cleary 1972). See Const. art. 4, § 16.

*Lappin v. Lucurell*, 13 Wn. App. 277, 284-285 (Wash. Ct. App. 1975).

Judge Cooney, not only denied Bennis the “presumption” of parental gifting, but also denied her the “inference.” As the *Lappin* court stated:

Inferences are logical deductions or conclusions from an established fact. *Fannin v. Roe*, 62 Wn.2d 239, 242, 382 P.2d 264 (1963).

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<sup>3</sup> And a Motion for Summary Judgment, my own footnote.

*Lappin* p. 284. Judge Cooney denied Bennis the inference by refusing to recognize that debt forgiveness is a logical conclusion arising from 24 years of account inactivity, and from a Will revision, without mention of the debt, within six months of debt: established facts in this case. Judge Cooney instead ruled:

“Given that the Statute of Limitations does not apply to the common law right of retainer, the court concludes that some type of affirmative act must be present for loan forgiveness to apply”.

The new rule of law is inconsistent with the legal doctrine that construes facts in light of the parental gifting presumption, and with the legal inference arising from 24 years of account inactivity and the will revision.

**Issue 7. The unprecedented rule of law that a debtor must prove debt forgiveness by proving a specific affirmative act is not good public policy and not necessary to protect the retainer doctrine.**

In Washington the Statute of Limitations does not bar a personal representative from retaining the debtor’s inheritance to repay a debt owed to the estate. The Common Law Debt Retention Doctrine is controversial and not recognized in all states *In re Estate of Smith*, 179 Wash. 417, 422-23, 38 P.2d 244, 246 (1934).

The Debt Retention Doctrine does not deserve reinforcement with an unprecedented legal corollary that debt forgiveness can only be proved by evidence of a decedent's affirmative act because the doctrine does more harm than good.

**The Benefits of the Doctrine:** The six-year Statute of Limitations would have barred Anne Roe's judicial remedy to collect the Bennis debt, RCW 4.16.040. The debt retention doctrine thus benefits only Anne Roe's competing residual beneficiaries, deserving or not. The same benefit is more sensibly controlled by the decedent. Anne Roe could have made any number of repayment provisions in her Will if she wanted Kathleen Bennis to reimburse the 24-year-old advance. Anne Roe was in a much better position to know her children and her own mind. But Washington nevertheless imposes the debt retention doctrine even though the doctrine is not needed and confers a very limited benefit.

**The Doctrine's Faults:** The retainer doctrine is deceptive, because most people and their attorneys are not aware of the doctrine and do not consider it in the estate planning process. The doctrine is especially likely to work injustice in the most common case, where parents orally and privately forgive children's debts.

Without professional advice these parents don't recognize that oral debt forgiveness is largely ineffective after death because of RCW 5.60.030 the Deadman Statute. When the retainer doctrine operates with the Deadman Statute the result is that debts, which the decedent has forgiven and forgotten, will be retained from a child's share. This occurs especially when elders do not take time to sort out and destroy irrelevant writings which may infer that a child once owed a debt.

Douglas Edwards could have written any number of Will provisions for Anne Roe to avoid the ambiguity surrounding this case. Attorneys commonly ask the testator whether children owe debts. As this case illustrates, it is also good practice to ask whether the testator has forgiven a child's debt. Had Mr. Edwards been aware of the debt, he would have resolved the matter by providing for retention or not. But if the lawyer does not ask whether debts have been forgiven, a testator as old as Anne Roe, will not likely volunteer the information after 24 years. The retention of a forgiven debt is not unusual; it is a typical result of the debt retention doctrine combined with the Deadman Statute.

The point here is that doctrine does not deserve reinforcement by a new unprecedented rule of law denying a child

the otherwise logical inference of forgiveness arising from 24 years of account inactivity.

**A NEW RULE OF LAW IS NOT NEEDED TO PROTECT THE DEBT RETENTION DOCTRINE**

The debt retention doctrine can co-exist with the the presumption of parental gifting, *Buckerfield'S, Ltd* . If the facts are construed in light of the parental gifting presumption then the estate can still overcome the presumption by proof that is certain, definite, reliable and convincing and leaves no reasonable doubt that the debt was not forgiven. In that case the retention doctrine will still apply to defeat a statute of limitations defense.

And the same is true if the court infers a gift from 24 years of account inactivity to apply an inference per *Lappin*. The estate can overcome the inference by evidence that more probably than not the debt was not forgiven. If the estate meets its burden, then the retainer doctrine will still apply to defeat a Statute of Limitations defense.

The court can readily see that a new rule is not needed to protect retainer doctrine. The retainer doctrine is not diminished by recognizing established presumptions and inferences to resolve this case. There is thus no reason to adopt a new rule of law to

require a child to prove parental debt forgiveness by proof of an affirmative act.

**Third Assignment of Error: The Court erred when it granted the Estate's Motion for Summary Judgment and Denied Bennis' Motion for Summary Judgment.**

**Issue 8: Debt forgiveness is conclusively established where the Declarations of Kathleen Bennis and Brian Bennis are considered with the Inventory from the Ted Roe Estate. Judge Cooney should thus have granted Bennis' Motion for Summary Judgment.**

If Declarations of Kathy and Brian Bennis re Debt forgiveness are considered with the Inventory of Theodore Roe Estate along with all of the other facts, then the debt was unmistakably forgiven, and Bennis was entitled to summary judgment.

**Issue 9: Because the Stipulated Facts infer debt forgiveness Judge Cooney should have denied the Estate's Motion for Summary Judgment.**

As stated above, the law presumes parental gifting from cash transfers. *Buckerfield's Ltd. v. B.C. Goose & Duck Farm Ltd.*, 9 Wn. App. 220, 224, 511 P.2d 1360 (1973), and *Lappin v. Lucurell*, 13 Wn. App. 277, 282 (Wash. Ct. App. 1975). Parents are as likely to make gifts in the form of debt forgiveness. The Stipulated Facts must be considered in that light. And if the court does not apply the

presumption of parental gifting then it ought to at least make the inference of a parental gift from the evidence.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts are considered in favor of the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993) *Goad v. Hambridge*, 85 Wn. App. 98, 102 (Wash. Ct. App. 1997).

Debt forgiveness, including an affirmative act of debt forgiveness, is logically inferred from the following established facts:

(1) 24 years of account inactivity;

(2) Douglas Edwards rewrote Anne Roe's Will six months before she died. The Will makes no mention of Kathleen Bennis' debt. It is common practice to ask whether children owe debts in the estate planning process. If the Will does not mention such debts it is likely that the testatrix has forgotten to mention them to the estate planner, likely because the testatrix has forgiven them. Thus an inference of debt forgiveness does arise from the fact that the debt was not mentioned in Anne Roe's Will.

(3) Anne Roe could easily afford to forgive the debt; and

(4) Anne Roe's pre-death gifting pattern reveals her to be especially generous. The court has before it cancelled checks showing gifts to William Roe in the amount of \$49,000. Generous parents are especially likely to forgive debts.

And as stated above, if the court considers the evidence of the debt forgiveness conversation and the Inventory from the Theodore Roe Estate, debt forgiveness is proved beyond any doubt.

#### ***ATTORNEY FEES***

The trial court has yet to address attorney's fees except to rule that Bennis is not required to pay the Estate's fees related to her Motion to Reconsider. Bennis requests an order for fees pursuant to RCW 11.96A.150 and RAP 18.1.

If Bennis is required to pay any part of the attorney fees charged by the Hennessey firm then she asks this court to include in its Order a provision that fees are to be adjusted in accordance with RPC 1.5 (a)(5) to reflect the amount in controversy and the results achieved and Bennis Requests and order requiring Gerald Roe or the Estate to pay her attorney's fees similarly adjusted.

## LEGAL ARGUMENT

The court is not required to award fees to the prevailing party but is directed to order payment of fees in a manner that the court determines to “equitable” the statute authorizing the court to:

order costs, including reasonable attorneys’ fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

RCW 11.96A.150. The Court of Appeals may order payment of legal fees, or the matter may be remanded to the trial court RAP 18.1.

Attorneys are restricted in the matter of client fees by the provisions of RAP 1.5.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(4) the amount involved and the results obtained;  
RPC 1.5(a)(4).

Attorneys for Gerald Roe and the Probate Estate propose to charge fees on an hourly basis without regard to RAP 1.5(a)(4). They have so far prevailed against Bennis on the note matter to

benefit the estate in the amount of \$12,009. Judge Cooney did not impose fees against Bennis as the Estate requested because he agreed that the matter deserved to be reconsidered, an equitable consideration justified by RCW 11.96A.150. Gerald Roe and Elizabeth Gannon supported the case against Bennis. William Roe and Kathleen Bennis did not. Stipulated Facts, CP 85, ¶¶ 13-17. If the Estate prevails, then the attorney effort benefited Gerald and Elizabeth by only \$3,002.33 each. The amount that the Hennessey firm proposes to charge each beneficiary far exceeds that modest best case recovery.

Bennis proposes a court order adjusting all fees in accordance with RPC 1.5(a)(5). That outcome is equitable as required by RCW 11.96A.150.

The proposed application of RPC 1.5(a)(4) will encourage lawyers to tailor legal efforts to the likely result and diminish irrational, unprofitable estate litigation.

Bennis proposes an order excusing her from payment of fees to the Hennessey or Decker firms from her estate share because she opposed the litigation from the beginning. Only Elizabeth Gannon supported the proposed offsets against Kathleen Bennis and William Roe. Stipulated Facts, CP 85 (¶¶ 17)

## CONCLUSION

Kathleen BENNIS asks for a decision:

- (1) Reverse the court's order granting summary judgment to the Estate against her in the amount of \$12,009 and enter Summary Judgment that Bennis' debt is not owed;
- (2) Order payment of Bennis' legal fees associated with her appeal and in the underlying case;
- (3) Order adjustment of legal fees charged by the Personal Representative's attorney in accordance with the provisions of RPC 1.5(a)(5) and RCW 11.96A.150 and;
- (4) Excuse Bennis from direct or indirect payment of legal fees associated with the William Roe matter because she opposed the litigation from the start.

Respectfully submitted this 26 day of September, 2016.



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Rodney Reinbold; WSBA #4656  
Attorney for Kathleen Bennis

**COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON**

**In re Estate of Anne Marie Roe**

**William Roe, Respondent re Cross Appeal and  
Kathy Roe Bennis-Appellant**

**v.**

**Gerald F. Roe,  
Personal Representative of the Estate of Anne Marie Roe-  
Respondent and Cross Appellant**

**APPELLANT COURT CASE 345459  
SPOKANE COUNTY CAUSE NUMBER 14-4-00134-9**

**DECLARATION OF MAILING**

**DECLARATION OF MAILING**

I certify that on the <sup>th</sup>27 day of September, 2016, I caused a true and correct copy of the Brief of Appellant Kathleen Bennis to be deposited in the U.S. Mail at Okanogan, Washington, postage prepaid, addressed to the following:

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SIGNED at Okanogan, Washington, on the <sup>th</sup>27 day of September, 2016.

  
Printed name: PATTY CARLSON