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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34751-6-III

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

Spokane County Cause No. 2011-04-01394-6

AARON L. LOWE, Son of Decedent

Petitioner/Appellant,

v.

LONNIE D. LOWE, Individually and as
Personal Representative of the Estate of
Betty L. Lowe, Deceased,

Respondent/Appellee.

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNTER STATEMENT TO RESPONDENT’S INTRODUCTION AND RELIEF REQUESTED 1

II. COUNTER STATEMENT OF THE CASE 2

III. ARGUMENT 3

 A. De Novo Review is Required 3

 B. Findings of Facts were Necessary: The Motion Entered Did not Mention What was to be Distributed and to Whom. It Was not Sufficient 4

 C. Aaron Lowe, Under the Exigent Circumstances, was Denied Due Process 7

 D. The Amendment to Raise the Abuser and Vulnerable Adult Issues was Denied. The Issues Could not be Final as They Were Never Litigated. 8

 E. No Attorneys Fees are Allowable as the Case is First Impression. Under the Circumstances and New Law Must Be Decided 11

IV. CONCLUSION.....15

TABLE OF AUTHORITIES

CASES

<i>Advocates for Responsible Development v. Western Washington Growth Management Hearings Board</i> , 170 Wash.2d 577, 580, 245 P.3d 764 (Was. 2010)	14
<i>Cornu-Labat v. Hospital District No. 2, Grant County</i> , 177 Wash.2d 221, 298 P.3d 70 (Wash. 2013)	3
<i>Estate of Haviland</i> , 177 Wash.2d 68, 301 P.3d 31 (2013), 162 Wash.App 548; 161 Wash.App. 851, 173 Wash.2d 1001 (2013)	11, 12, 13
<i>Estate of Lowe</i> , 191 Wash.App. 216, 227-8, 361 P.3d 789 (Div. III, 2015)	2, 9
<i>Fluke Capital & Management Services Co. v. Richmond</i> , 106 Wash.2d 614, 625, 724 P.2d 356 (Wash 1986)	14
<i>Gradinaru v. State Dept. of Social and Health Services</i> , 181 Wash. App. 18, 235 P.3d 209, review denied. 181 Wash.2d 1010, 335 P.3d 940 (2014) ...	1, 13
<i>Groff v. Department of Labor and Industries</i> , 65 Wash.2d 35, 395 P.2d 633 (Wash. 1964)	4, 7
<i>Hanna v. Margitan</i> , 193 Wash.App. 596, 615, 373 P.3d 300 (Div. 3, 2016)	14
<i>In re Elliott's Estate</i> , 22 Wash.2d 334, 355, 156 P.2d 427 (Wash. 1945) ..	6, 10, 12
<i>In re Estate of Kordon</i> , 126 Wash.App. 482, 485, 108 P.3d 1238 (Div III, 2005)	3
<i>In re Estate of Wright</i> , 147 Wash.App. 674, 688, 196 P.3d 1075 (Div. 1, 2008)	14

<i>In re Marriage of Treseler and Treadwell</i> , 145 Wash.App. 278, 290, 187 P.3d 773 (Div. 1, 2008)	6
<i>In re Estate of Peterson</i> , 102 Wash.App 456, 9 P.3d 845 (Div. 2 2000)	4
<i>Kaplan v. Kaplan</i> , 524 Fed.Appx. 547, 548, 2013 WL 38841901 (11 th Cir. 2013)	13
<i>Lemond v. State Dept. of Licensing</i> , 143 Wash.App 797, 805, 180 P.3d 879 (Div. 1, 2008)	10
<i>Marshall v. Marshall</i> , 547 U.S. 293, 299, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006);	13
<i>Maytown Sand and Gravel</i> , 198 Wash.App. 560, 395 P.3d 149 (Div. II, 2012)	10
<i>Sharbono v. Universal Underwriters, Ins. Co.</i> , 139 Wash.App. 383, 423, 161 P/3d 406 (2007)	14
<i>Schibel v. Eymann</i> , 193 Wash.App. 534, 546, 372 P.3d 172 (Div. III, 2016)	10
<i>Schreiner v. City of Spokane</i> , 74 Wash.App. 617, 625, 874 P.2d 883 (Div. 3, 1994)	14
<i>Stevens County v. Futurewise</i> , 146 Wash.App. 493, 192 P.3d 1, (Div. 3) 9	
<i>Tulsa Professional Collection Services Inc., v. Pope</i> , 485 U.S. 478, 488, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988)	7
<i>Van Dinter v. City of Kennewick</i> , 121 Wash.2d 38, 47, 846 P.2d 522 (1993)	14

STATE STATUTES

RCW § 11.68.090 5, 7, 8
RCW § 11.76.030 3, 5, 7
RCW § 11.76.050 1, 5, 7, 8, 11, 13
RCW § 11.84.010 1, 3, 4
RCW § 11.84.020 2
RCW § 2.08.010 12

COURT RULES

CP 1-110 4
CP 42 2
CR 52(a) 3
CP 200 4, 5

RAP 2.2(1) 3

I. COUNTER STATEMENT TO RESPONDENT'S INTRODUCTION AND RELIEF REQUESTED

Lonnie Lowe, Respondent, removed Betty Lowe's hidden financial assets, kept them under his exclusive control and spent some of the money on himself. He now asks this Court to ignore the relatively new abuser law, RCW § 11.84.010, 020, enacted in 2009, protects an endangered person, Betty Lowe, from an abuser, Lonnie Lowe. The new law is liberally interpreted. See *Gradinaru v. State Dept. of Social and Health Services*, 181 Wash. App. 18, 235 P.3d 209, review denied. 181 Wash.2d 1010, 335 P.3d 940 (2014), a case that Lonnie Lowe never cites in his Respondent's Brief.

The prior litigation denied Appellant Aaron Lowe a right to be heard on the abuser statute. The correct time the issue is ripe for review is when the estate was to be distributed, as provided in RCW § 11.76.050. This opportunity first occurred on August 26, 2016. The Estate elected a formal closing. It did not move to strike Aaron Lowe's statutory right to be heard and cannot now be heard to complain about its own election to a formal closing. Lonnie Lowe continues to act in total conflict as personal representative and abuser and now complains that now he is the person financially abused even though he kept everything that should have been awarded to his two brothers. He seeks to have this Court disregard his abuser

conduct. Lonnie Lowe also seeks a ruling that Aaron Lowe had no right to testify. Arrangements were made to allow Aaron to participate by cell phone. Since the transmission to Aaron was blocked by the hospital in Palo Alto, California, a condition that Aaron Lowe at the time was unable to remedy on the spot, the facts of the emergency communication failure could not be instantly cured. Unknown at the time was why Aaron Lowe could not participate, by no fault of his own. Due process and right to be heard was violated.

II. COUNTER STATEMENT OF THE CASE

The prior litigation never determined whether RCW § 11.84.020 applies. It holds that no slayer or abuser shall acquire any property or receive any benefit as a result of the death of a decedent. At page 10 of Respondent's Statement of Fact, Lonnie Lowe argues that evidence was derived from the prior trial. The argument portion of this reply will establish that the issue must be "actually determined." It was not. The trial court denied the Second Amended and Supplemental Complaint. See *Estate of Lowe*, 191 Wash.App. 216, 227-8, 361 P.3d 789 (Div. III, 2015) and CP 42. The distribution of the Estate was not litigated in the case. In fact, the trial court ordered a formal appraisal. *Id.* at 230-1. No final distribution could have taken place. The

prior proceedings never included a request of the Personal Representative to distribute the estate. RCW §§ 11.84.010 and .030 apply when the Estate is to be finally distributed. Aaron Lowe tried to participate by cell phone. R.P. 5. The hook up was blocked, he never had a chance to testify. The prior proceedings never involved distribution to heirs. RCW § 11.76.030 is invoked only when the estate is ready to be closed and distributed.

III. ARGUMENT

A. De Novo Review is Required.

The case should be reviewed de novo as the issues are legal and constitutional issues. CR 52(a) and RAP 2.2(1) have to be construed. The hearing was before the Court without a jury. The evidence was entirely documentary. The review is de novo. *Cornu-Labat v. Hospital District No. 2, Grant County*, 177 Wash.2d 221, 298 P.3d 70 (Wash. 2013) states: “An appellate court stands in the same position as the trial court when the record consists entirely of documentary evidence and affidavits.” *Id.* at 229. A filing that construes a probate law that is part of an existing probate proceeding is a question of law reviewed de novo. See, *In re Estate of Kordon*, 126 Wash.App. 482, 485, 108 P.3d 1238 (Div. III, 2005). The facts are not under review as they were not controverted at the hearing on the Petition for

Distribution. Dismissal of the motion in the probate is reviewed de novo. *In re Estate of Peterson*, 102 Wash.App 456, 9 P.3d 845 (Div. 2 2000).

B. Findings of Facts were Necessary: The Motion Entered Did Not Mention What was to be Distributed and to Whom. It was Not Sufficient.

The Order entered in this case, CP 200, did not refer to the Petition of Aaron Lowe, CP 1-110, or the allegations of abuser contained in the Petition. It also failed to enter any finding on Aaron Lowe's dispute contending that Lonnie Lowe take nothing for violating RCW §§11.84.010-020. *Groff v. Department of Labor and Industries*, 65 Wash.2d 35, 395 P.2d 633 (Wash. 1964) holds that:

For an adequate appellate review in cases such as the one now before us, the court should have, from the trial court which has tried the case de novo, findings of fact (supplemented, if need be, by a memorandum decision or oral opinion) which show an understanding of conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions, together with a knowledge of the standards applicable to the determination of those facts. *Id.* at 40.

Groff holds that if the findings are not sufficient the case is sent back to the trial court. *Id.* at 47. Here, Lonnie Lowe presented no defense to the contention that would prevent him from distributing one third of the remainder estate to himself. Lonnie contends that the issue has already been

decided, a bootstrap argument. The order entered never addressed the abuser argument. CP 200. The Estate, early on, was granted non intervention powers but elected under RCW § 11.68.090 to “exercise the powers granted to a personal representative under chapter 11.76.” RCW § 11.76.030 allows a final report indicating, among other matters, “the names and addresses, as nearly as may be, of the heirs who may be entitled to share in such estate.” “. . . and shall set out such other matters as may tend to inform the court of the condition of the estate.” RCW § 11.76.050 allows any interested person to:

File objections to the said report and petition for distribution, or may appear at the time and place fixed for the hearing thereof and present his or her objections thereto. The court may take such testimony as to it appears proper or necessary to determine whether the estate is ready to be settled, and be approved, and to determine who are the legatees or heirs or persons entitled to have the property distributed to them, and the court shall, if it approves such report, and finds the estate ready to be closed, cause to be entered a decree approving such report, find and adjudge the persons entitled to the remainder of the estate, and that all debts have been paid, and by such decree shall distribute the real and personal property to those entitled to the same.

The court never found or adjudged whether testimony was needed; who were the persons entitled and never decreed the distribution of the estate. Aaron Lowe was entitled to either one third

or half of the remainder of the estate. The decree never mentioned the dispute or how much each remainder person should get. A court administering a probate has complete power over the assets of the estate.

These statutes confer upon the probate court plenary jurisdiction and power over the probate of wills, and in consequence thereof, the probate court may do any and all things essential to make its action effective on the premises. If the case demands that the court revise its decrees in order to effect justice, it has the power to do so, to the same extent that any court of general jurisdiction has such power as incidental to its general powers. So long as the court retains its grip upon the assets of an estate, it has the power to control their distribution, and if, in order to distribute the assets to the parties lawfully entitled thereto, it is necessary to vacate an earlier order or decree rendered ex parte, the court has that power.

In re Elliott's Estate, 22 Wash.2d 334, 355, 156 P.2d 427 (Wash. 1945). The *Elliott's* estate case allowed the filing of a later will disinheriting the surviving spouse who was to receive all the estate under the first will even though the applicable statute had run. The court held that the final account settlement statute "confers upon the court jurisdiction to determine who are entitled to the property, as the power to distribute includes the power to determine to whom the distribution should be made." *Ibid.* at 355. Lonnie Lowe, at page 13

of his brief, cites *In re Marriage of Treseler and Treadwell*, 145 Wash.App. 278, 290, 187 P.3d 773 (Div. 1, 2008) that case was a dissolution proceeding and not a hearing under RCW § 11.76.030. The hearing could not be dismissed by court rule 52(a)(5), as no rule 12 or 56 was applicable to the hearing allowed to an heir in a probate. If a probate court adversely affects a property interest, due process applies. *Tulsa Professional Collection Services Inc. v. Pope*, 485 U.S. 478, 488, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). Aaron Lowe is entitled to have a meaningful appellate review of the trial court's findings indicating "A resolution of the material issues of fact that resonate beneath the generality of ultimate conclusions." *Groff*, 65 Wash.2d at 40.

C. Aaron Lowe, Under the Exigent Circumstances, was Denied Due Process.

Lonnie Lowe, at page 13 of his brief, contends that Lonnie Lowe, as Personal Representative, did not waive his non-intervention powers. Lonnie fails to cite RCW § 11.68.090 allowing the personal representative to proceed under Chapter 11.76. He may exercise and, in this case, did elect to proceed under 11.76.030 for a formal closing. This triggers RCW § 11.76.050 allowing an interested party to appear

to “present his or her objections thereto.” A non-intervention ruling allows the personal representative “all without an order of the court and without notice, approval or confirmation and in all other respects administer and settle the estate of the decedent without intervention of court.” RCW § 11.68.090. Lonnie Lowe abandoned the right of non intervention and asked the court to intervene. Lonnie cannot now complain about the procedure he elected and now invites error caused by his own conduct. The argument of Lonnie Lowe at page 15 of his brief is wrong, as RCW § 11.76.050 applies where Lonnie elected to proceed under Chapter 11.76. He could proceed under 11.76. The procedure was approved by statute.

Aaron sought the postponement which was denied. He tried to utilize the alternative. His testimony was prevented by a circumstance beyond control of anyone. The statute, RCW § 11.76.050, allows the interested party to testify. A default is not allowable under these circumstances as good cause exists.

D. The Amendment to Raise Abuser and Vulnerable Adult Issues was Denied. The Issues Could Not Be Final As They Were Never Litigated.

Lonnie Lowe, at page 10 of his brief, stated that the “trial court noted, that all of the proffered ‘evidence’ in support of Aaron’s

accusation (attached the Certification in Support) were derived from trial,” citing RP 11. The Court asked whether a motion to amend at the end of the trial was offered. Neither the court or council could remember.” R.P. 12. At page RP 10-11, Aaron Lowe’s counsel argued that in the recent amended complaint “the issue of vulnerable adult was denied.” RP 10. “It was never tried. The Court, again turned down the issue of vulnerable adult.” RP 11. The Second Amended Complaint was denied. *In re Estate of Lowe*, 191 Wash.App. 216, 361 P.3d 789 (Div 3, 2015) “Aaron contends that the trial court erred when it denied his request to file his second amended and supplemental Petition.” *Id.* at 227. The Court upheld the denial of the amendment. *Id.* at 228. Aaron Lowe was aware that the abuser amendment was not allowed. CP 43. The abuser claim was never actually litigated or determined. *Stevens County v. Futurewise*, 146 Wash.App. 493, 192 P.3d 1, (Div. 3 2008) states:

COLLATERAL ESTOPPEL. similar to res judicata, collateral estoppel prevents a party from relitigating issues that have been raised and litigated by the party in a prior action. *Reninger v. Dep’t of Corr.*, 134 Wash.2d 437, 449, 951 P.2d 782 (1998). Unlike res judicata, collateral estoppel is applicable when the claim is different but some of the issues are the same. *Garcia v. Wilson*, 63 Wash.App. 516, 518-19 n. 5, 820 P.2d 964 (1991). Important here,

“collateral estoppel precludes only those issues that have actually been litigated and determined.” *McDaniels v. Carlson*, 108 Wash.2d 299, 305, 738 P.2d 254 (187). Not only are Ms. Wagenman and Futurewise not the same party, but Ms. Wagenman’s claim that SCC 13.10.034(3)(C) unlawfully limits critical habitats to those established by government rule or statute was not addressed the prior cases. Although raised, the issue was not actually determined. Consequently, collateral estoppel does not bar Futurewise from raising the same issue. *Id.* at 507-8.

A tortious interference claim did not preclude explicit claims provided by statute involving other elements. The abuser claim was allowable, the amendment of the statutory claims was denied on the first trial. *Maytown Sand and Gravel LLC*, 198 Wash.App. 560, 395 P.3d 149 (Div. 2, 2012). ¶ 63 requires that the issue must be identical in all respects, quoting *Lemond v. State Dept. Of Licencing*, 143 Wash.App 797, 805, 180 P.3d 879 (Div. 1, 2008). The earlier action must necessarily decide the same issue as presented in the current case. *Schibel v. Eymann*, 193 Wash.App. 534, 546, 372 P.3d 172 (Div. III, 2016). *In re Elliott’s Estate*, 22 Wash.2d 334, 156 P.2d 427 (Wash. 1945) applies. In the case the court construed RRS § 1533, now RCW § 11.76.050. “Estates may be distributed to the persons entitled thereto.” *Id.* at 355. RCW § 11.76.050 states “and to determine who are the legatees or heirs or persons entitled to have the

property distributed to them . . . find and adjudge the persons entitled to the remainder of the estate.” The estate was open and no remainder decisions were chronicled.

E. No Attorneys Fees are Allowable as the Case is First Impression. Under the Circumstances and New Law Must be Decided.

The Estate requests attorney’s fees. It initiated a formal closing of the Estate. Aaron Lowe, a residuary beneficiary, was invited by notice to appear and question the distribution. “Any person interested may file objections to the said report and petition for distribution or may appear at the time and place fixed for the hearing and present his or her objections thereto.” RCW § 11.76.050. He was utilizing a statutory right to find out, whether he received a one half or one third remainder. Unlike *Estate of Haviland*, 177 Wash.2d 68, 301 P.3d 31 (2013) where the “court granted the petition to remove the alleged abuser.” *Id.* at 73. Here, the alleged abuser Lonnie Lowe was not removed as personal representative and proceeded in a complete conflict of interest. He sought to ignore his abuser conduct and award a one third residuary interest to himself. Aaron Lowe, a one third residuary beneficiary, raised the issue at the

right time. He acted due to the failure of Lonnie Lowe to recuse himself. Lonnie Lowe never responded to the allegation and now wants attorney fees. *Haviland* consisted of two appeals. One was an appeal of a 2006 holding of undue influence invalidating the will. It was brought by the children. 162 Wash.App. 548, 255 P.3d 854 (Div. I, 2011). The second suit was from a petition filed in 2009 by the successor personal representative of the same estate alleging abuser disinheritance. The Haviland children joined in the appeal. *In re Estate of Haviland*, 161 Wash.App. 851, 251 P.3d 289 (Div. I, 2011). The appeal was remanded to the trial court and review was granted, 173 Wash.2d 1001, 268 P.3d 941 (2011), resulting in the review of the abuser issue alone. *In re Estate of Haviland*, 177 Wash.2d. 68, 301 P.3d 31 (2013). The abuser statute is relatively new in estate matters, being enacted in 2009. Since probate matters are procedural court proceedings that must be originated in superior court (see RCW § 2.08.010), they are unlike typical litigation between parties. They are on going until closed and “may do all things essential to make its action effective in the premises.” *Elliott’s Estate*, 22 Wash.2d at 355. Aaron Lowe challenged the validity of written instructions, a first

impression matter and similar to *Haviland*. When the abuser statute was ripe for determination, Aaron Lowe challenged Lonnie Lowe's conduct as an abuser. See *Marshall v. Marshall*, 547 U.S. 293, 299, 126 S.Ct. 1735, 164 L.Ed.2d 480 (2006); *Kaplan v. Kaplan*, 524 Fed.Appx. 547, 548 (11th Cir. 2013). Aaron Lowe was granted authority to ask the trial court to determine the amount of his interest in the residue of the estate. RCW § 11.76.050. His action was allowed by statute. The request was to determine what share of the residue he would receive. He had ample facts to make the challenge. This Court has not yet determined the outcome. In the event that Aaron Lowe does not prevail however, he should not be penalized for utilizing his right as a beneficiary by presenting a material matter. To date, he has never received any distribution. The Personal Representative initiated the proceeding and did not dispute Aaron Lowe's argument. No findings were entered so no prevailing party was determined at the hearing. No request for attorney's fees was made at the trial court proceeding. Aaron Lowe raised the abuser issue upheld in *Gradinaru v. State of Washington Dept. Of Social and Health Services*, 181 Wash.App 18, 24, 325 P.3d 209 (Div. 1, 2014).

This is a debatable issue. *Hanna v. Margitan*, 193 Wash.App. 596, 615, 373 P.3d 300 (Div. 3, 2016) applies; see also, *Advocates for Responsible Development v. Western Washington Growth Management Hearings Board*, 170 Wash.2d 577, 580, 245 P.3d 764 (Wash. 2010). Neither party prevailed; *Sharbono v. Universal Underwriters, Ins. Co.*, 139 Wash.App. 383, 423, 161 P.3d 406 (2007) also applies. The estate closure was a normal probate procedure. If reasonable minds might differ on the issues raised on appeal, attorneys fees are not awarded. *In re Estate of Wright*, 147 Wash.App. 674, 688, 196 P.3d 1075 (Div. 1, 2008); *Fluke Capital & Management Services Co. v. Richmond*, 106 Wash.2d 614, 625, 724 P.2d 356 (Wash 1986). Aaron Lowe's appeal is based on relevant appellant opinions. See *Van Dinter v. City of Kennewick*, 121 Wash.2d 38, 47, 846 P.2d 522 (1993); *Schreiner v. City of Spokane*, 74 Wash.App. 617, 625, 874 P.2d 883 (Div. 3, 1994). This case has a reasonable possibility of reversal. *City of Lynwood v. Snohomish County*, 48 Wash.App. 210, 213, 738 P.2d 699 (Div. 1, 1987). No attorney's fees are awardable.

IV. CONCLUSION

The abuser issue was timely raised as it determines what share is received. The decision should be reversed.

DATED this 22nd day of June, 2017.



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CERTIFICATE OF SERVICE

This is to certify that on June 22, 2017, a copy of the Reply Brief of Petitioner was served on Counsel for Plaintiff/Appellee by hand delivery, addressed as follows:

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