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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34751-6-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

In the Matter of:

ESTATE OF BETTY L. LOWE,

Deceased,

AARON L. LOWE, Son of Defendant,

Petitioner/Appellant,

vs.

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

Respondent/Appellee,

RESPONDENTS' BRIEF

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I. INTRODUCTION & RELIEF REQUESTED

This appeal is Appellant Aaron Lowe's third attempt to have the Court of Appeals permit an additional cause of action against his brother, Respondent Lonnie Lowe, for alleged financial abuse of their deceased mother, Betty Lowe. The only thing that has changed since this matter was last before the Court is the trial court's post-mandate entry of the August 26, 2016 Order Approving Final Report and Petition for Decree of Distribution by Personal Representative with Nonintervention Powers (with Accounting) (the "Order"). Under the auspices of challenging the trial court's fairly routine entry of that Order on procedural and due process grounds, Aaron's¹ latest appeal appears singularly tailored to drive up costs for his brother and the estate by re-litigating issues decided against him (and affirmed on appeal).

By now, the Court is very familiar with the facts of this case, which resulted in a prior published decision and principally concern the disposition of various precious metals that Betty inherited from her husband Donald E. Lowe in 2004. Aaron's oft-repeated accusations against Lonnie, the personal representative of Betty's estate, have not swayed any trial or appellate court to rule in his favor over the past six years and nothing has transpired or been discovered to change that result.

¹ First names of the parties will often be used herein to avoid confusion.

Although Aaron is free to disagree with the courts' decisions, he cannot be permitted to endlessly pursue matters that have already been definitively resolved against him.

In this most recent appeal, assignments of error 2, 4, 5, 6 and 7 all concern Aaron's allegation that Lonnie financially abused his mother and complain that the trial court should have set that issue for trial. However, Aaron already appealed the trial court's denial of his motion to add a claim for financial abuse and this Court unanimously affirmed that decision. Nothing has transpired since the issuance of the Court's mandate to change that result, nor has Aaron given the Court any plausible reason to reconsider its decision terminating review.

The remaining assignments of error (1 and 3) concern the one thing that has happened at the trial court level since the mandate issued: the ministerial entry of the Order closing out the nonintervention probate of Betty's estate.

With respect to assignment of error 1, Aaron complains that he was unable to personally attend and testify at the hearing. However, there is no dispute that Aaron was (a) given notice of the hearing, (b) permitted to file briefing and 100 pages of testimony and exhibits in opposition, (c) represented by counsel at the hearing and (d) given the opportunity to attend telephonically, but failed to make appropriate arrangements. Due

process was afforded. Indeed, Aaron was given more opportunity to object to entry of the Order in this nonintervention probate than he was statutorily entitled to under RCW 11.68.100. Even under the more rigorous standards of a full intervention probate contained in RCW 11.76.050, Aaron was given appropriate notice and the opportunity to articulate his objections. The trial court simply found them unpersuasive.

Assignment of error 3 complains that the trial court failed to enter findings of fact and conclusions of law with its Order pursuant to Civil Rule ("CR") 52(a). This argument is equally without merit because CR 52(a) only requires findings of fact and conclusions of law related to a bench trial and specifically states that such findings and conclusions are not required when the court enters a decision on motions. Here, the trial court did enter findings of fact and conclusions of law after trial, but did not (and was not required to) enter findings and conclusions with respect to Lonnie's petition (motion) for entry of the Order closing the estate.

For all of the reasons stated herein and those set forth in the Court's published decision of November 10, 2015, Lonnie respectfully requests that the trial court's Order be affirmed so that this matter can finally be brought to an end. Although a 2-1 majority of the Court recognized Lonnie's sizeable inheritance in declining to award attorneys' fees after the last appeal, Aaron has persisted in his efforts to make this litigation as

costly and time-consuming to Lonnie and the estate as he can. For this reason, the Respondents² respectfully request that the Court now exercise its discretion pursuant to RCW 11.96A.150(1) and award reasonable attorneys' fees and costs on this subsequent appeal.

II. STATEMENT OF THE CASE

A. FACTS.

Despite Aaron's efforts to spin them on successive appeals, findings of fact in this case have already been entered by the trial court, affirmed on a prior appeal, and are absolute verities here. *In re A.W.*, 182 Wn.2d 689, 711 (2015)("Unchallenged findings of fact are verities on appeal.")(citing *Merriman v. Cokeley*, 168 Wn.2d 627, 631 (2010)). Although these facts are well known to the Court and aptly stated in the Court's prior published opinion, *In re Estate of Lowe*, 191 Wn.App. 216 (2015), Respondents provide the following summary of the trial court's findings of fact (CP 243 - 252) for ease of reference:

Betty Lowe's husband of 60 years, Donald, predeceased her in 2003. (CP 244 at ¶¶ 2, 7) Donald's will made no mention of precious metals, including silver bars and coins that he collected over the years and hid in the fireplace foundation of the family home. (CP 244-245 at ¶¶ 4-6,

² This brief is submitted on behalf of both Lonnie Lowe, individually and as Personal Representative of the Estate of Betty Lowe, and on behalf of the Estate. All references to "Lonnie" or Respondents include both Lonnie and the Estate.

11) Although his will made some specific bequests of musical instruments, he left his residuary estate to his "Personal Representative". (CP 245 at ¶ 10)

After Donald's will was admitted to probate, Aaron, his ex-wife Denise Lowe, and Lonnie each filed declinations to serve as Personal Representative. (CP 244 at ¶¶ 7-8) Aaron filed a declaration nominating his mother, Betty, to serve as Personal Representative and Betty was appointed for that purpose. (CP 244-245 at ¶¶ 8-9) As a result of the lack of a named individual to inherit the residuary estate, it passed entirely to Betty under the laws of intestacy. (CP 245 at ¶¶ 12-14) Donald's probate was completed and closed on April 15, 2004. (CP 245 at ¶ 14)

Betty died testate on October 1, 2011. (CP 248 at ¶ 30) She executed her will on September 15, 2003, naming her son Lonnie as Personal Representative. (CP 246 at ¶ 16) The will was drafted by attorney Robert Lamp. (CP 247 at ¶ 27) Betty also executed a Durable Power of Attorney naming Lonnie at the same time she executed her will. (CP 246 at ¶ 16; CP 107-110) Mr. Lamp verified that Betty had sufficient capacity to execute the documents. (CP 247 at ¶ 27) He found her to be competent and observed that she was totally appropriate and cognizant of what she had and what she wanted to do with it. *Id.*

On September 3, 2007 and September 11, 2007, Betty executed written instructions for the distribution of some of her personal property. (CP 246 at ¶ 17). The September 11 instructions were prepared by Mr. Lamp to formalize the September 3 instructions and authorized Lonnie to "distribute as he shall determine or retain for himself" the silver coins and bars. (CP 246 at ¶18) Mr. Lamp verified Betty had the capacity to execute the written instructions. (CP 247 at ¶ 27) Lonnie did not assist in drafting the written instructions prepared by Mr. Lamp and was not present when his mother signed them. (CP 248 at ¶ 28)

A nurse practitioner who saw Betty for some medical issues from 2002 to 2011 also observed that she was alert, oriented, well groomed, and relevant during the time she saw her. (CP 247 at ¶ 26)

Prior to her death, Betty authorized Lonnie to take some of her property, including the precious metals, to his house in Olympia for safekeeping. (CP 246 at ¶ 19) Betty also authorized Lonnie to sell some of the property to buy a vehicle for her and make various improvements to her home. (CP 246 at ¶¶ 20-21). Lonnie never used Betty's assets for himself while she was alive and did not use the Power of Attorney to make gifts of Betty's property to himself. (CP 247-248 at ¶¶ 22, 29)

B. PROCEDURE.

Betty passed away on October 1, 2011 and her will was admitted to probate on October 28, 2011. (CP 248 at ¶ 30) Pursuant to Betty's will, Lonnie was appointed as Personal Representative, to serve without bond and with nonintervention powers. (CP 248 at ¶ 31)

Aaron initiated this action on February 22, 2012, by filing a Verified Petition for a Will Contest and other causes of action against his brother Lonnie, both individually and in his capacity as Personal Representative. (CP 248 at ¶ 32) Aaron filed an amended petition on November 2, 2012. (CP 248 at ¶ 33) Lonnie answered the amended petition and denied Aaron's assertions. (CP 248 at ¶ 34)

As the Court is aware from his last appeal, Aaron moved the trial court for an order permitting him to file a second amended and supplemental petition less than a month before trial, claiming that Lonnie had "financially abused" his mother in violation of the Vulnerable Adult Act and precluding any inheritance under the "Inheritance Rights of Slayers or Abusers" Act. The trial court denied Aaron's untimely motion, but gave him significant leeway to explore his contention at trial. (RP 9-10, 17) Aaron sought discretionary review of that issue by this Court in Case Number 319318, which was denied by a Commissioner on October 17, 2013.

The case was tried before the Honorable Maryann C. Moreno in September 2013, resulting in a Memorandum Opinion and Findings of Fact and Conclusions of Law that denied all relief sought by Aaron and ordered him to pay Lonnie's and the estate's attorney fees. (CP 229-242, CP 243-252)

Aaron appealed to this Court on numerous grounds, including the trial court's denial of his motion to file a second amended and supplemental petition to add a claim for financial abuse. The Court unanimously affirmed the trial court's ruling in a published decision, noting that Judge Moreno's findings were supported by substantial evidence and that, despite Aaron's many accusations, he had failed to establish a breach of Lonnie's duties as personal representative of their mother's estate. *In re Estate of Lowe*, 191 Wn.App. 216 (2015). Aaron then sought discretionary review by the Washington State Supreme Court, which was denied. *Lowe v. Lowe*, 185 Wn.2d 1019 (2016).

After the mandate was issued, Lonnie attempted to close out his mother's nonintervention probate by filing a Final Report and Petition for Decree of Distribution by Personal Representative (the "Petition").³ (CP

³ As a personal representative with nonintervention powers, Lonnie could have closed the estate by filing a declaration of completion of probate pursuant to RCW 11.68.110. Given the long and contested nature of this probate, Lonnie elected to provide greater transparency to the beneficiaries with the final report and general accounting. (RP 6)

253-270) The Petition was set for hearing on August 26, 2016 and Aaron was given notice thereof on August 3, 2016. (CP 272-274)

Twelve days later, on August 15, 2016, Aaron filed a motion to continue the hearing on Lonnie's Petition. (CP 275-278) Aaron's supporting declaration stated that he was unavailable on August 26, 2016, because he needed to be in California for his significant other's surgery. (CP 279-281) Lonnie opposed the motion to continue because it was untimely and because Aaron had not then filed an objection to the Petition or explained why his presence was necessary at the hearing. (CP 283-286)

On August 18, 2016, Aaron signed and filed an objection to the Petition, taking issue with the form and content of Lonnie's report and rehashing familiar accusations against Lonnie for financial abuse and the distribution of their father's estate in 2004. (CP 287-296) In support of his objection, Aaron also filed a pleading titled "Petitioner's Rule of Evidence 902(d) Certification and Rule of Evidence Hearsay Exception Pursuant to 804(b)(1) and (3) Establishing Record in Support of Objection" (the "Certification in Support"), which attached approximately 100 pages of trial testimony and exhibits. (CP 1-110)

On August 24, 2016, the trial court held a telephonic hearing to address Aaron's motion to continue the hearing on the Petition. (CP 297-299) Aaron's motion to continue was denied. *Id.*

At the hearing on August 26, Aaron was represented by his counsel, Robert Kovacevich. (CP 302; RP 2) The trial court attempted to accommodate Aaron's unavailability by agreeing to move the time of the hearing and/or permitting him to participate in the proceedings by telephone, but Aaron and/or his counsel failed to make prior arrangements with the trial court's judicial assistant. (RP 4-6) Despite the lack of prior arrangements, the trial court paused the proceedings while Her Honor's bailiff attempted to reach Aaron by telephone. *Id.* Aaron did not answer his phone and the bailiff left a message.⁴ *Id.* At that point, the hearing proceeded without objection from Aaron's counsel. *Id.*

During oral argument, Aaron's counsel articulated his objections and stated that Aaron's claims for alleged financial abuse of a vulnerable adult were "never tried". (RP 11-12) However, the trial court noted that all of the proffered "evidence" in support of Aaron's accusation (attached to the Certification in Support) were derived from trial. (CP 1-110; RP 11) Aaron's counsel could not answer the trial court's logical follow-up question about whether he ever moved to allow the claim to conform to the evidence at the end of trial. (RP 12) There is no evidence in the record indicating that such a motion was ever made.

⁴ Despite Aaron's attempts to explain his failure to answer the phone in his Opening Brief, the record on appeal contains no such evidence or explanation.

After considering the evidence and argument presented by the parties, the trial court granted Lonnie's Petition and entered the Order closing Betty's probate. (CP 300-301) This second appeal followed.

III. ARGUMENT

A. STANDARD OF REVIEW.

Aaron's Opening Brief does not articulate what standard of review applies with respect to his various assignments of error. Given the significant overlap between this appeal and his last, it is difficult to determine whether Aaron is once again challenging findings of fact from the trial, previously affirmed by this Court, or if he is simply raising issues of law related to the Court's entry of the Order closing Betty's estate.

In any event, a trial court's findings of fact are subject to the "clearly erroneous" standard of review; a finding of fact is clearly erroneous when, although there is some evidence to support it, a review of all the evidence leads to a "definite and firm conviction that a mistake has been committed." *Schryvers v. Coulee Community Hosp.*, 138 Wn.App. 648, 654 (2007). The Court of Appeals defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness and credibility of witnesses. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App. 474 (2011). The party claiming

error has the burden of showing that a finding of fact is not supported by substantial evidence. *Id.* at 497.

A question of law is reviewed de novo. *Id.* An appellant also has the burden to support its assignment of error of law with authority and legal argument. *Riksem v. City of Seattle*, 47 Wn.App. 506 (1987).

Once again, Aaron has not met these burdens. While many of his assignments of error are commingled throughout his argument and/or never addressed, the Respondents will respond in the order of Aaron's argument for the sake of the Court's convenience.

B. CIVIL RULE 52(A) DOES NOT REQUIRE THE TRIAL COURT TO ISSUE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR DECISIONS ON MOTIONS. [ASSIGNMENT OF ERROR NO. 3]

Aaron's argument on appeal begins by complaining that the trial court failed to enter CR 52(a) findings of fact and conclusions of law with its August 26, 2016 Order to close Betty's probate. (Opening Brief, pp. 3, 13-15) This argument should be summarily rejected, because CR 52(a) contains no such requirement:

(1) *Generally.* In all actions tried upon facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law. Judgment shall be entered pursuant to rule 58 and may be entered at the same time as the entry of findings of fact and the conclusions of law.

...

(5) *When Unnecessary.* Findings of fact and conclusions of law are not necessary:

...

(B) Decision on Motions. On decisions on motions under rules 12 and 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2).

CR 52(a) (underlining added). The rule is plain enough. CR 52(a) requires findings of fact and conclusions of law after a bench trial, but specifically states that such findings and conclusions are not required when the court enters a decision on motions.⁵ *In re Marriage of Treseler & Treadwell*, 145 Wn.App. 278, 290 (2008). None of the cases cited in Aaron's briefing even cite to CR 52(a), but all of them refer to required findings of fact and conclusions of law at the conclusion of a bench trial.

The trial court complied with CR 52(a) by entering findings of fact and conclusions of law after a bench trial. (CP 243-252) However, the trial court was not required to enter findings and conclusions in ruling on Lonnie's Petition (motion) for an Order closing out the estate and did not err in entering the Order as drafted.

C. AARON WAS GIVEN NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO ENTRY OF THE COURT'S ORDER, WHICH EXCEEDED THE REQUIREMENTS OF THE APPLICABLE PROBATE STATUTES AND SATISFIED DUE PROCESS. [ASSIGNMENT OF ERROR NO. 1]

Aaron's attempt to argue that he was deprived of due process at the August 26, 2016 hearing on Lonnie's Petition misstates the applicable law

⁵ Aaron also cites to Spokane County Local Rule ("LCR") 52(a), however that rule merely supplements CR 52(a) and likewise excepts findings and conclusions that are "otherwise unnecessary by reason of CR 52(a)(5)".

and evidence of record. In truth, Aaron was afforded more than adequate notice and opportunity to be heard with respect to Lonnie's Petition, which far exceeded his statutory rights in this action.

At the outset, it is important to recall that Lonnie was appointed personal representative of Betty's estate with nonintervention powers. (CP 248 at ¶ 31) As a result, the applicable statutes governing the closure of the estate are RCW 11.68.100 and RCW 11.68.110. RCW 11.68.100 requires (a) an application by the personal representative and (b) notice to potential heirs. Other than objecting to the reasonableness of fees, RCW 11.68.100 does not specifically entitle interested parties to object to the personal representative's application or submit evidence and testimony in opposition to the closing of an estate.

As a personal representative with nonintervention powers, Lonnie could have closed the estate by filing a declaration of completion of probate pursuant to RCW 11.68.110 and providing notice. Given the long and contested nature of this probate, Lonnie instead elected to provide greater transparency than required by utilizing the alternative decree procedure under RCW 11.68.100 and filing a final report and general accounting. (RP 6) In doing so, Lonnie did not waive his nonintervention powers and Aaron has not identified any authority stating that a personal

representative waives his or her nonintervention powers by utilizing the alternative decree procedure under RCW 11.68.100.

Nevertheless, Aaron contends that Lonnie should be held to the requirements articulated in RCW 11.76.050, which only applies in cases where the personal representative of an estate lacks nonintervention powers. RCW 11.76.050 provides, in relevant part:

Hearing on final report—Decree of distribution.

Upon the date fixed for the hearing of such final report and petition for distribution, or either thereof, or any day to which such hearing may have been adjourned by the court, if the court be satisfied that the notice of the time and place of hearing has been given as provided herein, it may proceed to the hearing aforesaid. 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 thereof and present his or her objections thereto. The court may take such testimony as to it appears proper or necessary. . .

Id. (emphasis added).

The Court's objective in statutory interpretation is "to ascertain and give effect to legislative intent." *City of Seattle v. Swanson*, 193 Wn. App. 795, 810 (2016) (citing *Ellensburg Cement Prods., Inc. v. Kittitas Co.*, 179 Wn.2d 737, 743 (2009)). The Court's interpretation must begin with the statute's plain meaning and when the statute's meaning is plain on its face, the Court must "give effect to that plain meaning as an expression of legislative intent." *Swanson*, 193 Wn. App. at 810 (citing *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526 (2010); *City*

of Spokane v. Spokane County, 158 Wn.2d 661, 673 (2006)). If a statute's plain language is subject to only one interpretation, the Court must end its inquiry. *Swanson*, 193 Wn. App. at 810.

The plain language of RCW 11.76.050 would not entitle Aaron to file objections and appear at the hearing to present objections and provide testimony. The statute is clearly written in the disjunctive and permits an interested person to file objections OR appear at the hearing to present said objections. The statute also grants the trial court discretion to take testimony that it deems proper or necessary, but does not require it.

Even if RCW 11.76.050 were applicable to this nonintervention probate, which it is not, there can be no dispute that Aaron was given notice and the opportunity to be heard in accordance with the statute and his due process rights under the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 3 of the Washington State Constitution. "The fundamental components of due process are notice and an opportunity to be heard. . . These are not mere formalities. Due process must be 'meaningful and appropriate to the nature of the case.'" *Alvarado v. State, Dep't of Licensing*, 193 Wn.App. 171, 177 (2016)(internal citations omitted).

Here, Aaron does not contest that he was given actual notice of the hearing on Lonnie's Petition, which was served upon his counsel twenty-

three days before the hearing. (CP 272-274) Nor can Aaron complain that the trial court refused to let him be heard or file an objection, which he personally signed under penalty of perjury and filed with a voluminous Certification in Support that the trial court read and considered. (CP 287-296; CP 1-110; RP 11) Based on these facts alone, the Court could conclude that the requirements of RCW 11.76.050 (if applicable) were satisfied and that Aaron had both notice and the opportunity to be heard.

Even so, Aaron still complains that the trial court failed to comply with RCW 11.76.050 and denied him due process because he was unable to personally attend the hearing due to a scheduling conflict. This argument fails in numerous respects.

First, the statute (if applicable) would not entitle Aaron to file an objection and attend the hearing to present that same objection - it only provides that he could object in one manner or the other. Second, the trial court has discretion to permit testimony it deems proper or necessary, but is not required to do so. Third, the trial court gave Aaron the opportunity to rearrange the time (but not the date) for the hearing, but never received a response from him. (RP 4) Fourth, the trial court permitted Aaron to participate in the hearing by telephone, but Aaron and/or his counsel failed to make prior arrangements with the judicial assistant and efforts to call Aaron were unsuccessful. (RP 5-6) The trial court even paused the

proceedings while Her Honor's bailiff attempted to reach Aaron by telephone. *Id.* Despite all of the above, Aaron was still given the opportunity to have his objection stated at the hearing, which was presented by his attorney of record. (CP 302; RP 2)

In summary, the trial court went to great lengths to afford Aaron the opportunity to be heard and his objections were briefed and argued by counsel. That is far more than either RCW 11.68.100 or RCW 11.76.050 require and thoroughly sufficient to satisfy Aaron's due process rights. Aaron's objection did not fail because he was deprived of notice and the opportunity to be heard - it failed because Aaron was unable to establish a viable basis for keeping the probate of Betty's estate open following his loss at trial and the issuance of this Court's decision terminating review.

D. THE LAW OF THIS CASE PROHIBITS AARON'S CONTINUING EFFORTS TO AMEND HIS CLAIMS AFTER TRIAL AND ISSUANCE OF THE COURT OF APPEALS MANDATE. [ASSIGNMENT OF ERROR NOS. 2, 4, 5, 6 AND 7]

The balance of Aaron's argument on appeal concerns five assignments of error that each relate to his thoroughly disproved accusations of financial abuse. Although difficult to follow, Aaron appears to contend that the issue of financial abuse was "never tried" (RP 11-12), despite the fact that all of the supposed "evidence" of abuse in Aaron's designation of clerk's papers was elicited at trial. (CP 1-110)

Aaron's argument is nonsensical and does not even deign to articulate what new order or actions of the trial court were made in error. Other than entry of the Order closing the probate, nothing has transpired since the issuance of the Court's mandate on May 26, 2016. It would therefore appear that Aaron is improperly asking the Court to revisit its prior decision rejecting the addition of his proposed claims, which the Supreme Court declined to review and the trial court dutifully complied with pursuant to the mandate.

The denial of Aaron's motion to add a claim for financial abuse, affirmed by this Court, is the law of the case and is not subject to revisitation on this appeal. The Court's mandate notified the trial court that the November 10, 2015 Published Opinion had become a decision terminating review, which terminates review unconditionally. RAP 12.5, RAP 12.3(a)(2). The mandate has not been recalled pursuant to RAP 12.9 and, as a result, "the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court". RAP 12.2.

The trial court's Order closing this probate, without permitting Aaron to allege additional claims against Lonnie, was an order enforcing the mandate of this Court. As such, it is not appealable under RAP 2.2(a), because such an appeal would conflict with a court rule (RAP 12.2). *See*

Allyn v. Asher, 132 Wn.App. 371 (2006)("RAP 12.2 is a broad statement of the authority and binding power of the appellate decision. The decision is binding unless the appellate court recalls the mandate or unless the trial court properly makes a new substantive decision and the appellate court changes its view of the law during the second appeal.")

Aaron had a full and fair opportunity to appeal the trial court's decision to deny the addition of a claim for financial abuse and, because nothing has changed, he is not entitled to a second bite at the apple. In fact, the trial court gave Aaron wide latitude to introduce any evidence of alleged abuse at trial, which he attempted to do. (RP 17; CP 1-110) All of the supposed "evidence" of abuse that Aaron elicited was available to him at the close of trial, when he failed to move for an amendment of claims to conform to the evidence, and on his first appeal. (RP 11-12)

The Court should also refuse to revisit its prior denial of additional claims for financial abuse on the basis of futility. When it is obvious from the record why an amendment would have been futile, the court does not abuse its discretion in denying it. *Snohomish Regional Drug Task Force v. 414 Newberg Rd.*, 151 Wn.App. 743, 761 (2009).

Aaron's attempt to add claims that Lonnie could not inherit as an "abuser" of a vulnerable adult remain futile based upon the trial court's affirmed findings of fact. As noted above, unchallenged findings of fact

are verities on this appeal. *In re A.W.*, 182 Wn.2d 689, 711 (2015)(citing *Merriman v. Cokeley*, 168 Wn.2d 627, 631 (2010)).

The trial court's findings of fact establish that Lonnie did not engage in misconduct relative to Betty's finances when she was alive, or in the execution of her testamentary documents. Lonnie never used Betty's assets for himself while she was alive and did not use the Power of Attorney to make gifts of Betty's property to himself. (CP 247-248 at ¶¶ 22, 29) Lonnie did as directed by his mother, who had the capacity to make her own decisions. (CP 246 at ¶¶ 19-21)

There is similarly no evidence that Lonnie exerted control or influence over Betty in her decisions regarding her Will or written instructions. Betty sought legal counsel on both, who verified she was competent to execute them. (CP 246 at ¶18; CP 247 at ¶ 27) Lonnie was not present for either documents execution and did not draft either of them. (CP 248 at ¶ 28)

The trial court, and this Court, properly refused to allow Aaron's untimely claims against Lonnie for financial abuse of their mother and nothing new has happened to justify a revisitation and departure from that decision. The trial court should be affirmed so that this matter can (finally) be brought to an end.

E. THE COURT SHOULD EXERCISE ITS DISCRETION BY REQUIRING AARON TO PAY LONNIE'S AND THE ESTATE'S ATTORNEY FEES AND COSTS FOR THIS SECOND MERITLESS APPEAL.

It is understandable that Aaron is displeased with result of this litigation and the size of Lonnie's inheritance, but the Court should not condone Aaron's transparent effort to make Lonnie spend that inheritance on a seemingly endless stream of meritless lawsuits and appeals. Pursuant to RAP 18.1 and RCW 11.96A.150(1), Lonnie respectfully requests that the Court exercise its discretion by awarding his reasonable costs and attorney fees in responding to this second appeal.

In the prior appeal, the Court properly determined that Washington's probate statute, RCW 11.96A.150(1), grants trial and appellate courts discretion to award costs and attorney fees in probate proceedings. *In re Estate of Lowe*, 191 Wn.App. at 239. Although the Court unanimously upheld the trial court's award of fees to Lonnie, a split panel declined to award him appellate attorney fees on the basis that his inheritance ably allowed him to afford the expense of the last appeal. *Id.* at 240.

Unfortunately, Aaron's meritless second appeal demonstrates that he was bolstered by the Court's prior exercise of discretion and will continue to make Lonnie incur unnecessary legal fees so long as there is no consequence to him. RCW 11.96A.150(1) clearly provides the Court

with discretion to award attorney fees on appeal. *In re Estate of Wright*, 147 Wn.App. 674, 688 (2008). Lonnie faithfully executed his duties as personal representative of his mother's estate and prevailed against his brother on all of the significant and contested issues at trial and on the first appeal. Despite Lonnie's inheritance from Betty, he should not be forced to continue spending a fortune defending against meritless personal attacks from his brother. The Court should award Lonnie his reasonable attorney fees and costs incurred on this second appeal.

IV. CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the trial court's Order be affirmed and that Lonnie be awarded attorney fees incurred in this second appeal.

DATED this 8th day of June, 2017.



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PROOF OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 8th day of June, 2017, the foregoing was filed with the Court of Appeals, Division III, and delivered to the following persons in manner indicated:

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ATTORNEY FOR APPELLANT

- Hand Delivery
- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile Transmission
- Via Electronic Mail



Kim Kobasa