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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 355691

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

Spokane County Cause No. 16401072-7

AARON L. LOWE, Trustee and Beneficiary
of the Donald E. Lowe Trust

Plaintiff/Appellant,

v.

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

Defendant/Appellant.

OPENING BRIEF OF PLAINTIFF/APPELLANT

Aaron L. Lowe, pro se
Trustee/ Beneficiary
Plaintiff/Appellant
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I. INTRODUCTION

Donald E. Lowe died April 23, 2003. His will, dated March 31, 1995, listed his spouse Betty L. Lowe, who subsequently died October 1, 2011; and four children, Larry Lowe, Aaron L. Lowe, Rodonna Lowe, who died in November of 2002 before her father, and Lonnie Lowe. Donald E. Lowe had a penchant for silver and gold bars and coins. In the 1980's he, with the aid of a family friend, hid 22 silver bars weighing 55 to 67 pounds each and four bags of silver and gold coins into a fireplace foundation in the family home. To this day, the small fortune has never been included in any of his estate proceedings. Donald's last will conveyed his residuary estate to Aaron L. Lowe. Unknown to Aaron L. Lowe, until the probate attorney retrieved Donald E. Lowe's probate file in response to a subpoena in 2015, was a trust entirely in Donald E. Lowe's handwriting. Donald E. Lowe wrote a "superwill". It states in full:

Dear Boys,
Larry, Aaron & Lon

I just wanted to write down some of my thoughts about after I'm gone.

I have asked Aaron to take responsibility in looking after your mother. It may be necessary to sell what ever he can to care for her. After she is gone, I want everything else divided between you boys or sold and the money divided between you.

I told Mike that he could live in the Napa house as long as he takes care of Kelsey.

My life was awfully short & I didn't do much.

You are three of the finest boys anyone could have & I'm so proud of you. I hope you can get along with each other.

Love dad
Don Lowe

Kelsey is the child of Rodonna Lowe. Lonnie D. Lowe had a copy of the handwriting, at least as early as the time of Don's probate, but never told or gave a copy to Aaron L. Lowe. The handwriting has all the elements necessary to create a valid trust. It is a superwill and allows Aaron L. Lowe, as trustee, to possess and distribute Don's property to the three named surviving children. It supercedes the terms of Donald's Will. Donald Lowe was concerned with Betty Lowe's drug dependency. From 2003 to 2007, Lonnie D. Lowe removed the gold and silver from the family home in Spokane to his home in Olympia, where he still has what is left of it. The handwriting was never referenced or filed in Donald E. Lowe's probate proceeding. The reason a trust is not filed in a probate proceeding is that a trust conveys assets without probate. It avoids probate. It makes the reopening of Donald Lowe's probate superfluous. Lonnie D. Lowe told no

one but his wife about the gold and silver and never made a contemporaneous list of what he took from his parents' home. Lonnie D. Lowe was named executor of Betty L. Lowe's estate. Litigation ensued, *In The Matter of the Estate of Betty Lowe*, 191 Wash.App. 216, 361 P.3d 789 (2015), to force Lonnie to make Betty L. Lowe's community interest in the gold and silver pass accordingly to her will. In the litigation, Aaron L. Lowe submitted a second amendment to the petition in Betty L. Lowe's estate "including an argument that the assets in Donald's Estate were distributed in error to Betty." 191 Wash.App. at 223. The Second Amended Petition was denied and the denial was upheld on appeal. Here, this complaint seeks to establish the writing as a valid trust and retrieve the assets from Lonnie that belong to the trust. The Estate of Donald E. Lowe or the Trust were never parties in the Betty L. Lowe estate litigation. The Trust issues were never litigated. The Trust itself is an independent party represented by the Trustee. Nevertheless, the Trial Court never compared the two pleadings and concluded, without analysis of the elements, that this suit was barred by res judicata or claim preclusion. The case was dismissed.

II. ASSIGNMENTS OF ERROR

ONE

The Trial Court erred in dismissing the Complaint.

TWO

The Trial Court erred in ruling that the case was barred by claim preclusion or issue preclusion.

THREE

The Trial Court erred by failing to place the burden of proof to prove res judicata or issue preclusion on Lonnie D. Lowe.

FOUR

The Trial Court erred by concluding, without reviewing facts or enunciating any reasons why, the claim was barred by issue preclusion and/or res judicata.

FIVE

The Trial Court erred by failing to review the elements of collateral estoppel one by one, by comparing the complaints side by side, requiring Lonnie D. Lowe to prove to the Court that: (1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against

whom collateral estoppel was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice.

SIX

The Trial Court erred by failing to require Lonnie D. Lowe to prove the elements necessary to find res judicata. They are: (1) same subject matter; (2) same cause of action; (3) same persons and parties; (4) same quality of the persons for or against whom the claim is made.

SEVEN

The Trial Court erred by failing to find that both the Estate of Donald E. Lowe and the Donald E. Lowe Trust were not parties to the Betty L. Lowe estate litigation and that the facts of the Trust occurred eight years prior to Betty L. Lowe's death.

EIGHT

The Trial Court erred by ignoring the contemporary trust law establishing a trust as an independent party to decide between trust and testamentary beneficiaries.

NINE

The Trial Court erred by failing to apply the trust statutes including RCW. §11.11.007 to the holographic writing of Donald E. Lowe. The statutes

validate the writing as a revocable trust.

TEN

The Trial Court erred by concluding that the Declarations of Aaron L. Lowe and Robert E. Kovacevich did not establish a dispute as to material fact.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The case is to be reviewed de novo. Lonnie D. Lowe admits that Judge Moreno denied the request to reopen Donald E. Lowe's Estate. (CP 26). *Estate of Betty L. Lowe*, 191 Wash.App. at 227-8. No facts could have been submitted as the Court heard only arguments to deny the amendment of the pleadings. The denial was upheld on appeal. The denial was on a Second Amended Complaint "that the assets in Donald's Estate were distributed in error to Betty's Estate." Lonnie D. Lowe attempts to rely on the statement of Judge Moreno that "there is no basis in law or fact to reopen the Estate of Donald E. Lowe." The contention is that Aaron L. Lowe "was involved in the probate." CP 261. This argument is completely wrong and ignores universal law. The trust avoids probate. It passes assets outside of probate. A. James Casner, *Estate Planning - Avoidance of Probate*, 60 Colum.L.Rev. 108 (1960) states "The revocable inter vivos trusts is one of the widely

employed vehicles for the avoidance of probate. Attacks on this type of trust, as being testamentary insofar as the trust provides for the disposition of property from and after the death of the settlor, have been made from time to time, but with little success.” *Id.* at 109. Casner was a Harvard professor and considered to be one of the top estate planning law teachers who formulated the law of restatement of trusts. John R. Price, *Price on Contemporary Estate Planning*, 2015 ed. § 10.7, page 10, 031 states that the revocable trust is “one of the most important and flexible devices available to the estate planner.” Another advantage of a revocable trust, is that the assets are not inventoried in a probate, so public scrutiny is avoided. Owning over half a million dollars of gold and silver that is not registered anywhere was probably a motive for Don to draft the trust. The gold and silver was not inventoried in Don’s probate. Reopening of the probate of Donald E. Lowe has nothing to do with the holographic trust that was supposed to hold the gold and silver. Privity between Don’s Will and his Trust is denied by RCW 11.11.007 that separates trusts from wills and permits lawsuits to determine ownership between will beneficiaries and trust beneficiaries. This lawsuit was the first time these issues ever occurred in the Lowe family estates. Yet to be determined, is whether the acceptance of both halves of the property results

in an election that both halves are in the trust under a theory of widow's election. See *Estate of Murphy*, 544 P.2d 956, 960 (S.C. Cal. 1976). The trust had nothing to do with the probate as it eliminated probate. In this case, it is abundantly clear and beyond dispute that all the proceedings ignored the trust and trust issues. The result sought here is that Donald E. Lowe's estate belongs to the trust. Obviously, there is no preclusion of any kind. Lonnie D. Lowe's argument ignores common estate planning. Further, the reopening was denied. The trust issues are yet to be determined. There is no issue preclusion or res judicata. The doctrine of res judicata is to prevent repetitious suits involving the same cause of action. The claim that Donald E. Lowe's handwritten revocable trust preempted Don's will was never raised. The constitutional right to be heard was denied. Wash. Const. art. 1, § 10, RCW § 2.08.010. The trust could not be identical and the Court decided to deny the right to consider Donald E. Lowe's issues in the Betty L. Lowe litigation. The denial of Don's probate precludes the issue. If this is not enough to deny preclusion the failure to recognize that the trust avoids probate is enough. The probate does not involve the trust. The issues were never litigated to any judgment, let alone final judgment. This litigation applies to Donald E. Lowe's Estate that involves a trust and a will. The time

was eight years before Betty L. Lowe's death. The issues in this case point out a complete failure to recognize the burden to analyze the submissions of Lonnie D. Lowe and the decision of the Trial Court was to deny the Second Amended Complaint asking to determine that the Trust owns Don's assets. Assets do not have to be inventoried if the trust is validated. The pleading to reopen the estate was denied. The issues in the Donald E. Lowe's Estate, that would have established the trust, were never heard or decided. This litigation should be allowed to determine where the assets belong. Lonnie D. Lowe seeks a double denial. Donald E. Lowe hand wrote a trust and also had a will prepared and signed. Both indicate an intent that Aaron L. Lowe be trustee for his mother during her life if Don did not survive her. Lonnie D. Lowe's devious manipulation thwarted Don's understandable intention. It was Don's laudable intention to split what was left three ways. The Court should honor what Don clearly intended.

IV. STATEMENT OF THE CASE

The case is on review from a motion to dismiss apparently converted to summary judgment. The salient facts are set forth in the Complaint. Clerk's Papers, hereafter "CP" 1-13. Aaron L. Lowe and Lonnie D. Lowe are brothers. CP 2, 3. Their father, Donald E. Lowe, died April 16, 2003.

CP 3. Their mother died October 1, 2011. CP 3. Donald E. Lowe wrote a holograph document before his death (CP 1, 13). It is set forth in the Introduction.

Aaron L. Lowe contended that the document created an express valid trust. CP 2, 3. Current statutory law applies. Aaron L. Lowe, as Trustee, wants the property that was not inventoried in Donald E. Lowe's Estate to be turned over to him, as Trustee of the express trust, so that he can distribute it. CP 5, 6. Aaron had no knowledge of Donald E. Lowe's handwritten document until August of 2013. CP 8. The assets must be turned over as trust assets. Lonnie D. Lowe must turn them over, or if he no longer has them, Aaron L. Lowe, as Trustee, must recover a fair market value judgment against Lonnie D. Lowe. This is Donald Lowe's intent. Defendant Lonnie D. Lowe moved to dismiss the Complaint, CP 15-32, on the basis of res judicata and claim preclusion. The Court granted the motion on July 11, 2017, CP 51-53, stating that *In re Estate of Lowe*, 191 Wn.App 216 (2015) "supports claim preclusion and issue preclusion." The result is that Aaron L. Lowe, as Trustee, was denied the opportunity to distribute the assets as his father intended.

V. ARGUMENT

A. Standards of Review

The standard of review of summary judgment is de novo. *Schiebel v. Eyemann*, 189 Wash.2d 93, 98, 399 P.3d 1129 (2017). *Storti v. University of Washington*, 181 Wash.2d 28, 35, 330 P.3d 159 (Wash. 2014) states “Summary judgment is appropriate only where, viewing the facts in the light most favorable to the non-moving party, there is no genuine issues of material fact and accordingly the moving party’s entitled to judgment as a matter of law.” *Id.* at 35. “A material fact is one that affects the outcome of the litigation.” *M.M.S. v. State Department of Social and Health Services and Child Protective Services*, 2017 WL 5380328 *3, 404 P.3d 1163 (Div 2, 11/14/2017). Questions of law are reviewed de novo. *Id.* at *3. Motions to dismiss are also reviewed de novo. *Ckukri v. Stalfort*, ___ Wn.2d ___, 403 P.3d 929, 931 (Div. 1, 10/16/2017). “We review CR 12(b)(6) dismissals de novo.” *Futureselect Portfolio Management v. Tremont Holdings Inc.*, 180 Wash.2d 954, 131 P.3d 29 (Wash. 2014). “All facts in the Complaint are taken as true, and we may consider hypothetical facts supporting Plaintiff’s claim.” *Id.* at 962.

B. The Burden of Proof on Res Judicata and Claim Preclusion is on Lonnie D. Lowe.

“The party asserting the defense of res judicata bears the burden of proof.” *Hisle v. Todd Shipyards Corp.*, 151 Wash.2d 853, 865, 93 P.3d 108 (Wash. 2004). “The party asserting the defense of res judicata has the burden of proving the claim was decided in the prior adjudication.” *Civil Service Commission of the City of Kelso v. City of Kelso*, 137 Wash.2d 166, 172, 969 P.2d 474 (Wash. 1999).

Lemond v. State Department of Licensing, 143 Wash.App. 797, 180 P.3d 829 (Div. I, 2008) states “proving the identity of issues for purposes of establishing the applicability of the doctrine of collateral estoppel requires that the party seeking to have the doctrine applied must specifically identify the issues and underlying legal principles litigated in the prior proceeding. *Id.* at 803. Evidence suppressed in criminal proceedings was able to be litigated admissibly in a civil proceeding. *Id.* at 800.

C. The Trial Court did not Apply the Facts or Reasoning Necessary to Support its Ruling.

The Court’s letter ruling, CP 52, merely states that “after review of over six-hundred pages of documents, this Court finds that there is no

genuine issue of material fact that *In re Estate of Lowe*, supports claim preclusion and issue preclusion and therefore Defendant Lonnie D. Lowe's Motion to Dismiss is granted." The ruling of the Court placed the burden of proof on Aaron L. Lowe when it should have been on Lonnie D. Lowe.

D. The Failure to Apply the Facts to Elements of Res Judicata or Claim Preclusion is Reversible Error.

The Court did not specify where and what facts applied to find that the critical elements necessary to preclude the action were satisfied to find res judicata or claim preclusion. No analysis was made by the Court. The footnote listed the documents. Among the listed documents were the Declaration of Aaron L. Lowe and attorney Robert E. Kovacevich. CP 22-38, 39-50. The Declarations prove the denial of the Amended Complaint that would have made Donald E. Lowe's Estate a party, but the estate was not a party. The trust was not litigated. It would have preempted Don's Will. CP 23-4. Aaron L. Lowe proved his mother's drug dependency, the fact that Don trusted Aaron and that Lonnie secretly took trust assets. CP 40-1. None of these declarations were controverted. The letter ruling also concluded that since documents were submitted outside the pleadings, "the Court treated Lonnie's Motion as one for summary judgment." Nowhere in the six-hundred pages was the Estate of Donald E. Lowe a party. Totally absent

from any litigation was the Donald E. Lowe Trust. All that is required is to compare the complaints side by side. The Betty Lowe operative complaint is attached. It must be compared with this Complaint. CP 1-13. When compared, collateral estoppel disappears. The Trust itself is not a party and not in any pleadings. Trust issues were never a subject of any motion. The elements to constitute res judicata or issue preclusion were never mentioned or analyzed. The failure requires at least a remand. See *Spokane Research & Defense Fund v. City of Spokane*, 155 Wash.2d 89, 117 P.3d 1117 (Wash. 2005) that found the defense could be waived. “The city cites these four elements and minimally applies them, but it does not analyze them in any depth against the tests discussed in the case law.” *Id.* at 99. This case involves a holographic trust written entirely by Donald E. Lowe. The Complaint in this case, CP 1-13, seeks to obtain a declaration of the validity of the handwriting as establishing a revocable living trust that conveyed the assets, now held by Lonnie D. Lowe, to Aaron L. Lowe for distribution to himself and his two brothers equally. Recently enacted state law specifically allows Aaron to determine that the trust beneficiaries were to have the property, not the Will of Donald E. Lowe, who died in 2003. RCW 11.11.007. Betty L. Lowe died in 2011. This case involves the death of

Donald E. Lowe, not Betty L. Lowe. The trust became irrevocable on Don's death. It was a "superwill" that conveys Don's property by the terms of the trust. The two documents were completely independent from each other. The testamentary beneficiaries of Donald E. Lowe did not receive the gold and silver for many reasons. One is that it was never inventoried in Donald E. Lowe's Estate. CP 6. Even if inventoried, it is a trust asset. None of these issues were ever litigated. The issues are not similar for the obvious reason that they were denied presentation in the prior litigation. That is why this case was commenced. No statute of limitations applies.

E. Donald E. Lowe Created a Non Probate Trust that was a Party in itself. The Complaint Sought to Apply the Trust Statute, RCW § 11.11.007, to Determine Whether the Trust Asset Beneficiaries took the Assets, Not the Testamentary Beneficiaries. These Tests were not Probate Issues. Nowhere in any Proceeding to Date was RCW 11.11.007 at Issue. This is the Ultimate Half Million Dollar Issue in the Family Estate. There was Never a Final Judgment on the Merits Determining the Issue of Whether the Trust Beneficiaries or the Testamentary Beneficiaries received the Gold and Silver.

The writing of Donald E. Lowe is governed by the "Superwill" provisions of RCW § Ch. 11.11. See Cynthia J. Artura, "*Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*" 74 Wash. L. Rev. 799 (1999). RCW Title 11.11

includes a revocable living trust within its provisions. RCW § 11.11.010(5) states that “designate” means a writing by which the owner selects a beneficiary. Only a writing is required. There is no specific form necessary for designation, only a writing is required. A non probate asset is defined under RCW § 11.11.020 specifically referencing RCW § 11.02.005. RCW § 11.02.005(10) states that a nonprobate asset “means those rights and interests of a person having beneficial ownership of assets that pass on a person’s death under a written instrument or arrangement other than a person’s will.” It also includes a “trust of which the person is grantor that becomes irrevocable only on the person’s death.” RCW § 11.02.050(10). *Manary v. Anderson*, 176 Wash.2d 342, 354, 292 P.3d 96 (Wash. 2013) clearly holds that all that is required is that on death, rights and interests pass by a written instrument. RCW § 11.11.007 specifically applies to controversies between beneficiaries of a trust and testamentary beneficiaries. Nowhere in any prior proceedings were the rights of trust beneficiaries and will beneficiaries of Donald E. Lowe litigated.

In re Estate of Cordero, 127 Wash.App. 783, 789, 113 P.3d 16 (Div. 1, 2005), holds that a living trust supercedes a will and conveys the property according to the trust, not the will. *In re Estate of Furst*, 113 Wash.App. 839,

55 P.3d 664 (Div. 1, 2002) upheld a revocable living trust “But the will at issue did not purport to revoke the trust.” *Id.* at 843.

There can be no doubt that the issue preclusion and res judicata doctrine does not apply. The prior litigation refused to hear whether the Estate of Donald E. Lowe was to pass under the revocable express trust or to the will beneficiaries. This issue is not even close, as the trust facts were never at issue in prior proceedings, let alone whether trust or testamentary beneficiaries inherited the property.

F. Washington Law Denies Claim Preclusion and Issue Preclusion.

Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation In Washington*, 60 Wash. L. Rev. 805, (1985) states the difference between claim and issue preclusion. “The orthodox statement is that the doctrine of collateral estoppel differs from the res judicata in that, instead of preventing a second assertion of the same claim or cause of action, collateral estoppel prevents a second litigation of issues even though a different claim or cause of action is asserted. More modernly then, just as res judicata has come to be called claim preclusion, collateral estoppel has come to be called issue preclusion.” *Id.* at 829. “Collateral estoppel, also known as issue preclusion bars litigation of an issue in a later proceeding involving the same parties.”

Schiebel v. Eyemann, 189 Wash.2d 93, 99, 399 P.3d 1129 (Wash. 2017). “For collateral estoppel to apply, the party seeking must show: (1) the issue in the earlier proceeding is identical to the issue in the later proceeding, (2) the earlier proceeding ended with a final judgment on the merits, (3) the party against whom collateral estoppel was a party, or in privity with a party, to the earlier proceeding, and (4) applying collateral estoppel would not be an injustice.” *Id.* at 99. In this case, the Court’s letter ruling, CP 51-53, never considered that Defendant Lonnie D. Lowe created complexity by hubris of a long list of documents that seeks to derail Donald E. Lowe’s well thought out estate plan that he wrote himself. It was better than many learned scholars of the law could devise. He was concerned about Betty L. Lowe’s pill addiction and wanted Aaron L. Lowe to protect her in the event of his prior death. There can be no denying that the intention of the testator is the paramount consideration. The Trial Court never explained why the fourth element of collateral estoppel did not deny the doctrine. It would be manifest injustice to deny what Don, as Testator, intended. The Court is supposed to carry out the testator’s intent. Don hoped that Lonnie would get along with Aaron. It didn’t happen. If Don was alive, he would have prevented Lonnie’s purloining of all the gold and silver to himself. The application of

res judicata is stated in *Hayes v. City of Seattle*, 131 Wash.2d 706, 934 P.2d 1179 (Wash. 1997). “The purpose of res judicata is to ensure the finality of judgments. Here, there was no prior litigation of the trust. There could be no finality. Under this doctrine, a subsequent action is barred when it is identical with a previous action in all four respects: (1) same subject matter; (2) same cause of action; (3) same persons and parties; (4) same quality of the persons for or against whom the claim is made.” *Id.* at 712. In *Hayes*, the lawsuit involved the seller’s misrepresentation of property. The second lawsuit was against the seller for breach of warranty. Unlike this case, the facts come from a single real estate transaction. *Id.* at 113. “Finally, nothing in the subsequent action for damages destroyed or impaired any right established in the action for judicial review.” *Id.* at 714. All four conditions must be met. *Ullery v. Fulleton*, 162 Wash.App. 596, 602-3, 256 P.3d 406 (Div. III, 2011) rejected res judicata and collateral estoppel as the assignment documents were different. Attached as Appendix to this brief is the Amended and Supplemental Petition that was the pleading in *In re Estate of Betty Lowe*, 191 Wash.App. 216, 361 P.3d 789 (2011). (The Petition was included in Defendant’s Motion to Dismiss. CP 15-33). The Complaint in this case contains completely different capacities of Aaron L. Lowe and

requires that Donald E. Lowe's Trust prevails. These issues were denied by refusal of the amended pleading in the Betty L. Lowe litigation and total disregard of the Trust. Examination of the complaints side by side easily proves that res judicata cannot be applied as all four tests are not met. The subject matter here is the trust of Donald E. Lowe. Three documents are involved in the Lowe family Estate plan. Two wills, two probates and a trust, that eliminates probate, are all competing documents. So far, only Betty Lowe's inventory mentions the gold and silver. The subject matter cannot be identical as the complaint seeks to establish the validity of the trust, therefore, the subject matter is different. The cause of action seeks validity, superiority of the trust and conveyance of assets to the trust. Both the Trust and the Estate of Donald E. Lowe were denied as parties in the Betty L. Lowe litigation. This Court's decision in *Steven County v. Futurewise*, 146 Wash.App. 493, 192 P.3d 1 (Div. 3, 2008) applies and requires that this case be reversed. The case methodically denied both res judicata and claim preclusion. *Id.* at 508. The issues in the case were not raised or decided in the prior litigation. Privity did not exist as the claimants were different and statutes were not addressed the prior proceeding. *Id.* at 507-8. "This doctrine is applied cautiously due to the danger of depriving a non party of its day in

court.” *Ibid* at 508. “Although raised, the issue was not actually determined.” *Futurewise* applies here, the trust of Donald E. Lowe was denied its day in court. This case determines where Donald E. Lowe’s property is included as assets; whether it passes under his will or trust. In *Bordeaux v. Ingersoll Rand*, 71 Wash.2d 392, 429 P.2d 207 (Wash. 1967) the operator of a tamping machine suffered severe nose bleeds. He brought a claim for industrial insurance and was denied. He later brought suit against the manufacturer of the machine. The court denied res judicata as the manufacturer was a third party and did not participate in the industrial insurance proceeding. Aaron L. Lowe is bringing the suit as trustee and beneficiary of the trust. He is not bringing the action individually. The two capacities are not of the same quality. The method is to compare the complaints side by side. If the comparison is not identical and different proof is required “a new subject matter is raised, and the plaintiff may likewise pursue that claim.” *Meder v. CCME Corp*, 7 Wash.App. 801, 810, 502 P.2d 1252 (Div. I, 1972).

Rufener v. Scott, 46 Wash.2d 240, 280 P.2d 253 (Wash. 1955) involved a fire started due to improper installation of equipment in a barn. The question of the owner’s knowledge was submitted to the jury. However, it could not be determined whether the issue was determined by the jury’s

verdict as one of three grounds was submitted. Only one was covered by insurance. The case held that res judicata did not apply. The verdict of the jury did not determine the issue. Therefore it was not res judicata. *Id.* at 245. In *Civil Service Commission v. City of Kells*, 137 Wash.2d 166, 969 P.2d 474 (Wash. 1999) different evidence and different rights were involved. *Id.* at 172. “Res judicata is not implicated by the facts at hand because the causes of action are not identical.” *Id.* at 177. *Dot Foods, Inc. v. State, Department of Revenue*, 185 Wash.2d 239, 372 P.3d 747 (2016) also lists the requirements of collateral estoppel. “To invoke collateral estoppel, Dot Foods must establish that (1) the issue decided in *Dot Foods I* was identical to the issue that is presented to us now.” *Id.* at 254. “Both the facts and the applicable law in this case are distinguishable from *Dot Foods I*.” *Ibid.* at 254. The case rejected collateral estoppel. Here the elements to constitute res judicata or claim preclusion were never mentioned or analyzed. The failure requires at least a remand. *Spokane Research & Defense Fund v. City of Spokane*, 155 Wash.2d 89, 117 P.3d 1117 (Wash. 2005) found the defense could be waived. “The city cites these four elements and minimally applies them, but it does not analyze them in any depth against the tests discussed in the case law.” *Id.* at 99.

The trial court here did not explain or differentiate. *C.I.R. v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898, is the seminal case on res judicata.

It notes that the difference is important:

It is first necessary to understand something for the recognized meaning and scope of res judicata, a doctrine judicial in origin. The general rule of res judicata applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See von Moschzisker, 'Res Judicata,' 38 Yale L.J. 229; Restatement of the Law of Judgments, ss 47, 48. *Id.* at 597-8.

. . . Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at the time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, res judicata is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. . . If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel

has no bearing on the situation. *Id.* at 600. (Underlining added).

In this case, the law on trust is totally different than the laws of testamentary disposition. Neither the facts or law is the same.

The Complaint of Aaron L. Lowe was as trustee and beneficiary. CP 1-13. The Complaint, CP 9, alleges that the trust document was never filed in Donald E. Lowe's probate. The prayer seeks to certify the trust as valid and still in effect. It was also to establish the validity of the document in his father's handwriting as a trust and to recover trust assets. The parties were not the same. The Defendant filed a Motion to Dismiss, CP 15-32, and also an Affidavit of attorney Greg Devlin that attached pleadings from prior cases. Mr. Devlin did not state he knew the documents of his own knowledge. He stated only that they "were relevant."

Robert E. Kovacevich filed a Declaration in Opposition, CP 39-50, declaring under penalty of perjury and stated "I know these facts of my own personal knowledge" and that the trial Judge "never made a ruling on the trust." It also stated that the gold and silver assets were never inventoried in Donald E. Lowe's Estate. "Donald E. Lowe's Estate was not a party." No issue about the trust was actually litigated nor was any determination made on any aspect of the trust. Aaron L. Lowe also filed a Declaration. CP 33-38.

He stated that the trust attached to the Complaint was unknown to him “Until 2013, when the trust was brought to Robert Lamp’s third deposition. I had never known or seen the document attached to the Complaint.” “There is absolutely no doubt in my mind that the document attached to the complaint is completely in Donald E. Lowe’s own handwriting.” “I know this fact of my own personal knowledge.” CP 38. The documents the Defendant attached to his Motion do not contain any determination regarding the Trust. Donald E. Lowe wanted me to “handle his money and he wanted me to take care of my mother during her remaining lifetime. CP 37. Defendant, argues that these Declarations are “largely inadmissible hearsay.” No oath is attached to the Argument. Both Declarations of Aaron L. Lowe and Robert E. Kovacevich were based on personal knowledge. The Defendant only questioned the Declarations by argument. No counter-affidavits were filed. Both Aaron L. Lowe and Robert E. Kovacevich were personally present at the trial of the prior case. The Declaration of Robert E. Kovacevich stated he had the complete transcript of the prior case, CP 40, and was present all during the trial. Aaron L. Lowe testified to facts of his own knowledge indicating Donald E. Lowe trusted him. CP 34. He also testified that he was present in court at the prior trial. CP 35. If facts are set forth that are

admissible in evidence and the Declarations only controverted by argument, they must be accepted “as stating the established facts of the case.” *Consolidated Elec. Distributions, Inc. v. Northwest Homes of Chehalis, Inc.*, 10 Wash.App. 287, 292, 518 P.2d 225 (Div. 2, 1973); *Graaff v. Bakker Bros. of Idaho, Inc.*, 85 Wash.App. 814, 818, 934 P.2d 1228 (Div. III, 1997); *Henry v. St. Regis Paper Co.*, 55 Wash.2d 148, 151, 346 P.2d 692 (1959); *Garza v. McCain Foods, Inc.*, 124 Wash.App. 908, 917, 103 P.3d 848 (Div. III, 2004).

Storti v. University of Washington, 181 Wash.2d 28, 330 P.3d 159 (Wash. 2014) denied res judicata based on the conclusion that the cases “state different claims based on separate facts and evidence.” *Id.* at 41. The cases must involve “identical causes of action.” *Id.* at 40. The case applies as this case involves the facts of a trust that should have been effective to distribute Donald Lowe’s property, not a will or Betty L. Lowe’s probate. It must be litigated to determine that the assets omitted from Donald E. Lowe’s prior probate should be assets of the Trust and divided equally.

G. Trusts Convey Property Outside the will as Non Probate Assets. Res Judicata Does Not Apply to Trust Determination.

RCW § 2.08.010 specifically confers jurisdiction of the Superior Court over “all matters of probate.” The probate statutes RCW §

11.96A.020(1) delegate “full and ample power and authority to administer and settle (a) all matters concerning the estates . . . and (b) all trusts and trust matters. RCW § 11.96A.030(2)(c)(i) defines “matters” to include the construction of wills, trusts, community property agreements and other writings. (Underling added). The case of *in re Peterson’s Estate*, 12 Wash.2d 686, 123 P.2d 733 (Wash. 1942) involved two probates. The probate litigation exceeded 18 years and four appeals, *id.* at 693. The court stated “Because of this peculiar status of the courts in probate proceedings, if it becomes apparent during the course of administration that a mistake has been made at some earlier state, the court should immediately take steps to remedy the situation insofar as that is possible.” *Id.* at 722-3. The court rejected the argument that res judicata applied and imposed a constructive trust on the sole heir. *Id.* at 724. This is unlike conventional litigation between parties. *In re Elliott’s Estate*, 22 Wash.2d 334, 156 P.2d 427 (Wash. 1945) allowed a later will to be approved beyond the normal will contest statute of limitations. The court has original jurisdiction over all matters relating to trusts. RCW § 11.96A.040(2) this includes a right to a declaratory judgment on a trust including the declaration sought by Aaron L. Lowe. RCW § 11.96A.080. RCW § 11.11.003 applies. It applies to assets outside

of wills and is to be liberally construed. RCW 11.11.005(a). *Elliott's Estate*, quotes, 22 Wash.2d at 351, are pertinent here.

To give effect to a testator's will the instrument must, of course, first be admitted to probate, and, where the testator has made more than one will, the *last* will is the one which must be given effect as the latest and final expression of the decedent's testamentary wishes, if such result can be obtained within the established rules of law. As stated in Rood on Wills, 2d Ed., § 413, p. 352, 'It has been declared a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and punctually observed so far as it is consistent with the established rules of law.'

In re Campbell's Estate, 46 Wash.2d 292, 280 P.2d 686 (Wash. 1955)

involved the approval of two different wills in the same estate. The personal representative named in the latest will moved to reverse the letters testamentary on the first will. The motion was denied without any reason given. The court held that res judicata does not apply as no reason was given to deny the motion and the later will was not attacked. The opinion states "(5) so long as the court retains its control over the assets of the estate, it may vacate an earlier order rendered *ex parte* if the necessities of the case demand that previous orders be vacated or reversed to effect justice." *Id.* at 295. These cases apply here. The Estate of Donald E. Lowe must be reopened to

prove the trust was created and intended to hold and distribute his property after he died.

In *McDaniels v. Carlson*, 108 Wash.2d 299, 738 P.2d 254 (Wash. 1987), the plaintiff lived with the child's mother during her divorce from her husband. The husband was held to be father of the child. The plaintiff knew of the divorce proceedings but also filed to be determined to be the child's father. The court held that collateral estoppel did not apply as paternity was only a collateral issue in the divorce proceedings. "Collateral estoppel requires that the issue decided in the prior adjudication be identical with the one at hand." *Id.* at 305. *Northwest Wholesale, Inc. v. PAC Organic Fruit LLC*, 183 Wash.App. 459, 334 P.3d 63 (Div. 3, 2014) states "Additionally, the issue to be precluded must have been actually litigated and necessarily determined in the prior action." *Id.* at 491.

In *Mellor v. Chamberlin*, 100 Wash.2d 643, 673 P.2d 610 (1983) the issue concerned the same parking lot but one was a dispute over including the lot as part of a sale. The second was about encroachment occurred. The damages issue was not ripe. The second suit was not barred.

H. The Facts of Donald E. Lowe's Estate Could Not Be Presented as the Amended Complaint was Denied. Even if Examined, the Donald E. Lowe Arguments in the Betty

L. Lowe Estate were at Best Evidentiary Facts and not Ultimate Facts of the Betty L. Lowe estate litigation.

A cause of action must be in existence at the time of the first action. *Meder v. CCME Corporation*, 7 Wash.App. 801, 502 P.2d 1252 (Div. 1, 1972). In the case, waste was “committed after the commencement of the first cause of action.” *Id.* at 810. The plaintiff could pursue the claim. Here the Trust was first discovered by Aaron L. Lowe after the litigation on the Betty L. Lowe Estate was commenced and would be tried in a few days. The Trust was discovered by Aaron years after Donald E. Lowe’s Estate was closed. Here, as alleged in the Complaint, CP 8, Plaintiff was unaware of the Trust until 2013. He could not have pursued an action in Betty L. Lowe’s Estate as the case was set for trial. Motions to amend to add Donald E. Lowe’s Estate as a party were denied. No motion of any kind was ever presented that involved the Trust. Like *Calhoun v. Hook*, 2009 WL 4928048 at *7 (W.D. W.N. 2009), the Trust of Donald E. Lowe was never a party, hence there is no final judgment on the merits.

I. To Date, Federal Taxes have been Avoided or Evaded.

Aaron L. Lowe, as Trustee, is liable for unpaid federal gift taxes. Gifts over the federal gift tax exclusion were made. Lonnie D. Lowe’s attorneys have not responded to requests for income tax returns. Lonnie D.

Lowe received gifts. Both trustees and transferees are liable for federal taxes. See *U.S. v. Estate of Cipriano Espinor*, 2016 WL 3361816 *6 (E.D. Cal. 2016). The individual transfer and also the trustee were both liable for unpaid federal taxes. The Estate did not seek a tax discharge from personal liability. See 26 U.S.C. § 2204. The Internal Revenue Manual 5.5.2.5.5 (02-11-2011) states “Before any money can be distributed to beneficiaries all the debts of the deceased must be paid, including the funeral bill, any medical bills taxes and credit cards.” RCW § 11.42.090(2)(f) requires taxes to be paid. A house was sold during life. Lonnie D. Lowe found the coins and bars in his parents house. Income tax is owed when found. *Cesarini v. United States*, 428 F.2d 812 (6th Cir. 1970). Fair market value at the time is the appropriate standard. *Collins v. C.I.R.*, T.C. Memo 1992-478 at *10. Statutes of limitation do not apply. 26 U.S.C. § 6501(c)(3). If the find was a gift, a gift tax return has to be filed. 26 U.S.C. § 6501(c)(3). These issues were omitted in Donald E. Lowe’s Estate proceedings.

J. The Donald E. Lowe Trust was Never a Party and Never Validated. RCW Ch. 11.11 was Not Applied. The Donald E. Lowe Estate Was Not Reopened. At Most the Estate Discussion Involved Evidentiary Facts Considered to Deny the Reopening. These Evidentiary Facts Were Not Part of the Complaint and Were Not Adjudicated for the Reason that Even the Donald E. Lowe Estate Was Not a Party.

The case of *Seattle First National Bank v. Kawachi*, 91 Wash.2d 223, 558 P.2d 725 (Wash. 1978) also requires reversal in favor of Aaron L. Lowe. The case held that documents introduced into evidence by an estate on transactions in 1961 and 1962 did not bar an action for a loan made in 1967 brought in 1970. “No instructions with respect to the 1961 and 1962 transactions were requested or given.” *Id.* at 225. The issue in the first case was \$100,000 delivered in 1967. The respondents, Kawachi, were held not liable on the 1967 delivery. The 1961 and 1962 transactions were introduced into evidence in the prior trial of the 1967 transactions. They argued that the 1961 and 1962 transactions “should have been litigated then.” *Id.* at 463. The court held the action on the 1961 and 1962 did not bar an action for a loan made in 1967 brought in 1970. “No instructions with respect to the 1961 and 1962 transactions were requested or given.” *Id.* at 225. At the trial, payment of \$25,000 and \$10,000 were introduced “to show the relations between the parties” *Id.* at 224. The 1961 and 1962 amounts were never adjudicated. The court held that these were merely evidentiary facts and not ultimate facts and not “essential to the judgment.” *Id.* at 228. A second suit was allowed. The Respondents, Kawachi, were held not liable on the 1967 delivery. The 1961 and 1962 transactions were introduced into evidence in the prior trial of the 1967 transactions. They argued that the 1961 and 1962

transactions ‘should have been litigated then.’ *Id.* at 463. The court held the action on the 1961 and 1962 promissory notes were not barred by res judicata or claim preclusion. The court adopted the definition of res judicata as: “to make a judgment Res judicata in a subsequent action there must be a concurrence of identity in four respects: (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the person as for or against whom the claim is made. (*Northern Pac. Ry., v. Snohomish Cy.*, 101 Wash. 686, 688, 172 P. 878 (1917)).” The court notes that the doctrine of collateral estoppel “prevents a second litigation of issues between the parties even though a different claim or cause of action is asserted.” *Ibid.* at

225. Collateral estoppel was also denied:

The answer is that it is not. Not only were the claims not adjudicated, but they and the evidence concerning them formed no essential part of the claim at issue in that action, but were introduced as facts from which the existence of one of the elements of the cause of action could be inferred. They constituted what is commonly termed “evidentiary facts.”

The applicable principles are found in the Restatement of Judgments s 68 (1942):

(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, except as stated in ss 69, 71 and 72.

(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action.

Restatement of Judgments s 68, comment P (1948 Supp.) states:

P. Evidentiary facts. The rules stated in this Section are applicable to the determination of facts in issue, i.e., those facts upon whose combined occurrence the law raises the duty or the right in question, but not the determination of merely evidentiary or mediate facts, even though the determination of the facts in issue is dependent upon the determination of the evidentiary or mediate facts.

***229** This rule is also found in 46 AmJur.2d Judgments s 425 (1969) and 50 C.J.S. Judgments ss 689, 690, 697 (5th ed. 1925).

The cases are extensively annotated in 142 A.L.R. 1243 91943), Ultimate fact, as distinguished from evidentiary fact, as regards effect of judgment as estoppel. It is said in that annotation that the courts agree that the doctrine of collateral estoppel by judgment is confined to ultimate facts (facts directly at issue upon which the claim rests), and does not extend to evidentiary facts (facts which may be in controversy but rest in evidence and are merely collateral).

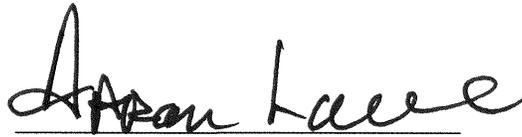
The facts with respect to the 1961 and 1962 transactions formed no part of the claim with respect to the 1967 transactions. In themselves they bore no relationship to that transaction, and they were introduced solely for the purpose of proving an element of the claim at issue. The evidence was introduced to support an inference that the 1967 transaction was likely to have occurred as alleged. Other than that, it had no value in the proceeding.

Pomery v. Waitkus, 577 P.2d 396, 183 Colo 344 (1974) also applies here as collateral estoppel did to apply to a co- passenger in the same accident. The co-passenger “was not afforded a full and fair opportunity to litigate the issues.” *Id.* at 350.

VI. CONCLUSION

Aaron L. Lowe tried to litigate the trust document’s priority over Don’s will. The Betty Lowe Probate did not include either the Estate of Donald Lowe or his Trust. The trust issues were never litigated in any prior litigation. The parties are not the same and the claims, facts and law are all different. Res judicata and claim preclusion are not applicable. does not apply.

DATED this 29th day of November, 2017.

A handwritten signature in black ink that reads "Aaron Lowe". The signature is written in a cursive style with a horizontal line underneath the name.

AARON L. LOWE, pro se
Trustee, Beneficiary Plaintiff/Appellant

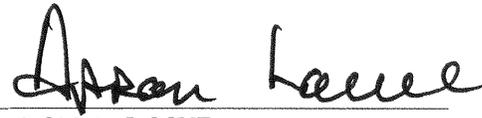
CERTIFICATE OF SERVICE

This is to certify that on November 30th, 2017, a copy of the Opening Brief of Plaintiff/Appellant was served on Counsel for Defendant by hand delivery, addressed as follows:

William O. Etter
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Greg M. Devlin
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601 W. Riverside Avenue, Suite 1900
Spokane, WA 99201

DATED this 30th day of November, 2017.



AARON L. LOWE, pro se
Beneficiary Plaintiff/Appellant

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THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE**

In the Matter of:)
)
)
ESTATE OF BETTY L. LOWE,)
)
Deceased.)
_____)
)
AARON L. LOWE, Son of)
Decedent,)
Petitioner,)
v.)
LONNIE D. LOWE, Individually and)
as Personal Representative of the)
Estate of Betty L. Lowe, Deceased,)
Respondent.)
_____)

No. 11-4-01394-6

AMENDED AND
SUPPLEMENTAL PETITION FOR
RESTORATION OF ASSETS
OMITTED FROM THE ESTATE
BY AMENDED INVENTORY OR
ORIGINAL INVENTORY; FOR AN
ORDER PURSUANT TO RCW
11.44.035 SUSTAINING
CHALLENGE TO ORIGINAL
AND AMENDED INVENTORY;
FOR DECLARATION OF
INVALIDITY OF INSTRUCTION;
FOR DISTRIBUTION OF
TANGIBLE PERSONAL
PROPERTY AND TO
DETERMINE WHAT ASSETS
WERE INTENDED TO BE
INCLUDED IN THE WRITTEN
INSTRUCTION; FOR
TORTUOUS INTERFERENCE
WITH RIGHT TO INHERIT;
FOR ORDER TO ISSUE
CITATION REMOVING
PERSONAL REPRESENTATIVE
AND APPOINTING
SUCCESSOR PERSONAL
REPRESENTATIVE (RCW
11.28.250 and 11.68.070)

Amended Petition - 1

1 Aaron L. Lowe, son of Decedent, petitions this Court, pursuant to CR
2 15(a), through his attorney, Robert E. Kovacevich, pursuant to RCW
3 11.24.010, 11.96A et seq., 11.28.250, 11.44.015, 11.44.035, 11.68.070,
4 7.24.010, 7.24.050, and other statutes and laws, as follows:
5

6 **Parties**

7 1. Petitioner Aaron L. Lowe is one of three surviving sons of
8 Decedent Betty L. Lowe, lives in Spokane County, Washington and is an
9 heir under Decedent's will. He would also be one of Betty L. Lowe's
10 intestate heirs. A copy of the will is attached to the original Complaint.
11

12 2. Lonnie D. Lowe, is also a son of Decedent and has been
13 appointed as personal representative of the Estate of Betty L. Lowe,
14 Spokane County Superior Court No. 11-4-01394-6. He is named
15 personally, as agent and as attorney-in-fact, and as personal representative
16 of Decedent.
17

18 **Jurisdiction**

19 3. Decedent died as a resident of Spokane County, Washington on
20 October 1, 2011. A document purporting to be a will dated September 15,
21 2003, was admitted to probate on October 28, 2011.
22

23 4. Petitioner is a residuary beneficiary of one-third of 80% of the
24 residue of Decedent's estate. By a writing purported to be written
25 instructions for distribution of tangible personal property, dated September
26

1 11, 2007, the Decedent attempted to leave Respondent Lonnie L. Lowe, "all
2 silver coins and bars to distribute or to retain for himself." The document
3 is attached to the original Complaint. The document was not notarized or
4 attested as a will. It was not in the handwriting of Betty L. Lowe and did
5 not describe the silver coins and bars by number, weight, or other
6 description with reasonable certainty sufficient to delineate the coins and
7 bars from other coins or bars that are part of the residuary estate. The
8 writing also failed to describe the recipients of the coins and bars with
9 reasonable certainty as Lonnie D. Lowe could distribute to others who were
10 unnamed. The writing failed to comply with RCW 11.12.260 or the
11 requisites of a will in the attempted distribution of all coins and bars,
12 hence, these items are distributable under the laws of descent or by will.
13

14
15
16 5. After this case was served and filed, Lonnie Lowe, on or about
17 September 25, 2012, filed an amended inventory in the estate eliminating
18 a checking account at Spokane Teacher's Credit Union in the amount of
19 \$1,932.45 and a certificate of deposit at the Spokane Teacher's Credit
20 Union in the amount of \$47,466.07. If the transfers were to Lonnie Lowe,
21 he has wholly failed to fulfill his burden of proof of evidence of gift. The
22 described assets are still part of the estate. The amended inventory did not
23 explain the reason for the omission, nor did the amended inventory fulfill
24 the requirements of RCW 11.44.015 for the reasons that neither the
25
26
27

1 amended inventory or original inventory filed, determine the fair net value
2 of the real estate, the collectible coins, the musical instruments and other
3 assets.
4

5 6. The statute requires that the inventory list each item. Each
6 item was never listed. Valuable coins and bars cannot be identified.
7 Musical instruments and real estate values were not appraised in the
8 manner required by statute. RCW 11.44.015(f) requires personal property
9 to be identified. None of the coins, bars or collector items were identified.
10 The identification is necessary to prove equal distributions in kind. In
11 August of 2012, Lonnie Lowe was personally served a subpoena requesting
12 lists of assets and all written instructions of tangible property signed by the
13 Decedent.
14
15

16 7. At his deposition taken September 12, 2012, Lonnie Lowe
17 admitted that he had cancelled checks and bank statements of Betty Lowe;
18 that he was the possessor of two written durable powers of attorney, health
19 care and financial. He admitted that he was appointed attorney-in-fact of
20 Decedent and that the documents were in his possession, but he did not
21 produce the documents. He promised under oath that he would produce
22 them voluntarily after the deposition. A reminder was also sent to Lowe's
23 counsel to produce the documents. To date, the powers of attorney have not
24 been produced nor have other items promised. As attorney-in-fact or agent
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27

1 of Decedent, Lonnie Lowe had a fiduciary duty to disclose all facts of the
2 relationship and to account to the estate.
3

4 8. The reason for omission of the items from the original or
5 amended inventory was not explained. Signature cards or other proofs have
6 not been produced. On information and belief, it is therefore alleged that
7 the powers of attorney did not include a specific direction, pursuant to RCW
8 11.94.050 to designate any joint tenancy with right of survivorship or to
9 make gifts of any assets of the principal's property. Lonnie Lowe, on
10 deposition, contended that the Decedent made annual and other gifts to
11 him. Gifts must be proven by clear, cogent and convincing evidence.
12 Delivery and intent must be proven. Based on information and belief,
13
14 Petitioner alleges that all transfers by Lonnie Lowe to himself of Decedent's
15 property are ineffectual and void. The assets purportedly transferred must
16 be part of the estate and included in the inventory.
17

18 9. Lonnie Lowe, as personal representative or attorney-in-fact or
19 agent as the holder of powers of attorney, is charged with the duty to
20 accurately account for assets of the Decedent. At his September 12, 2012
21 deposition, Lonnie Lowe admitted that he had insufficient or inadequate
22 accounting of purported cash gifts or assets transferred to his dominion and
23 control. The assets belonged to Betty Lowe. Lonnie Lowe indicated that the
24 assets were transferred to him before Decedent died. He contended that
25
26
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1 yearly \$10,000 gifts were made to him by the Decedent. As attorney-in-fact
2 or agent, Lonnie Lowe had a duty to account for Decedent Betty Lowe's
3 assets. Lonnie Lowe commingled Betty Lowe's assets with his own assets
4 and cannot accurately account for the estate's assets or what assets were
5 sold before or after the death of Decedent. Based on information and belief,
6 Lonnie Lowe wrongfully disposed of Betty Lowe's assets. The amount, when
7 proven, must be restored and paid by Lonnie Lowe to the estate.
8
9

10 **Defendant as a Fiduciary, has Failed to Keep Accurate Records**
11 **and to Keep Decedent's Property Separate from his Property.**

12 10. Before and after the death of Betty Lowe, Lonnie Lowe has
13 failed to keep an accurate account of Decedent's assets sold, disposed of,
14 or transferred. No annual accounting has been filed in the estate. Any
15 transfer by powers of attorney are invalid and the property transferred is
16 part of the estate. If Lonnie Lowe is unable to adequately account between
17 his property and that owned by Decedent, all commingled property should
18 be awarded to the estate.
19

20 **Claim of Undue Influence on Purported Distribution of Tangible**
21 **Personal Property**

22 11. Based on information and belief, the document purporting to
23 distribute tangible personal property dated September 11, 2007, was
24 procured under undue influence and fraud of Lonnie D. Lowe and/or others
25 in concert with Lonnie D. Lowe and/or others in concert with one another.
26
27

1 **Claim of Lack of Capacity to Validly Execute or Convey Tangible**
2 **Personally Purported by September 11, 2007 Document**

3 12. On information and belief, Betty L. Lowe lacked mental capacity
4 to comprehend the importance of the document she signed on September
5 11, 2007. She did not know the extent or description of property that the
6 document would transfer.
7

8 13. Based on information and belief, the document signed on
9 September 11, 2007, was vague and uncertain. It failed to specify and
10 define the number of coins and number of bars or specify the recipient of
11 the property. It failed to comply with RCW 11.12.260 or the requirements
12 of a valid will.
13

14 14. The document signed on May 11, 2007, failed to specifically
15 name or specify the persons who were to receive the silver and coinage and
16 rendered the intended distribution invalid or created a constructive or
17 resulting trust void for vagueness.
18

19 15. In the document attached as Exhibit B to the original
20 complaint, the writing states that Lonnie (sic) O. Lowe could retain silver
21 coins and bars himself.
22

23 16. Based on information and belief, the Decedent was unaware of
24 some or all of the nature and extent of the silver coins and of the silver bars.
25 Since Decedent was unaware, she lacked knowledge of the nature and
26 extent of the property, some or all of which was securely secreted by her
27

1 deceased husband and/or others. Since she could not have contemplated
2 the extent of the property, she had no power to gift or convey the property
3 and no dominion over the property sufficient to complete the gift or
4 disposition. The attempted distribution of "all silver coins and bars" was
5 not within the Decedent's knowledge at the time of amount or value, hence
6 could not be a valid distribution. Therefore, the attempted disposition is
7 void and is subject to disposition by will or intestate descent as will be
8 finally determined by this litigation. Further, if Lonnie Lowe appoints to
9 himself, RCW 11.12.091(2)(c) is violated as Petitioner will receive only a
10 relatively nominal interest.

13 **Tortuous Interference with Economic Expectancy**

14
15 17. Petitioner Aaron L. Lowe, as a surviving son and direct intestate
16 heir of Decedent Betty L. Lowe, is entitled to the expectancy of gift or
17 inheritance from her estate. The purported will document attached as
18 Exhibit A to the original Complaint also lists Petitioner as a residuary
19 distributee and legatee.
20

21 18. On information and belief, the Respondent Lonnie D. Lowe with
22 knowledge of all conduct, has intentionally induced Betty L. Lowe not to
23 make a bequest of gift to Aaron L. Lowe by intentionally removing or
24 causing others to remove property belonging to Betty L. Lowe. Further, he
25 used his fiduciary position as attorney-in-fact or agent to intentionally
26

1 remove property from the estate that would have been gifted or distributed
2 to Petitioner. Lonnie Lowe, over a period of time, during the lifetime of
3 Decedent and thereafter, systematically removed Betty Lowe's property to
4 his custody, dominion and control. He intentionally failed to disclose his
5 activity to Petitioner. Lonnie L. Lowe used the possession to tortuously and
6 intentionally remove assets that would otherwise be part of Betty Lowe's
7 estate.
8
9

10 19. Petitioner further requests that Lonnie Lowe prove and deliver
11 all documents involved in the accounts alleged in joint tenancy.

12 20. On information and belief, Lonnie D. Lowe intentionally and
13 maliciously, omitted or removed property owned by Betty L. Lowe either
14 before or after her death, and secreted said property tortuously depriving
15 Petitioner of expectancy of a gift or inheritance from Betty L. Lowe.
16

17 **Declaratory Judgment**

18 21. Pursuant to RCW 7.24.010 and 050, Petitioner requests that
19 the Court hear and determine that the inventories filed by the personal
20 representative on February 6, 2012 and September 25, 2012, be
21 supplemented to include the detail omitted at Schedule 6, No. 4, by listing
22 each musical instrument and value; No. 4 by indicating where the coins
23 were located at before Decedent's death, who removed them, number of
24 silver coins, whether stored in folders or other contains, whether circulated
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1 or uncirculated, the denomination and year of issue.

2 22. Also regarding No. 5, the number of silver bars, their weight
3 and size, the percentage of silver contained, where they were located and
4 who removed them from their location before or after Decedent's death. Also
5 on No. 5, the exact count of silver dollars, date of issue, whether circulated
6 or uncirculated and where found before or after Decedent's death and who
7 found and/or removed them.
8
9

10 23. At No. 6, the date of issue of the \$50 gold coins and 4 \$20 gold
11 coins, where found before or after Decedent's death.

12 24. In addition to the above, in either event, whether the document
13 dated September 11, 2007, is valid or invalid, the Court determine and
14 declare what "all silver coins and bars" are included in the purported
15 instructions, where the property was located and/or removed before or after
16 Decedent's death, whether any of the property was distributed, who the
17 personal representative distributed the property to, where it is stored and
18 who has custody, including the chain of custody and to include the
19 accounts at the Spokane Teacher's Credit Union as estate assets.
20
21

22 25. In addition, to order the personal representative who has
23 permission to name the custodians of minor children, to name the
24 custodian.
25
26
27

1 inheritance or gift.

2
3 3. Ordering a detailed inventory of all silver bars and collector
4 coins by number, date of issue, face amount, weight, and in regard to coins,
5 whether circulated or uncirculated.

6 4. Order a complete accounting of all assets of Decedent
7 transferred by Lonnie Lowe or in which Lonnie Lowe had any participation
8 in any way with any transfers.

9
10 5. Order Lonnie Lowe to produce all documents of any kind that
11 pertain to any assets that were owned by Betty Lowe both before and after
12 her death.

13
14 6. Enter an Order finding inadequate accounting, self-dealing and
15 appointing a successor removing Lonnie D. Lowe as personal representative
16 of the estate.

17 7. Declare Petitioner's rights and clarifying Respondent's
18 obligations, extent of distribution and clarification of inventory.

19
20 8. Awarding Petitioner his inheritance.

21 9. Awarding Petitioner his fees and costs.

22 10. Granting other relief as the Court deems equitable.

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DATED this 2nd day of November 2012.



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VERIFICATION

Petitioner, Aaron L. Lowe, certifies or declares under penalty of perjury under the laws of Washington that the foregoing is true and correct, except for allegations on information and belief in which he believes are true and correct.

DATED this 2nd day of November 2012.



AARON L. LOWE

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CERTIFICATE OF SERVICE

I certify that a copy of Response to Motion to Dismiss was served on counsel for defendants by personal delivery on this 2nd day of November 2012, in a postage-paid envelope addressed as follows:

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Witherspoon Kelley
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