

47124-8-II

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

In Re the Estate of MILDRED G. JOHNSON,

Deceased.

STEVEN C. JOHNSON,

Appellant,

v.

HOPE SOLEY, Personal Representative of the Estate of JUDY COHN;
JOY WALTER and CHRIS JOHNSON,

Respondents.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

A. This Court should Review the Trial Court's Orders and Entry of Judgments under the De Novo Standard of Review Because the Trial Court Did Not Weigh Facts or Testimony.

The parties dispute the appropriate standard of review in this case. The appropriate standard of review is de novo given that the trial court did not take testimony, did not review evidence, and instead adopted the proposed findings of fact made by the Special Master. Moreover, in *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004). There the trial court was sitting in its equitable authority of a probate proceeding and a de novo review of the entire record is proper. A similar standard should apply here. Respondents' position that the court should apply the substantial evidence standard faultily presumes: (1) that the court weighed the evidence, when instead that task was achieved by the Special Master; and (2) the evidence considered in reaching the findings of fact would be available for review. Instead, the substantial evidence standard is untenable when considering that the evidence considered by the Special Master in making the findings of fact are not part of any record. In application, Steven Johnson¹ cannot argue that the findings were

¹ Steven Johnson, the appealing party, will be referred to as "Johnson" throughout this brief. Because the Estate at issue involves others with the surname Johnson, any reference to them will be by first and last name.

unsupported by substantial evidence on the record when the evidence is not part of the record at all.

Respondents rely on *Foster v. Gilliam*, 165 Wn. App. 33, 268 P.3d 945 (2011), to support the application of the substantial evidence standard due to a sizeable and complex written record below.¹ *Foster* is distinctly distinguishable in this case. In *Foster*, the parties submitted lengthy and extensive declarations, but all proceedings were actually held before the court. The trial court commissioners in *Foster* weighed all evidence that was presented in reaching its conclusions. *Id.* While in this case, there is a significant amount of declarations and filings made before the trial court judge, those filings and findings were not the basis of the findings of fact and conclusions of law entered against Johnson. Instead, the Special Master was appointed to make those findings of fact and conclusions of law. The Special Master was the finder of fact. The Special Master was the determinative force that considered the lengthy testimony and the sizeable record. Citing to the Special Master's report as the sizeable and complex record, is inadequate when considering that the trial court only adopted those findings made by the delegated authority. *See* Resp. Brief at 45. *Foster* may have been illuminating in this case as to the proper

¹ Respondents cite to *Anderson v. City of Bessemer City*, 470 US 564, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985) to support the position that review should not be de novo. The quote cited by Respondents contemplates a trial on the merits.

standard of review, *if* the sizeable and complex record was actually considered in making the findings of fact.

Moreover, reliance on *Foster* underscores the crux of Johnson's appeal. There is no record of the evidence considered to weigh whether or not it was substantial. The sizeable and complex record, testimony, and other forms of evidence considered in reaching findings were before the Special Master, not the trial court. The Special Master's reports identify that he interviewed *parties and considered evidence*. Those interviews and that evidence are not part of the record in the trial court. The actual amount of evidence which could create a sizeable record that was considered in making factual findings is not part of the record to be submitted to this Court for review. Johnson is hamstrung because he cannot argue that the evidence on the record does not support the findings because there is no record of that evidence. Respondents want to preclude allowing *de novo* review based on the argument there was a significant amount of evidence. Respondents point to the Special Master's report for proof of the substantial evidence they argue exists. *See Resp. Brief at 45.* That is the only evidence available to consider since the evidence before the Special Master was not before the trial court. Johnson cannot attack whether or not the weight of the evidence supports the findings and in

turn, whether or not the findings support the conclusion because there is no record to argue from.

Respondents' argument regarding "substantial evidence" underscores the error of adopting the Special Master's recommended findings because that evidence was only presented to and weighed by the Special Master, and not the trial court. In *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959), the court noted the importance of a fact finder weighing the testimony and credibility of witnesses. This principle is so foundational that the court resists enlarging or modifying that doctrine. *Id.* See *Graves v. H.L. Griffith Realty & Banking Co.*, 3 Wash. 742, 29 P. 344, (1892). In step with these principles, a motion for summary judgment does not include findings of fact, because the court should not be weighing facts or credibility in a summary fashion. See e.g. *Wash. Optometric Ass'n v. Pierce Cnty., City of Tacoma*, 73 Wn.2d 445, 438 P.2d 861 (1968); *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 586 P.2d 860 (1978). But in this case, the trial court did not hear the evidence; did not weigh the credibility of witnesses; and the findings of fact were not based upon declarations. Instead, the trial court adopted findings made by the Special Master who performed those functions.

Similarly, Respondents' position for a substantial evidence standard for fact finding tasks is equally misplaced. Respondents advocate for the substantial evidence standard to preserve the deference for the fact-finding role of the trial court. In a footnote, Respondents take issue with the lack of reconciliation between the de novo standard of review and the constitutionally protected fact-finding role of the trial court. Resp. Brief, p. 30, ln. 16. Such argument, however, may be more persuasive if the trial court had in fact acted as fact finder rather than delegating it to the Special Master. Because the trial court did not weigh testimony and credibility, and consider the evidence before the Special Master in reaching the factual findings, it is difficult to comprehend how a de novo standard of review of the court's legal conclusions, and entry of judgments, could degrade the fact finding authority when that power was already fully delegated.

Arguably, Respondents' recognition of the constitutional importance of the trial court's fact-finding role as identified in *Thorndike* further bolsters the improper nature of the proceedings as they evolved before the trial court. If the authority to find facts is so great that the Court of Appeals cannot substitute its reasoning, the trial court should not be permitted to delegate that power. It was accordingly improper to carte-

blanche adopt the findings and conclusions of the Special Master without any of the other protections, as outlined below.

Given the inadequate record for review, the de novo standard is appropriate. Moreover, and possibly most importantly, the appointment of the Special Master, and the rubber stamp adoption of his findings and conclusions, is an issue of law. *See Peebles v. Port of Bellingham*, 93 Wn.2d 755, 774, 613 P.2d 1128 (1980) (overruled on other grounds), (when the matter on appeal is a question of law, *Thorndike* is not applicable). Whether or not he was properly appointed to carry out a clearly identified role under any legal authority is a question of law. There is no evidence that can change that the Special Master was improperly the recipient of a delegation of duties he could not lawfully perform. There is no weight of evidence that supports allowing a special master to act as fact finder and adjudicator of a party's rights in the manner that was carried out. As a matter of law, it was improper to adopt findings made by the Special Master. Under any standard, the failure to clearly appoint the Special Master for a role which was supported by law was a reversible error.

B. Respondents failed to respond to the assignment of error that the appointment of the Special Master was in error, and the adoption of the fact finding report is procedurally improper.

In his opening brief, Johnson posited three possible theories of how the Special Master could have been appointed. Respondents failed to identify how the appointment of the Special Master was appropriate under any vehicle. Respondents do not adequately address the argument that the Special Master exceeded the authority of an expert under ER 706. A court appointed expert may “both testify and advise the court on technical matters when the facts presented are not clear to the fact finder.” *In re Welfare of Angelo H.*, 124 Wn. App. 578, 588, 102 P.3d 822 (2004). A court appointed expert is subject to same procedures as an expert retained by a party. For example, an expert is subject to cross-examination. There is no dispute that the Special Master appointed in this matter never testified, and never offered opinions on technical issues.

Respondents cite *In Re Estate of Cooper*, 81 Wn. App. 79, 96, 913 P.2d 393 (1996), to argue that a Special Master can be appointed in an probate proceeding, but the court in *Cooper* held adopting the Special Master’s report was an error for the very same reason Johnson alleges in this paper: there was no opportunity to depose or cross examine the special master/expert witnesses appointed under ER 706. “The parties also have the right to depose the expert and call him or her at trial.” *Id.*

The court in *Cooper* went on to say trial court “also did not comply with the procedures outlined in Fed.R.Civ.P. 53 [Governing Discovery

Special Masters which had] not been adopted in Washington” at that time. *Id.* at 96. The rule, now found at CR 53.3 provides the court may appoint a “Special Master either to preside at depositions or adjudicate discovery disputes, or both.” The powers of the Special Master outlined in CR 53.3(d) identify the powers of the Special Master consistent with the purpose of the appointment, to resolve issues of discovery. There is no dispute that the Special Master’s role in this case was not to adjudicate a discovery dispute between the parties.

In fact, the Special Master acted like a referee under RCW 4.48.070. He interviewed witnesses, considered documents as evidence, weighed evidence and made factual findings. The court then entered judgment based upon his report. While a trial by referee is permitted on the motion of a party, the formalities of a trial remain.

Subject to the limitations and directions prescribed in the order of reference, the trial conducted by a referee shall be conducted in the same manner as a trial by the court. Unless waived in whole or in part, the referee shall apply the rules of pleading, practice, procedure, and evidence used in the superior courts of this state. The referee shall have the same power to grant adjournments, administer oaths, preserve order, punish all violations thereof upon such trial, compel the attendance of witnesses, and to punish them for nonattendance or refusal to be sworn or testify, as is possessed by the court.

RCW 4.48.060(1) (emphasis added).

The actions of the Special Master failed to comply with RCW 4.48.010 *et seq.* There was no formality of the pleadings, examination of witnesses, or adherence to the rules of evidence. There was no record. Nothing demonstrates that anything the Special Master heard from witnesses was pursuant to a sworn statement. The Special Master simply “interviewed” witnesses outside the presence of opposing counsel and made no record of the interviews.

There is no recognized authority in statute or rule to authorize the Special Master to operate in the manner performed here. The Special Master’s role exceeded that of an expert under ER 706, the appointment and procedure was improper under RCW 4.48.010, and the investigation and recommendation greatly exceeded the authority of a Discovery Special Master appointed under CR 53.3.

C. Even if Johnson Could Be Removed as Personal Representative, the Adoption of the Special Master’s Report and Imposition of Judgments Was in Error as It Violated Johnson’s Right to Due Process.

The majority of the Respondent’s brief is dedicated to arguments as to why the trial court properly removed Johnson from his role as Personal Representative. The brief fails to adequately address, however, the argument that failing to follow any proscribed procedure whatsoever violated Johnson’s due process rights when the Court entered findings and

judgments against him. The court only had jurisdiction over any of these parties because of a probate proceeding. There was no TEDRA petition, no invocation of jurisdiction over Johnson for any role other than as personal representative. The lack of any TEDRA petition or other action against Johnson, or the entities in which he was manager, should have precluded the court from entering findings and conclusions against Johnson along with the accompanying judgments.

The appointment of the Special Master was not in accordance with any legal authority that could conceivably apply. Since the Special Master ultimately became the trier of fact based upon independent interviews of witnesses conducted without a record, or the opportunity for cross-examination, Johnson lost his right to due process.

Respondents wholly fail to address how entry of judgments against Johnson based upon findings made by the Special Master, did not violate Johnson's due process rights. This summary proceeding conducted primarily outside of the courtroom was the primary consideration for the entry of over \$270,000.00 in monetary judgments.

Even though this is a civil matter, Johnson still had a due process right to be heard, examine witnesses, and have a record of the proceedings, before monetary judgments were entered against him. *See e.g. Leda v. Whisnand*, 150 Wn. App. 69, 207 P.3d 468 (2009); *see also*

Sitton v. State Farm Mut. Auto. Ins. Co., 116 Wn. App. 245, 63 P.3d 1968 (2003) (class members have a due process right to be protected in class certification under CR 23(b)(1) or CR 23(b)(2) unless monetary damages are merely incidental to the primary claim). Respondents' reliance on *Thorndike* underscores the importance of having a proper forum for having factual findings entered against any party. In *Thorndike*, the Supreme Court noted that the State Constitution did not provide any authority for it to substitute its factual findings for those of the trial court. *Thorndike*, 54 Wn.2d at 575. The absence of any authority of a higher court to impose its own reasoning illustrates the importance of the trial court's fact finding. The *Thorndike* court essentially noted that no authority exists to override the fact finding power of the trier of fact. Here, however, the trial court did not make the factual findings even though it entered the Orders and Judgments against Johnson. The factual findings were made by the Special Master and the trial court simply adopted them. *See* CP 2039-2064; CP 2175-2184. This violated his right to due process, and there is no adequate remedy except to vacate the judgments and remand because this Court cannot substitute its judgment to enter appropriate findings.

Johnson did not have an adequate opportunity to be heard in violation of his right to due process. *See Carlstrom v. Hanline*, 98 Wn.

App. 780, 790, 990 P.2d 986, 991 (2000) (emphasis added). A “meaningful opportunity to be heard” is a minimum requirement. *Leda*, 150 Wn. App. at 83. The Special Master conducted independent witness interviews. There was not an adequate opportunity to know the testimony of other witnesses, or to provide response or rebuttal. There was no meaningful opportunity to cross-examine witnesses. Without the opportunity to know the testimony of other parties, or to cross-examine other witnesses, Johnson was deprived the opportunity to identify factual inaccuracies or inconsistencies in the testimony of the witness. As a result, the Special Master’s findings of credibility are based upon proceedings where the credibility of witnesses may not have been legitimately challenged or properly weighed.

In addition, there was no record of any of the proceedings that occurred. The only resemblance of a record is the Special Master’s report which summarizes the events and makes the findings and conclusions. Not only does the lack of record prejudice Johnson’s ability to adequately challenge issues on appeal, but the absence alone violates his due process rights. *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963) (to satisfy due process, there must be a record of “sufficient completeness” for a review of the errors raised by the defendant in a criminal case). “[W]hen an adequate record exists, the appellate court may carry out its long-standing

duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.” *State v. Contreras*, 92 Wn. App. 307, 313, 966 P.2d 915 (1998); *see also Bulzomi v. Dep’t of Labor & Indus.*, 72 Wn. App 522, 864 P.2d 996 (1994) (an insufficient record on appeal precludes review of the alleged errors). The absence of a clear record is a fatal defect. *Beach v. Board of Adjustment of Snohomish Cnty.*, 73 Wn.2d 343, 438 P.2d 617 (1968) (citing *Crouch v. Ross*, 83 Wash. 73, 145 P. 87 (1914)). While these proceedings are civil in nature, there is still a due process interest in the opportunity to be heard and having a record of what was said, particularly when those proceedings result in judgments. Absent a record, Johnson has no opportunity to adequately challenge the underlying events that occurred before the appeal.

D. Failure to Object to the Appointment of the Special Master Should Not Bar Relief Because the Adoption of the Special Master’s Report Was an Additional Error.

Respondents argue that Johnson failed to object to the appointment of the Special Master. As an initial matter, the Special Master was not appointed through the motion of either party. Johnson had filed a motion for Court approval of an accounting. CP 1290-99, and Judy Cohn, Joy Walter and Chris Johnson filed a motion to remove the personal representative and to appoint a successor personal representative. CP

1302-1326. These motions were heard by the court, but no order was entered.

The court requested additional information and inquired about whether the parties could agree on an accountant who could perform an accounting to address a number of disputes. RP (5/2/14 p. 31, 33). The parties were asked to come back with a proposed accountant. RP (5/2/14 p. 33). At the return hearing the trial court appointed the Special Master without motion from either party. RP (5/23/14 p. 3); CP 1934-42. The scope of the Special Master's authority did not invoke the need to object to his appointment. Rather, the court's adoption of the Special Master's report was the violation, which Johnson objected to. There was no proper time or no need to object at appointment. It was not known until the Special Master recommendations were adopted exacting the Special Master's role would be fined. The opportune time to object was when the report was adopted and this objection was made.

E. The Judgments and Findings Against Johnson Are Invalid Because TEDRA Was Never Invoked.

The importance of an initiating pleading or some sort of filing to commence an action against someone or some party is paramount to the American judicial process. In fact, our civil court rules identify that there is only *one* form of action, "a civil action." CR 2. While a multitude of

variations of the classifications or categorizations of civil actions exist, the initiation of a proceeding is an important step. Filing some form of action places a person on notice of the claims against them, provides the opportunity to know that the court will exert subject matter and personal jurisdiction. *See* CR 3 regarding commencement of action.

Respondents argue that former RCW 11.96A.090 did not require a TEDRA petition to be filed in this case because that provision governed actions incidental to an existing judicial proceeding. Resp. Brief at 34. The former provision stated, “A judicial proceeding under [Title 11 RCW] may be commenced as a new action or as an action incidental to an existing judicial proceeding. . . .” Respondents’ argument overlooks that the former statute still contemplated the commencement of *some* action. That an action may be incidental to an existing judicial proceeding does not forego the requirement of first initiating some form of petition to invoke TEDRA. *Compare* Resp. Brief 34. An “action” is a prosecution in a court for enforcement or protection of private rights and redress of private wrongs. *Thorgaard Plumbing & Heating Co. v. King Cnty.*, 71 Wn.2d 126, 426 P.2d 828 (1967). Without a TEDRA petition, Respondents never invoked the court’s jurisdiction under TEDRA to adjudicate rights extraneous to the administration of the Estate. Here, Johnson had his rights adjudicated outside the parameters of the

administration of the estate, and the result was the entry of judgments in amounts exceeding \$270,000.00.

Citing the language of TEDRA that defines “matter” broadly does not save Respondents from the fact that the Act was never invoked. *See* Resp. Brief at 33 (citing RCW 11.96A.030(2)). TEDRA does not simply apply because there was a trust or an estate. The protections and benefits of that chapter must somehow be invoked by a party’s petition. A party may have a right to the proceeding, and the proceeding may be defined broadly, but that does not automatically mean a proceeding or action has been commenced. Johnson’s challenge on appeal is not that the Respondents failed to pay the clerk’s filing fee, or that the case should have been filed under a separate cause number. Instead, the issue with the proceedings below is that Respondents never petitioned the Court to invoke TEDRA; never filed a TEDRA action against Johnson to identify the specific claims at issue; and never properly brought any issues before the court. Without commencing a TEDRA action, the trial court did not have the authority or jurisdiction under TEDRA to enter judgments against Johnson.

Similarly, the Respondents oversimplify the issue in this case by trying to justify the judgments by arguing the Court could have proceeded

because it had jurisdiction by revoking the nonintervention powers. The dispute is not solely the removal of Johnson as personal representative.

Under Title 11.68 RCW and Title 11.28 RCW, a trial court has authority to remove a personal representative even if appointed with non-intervention powers. *See In re Estate of Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004). In *Jones*, the beneficiaries of an estate filed “petitions during the probate proceeding” to remove the personal representative, in addition to seeking other relief. *Id.* at 7. While the opinion is silent as to the type of petitions filed, it considers the removal of the personal representative under RCW 11.68.070 and RCW 11.28.250. *Id.* Cases like *Jones* demonstrate that the trial court has the authority to revoke nonintervention powers and remove a personal representative absent TEDRA. In a case like the one at bar, however, the trial court acts improperly when TEDRA provisions are used to enter judgment against the former personal representative without a proper petition or action being filed under that Act to invoke its authority.

Similarly, the contemplation of jurisdiction to revoke nonintervention powers and to remove a personal representative is different from the jurisdiction conferred by TEDRA. In *In re Estate of Ardell*, 96 Wn. App. 708, 714-15, 980 P.2d 771 (1999), the beneficiaries of the estate invoked the jurisdiction to remove the personal representative

by filing such petition before the declaration of completion was filed.

Citing *In re Estate of Peabody*, the *Ardell* court recognized the legislative scheme at issue:

(a) Mr. Peabody in his lifetime made a non-intervention will, but no court then had jurisdiction of his estate. (b) Mr. Peabody died. Still no court had jurisdiction of his estate until, after his death, by proper petition setting up the jurisdictional facts, filed in the superior court of the proper county, that court, by reason of that application to it, obtained jurisdiction of the estate. (c) When the order of solvency was properly entered, the further administration of the estate was by the statute relegated exclusively to the executors, and the probate court, which had before had jurisdiction, then lost its jurisdiction of the estate. (d) Thereafter, in order for the court to regain jurisdiction of the estate, its jurisdiction must be again invoked by a proper application made by someone authorized by the statute so to do....

96 Wn. App. at 715 (citing *In re Estate of Peabody*, 169 Wash. 65, 70, 13 P.2d 431 (1932)). The *Ardell* court held that the jurisdiction was invoked by an interested person under RCW 11.68.070. *Ardell* 96 Wn. App. at 717. The reasoning of *Ardell* demonstrates that when the estate is with nonintervention powers, the jurisdiction of the court must be specifically invoked. Even still, the court's authority in *Ardell* derived from Title 11.68 RCW, not Title 11.96A RCW or its predecessors. It is insufficient to reason that because an estate proceeding is ongoing where the interested beneficiaries sought removal of the personal representative, TEDRA is automatically invoked without a proper TEDRA petition. Because the

court only has jurisdiction over a nonintervention estate or its personal representative by a filing, the requirements of TEDRA to file an action, even if incidental to an ongoing estate proceeding, cannot be diminished or overlooked. Failure to specifically trigger jurisdiction under TEDRA means that the rights and protections of the Act were never invoked. It was improper to enter judgments against Johnson as if the Act applied.

By further analogy, the court in *In re Estate of Kondon*, 157 Wn.2d 206, 137 P.3d 16 (2006), held that the failure to serve a proper summons or citation deprived the court of personal jurisdiction for purposes of a will contest (examining RCWs 11.96A.100(2) and 11.24.020). In *Kondon*, the will contestant timely filed a petition but did not serve a citation pursuant to RCW 11.24.020. *Id.* at 208. Although the action was considered “incidental to an existing judicial proceeding relating to the same...estate,” the party challenging the will was not excused from properly invoking the court’s jurisdiction. *Id.* at 212. Recognizing that TEDRA explicitly disavows any intention to alter notice procedure in a will contest, the Court determined that the plain language of TEDRA did not affect the citation requirement of RCW 11.24.020. *Id.*

Kondon shows that the Court is not remiss with regard to the requirements that a party first invoke personal jurisdiction. The fact that an existing judicial proceeding relating to the estate may exist, there is no

automatic guarantee that the court has personal jurisdiction over all interested parties in the capacity sought by the Respondents here. Put simply, the failure to file any TEDRA petition against Johnson left the trial court without proper personal jurisdiction over these proceedings as they unfolded, and the trial court could not enter judgments against Johnson as it did in this case. The existence of a related estate proceeding, absent some action against Johnson in any form, was insufficient to confer personal jurisdiction.

F. Respondents Concede the Judgment Against Gail Johnson, Individually Is Error. At a Minimum, the Matter Should Be Remanded to the Trial Court to Correct This Agreed Error.

The judgments entered by the trial court included naming Gail Johnson in her individual capacity, even though the judgments purported to arise out of conduct of Johnson taken as the personal representative. CP 2312. Respondents concede it was error to name Gail Johnson individually. Resp. Brief at 60. This should be remanded to the trial court to correct this error, if nothing else.

In addition, however, it was error for the trial court to enter judgment against Gail Johnson's interest in the marital community. Presuming every other procedural and evidentiary issue raised on appeal was proper, there is insufficient evidence to support entering judgment against Gail Johnson's portion of the community. The only argument that

there was any community involvement raised by the Respondents is that Johnson repaid promissory notes to Steven and Gail Johnson. Resp. Brief at 60. Respondents use this evidence to extrapolate the presumption that all activities were taken on behalf of the marital community.

Johnson was held liable for acts he took as a partner of a general partnership and personal representative of an estate. The only trigger for personal jurisdiction was the filing of the petition to probate the will. Without a proper record or additional evidence, it was in error that the trial court entered a judgment against Gail Johnson's interest in the community. *La Framboise v. Schmidt*, 42 Wn.2d 198, 254 P.2d 485 (1953), is not persuasive when considering that the undisputed evidence was that Johnson was operating as personal representative of an Estate where he was the beneficiary. In *La Framboise*, there was an *action against* a married man for torts committed during the marriage. Not only was there no *action against* Johnson, but the conduct he was held liable for was not on behalf of the community. The distribution he was subject to receive from the Estate is undisputedly separate property. There was insufficient evidence to support that the conduct benefited the marital community, and thus, insufficient evidence to enter judgment against the marital community.

H. Respondents Did Not Address the Reasonableness of the Fees Awarded Below. Fees on Appeal Should be Awarded to Johnson and Not Respondents.

Johnson challenged the reasonableness of the fee award made in the trial court. Brief pp. 43-47. Respondents did not respond except to summarily state the fees incurred were reasonable. Resp. Brief at 58. Should the entry of any judgment for attorneys' fees be upheld on principle, this Court should remand the matter to the trial court for further proceedings as to the reasonableness of the fees requested, and whether the judgment should be amended accordingly.

Notwithstanding, Johnson should prevail on appeal and should be awarded his attorneys' fees on appeal. RAP 18.1. RCW 11.68.070 allows an award of fees to a personal representative defending against his removal. In addition, should the Court determine that TEDRA applied, but that the judgments still were entered without proper authority, the court could award attorneys' fees under RAP 18.1 and RCW 11.96A.150. Given that significant judgments were entered against Johnson without any valid basis for doing so, the Court should reverse and remand for further proceedings and the only party who should be awarded attorneys' fees on appeal is Johnson.

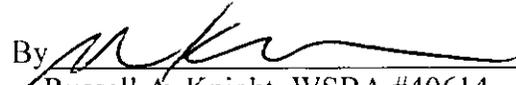
II. CONCLUSION

In adopting the Special Master's report and entering judgment without trial, other hearing, or any meaningful opportunity for Johnson to be heard, his due process rights were violated.

For the reasons set forth herein, Appellant respectfully requests this Court vacate the judgments entered against him remand this matter to the trial court for a proceeding, authorized under recognized statute or rule which affords Johnson the opportunity to be heard.

RESPECTFULLY SUBMITTED this 10th day of December,
2015.

SMITH ALLING, P.S.

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CERTIFICATE OF SERVICE

Pursuant to the laws of the State of Washington, the undersigned certifies under penalty of perjury that a true and correct copy of the foregoing document was forwarded by e-mail on December 10, 2015, to the following:

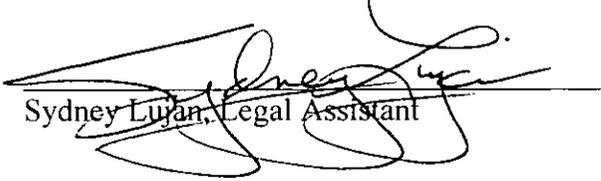
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