Supreme Court No. 89549-0

Court of Appeals, Division I, No. 68749-2-I

SUPREME COURT
OF THE STATE OF WASHINGTON

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WASHINGTON FEDERAL SAVINGS,

Petitioner,

vs.

MICHAEL P. KLEIN, personal representative of the Estate of Robert Klein, Deceased,

Respondent.

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# ANSWER TO PETITION FOR REVIEW

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## INTRODUCTION

Respondent Michael P. Klein, personal representative of the estate of Robert Klein (the "Estate") respectfully asks this Court to deny the petition for review ("Petition") filed by Petitioner Washington Federal Savings ("WaFed") because WaFed fails to satisfy any of the four considerations governing acceptance of review under RAP 13.4(b). The central issue in this case is whether WaFed, a creditor of the Estate, was given "actual notice" as expressly defined by the probate non-claim statute, RCW 11.40.020(1)(c). If so, its creditor's claim regarding the promissory note ("Promissory Note") issued on certain property ("Condo 11W") was untimely and properly dismissed on summary judgment. In affirming the grant of summary judgment to the Estate, Division One of the Washington State Court of Appeals held that the probate "statute requires only proof that the [E]state's notice to creditors was mailed, not proof that it was received." *Wash. Fed. Sav. v. Klein*, 311 P.3d 53, 54 (Wash. App. 2013).

RCW 11.40.051(1)(a) and (c), attached as Appendix ("Appx.") B, provide that a creditor who fails to file a creditor's claim within the statutory period is forever barred from collecting a debt from the estate. The policy underlying the probate statute is to bring finality and settlement to the probate of an estate. The non-claim statute necessarily bars

creditors from asserting claims against an estate where creditors miss the claim-filing deadlines set forth in RCW 11.40.051. This is precisely what happened to WaFed. The undisputed evidence shows that the PR sent WaFed "actual notice" — as defined in the statute — and WaFed failed to file a creditor's claim within the statutory time period. Because the deadline for WaFed to file its creditor's claim lapsed, any unsecured deficiency on the Promissory Note is unenforceable.[1]

RCW 11.40.020 (attached as Appx. B) expressly states that "actual notice" as set forth in RCW 11.40.051 may be satisfied by "mailing the notice to the creditor at the creditor's last known address, by regular first class mail, postage prepaid . . .." RCW 11.40.020(c). Notably, the

[1] Nothing prevents WaFed from enforcing its deed of trust on Condo 11W, which deed was recorded as security for the Promissory Note. A creditor need not file a creditor's claim to enforce a deed of trust and to realize on the security. RCW 11.40.135. In most circumstances, banks do not need to file creditor's claims when their loans are secured by deeds of trust on real property. In normal circumstances — and especially during a real estate boom — it is understandable that banks do not worry about filing creditor's claims because as long as banks do not overestimate the value of a property during the underwriting process, the amount owed on the note will not be at risk of exceeding the value of the property secured by the deed of trust. But when real estate values decline, there is a risk to banks that the security (the market value of the property as secured by the deed of trust) could be less than the amount owing on the loan. This is particularly true if a bank engages in less-than-rigorous underwriting practices, overestimating the value of its security. In making the loan to Robert Klein in June 2006, WaFed apparently took the risk that the security would be sufficient to cover its losses in the event of a default, but that turns out to have been a poor business decision.

triggering event for actual notice is the personal representative's act of "mailing" the notice to creditors. RCW 11.40.051; RCW 11.40.020. WaFed's Petition downplays Section .020, preferring to ignore the Legislature's definition of "actual notice," and instead attempts to re-define the term as requiring proof that the notice was actually received. But that is not what the statute says. Nor does the statute implicate the mailbox rule — indeed, the express language of the statute contradicts (and therefore overrides) the common law mailbox rule.

As discussed below, the Petition fails under RAP 13.4(b). First, Division One's decision does not conflict with another decision of the Court of Appeals— the case to which WaFed points as conflicting is not at all in conflict because that case deals with the mailbox rule. Next, WaFed's Petition does not present a significant question of law under the state or federal constitutions. Third, the Petition does not involve an issue of substantial public importance that should be determined by this Court. Finally, the Petitioner failed to challenge the adequacy of the affidavit at issue here in the trial court, thereby waiving the argument presented. This Court should deny the Petition and award attorney fees and costs to the Estate pursuant to the contract between the parties.

## STATEMENT OF ISSUES

1. Does Division One's opinion in this case conflict with a decision of the state Supreme Court or Court of Appeals? NO.

2. Does WaFed's Petition involve a significant question of law under the state or federal constitutions? NO.

3. Does WaFed's Petition involve an issue of substantial public importance that should be determined by the Washington Supreme Court? NO.

4. Was Division One correct to find no genuine issue of material fact that "actual notice" was given within the meaning of RCW 11.40.020(1)(c), where a legal assistant submitted an affidavit of mailing which was contemporaneously filed with the Court and which was unchallenged by WaFed? YES.

5. Where the Petitioner failed to challenge the adequacy of an affidavit of mailing in the trial court, did it waive its ability to do so on appeal? YES.

## STATEMENT OF THE CASE

WaFed's Petition discusses numerous facts which are irrelevant to its disposition. The essential facts are recited in Division One's opinion. (Appx. C.) They are also summarized here with citations. *See also* Appx. A (Brief of Respondent).

### I. Decedent Robert Klein Executed a Note and a Deed of Trust to Buy Condo 11W, And Condo 11W Lost Significant Value

On June 23, 2006, WaFed and Robert Klein executed an agreement whereby WaFed loaned Robert Klein $375,000. *See* CP 66, 98. That same day, Robert Klein executed the Promissory Note. CP 66. To secure

payment of the Promissory Note, Robert Klein executed and delivered to WaFed a deed of trust on Condo 11W. *Id.*

Following Robert Klein's death, his son, Michael Klein, petitioned for an order to probate Robert Klein's Last Will and Testament under King County Superior Court Case No. 09-4-06471-4 SEA (the "Probate Matter"). The Court appointed Michael Klein as personal representative ("PR") of the Estate to serve with non-intervention powers. CP 67, 98.

In the course of probating the Estate, the PR attempted to sell Condo 11W, but the PR was unable to sell it for an amount equivalent to what is owed on the Promissory Note, and evidence showed that the market for condominiums in Tacoma was diminishing. CP 67, 94, 99, 128-48. After reducing the price of Condo 11W five times and rejecting three offers that fell significantly short of the listing price, the listing agent was unable to sell the condo. CP 67. Condo 11W would not sell for enough to repay the note amount of $353,324, and it was unlikely to sell for more than $200,000 at any time in the near future. CP 67, 95.

Though the PR had attempted to offer WaFed a deed in lieu of foreclosure, WaFed rejected that offer, insisting that it would seek to collect on any deficiency owed above the value of the property. CP 67, 99-100. At the time of the trial court proceeding, the balance of the mortgage was $356,088, plus fees and interest. CP 66, 98, 104.

## II. The PR Provided Probate Notice To Creditors As Required By Statute, And WaFed Failed to File A Timely Creditor's Claim

On January 28, 2011, the PR's counsel sent WaFed a letter enclosing a Probate Notice to Creditors. Appx. D (CP 329-38); CP 68. On the same day, Ann Favretto, a legal assistant, executed a notarized Affidavit of Mailing and this Affidavit was filed in the probate matter attesting that actual notice of the notice to creditors had been given to WaFed. Appx. D (340-41); CP 68.

Despite having been sent direct notice, WaFed did not timely file a creditor's claim. Pursuant to the probate code, WaFed was required to file a creditor's claim for any unsecured deficiency due on the Promissory Note the later of (a) 30 days from the PR's mailing of notice, which would have been February 27, 2011 (based on the January 28, 2011 letter), or (b) four months after the date of first publication of the notice, which would have been May 7, 2010 (based on a date of first publication of January 7, 2010). CP 68; *see* RCW 11.40.051(a) (attached as Appx. B). But WaFed did not file and serve its creditor's claim until one year after it received notice from the PR, on May 10, 2011. Appx. E (CP 122-23); CP 68. Thus, WaFed missed the statutory deadline for filing its creditor's claim for the deficiency (the amount owing on the Promissory Note that exceeded the current value of the property, *i.e.*, the amount secured by the

deed of trust). CP 68. In the probate proceedings, the PR filed a petition under the Trust and Estates Dispute Resolution Act ("TEDRA") and made several attempts to address WaFed's untimely filed creditor's claim. CP 56-57, 68-69, 316.[2]

On October 27, 2011, the PR's attorney transmitted a Notice of Rejection of Creditor's Claim notifying WaFed that the PR was rejecting WaFed's creditor's claim. CP 126. In November of 2011, WaFed filed this new action (from which appeal was taken) challenging the PR's rejection of its creditor's claim. CP 8.

## III. Judge Armstrong Granted the Estate's Motion for Summary Judgment

The Estate moved for summary judgment dismissal of WaFed's claims. CP 65. WaFed's opposition contended, among other things, that the PR failed to provide "actual notice" to WaFed. CP 152, 166. The PR argued that because WaFed had missed its opportunity to file a creditor's claim against the Estate, it was barred from later collecting on it under the non-claim statute. CP 65, 72-73.[3] The trial court, Judge Sharon

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[2] As Division One noted, after the PR filed the TEDRA petition, there followed several months of inconclusive litigation, which need not be detailed here. *Klein*, 311 P.3d at 55.

[3] Because the purpose of the probate code is to obtain early and final settlement of estates so that those entitled may receive the property free from any encumbrances and charges that could lead to long litigation, the non-claim statute, RCW 11.40.010 *et seq.*, is more strictly enforced than

Armstrong, agreed with the PR and granted the Estate's motion to dismiss WaFed's claims on summary judgment. CP 316. The trial court awarded attorney fees and costs to the Estate, and WaFed appealed. Supplemental Clerk's Papers, Sub. No. 41.

## IV. Division One Ruled in Favor of the Estate

On appeal, Division One rejected WaFed's arguments and affirmed the trial court's ruling granting summary judgment in favor of the Estate. The opinion, *Washington Federal Savings v. Klein*, attached as Appx. C, was decided by a three-member judicial panel. Judge Mary Kay Becker authored the opinion, and Judges Linda Lau and Ronald E. Cox concurred.

Division One held that the probate statute requires only proof that the estate's notice was mailed, not proof that it was received." *Klein*, 311 P.3d at 54. Division One reasoned, "Had proof of receipt been of

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general statutes of limitation. "***The statute is mandatory, not subject to enlargement by interpretation, and cannot be waived***." *Judson v. Associated Meats & Seafoods*, 32 Wn. App. 794, 798, 651 P.2d 222 (1982) (emphasis added) (internal citation omitted). Courts have held that the non-claim statute applies to the settlement of estates, supersedes all other statutes of limitation, and applies to every kind and character of claim against an executor and administrator. *See Turner v. Lo Shee Pang's Estate*, 29 Wn. App. 961, 963, 631 P.2d 1010, *review denied*, 96 Wn.2d 1013 (1981); *see also In re Estate of Earls*, 164 Wn. App. 447, 453 n.9, 262 P.3d 382 (2011) (citing *Davis v. Shepard,* 135 Wash. 124, 125, 237 P. 21, 41 A.L.R. 163 (1925) (stating that the non-claim statute applies to claims of every kind and nature, both those established and contingent)).

concern to the Legislature, it could have so provided. Just such a requirement exists in the mortgage foreclosure context, for example, where the Legislature requires creditors to transmit notices of foreclosure sale *by both* first class and either certified or registered mail, return receipt requested. Actual notice under RCW 11.40.020(1)(c) is accomplished by mailing, without regard to proof of receipt." *Klein*, 311 P.3d at 56 (internal quotations and citations omitted).

Division One explained that proof of receipt is not necessary to satisfy Due Process because under most circumstances notice sent by mail is deemed reasonably calculated to inform interested parties of an impending action. *Id.* Division One added that the cases cited by WaFed did not establish that Due Process requires proof of receipt. *Id.*

As for WaFed's challenges to the adequacy of the Estate's proof of mailing, Division One noted that the Estate raised concerns as to whether WaFed had waived its ability to challenge the adequacy of the affidavit of mailing signed by Ms. Favretto, a legal assistant of the Estate's attorney, by failing to raise the issue in the trial court. *Id.* Division One assumed for the sake of argument that the issue was preserved, and it determined that the "caused to be served" language contained in Ms. Favretto's affidavit of mailing was sufficient to establish *prima facie* evidence of

mailing. *Id.* at 57. Division One concluded that WaFed failed to raise an issue of material fact as to the mailing of the notice to creditors. *Id.*

Division One issued the opinion as "unpublished" and granted the Estate's petition for attorney fees and costs. The Estate subsequently moved to publish Division One's decision. Division One granted the motion to publish.

## ARGUMENT

This Court should deny WaFed's Petition because WaFed fails to establish any of the four considerations for this Court to accept review under RAP 13.4(b). WaFed contends that RAP 13.4(b)(2), (3), and (4) support review of its Petition. However, none of these three considerations applies in this case.

### I. Division One's Decision In this Case Does Not Conflict With Division Two's Decision in *Tassoni*

This Court should reject WaFed's argument under RAP 13.4(b)(2) that Division One's decision in this case conflicts with Division Two's decision in *Tassoni v. Dep't of Ret. Sys.*, 108 Wn. App. 77, 29 P.3d 63 (2001), *review denied*, 145 Wn.2d 1030 (2002), because *Tassoni* is inapposite. *Tassoni* was not a probate case. It did not involve construing the probate code's "actual notice" language set forth in RCW 11.40.020(1)(c) and considered by Division One below. Instead, it

applied the common law standard for proof of mailing, *i.e.*, the mail-box rule, and did not deal with the probate laws.[4]

The contentions in WaFed's Petition are based only on case law discussing what constitutes sufficient notice under the common law mail-box rule, rather than the "actual notice" provision in RCW 11.40.020(1)(c). WaFed cites no legal authority that would apply in the probate context or that would otherwise undermine Division One's decision in this case. There is no case in Washington that applies the mailbox rule in the context of probate proceedings or that otherwise invalidates a probate notice based on this rule.[5] WaFed tacitly conceded this point below by characterizing the mailbox rule as "instructive," Brief of Appellant ("Br. of App.") at 31, rather than controlling. Yet to the extent the non-claim statute is inconsistent with the mailbox rule, the common law mailbox rule must give way to the Legislature's more specific guidance.

As Division One held in determining this issue, the statutory standard of proof requires only proof that the notice to creditors was

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[4] Moreover, this case is distinguishable from *Tassoni* also because here there is an affiant, Ms. Favretto, who specifically attests to having mailed the notice or causing it to be mailed.

[5] In other parts of this same statute, the Legislature has set forth rebuttable presumptions, *cf.* RCW 11.40.040(2), but it chose not to do so in § .020.

mailed, not proof that it was received. *Klein*, 311 P.3d at 55. All three members of the judicial panel agreed with this result and the underlying reasoning; no dissenting opinion was submitted. Despite several citations to *Tassoni* in WaFed's brief, Division One apparently found that case so inapt that it did not specifically distinguish *Tassoni* in its opinion. There is no basis for WaFed to contend that Division One's decision in this case conflicts with another Court of Appeals decision.

WaFed now argues that there is an issue regarding the PR's credibility, Petition at 4 n.1, but ignores that this argument — even if it were relevant, which it is not — would apply only to the PR, Michael Klein, and not to Ms. Favretto.

Indeed, as found by Division One, Ms. Favretto's affidavit provided proof of "actual mailing" as required by the statute. *Klein*, 311 P.3d at 57.[6] Division One's holding does not conflict with another

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[6] The affidavit states, in full:

> Anne Favretto, first being duly sworn on oath, states that this Affidavit is made on behalf of the personal representative.
>
> On January 28, 2011, I have given, or caused to have given, the creditors listed on said Exhibit A [which included Washington Federal Savings], actual notice by mailing to the creditor's last known address, by regular first class mail, postage prepaid, a true and correct copy of the notice to creditors filed herein.
>
> /s/ Anne Favretto

Court of Appeals decision, and therefore RAP 13.4(b)(2) does not support review.

## II. This Case Does Not Involve A Significant Question Of Constitutional Law

The prior section established that, contrary to the Petition's assertion, the sending of notice to creditors under the non-claim statute is subject to specific statutory guidance from the Legislature, and is not subject to the mailbox rule. The subsequent question WaFed implies (but does not expressly ask) is whether such a regime passes muster under the Due Process Clause. This is an issue WaFed failed to raise before Division One. *Cf.* Br. of App. at 15-19 (discussing Due Process principles but declining to argue that the non-claim statute is unconstitutional) & 2-3 ("Issues Pertaining to Assignment of Error"). It should therefore be disregarded. Br. of App. at 2-3.[7]

If the Court proceeds to consider RAP 13.4(b)(3), this Court should reject WaFed's argument that this case involves WaFed's Due Process rights not to have its "claim held time barred without actual notice." Petition at 11. There is no question that actual notice is required.

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[signature and stamp of notary]

CP 340-41 (attached as Appx. D).

[7] This is not the first time WaFed has changed its argument. Division One noted, "Klein is correct that Washington Federal's position on appeal has evolved from its position in the trial court." *Klein*, 311 P.3d at 56.

The real issue is what constitutes actual notice as used in the probate code, RCW 11.40.020(1)(c). Division One answered — consistent with U.S. Supreme Court precedent — that proof of mailing notice, rather than proof of receiving notice, constitutes "actual notice."

As Division One explained, proof of receipt is not necessary to satisfy Due Process because, under most circumstances, notice sent by ordinary mail satisfies Due Process because this step in the process of transmitting the notice is deemed reasonably calculated to inform interested parties of an impending action. Division One added that the cases cited by WaFed did not establish a rule that Due Process requires proof of receipt. *Klein*, 311 P.3d at 56.

The non-claim statute's definition of "actual notice" is entirely consistent with Due Process. The U.S. Supreme Court has repeatedly recognized that "the mails are an 'efficient and inexpensive means of communication' that generally may be relied upon to deliver notice where it is sent." *Orix Fin. Servs. v. Phipps*, 72 Fed. R. Serv. 3d 400, 2009 WL 30263, at *10 (S.D.N.Y. Jan. 6, 2009) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, 70 S. Ct. 652, 94 L. Ed. 865 (1950)); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983); *Greene v. Lindsey*, 456 U.S. 444, 102 S. Ct. 1874, 72 L. Ed. 2d 249 (1982). The cases following

*Mullane* have held that "actual receipt of notice by a party is not required to satisfy the dictates of due process." *Orix Fin. Servs.*, 2009 WL 30263 at *9-10 (concluding that even if the Court were to accept defendant's affidavit averring that she had never received notice from any party, the certificate of mailing notice was all that was necessary to satisfy Due Process). "[T]he relevant inquiry for due process purposes focuses on the party providing the notice, and asks whether that party has provided 'notice reasonably calculated' to inform interested parties." *Id.* (noting that both the United States Supreme Court and the Second Circuit have ruled that under most circumstances notice "'sent by ordinary mail is deemed reasonably calculated to inform interested parties' of an impending action") (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988) (quoting *Tulsa Prof'l Collection Servs v. Pope*, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988))). "Indeed, the Supreme Court has applied this rule — that due process is satisfied upon the proper mailing of notice — in a wide array of proceedings where a defendant's property rights are at issue." *Id.*[8]

[8] *See, e.g., Tulsa Prof'l*, 485 U.S. at 490 (notice to creditors in probate proceedings); *Mennonite Bd. of Missions*, 462 U.S. at 799-800 (notice of mortgagee of tax foreclosure); *Greene v. Lindsey*, 456 U.S. at 455 (notice to public housing tenants of forcible entry and detainer actions); *Schroeder v. City of New York*, 371 U.S. 208, 214, 83 S. Ct. 279, 9 L. Ed. 2d 255, 89 A.L.R.2d 1398 (1962) (notice of condemnation proceedings);

The U.S. Supreme Court's decision in *Tulsa Professional Collection Services, Inc. v. Pope*, is instructive. 485 U.S. at 490. That case assessed the requirements of Due Process in the probate context. The court held that notice by publication was insufficient notice for reasonably ascertainable creditors. The court noted that it had repeatedly recognized "that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice." *Id.* at 490-91.

WaFed complains that Division One allows for an "irrebutable presumption" of mailing. Petition at 15. This is not so. WaFed had the ability to challenge Ms. Favretto's affidavit, but WaFed instead made the strategic decision to rest on its declarations in opposing summary judgment. At no time during the proceedings below did WaFed seek discovery from the PR or suggest that discovery would be necessary to resolve a factual dispute as to whether the PR sent actual notice of the pendency of the probate proceedings. WaFed declined to attempt to depose Ms. Favretto, who had filed the affidavit attesting to the fact that actual notice had been given under RCW 11.40.020(c). Moreover, WaFed brought no motion pursuant to CR 56(f).

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*Walker v. City of Hutchinson,* 352 U.S. 112, 116, 77 S. Ct. 200, 1 L. Ed. 2d 178 (1956) (notice of condemnation proceeding).

In sum, Division One — and the U.S. Supreme Court — has considered and addressed the Due Process concerns that WaFed raised below. In its Petition, WaFed fails to articulate, let alone to show, how Division One's constitutional analysis was deficient, or how that alleged deficiency can or should be remedied by this Court. Without more, WaFed fails to demonstrate how this case involves a significant question of constitutional law. Accordingly, WaFed cannot demonstrate grounds for review under RAP 13.4(b)(3).

## III. This Case Does Not Involve An Issue Of Substantial Public Importance That Should Be Determined By This Court

WaFed also fails to explain why this case involves an issue of "substantial" public importance that should be determined by this Court. *See* RAP 13.4(b)(4). In its Petition, WaFed said it wants clear and correct guidelines about what constitutes "actual notice" under RCW 11.40.020(1)(c). Yet the language of the statute is clear. Moreover, Division One has now ruled on this aspect of the non-claim statute and probate procedure, consistent with the statute's plain language.

Furthermore, WaFed assumes that the issue in this case is one of "substantial public importance" without explaining what constitutes *substantial* public importance or demonstrating how the issue in this case meets that standard. The Estate moved for publication of the opinion on

the grounds that the opinion is of "general public importance," Pet. at Appx. B5, arguing that "[t]he general public will benefit from the increased certainty that this Opinion brings to creditors and debtor estates in Washington." *Id.* The public has now been given that certainty and guidance. The issue WaFed's Petition should have focused on is why, now that Division One has clearly spoken on this issue, an issue of "substantial public importance" remains which demands review.

Noticeably missing from WaFed's argument is any explanation of how Division One's analysis of the issues and resulting decision is unclear and/or incorrect. WaFed does not cite any legal authority that would call Division One's legal determination in this case into question. As discussed above, WaFed not only fails to explain why Division One's decision is inadequate, it also fails to articulate what, if anything, it is asking this Court to do differently from Division One in considering the same issue.

Moreover, WaFed's argument under RAP 13.4(b)(4) focuses only on the first part of what is essentially a two-part test. For WaFed to demonstrate that RAP 13.4(b)(4) provides a viable basis for this Court to accept review of the instant case, it must show that the case involves an issue of substantial public importance *and* that the issue should be determined by this Court. The Estate moved for publication of Division

One's decision, but now that the law has been clarified, the Estate's arguments for publication no longer apply. WaFed fails to demonstrate how or why Division One's determination of this issue was in error. As such, WaFed fails to show how this case involves a substantial issue of public importance that should be determined under RAP 13.4(b)(4).

## IV. WaFed Has Waived Its Ability To Challenge The Estate's Evidence Of Mailing

Furthermore, WaFed has waived its ability to challenge the adequacy of the Estate's evidence of mailing because it failed to raise this issue in the trial court. As Division One established in its decision below, proof of mailing is all that is necessary to fulfill the probate code's actual notice requirement, RCW 11.40.020(1)(c). Yet when the trial court addressed this issue on summary judgment, WaFed raised no challenge to the adequacy of the affidavit of mailing signed by a legal assistant, Ms. Favretto. Division One acknowledged and explored the Estate's argument that WaFed had thereby waived its ability to challenge the adequacy of Ms. Favretto's affidavit of mailing by failing to raise the issue in the trial court. *Klein*, 311 P.3d at 56. But Division One assumed for the sake of argument that the issue was preserved, determining that the "caused to be served" language contained in Ms. Favretto's affidavit of mailing was sufficient to establish *prima facie* evidence of mailing. *Id.* at 57.

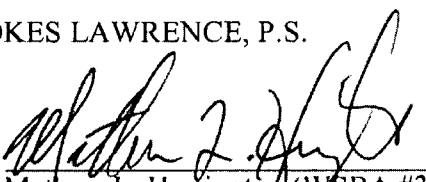
If this Court were to revisit WaFed's challenge to Ms. Favretto's affidavit, it need not analyze the issue as Division One did. Instead, the Court could hold that any challenge to the adequacy of Ms. Favretto's affidavit of mailing has been waived.

## CONCLUSION

This case is either a garden-variety summary judgment appeal, or it is a constitutional challenge to the validity of Washington's probate regime. WaFed appears unwilling to admit that it is pursuing the latter, and, therefore, this Court is left to conclude that it is the former. In either event, the case is unworthy of further review. WaFed fails to establish any basis for this Court to accept review under RAP 13.4(b). This Court should deny WaFed's Petition and award fees and costs to the Estate, pursuant to the contract between the parties.

DATED this 9th day of December, 2013.

STOKES LAWRENCE, P.S.

By: 

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 9th day of December, 2013, I caused a true and correct copy of the foregoing "Answer to Petition" to be delivered by messenger to the following counsel of record:

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Dated this 9th day of December, 2013, at Seattle, Washington.

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- Person filing the document
  - name: Mathew L. Harrington
  - phone number: 206-626-6000
  - bar number: WSBA No. 33276
  - email address: MLH@stokeslaw.com

Respectfully submitted is Respondent's Answer to Petition for Review with the certificate of service attached thereto in the above referenced case. Per telephone instruction from the deputy clerk of Supreme Court Clerk's Office this morning, the appendixes A - E and a hard copy of the answer will be submitted via US Mail.

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