Supreme Court No. 89829-4

Court of Appeals No. 69546-1

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

IN RE THE ESTATE OF T. MARK STOVER, Deceased,

TERESA VAUX-MICHEL,

Respondent/Cross-Appellant,

v.

ANNE VICTORIA SIMMONS, as Personal Representative of the Estate of T. MARK STOVER, Deceased,

Appellant.

TERESA VAUX-MICHEL'S PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Teresa Vaux-Michel ("Ms. Vaux-Michel") respectfully seeks review by the Supreme Court of the published Court of Appeals decision identified in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its opinion on December 23, 2013. The Court of Appeals' slip opinion is in the Appendix at pages A-1 through A-14.

C. ISSUES PRESENTED FOR REVIEW

1. Whether CR 6 applies to litigation related limitations periods and time deadlines in TEDRA proceedings (RCW 11.40.080 and RCW 11.40.100) when no method for time computation is provided in those statute(s)?

2. Whether, when an estate's personal representative fails to timely accept or reject a claim within the time periods provided under RCW 11.40.080, the claim becomes ripe for adjudication and rejection of the claim thereafter no longer serves a purpose, or can the personal representative take advantage of her own failure to comply with the statute and subject the claimant to the time deadlines of RCW 11.40.100?

D. STATEMENT OF THE CASE

1. Background/Introduction. The facts relied upon by the Court of Appeals in this case and the procedural history is set forth in the Court of Appeals decision. This lawsuit arose from Ms. Vaux-Michel's creditor's claim for a *gift causa mortis* left to her by Mark Stover, known as the dog whisperer and dog trainer to the stars. Mr. Stover knew his life was in danger and in the late summer and fall of 2009, he told his lawyer, a private investigator and close friends that he feared his ex-wife, Linda Opdycke, and her father, were going to have him murdered. A-21 to A-23. He also told these friends that he loved and planned to marry Ms. Vaux-Michel and that he had left a check for her in case he was murdered.[1] *Id.* On October 28, 2009, Mr. Stover disappeared, and on October 22, 2010, a Skagit County jury convicted Michiel Oaks, the live-in boyfriend of Linda Opdycke, of murdering Mark Stover. A-23. After his murder, two checks made out to Ms. Vaux-Michel, each in the amount of $150,000, were found in Mr. Stover's home. A-25 to A-26. Mr. Stover died intestate. A-22 to A-23.

[1] The day before he went missing, Mr. Stover told Andrea Franulovich, a friend of more than 14 years, that he had proposed to Ms. Vaux-Michel and he then showed Ms. Hyrkas the ring he had purchased for her. A-24 to A-25.

On September 16, 2011, after nearly two years had passed and Mr. Stover's estranged sister, Anne Victoria Simmons,[2] had not given Ms. Vaux-Michel actual notice that she had been appointed personal representative of Mr. Stover's estate, Ms. Vaux-Michel filed her creditor's claim. A-25. When Ms. Simmons did not allow or reject her claim within thirty days from presentation of the claim, Ms. Vaux-Michel, on October 19, 2011, served written notice on Ms. Simmons informing her that she would petition the court to have the claim allowed. *Id.* Ms. Simmons failed to notify Ms. Vaux-Michel that she was either allowing or rejecting her claim within the statutory twenty day period after her receipt of the notice. *Id.* Ms. Simmons did file and mail a purported rejection of the creditor claim on December 20, 2011, nearly two months after she received written notice. *Id.* Ms. Vaux-Michel filed her petition in the trial court on January 23, 2012. *Id.*

The Superior Court ruled that because the Estate failed to reject or allow Ms. Vaux-Michel's's claim within thirty days of notice of the claim, and then failed to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within twenty days after receiving notice that Ms. Vaux-Michel would petition the Court to allow the claim, the Estate no longer had

[2] Ms. Simmons had seen Mr. Stover just once in 20 years. *See* A-21. "There was estrangement to some extent in the family, making it less likely that relatives would necessarily be natural objects of Mr. Stover's bounty." *Id*

statutory authority to reject Ms. Vaux-Michel's claim and, therefore, Ms. Vaux-Michel had a reasonable time within which to file her petition. A-26 to A-27. The Superior Court ruled that the provisions of RCW 11.40.100 ceased to be applicable when Respondent failed to exercise her rights thereunder by her failure to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within 20 days after receiving notice. *Id.* Ms. Vaux-Michel filed her petition within in a reasonable time after notifying Respondent that she would petition the court. *Id.* Moreover, the Superior Court ruled that even if the thirty day period of RCW 11.40.100 was applicable, Ms. Vaux-Michel timely filed her petition. *Id.* at 27. The Estate mailed its rejection on December 19, 2011, Ms. Vaux-Michel received notice on, and had thirty days after December 19, 2012, to file her petition. Thirty days after December 19, 2012 was Wednesday, January 18, 2012, with three additional days for mailing (CR 6(e)), the date to file fell on Saturday January 20, 2012, which put "the first day other than a Saturday, Sunday or legal holiday, following the third day," on Monday, January 23, 2012. CR 6(e). The Superior Court then found that Mr. Stover had made a valid *gift causa mortis* to Ms. Vaux-Michel. A-25 to A-28. The Court of Appeals did not rule on the Superior Court's determination that Mr. Stover had made a valid *gift causa mortis* to Ms. Vaux-Michel.

2. The Court of Appeals' Commissioner's denial of the Estate's motion for discretionary review and denial of motion to modify commissioner's ruling.

A Court of Appeals Commissioner denied the Estate's motion for discretionary review of the Superior Court's decision that Ms. Vaux-Michel had timely filed her petition. A-15 to A-18. The Estate's motion to modify the commissioner's ruling was also denied. A-19.

3. Reversal of the Superior Court by the Court of Appeals

The Court of Appeals ruled that CR 6 does not apply to the limitations periods and time deadlines for TEDRA proceedings (RCW 11.40.100 and 11.40.080). It also effectively ruled that an estate's personal representative who has failed to allow or reject a claim within thirty days from presentation of the claim as required by RCW 11.40.080(1) & (2), and then fails to allow or reject the claim as required within twenty days after being served written notice that the claimant will petition the court to have the claim allowed, can thereafter reject the claim and take advantage of her own failure to comply with the statute. The Court of Appeals reversed the Superior Court as to both issues.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court is familiar with the criteria governing the acceptance of review of a Court of Appeals opinion. Here, the Court of Appeals decision satisfies three of these standards: RAP 13.4(b)(1-2) & (4). In an effort to

avoid repetition of argument, the critical public policy concerns that arise because of the conflict between the Court of Appeals decision with numerous decisions of this and the Court of Appeals, the (b)(3) discussion will be integrated into the discussions of (b)(1) and (2) below.

1. The Court of Appeals decision conflicts with prior decisions of this Court

This petition for review seeks the Supreme Court's affirmation that CR 6, perhaps the most deeply-imbedded and fundamental rule in litigation practice, applies to the Trust and Estate Dispute Resolution Act's (TEDRA) litigation related limitations periods and time deadlines. *See Troxell v. Rainier Pub. Sch. Dist. No. 307*, 154 Wash.2d 345, 350, 111 P.3d 1173 (2005) (CR 6(a) "plainly applies to the computation of a litigation related deadline or limitations period"); *In re Estate of Toth*, 138 Wn.2d 650, 981 P.2d 439 (1999) ("CR 6(e) operates to toll the response time only in cases in which a party is required to respond within a certain time after being served or notified"). Reversal of the Court of Appeals decision would eliminate the confusion that will surely arise from its conflicting decision while affirming the "well-accepted premise [and sound public policy] that '[l]itigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights.'" *Stikes Woods*

Neighborhood Ass'n v. City of Lacey, 124 Wash.2d 459, 463, 880 P.2d 25 (1994) (quoting, *McMillon v. Budget Plan of Va* , 510 F.Supp. 17, 19 (E.D.Va.1980) (bracketed material added)). The Court of Appeals overthrew this well-accepted premise and sound public policy when it laid its own trap for the unwary by ruling that CR 6 does not apply to the litigation related deadlines of RCW 11.40.100 and 11.40.080.

Although this case involves only one estate, the implications of this published decision, if not reversed, will extend far beyond the facts of this litigation and will establish confusing, contradictory precedent for attorneys, lay people and courts. Because this decision conflicts with precedent and so clearly implicates a crucial public concern—the proper administration of the courts and the fair and just handling of estates—its public significance is paramount. Review by this Court is necessary under RAP 13.4(b)(1-2) and (4).

a. The Court of Appeals decision conflicts with prior decisions holding that CR 6 applies to litigation related limitations periods and time deadlines in special proceedings.

Though the meaning of the time requirements in RCW 11.40.100 has not been examined by this Court, the same language and time requirements found in its predecessor statute[3] was construed by this Court

[3] RCW 11.40.030(3) provided: "*If the personal representative shall reject the claim*, in whole or in part, *he shall notify the claimant of said rejection* and file in the office of the

in *Van Duyn v. Van Duyn*, 129 Wash. 428, 225 P. 444 (1924). In *Van Duyn*, the administratix claimed "that the action [was] forever barred because not commenced within 30 days following the notification of the rejection of respondents' claim," *id.* at 429-30, however, this Court held that the thirtieth day, which fell on a Sunday, should be excluded. *Id.* In so concluding, this Court observed that this statute "is not a general statute of limitation prescribing the period within which the action may be commenced after its accrual, but is a special and very short statute of limitation, and manifestly one under which the court should not contract the prescribed period except as the statute clearly and unmistakably compels." *Id.* at 433. This Court also observed, "[a]nother conservative principle which should affect the determination of the question is that the computation of time should be so made as to protect a right and prevent a forfeiture, if this can be done without violating a clear intention or a

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clerk, an affidavit showing such notification and the date thereof. Said *notification shall be by personal service or certified mail* addressed to the claimant at his address as stated in the claim; if a person other than the claimant shall have signed said claim for or on behalf of the claimant, and said person's business address as stated in said claim is different from that of the claimant, notification of rejection shall also be made by personal service or certified mail upon said person; *the date of the postmark shall be the date of notification.* The notification of rejection shall advise the claimant, and the person making claim on his, her, or its behalf, if any, that the claimant must bring suit in the proper court against the personal representative *within thirty days after notification of rejection* or Before expiration of the time for serving and filing claims against the estate, whichever period is longer, and *that otherwise the claim will be forever barred.*" *Marquam v. Ellis*, 27 Wn.App. 913, 621 P.2d 190 (Wn.App. 1980) (emphasis supplied).

positive provision. *Id.* at 434. The Court of Appeals, though, ruled precisely to the contrary, contracting the prescribed period when it concluded that RCW 11.40.100's 30-day time requirement intended to convey 30 calendar days which, it said, is inconsistent with CR 6(a) and CR 6(e). Op. at p. 10. The Court of Appeals' decision is in conflict with *Van Duyn*, and nothing has changed to warrant the rejection of its holding. The Court of Appeals failed to even cite to *Van Duyn*.

In *Robel v. Highline Public Schools, Dist. No. 401, King County*, 65 Wn.2d 477, 398 P.2d 1 (1965), this Court affirmed the holding in *Van Duyn*, noting that "the issue was the application of RCW 11.40.030 authorizing notice of rejection of creditor's claims to be by personal service or registered mail." This Court then affirmed its holding in *Van Duyn* that "when the notice of the rejection of the claim is given to the claimant by registered mail, the notification is in no event complete so as to start the 30-day statute running until a reasonable time for the transmission and receipt of the notice has elapsed following the deposit of the notice in the post office." *Id.* at 483. This Court "deem[ed] the rule announced in the *Van Duyn* case to be a fair and equitable one, *and within the knowledge of the legislature in adding the existing notice-serving provisions. Accordingly, we hold it applicable to RCW 28.67.070. Robel*, 65 Wn.2d at 483 (emphasis supplied); *see also, Thurston County v.*

Gorton, 530 P.2d 309, 85 Wn.2d 133 (1975) (The legislature is presumed to know the construction placed upon statutes by the court).

This Court adopted CR 6 in 1967, *see* Order Adopting Civil Rules for Superior Court, 71 Wn.2d xvii (1967), and the legislature enacted RCW 11.40.100(1) in its present form in 1997, LAWS OF 1997, ch. 252 § 16. The *Van Duyn* and *Robel* decisions were within the knowledge of the legislature when it enacted RCW 11.40.100(1), but it chose not to change any part of the notice and time provisions. Moreover, with the knowledge of decisional law and knowledge that CR 6 embodies the holding in *Van Duyn* and *Robel*, the legislature incorporated CR 6 by not including a time computation provision that would have made RCW 11.40.080 inconsistent with the civil rules. Nevertheless, the Court of Appeals held precisely to the contrary. It did not even consider that the legislature could have, but did not alter the relevant parts of RCW 11.40.100(1) to supersede this Court's decisions. It ignored *Van Duyn* and *Robel*, and analogized instead to the unlawful detainer statute at issue in *Christensen v. Ellsworth*, 162 Wn.2d 365, 376, 173 P.3d 228 (2007), finding that because RCW 11.40.100(1) does not specify whether "day" means a business day, court day, or calendar day, it would apply the ordinary meaning of day which includes weekends. Op. at 7. It also ruled that applying CR 6(e) to RCW 11.40.100(1)'s 30-day time requirement is contrary to the plain language

of the statute, Op. at 10, though that conclusion clearly conflicts with this Court's decision in *Van Duyn* and *Robel*.

The Court of Appeals ignored this precedent and instead relied primarily upon *Christensen*, a factually distinguishable case. *Christensen* considered RCW 59.12.030(3), a special proceeding under CR 81 that provided for a three day notice period preceding the filing of an unlawful detainer action. 162 Wn.2d at 369. Unlike RCW 11.40.100, though, RCW 59.12.030(3) is a substantive law provision regarding when a person is guilty of unlawful detainer. Also unlike RCW 11.40.100, the legislature expressly provided that service by mail would add an additional day to the notice requirement, thereby expressly creating an inconsistency with CR 6(e); 162 Wn.2d at 374 (citation omitted). The "three days" meant "three calendar days," and was clearly inconsistent with CR 6(a) only because CR 6(a) specifically excludes weekends and holidays from time periods of less than seven days, *id.* at 375. This reasoning cannot rationally or properly be applied to the "30-day" time period in RCW 11.40.100. Also, the "days" in RCW 59.12.030(3) are a waiting period and in *Troxell*, this Court differentiated between the application of CR 6(a) to limitations periods and waiting periods." *Id.* at 375. CR 6(a) applies to the computation of litigation-related deadlines or limitations periods, *id.*, and does not apply to the computation of time for a waiting period. *Id.* at 358.

It is clear, then, that CR 6(a) controls the computation of time when action must be taken within a period of time, as in RCW 11.40.100(1), but does not control the computation of time where action is prohibited until a period of time has passed.

The Court of Appeals decision conflicts at every turn with existing Supreme Court precedent. RAP 13.4(b)(1)

b. The Court of Appeals decision defeats the broad purpose for which the civil rules were enacted of eliminating traps for practitioners and the strong policy of resolving legitimate disputes brought before the court rather than leaving parties without a remedy.

A TEDRA proceeding "is a special proceeding under the civil rules of court." RCW 11.96A.090(1).[4] The overall purpose of TEDRA "is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under Title 11 RCW. The provisions are intended to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement. [This] chapter also provides for judicial resolution of disputes if other methods are unsuccessful." RCW 11.96A.010. Entirely consistent with TEDRA's stated purpose, and in furtherance of its goals, CR 1 provides that the civil rules "shall be construed and administered to secure

[4] "The provisions of this title governing such actions control over any inconsistent provision of the civil rules." RCW 11.96A.090(1).

the just, *speedy*, and inexpensive determination of every action." *Id.* (emphasis supplied).

Moreover, applying CR 6 to RCW 11.40.080 and RCW 11.40.100 protects litigants who are "entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights,'" *Stikes Woods*, 124 Wash.2d at 463, which is consistent with the principle that "the law favors the resolution of legitimate disputes brought before the court rather than leaving parties without a remedy," *In re Estate of Palucci*, 61 Wn.App. 412, 415, 810 P.2d 970 (1991). In *Petrarca v. Halligan*, 83 Wn.2d 773, 522 P.2d 827 (1974), the claim of plaintiffs was filed in the estate within the proper time limit but was not rejected until more than the 90 days allowed in RCW 11.40.100 to move to substitute the personal representative had elapsed. *Id.* at 775. The court ruled that to not apply CR 25(a)(1), which vested the superior court with discretion to substitute the personal representative, even if the substitution was not made within the time authorized by RCW 11.40.100, would defeat the broad purpose for which the rules were enacted of eliminating traps for practitioners. *Id.* at 776. The Court emphasized that "where a rule of court is inconsistent with the procedural statute, the power of this court to establish the procedural rules for the courts of this state is supreme." *Id.*

Similarly, in *In re Estate of Van Dyke*, 54 Wn.App. 225, 772 P.2d 1049 (1989), the court ruled that RCW 11.24.020 does not supersede CR 19(b) because there are no inconsistencies between them. The court also determined that a CR 19(b) analysis was required because doing so is "consistent with the strong policy of resolving legitimate disputes brought before the court rather than leaving parties without a remedy." *Van Dyke*, 54 Wn.App. at 231.

The Court of Appeals decision lays a trap for the unwary by fundamentally altering how time is computed and it represents a sharp departure from the strong policy of resolving legitimate disputes brought before the court rather than leaving parties without a remedy. This Court should accordingly grant review pursuant to RAP 13.4(b)(4).

2. The Court of Appeals decision conflicts with prior decisions the Court of Appeals.

The confusion over its decision, analysis and "plain meaning" holding are exacerbated when compared with the decisions in *Canterwood Place, L.P. v. Thande*, 106 Wn.App. 844, 5 P.3d 495 (2001) (superseded by statute) and *Capello v. State*, 114 Wn.App. 739, 60 P.3d 620 (2002), where CR 6 was held to apply to special proceedings quite similar to RCW 11.40.100. In *Canterwood Place*, the court was presented with an issue of first impression: whether the method of computation of time set

forth in Civil Rule 6 applies to the computation of time for the return date on an unlawful detainer summons issued under RCW 59.12.070 which is a special proceeding within the meaning of Civil Rule 81. 106 Wn.App. at 847, 848. The court noted that because it is a special proceeding, "complete rules in Chapter 59 RCW will generally prevail over the civil rules," *id.* at 848; however, the court then observed: "Chapter 59 does not contain a complete rule regarding the calculation of days for the purpose of return of service deadlines, there is no method for computing time, nor is there a provision regarding whether the 'days' referred to in the statute are business days, court days, or calendar days." *Id.* Because RCW 59.12.070 is incomplete, the court held that CR 6 applies. *Id.* at 849. The analysis was favorably noted by this Court in *Christensen.* 162 Wn.2d at 375.

In *Capello,* the question before the court was whether Rule 6(a) applies to the computation of time under RCW 71.09.040 which is also a special proceeding within the meaning of CR 81. 114 Wn. App. at 745-46. In ruling that CR 6(a) applies to RCW 71.09.040, the court adopted the reasoning set forth in *Canterwood Place. Id.* at 748-49 ("We agree with the policy considerations in *Canterwood Place* and conclude that CR 6(a) applies to the computation of time under RCW 71.09.040(2)").

The statutes in *Canterwood Place* and *Capello* have the same relevant characteristics as RCW 11.40.100, specifically, they are special proceedings with litigation related time deadlines where the days (or hours) are undefined and there is no provision, or only an incomplete provision for time computation, yet the Court of Appeals held that CR 6 does not apply to RCW 11.40.100.

By ruling that CR 6 does not apply to a special proceeding with a litigation related time deadline and no provision for computation of time, the Court of Appeals decision conflicts with Court of Appeals precedent. RAP 13.4(b)(2).

3. The Court of Appeals holding that a personal representative can take advantage of her own failure to comply with RCW 11.40.080(2) conflicts with prior decisions of courts of appeal.

RCW 11.40.080 provides,

> (1) The personal representative *shall* allow or reject all claims presented in the manner provided in RCW 11.40.070. The personal representative may allow or reject a claim in whole or in part.
>
> (2) If the personal representative *has not allowed or rejected a claim within . . . thirty days* from presentation of the claim, the claimant may serve written notice on the personal representative that the claimant will petition the court to have the claim allowed. *If the personal representative fails to notify the claimant of the allowance or rejection of the claim within twenty days after the personal representative's receipt of the claimant's notice, the claimant may petition the court for a hearing to determine whether the claim should be allowed or rejected,*

> in whole or in part. If the court substantially allows the claim, the court may allow the petitioner reasonable attorneys' fees chargeable against the estate.

Id. (emphasis supplied).

When her claim was not allowed or rejected within thirty days after presentation as provided for in RCW 11.40.080(2), A-24 to A-25, Ms. Vaux-Michel served written notice on Ms. Simmons that she would petition the court to have the claim allowed.[5] *Id.* Ms. Simmons did not respond within 20 days as required, but she did serve a purported rejection of the claim nearly two months later. *Id.*

The Court of Appeals found Ms. Simmons' rejection of Ms. Vaux-Michel's claim effective though she failed to reject the claim within the time period provided by RCW 11.40.080(2). The decision is in conflict with other court decisions where it has been held that a personal administrator cannot take advantage of her own failure to comply with statutory provisions as to the method of notifying a . *See Johnston v. Von Houck*, 150 Wn.App. 894, 902, 209 P.3d 548 (2009) (citing *Malicott v. Nelson*, 48 Wn.2d 273, 275, 293 P.2d 404 (1956)) (administratrix may not take advantage of her own failure to comply with the statutory provision as to the method of notifying respondent of her rejection of his claim).

[5] The Court of Appeals incorrectly stated that "Vaux-Michel also argues for the first time on appeal that her claim is timely under RCW 11.40.051's two-year time limitation." Op. at 4, n. 2. Ms. Vaux-Michel never argued about the two-year time limitation; if there were an appealable issue there, the Estate, not Ms. Vaux-Michel, would have raised it.

Moreover, "[t]he statutory provisions regarding to whom and in what manner a notice of rejection must be given are for the protection of the claimant. Absent a showing of compliance with RCW 11.40.030, the limitation period of RCW 11.40.060 does not commence to run." *Marquam v. Ellis*, 27 Wn.App. 913, 621 P.2d 190, (Wn.App. 1980). Also, when the Estate failed to timely accept or reject her claim within the time periods provided under RCW 11.40.080, Ms Vaux-Michel's claim became ripe for adjudication and the claim rejection no longer served a purpose.

The Court of Appeals effectively ruled that a personal representative can take advantage of her own failure to comply with RCW 11.40.080(2); the decision of the Court of Appeals conflicts with Court of Appeals precedent and should be reversed. RAP 13.4(b)(2).

F. CONCLUSION

The Court of Appeals decision sharply conflicts with existing Supreme Court and Court of Appeals precedent, including disregarding this Court's plain holding in *Van Duyn*. Moreover, its decision completely undermines the strong public policy of resolving legitimate disputes brought before the court rather than leaving parties without a remedy and it has . And if allowed to stand, the published Court of Appeals' decision will create contradictory precedent and create great confusion for practitioners and courts who will be left with the impossible task of

attempting to reconcile the Court of Appeals decision with existent precedent.

This Court should grant review of and reverse the Court of Appeals decision and reinstate the decision of the trial court and grant such other and further relief as this Court deems appropriate. Fees and costs on appeal should be awarded to Ms. Vaux-Michel.

DATED this 22nd day of January, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the following document: PETITION FOR REVIEW OF TERESA VAUX-MICHEL, Court of Appeals Cause No. 69546-1, to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 22, 2014, at Kirkland, Washington.

Brian Fahling

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re Estate of T. MARK STOVER, Deceased, TERESA VAUX-MICHEL, Respondent, v. ANNE VICTORIA SIMMONS, as personal representative of the ESTATE OF T. MARK STOVER, Deceased, Appellant.	NO. 69546-1-I DIVISION ONE PUBLISHED OPINION FILED: December 23, 2013

LAU, J. — When a claim against an estate in probate is rejected by certified mail, RCW 11.40.100(1) requires the claimant to file suit against the estate within 30 days after the postmark date. Because Teresa Vaux-Michel failed to file suit against T. Mark Stover's estate within 30 days after the postmark on her rejected claim, and because CR 6 does not apply to extend this time limitation, we reverse and remand to the trial court with instructions to vacate the judgment and fees and costs award, determine the

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personal representative's request for trial fees and costs, and dismiss the action with prejudice. We decline to award the estate fees and costs on appeal.

FACTS

On September 16, 2011, Vaux-Michel filed a claim against Stover's estate. She alleged he had written a $150,000 check as a gift to her in anticipation of his death. When the personal representative failed to act on the claim, Vaux-Michel sent notice to the personal representative on October 19, 2011, that she intended to petition the court to allow the claim. On December 19, 2011, the personal representative rejected the claim. On January 23, 2012, Vaux-Michel petitioned the court to allow the claim. The trial court denied the personal representative's motion to dismiss the suit as untimely under RCW 11.40.100(1). A commissioner of this court denied the personal representative's motion for discretionary review. The case proceeded to a bench trial. After the close of evidence, the court ruled in Vaux-Michel's favor, entered judgment for $150,000, and awarded attorney fees and costs. The trial court entered the following unchallenged findings of fact and challenged conclusions of law relevant to the suit's timeliness:

> [Unchallenged findings of fact:]
>
> 30. Ms. Vaux-Michel presented and filed her claim pursuant to RCW 11.40.070 on September 16, 2011.
>
> 31. Respondent did not allow or reject Ms. Vaux-Michel's claim within thirty days from presentation of the same as required by RCW 11.40.080 ("The personal representative shall allow or reject all claims presented in the manner provided in RCW 11.40.070").
>
> 32. On October 19, 2011, Ms. Vaux-Michel served, via certified mail, written notice on Respondent that she would petition the court to have the claim allowed. RCW 11.40.080(2).
>
> 33. Respondent did not notify Ms. Vaux-Michel, within twenty days after her receipt of written notice, that she was either allowing or rejecting her claim. Id.

. . . .

[Challenged conclusions of law:]

2. Because Respondent failed to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within thirty days of notice of the claim, RCW 11.40.100, and then failed to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within twenty days after receiving notice that Ms. Vaux-Michel would petition the Court to allow the claim, RCW 11.40.080, Respondent no longer had statutory authority to reject Ms. Vaux-Michel's claim and, therefore, Ms. Vaux-Michel had a reasonable time within which to file her petition. RCW 11.40.080(2). The provisions of RCW 11.40.100 ceased to be applicable when Respondent failed to exercise her rights thereunder by her failure to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within 20 days after receiving notice.

3. Ms. Vaux-Michel filed her petition within a reasonable time after notifying Respondent that she would petition the court.

4. Even if the thirty day period of RCW 11.40.100 were applicable, Ms. Vaux-Michel timely filed her petition. Respondent mailed her rejection on December 19, 2011, Ms. Vaux-Michel received notice on, and had thirty days after December 19, 2011, to file her petition. Thirty days after December 19, 2011 was Wednesday, January 18, 2012, with three additional days for mailing (CR 6(e)), the date to file fell on Saturday January 20, 2012, which put "the first day other than a Saturday, Sunday or legal holiday following the third day," on Monday, January 23, 2012. CR 6(e).[1]

The personal representative appeals the order denying its motion to dismiss on time bar grounds and the final judgment.

ANALYSIS

This action under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, requires us to determine whether Vaux-Michel's suit is time barred under RCW 11.40.100(1), which requires a claimant to sue the personal representative within 30 days after notification of rejection by the personal representative. The following chronology of events is undisputed:

Sept. 16, 2011: Vaux-Michel notified the personal representative of her $150,000 claim.

[1] It appears the trial court meant to cite CR 6(a).

Oct. 18, 2011: Vaux-Michel notified the personal representative of her intent to petition the court to allow the claim.
Dec. 19, 2011: The estate postmarked its notification of rejection.
Jan. 23, 2012: Vaux-Michel petitioned the court to allow her claim.

The estate contends that Vaux-Michel's creditor claim is time barred under the plain language of RCW 11.40.100(1), regardless of the estate's noncompliance with RCW 11.40.080(2)'s time requirements. Vaux-Michel asserts, as she did below, two grounds as to why her suit is timely.[2] First, she argues that the estate's failure to timely accept or reject her claim within the time periods provided for under RCW 11.40.080(2) means her claim was ripe for adjudication, claim rejection no longer served a purpose, and she filed suit within a reasonable time. Second, she argues her suit is timely because CR 6(e) adds three extra days to the prescribed period.[3]

Whether Vaux-Michel timely sued the estate raises a question of statutory construction that we review de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). A court's objective in construing a statute is to determine the legislature's intent. Campbell & Gwinn, 146 Wn.2d at 9. "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Campbell & Gwinn, 146 Wn.2d at 9-10. Plain meaning

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[2] Vaux-Michel also argues for the first time on appeal that her claim is timely under RCW 11.40.051's two-year time limitation. Resp't's Br. at 15-16. The appellate court may refuse to consider claims not raised in the trial court. RAP 2.5(a). "The purpose of this general rule is to give the trial court an opportunity to correct errors and avoid unnecessary retrials." Postema v. Postema Enters., Inc., 118 Wn. App. 185, 193, 72 P.3d 1122 (2003). Even if we assume this claim was properly preserved, it fails. This statute applies only when the estate fails to give notice to creditors through the statute's defined procedures. 26B CHERYL C. MITCHELL & FERD H. MITCHELL, WASHINGTON PRACTICE: PROBATE LAW AND PRACTICE § 4.31 (2012).

[3] Vaux-Michel also invokes CR 6(a)'s time computation rule, which calculates periods of less than seven days by excluding weekends and holidays.

is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Campbell & Gwinn, 146 Wn.2d at 9-12. An undefined statutory term should be given its usual and ordinary meaning. Burton v. Lehman, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). Statutory provisions and rules should be harmonized whenever possible. Emwright v. King County, 96 Wn.2d 538, 543, 637 P.2d 656 (1981). If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

> As a general matter, time calculation rules should be applied in a clear, predictable manner. "It is a well-accepted premise that [l]itigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights."

Christensen v. Ellsworth, 162 Wn.2d 365, 372, 173 P.3d 228 (2007) (quoting Stikes Woods Neighborhood Ass'n v. City of Lacey, 124 Wn.2d 459, 463, 880 P.2d 25 (1994) (alteration in original) (internal quotation marks omitted)).

RCW 11.40.100(1) and RCW 11.40.080(2)

RCW 11.40.100(1) provides:

> If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection or the claim is forever barred. The personal representative shall notify the claimant of the rejection and file an affidavit with the court showing the notification and the date of the notification. The personal representative shall notify the claimant of the rejection by personal service or certified mail addressed to the claimant or the claimant's agent, if applicable, at the address stated in the claim. The date of service or of the postmark is the date of notification. The notification must advise the claimant that the claimant

> must bring suit in the proper court against the personal representative within thirty days after notification of rejection or the claim will be forever barred.

Vaux-Michel submitted her $150,000 creditor's claim to Stover's estate on September 16, 2011. The estate rejected this claim more than 30 days later, on December 19, 2011, by mailing notification of rejection to Vaux-Michel's attorney by certified mail. This notification informed Vaux-Michel that she "must bring suit in the proper court within 30 days after notification of rejection or the claim will be forever barred." Under RCW 11.40.100(1), quoted above, to be timely, Vaux-Michel was required to bring suit no later than January 18, 2012, 30 days after notification of rejection.[4] Vaux-Michel petitioned the court on January 23, 2012, 35 days after notification of rejection.[5]

Vaux-Michel does not contend that RCW 11.40.100(1) is ambiguous. Indeed, RCW 11.40.100(1) plainly states that a claimant like Vaux-Michel "must bring suit against the personal representative within thirty days after notification of rejection or the claim is forever barred." In Christensen, our Supreme Court held that CR 6(a), the time computation rule that excludes weekends and holidays from periods of less than seven days, did not apply to RCW 59.12.030(3)'s three-day period for a landlord to commence an unlawful detainer action after serving notice. Christensen, 162 Wn.2d at 369. Applying the plain meaning rule to the statutory term "day," the court reasoned:

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[4] For notification of rejection by certified mail, "the postmark is the date of notification." RCW 11.40.100(1).

[5] Vaux-Michel mistakenly claims that the estate computes the 30-day period as commencing on the postmark date. But the record shows that both parties agree that the first day of the 30 day period begins on the day after notification of rejection.

> The statute [RCW 59.12.030(3)] does not specify whether "day" means a business day, court day, or calendar day. There are no time calculation provisions in chapter 59.12 RCW. The ordinary meaning of "day" is a 24 hour period beginning at midnight. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 578 (2002) (defining "day" as a "CIVIL DAY [ ] among most modern nations : the mean solar day of 24 hours beginning at mean midnight"); id. at 316 (defining "calendar day" as "a civil day : the time from midnight to midnight"); see also 74 AM.JUR.2d Time § 10 (2001) ("[a] 'day' generally means a calendar day"). Using the ordinary meaning of day, weekends and holidays would be included in the calculation of the three day notice period.

Christensen, 162 Wn.2d at 373 (alterations in original). As in Christensen, the statute here does not specify whether "day" means a business day, court day, or calendar day. Accordingly, we apply the ordinary meaning of "day," which includes weekends. "In the absence of a specific statutory definition, words in a statute are given their common law or ordinary meaning." State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). Vaux-Michel's suit is untimely because she petitioned the court to allow her claim 35 calendar days after notification of rejection.

This approach also furthers the timely and efficient resolution of claims against the estate because the statute establishes a clear bright line rule within which a claimant "must" bring an action on a claim. In Johnston v. Von Houck, 150 Wn. App. 894, 209 P.3d 548 (2009), Division Two of this court agreed with the personal representative's contention that RCW 11.40.100(1) is worded to bar untimely creditor claims:

> [RCW 11.40.100(1)] sets forth a sequence of events and a time period within which a claimant must sue. This sequence and the 30-day "window" are intended to further the timely resolution of claims against an estate. See Nelson v. Schnautz, 141 Wn. App. 466, 475, 170 P.3d 69 (2007) (intent of probate code is to limit claims against the decedent's estate, expedite closing the estate, and facilitate distribution of the decedent's property), review denied, 163 Wn.2d 1054 (2008); In re Estate of Krueger's, 145 Wn. 379, 381-82, 260 P. 248 (1927)

> (provision that suit shall be brought within 30 days after rejection was "undoubtedly to facilitate the handling and settling of estates").

Johnston, 150 Wn. App. at 901-02.

As noted above, Vaux-Michel asserts that the estate's noncompliance with RCW 11.40.080(2)'s time provisions, as a matter of law, dispensed with any obligation on her part to bring suit within RCW 11.40.100(1)'s 30-day deadline. But this argument is not supported by any relevant case authority and, as discussed above, is contrary to the plain meaning of the statute. Nor does she identify any provision in chapter 11.40's comprehensive scheme governing claims against the estate to support her argument.

RCW 11.40.080(2) states:

> If the personal representative has not allowed or rejected a claim within the later of four months from the date of first publication of the notice to creditors or thirty days from presentation of the claim, the claimant may serve written notice on the personal representative that the claimant will petition the court to have the claim allowed. If the personal representative fails to notify the claimant of the allowance or rejection of the claim within twenty days after the personal representative's receipt of the claimant's notice, the claimant may petition the court for a hearing to determine whether the claim should be allowed or rejected, in whole or in part. If the court substantially allows the claim, the court may allow the petitioner reasonable attorneys' fees chargeable against the estate.

The statute's plain text provides a claimant like Vaux-Michel a permissive and simple mechanism intended to prompt a personal representative who fails to make a decision on a submitted claim. See Johnston, 150 Wn. App. at 901-02. In that circumstance, the claimant can notify the personal representative that she intends to petition the court to allow the claim unless the personal representative acts on the claim within 20 days. If the personal representative fails to act, the claimant may petition the court to allow the claim. Here, Vaux-Michel's notice to the personal representative of her intent to petition the court to allow the claim prompted the personal representative to make a decision on

the claim. Once the personal representative rejected the claim, RCW 11.40.100(1) required Vaux-Michel to "bring suit against the personal representative within thirty days after notification of rejection . . . ." See 26B CHERYL C. MITCHELL & FERD H. MITCHELL, WASHINGTON PRACTICE: PROBATE LAW AND PRACTICE § 4.33 (2012).

We are not persuaded by Vaux-Michel's unsupported contention that the personal representative's failure to reject her claim according to the time requirements in RCW 11.40.080(2) dispensed with any obligation to comply with RCW 11.40.100(1)'s time requirements. RCW 11.40.080(2) and .100(1) operate together to facilitate the prompt and efficient resolution of estate claims. See In re Pers. Restraint of Albritton, 143 Wn. App. 584, 593, 180 P.3d 790 (2008) ("The provisions of an act must be viewed in relation to each other and, if possible, harmonized to effect the act's overall purpose."). Nothing in RCW 11.40.080(2)'s or .100(1)'s text suggests that failure to comply with .080(2)'s time requirements excuses compliance with .100(1)'s time bar rule.[6] If the legislature had intended this result, it could have said so expressly. See In re Marriage of McLean, 132 Wn.2d 301, 307, 937 P.2d 602 (1997).[7]

[6] RCW 11.40.080(2) is plain on its face. "If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says." State v. Costich, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). "Courts will neither read matters into a statute that are not there nor modify a statute by construction." Rushing v. ALCOA, Inc., 125 Wn. App. 837, 840, 105 P.3d 996 (2005).

[7] We also note that in addition to other provisions in chapter 11.40 RCW, section .051 contains comprehensive time limits within which a claim must be brought.

CR 6

As discussed above, Vaux-Michel contends in the alternative that CR 6(e) adds three extra days for mailing to the 30-day time requirement.[8] This argument depends on whether CR 6(e)'s time computation rules apply to RCW 11.40.100(1).

CR 6(e) provides:

> Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

(Boldface omitted.) Under CR 81(a), the civil rules apply to all civil proceedings "[e]xcept where inconsistent with rules or statutes applicable to special proceedings . . . ." TEDRA actions are special proceedings. RCW 11.96A.090(1) provides, "A judicial proceeding under [title 11] is a special proceeding under the civil rules of court. The provisions of [title 11] governing such actions control over any inconsistent provision of the civil rules."

But even assuming the civil rules applied, application of CR 6(e) to RCW 11.40.100(1)'s 30-day time requirement is contrary to the plain language of the statute. As discussed above, the legislature intended for the phrase "thirty days" to convey its ordinary meaning of 30 calendar days. Thirty calendar days is inconsistent with CR 6(e), which adds three days for mailing, and with CR 6(a), which extends this period by excluding weekends and legal holidays.

> Rule 6(e) was adopted in order to mitigate the effects of CR 5(b), which provides that service is complete upon mailing, rather than delivery, of the

[8] According to Vaux-Michel, since the thirty-third day falls on a Saturday, the period "runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday." CR 6(a).

> notice. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 514 (2d ed. 1987) (Rule 6(e) is "a fair compromise between the harshness of measuring strictly from the date of mailing and the indefiniteness of attempting to measure from the date of receipt"). Rule 6(e) allows parties three additional days to respond in order to compensate for the transmission time when the notice is mailed.

In re Estate of Toth, 138 Wn.2d 650, 655, 981 P.2d 439 (1999). Unlike the policy concerns that drove the adoption of CR 6(e), RCW 11.40.100(1) provides a clearly-defined period within which a creditor must sue in court on his or her claim—30 calendar days after the claim rejection notice's certified mail postmark date.

Vaux-Michel relies on Canterwood Place L.P. v. Thande, 106 Wn. App. 844, 25 P.3d 495 (2001) (superseded by statute), and Capello v. State, 114 Wn. App. 739, 60 P.3d 620 (2002), to argue that CR 6(e) applies.[9] In Canterwood, we applied CR 6(a) to compute the return date on an unlawful detainer summons issued under former RCW 59.12.070. We applied CR 6(a) because, at the time of our decision, chapter 59.12 RCW contained "no method for computing time." Canterwood, 106 Wn. App. at 848. Similarly, in Capello, we applied CR 6(a) to compute the 72-hour period within which a probable cause hearing must be held under the sexually violent predator statute, chapter 71.09 RCW. We applied CR 6(a) because chapter 71.09 RCW was "silent on the issue of the computation of time" and contained no provision inconsistent with CR 6(a). Capello, 114 Wn. App. at 749. Unlike the statutory schemes at issue in Canterwood and Capello, chapter 11.40 RCW contains an express timing rule,

[9] Vaux-Michel acknowledges the absence of "controlling authority that Rule 6 applies to probate proceedings . . . ." Resp't's Br. at 24.

RCW 11.40.100(1), that addresses the precise issue raised by the parties.[10] Canterwood and Capello are unpersuasive.

Vaux-Michel also argues that applying CR 6(e) to RCW 11.40.100(1) "is sound public policy because litigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner . . . ." Resp't's Br. at 26. This argument is unpersuasive because the legislature has already spoken on this point. Our Supreme Court adopted CR 6(e) in 1967. See Order Adopting Civil Rules for Superior Court, 71 Wn.2d at xvii, xxxvii (1967). The legislature enacted RCW 11.40.100(1) in its present form 30 years later. LAWS OF 1997, ch. 252, § 16. We presume that the legislature enacts laws with full knowledge of existing laws. Thurston County v. Gorton, 85 Wn.2d 133, 138, 530 P.2d 309 (1975). Thus, we presume that the legislature enacted RCW 11.40.100(1) with full knowledge of the statute's inconsistency with CR 6(e). RCW 11.40.100(1) reflects the legislature's intent to "further the timely resolution of claims against an estate." Johnston, 150 Wn. App. at 901.

Attorney Fees

The estate requests trial and appellate attorney fees under TEDRA and RAP 18.1. Under TEDRA, courts have broad discretion to award attorney fees and costs in any proceeding governed by Title 11 RCW. See Wash. Builders Benefit Trust v. Building Indus. Ass'n, 173 Wn. App. 34, 84, 293 P.3d 1206 (2013) ("RCW 11.96A.150 provides both the trial court and this court with broad discretion to award attorney fees

[10] Vaux-Michel's citation to In re Estate of Van Dyke, 54 Wn. App. 225, 772 P.2d 1049 (1989) (remanding will contest petition for determination as to whether nonjoined legatees were indispensable parties under CR 19(b)) is unhelpful.

in a trust dispute."). Fees may be awarded to any party "in such amount and in such manner as the court determines to be equitable." RCW 11.96A.150(1)(c). We may "consider any relevant factor, including whether a case presents novel or unique issues." In re Guardianship of Lamb, 173 Wn.2d 173, 198, 265 P.3d 876 (2011); see, e.g., In re Estate of D'Agosto, 134 Wn. App. 390, 402, 139 P.3d 1125 (2006) (fees unwarranted because case involved "novel issues of statutory construction"); Bale v. Allison, 173 Wn. App. 435, 461, 294 P.3d 789 (2013) (fees unwarranted because case involved "unique issue").

The present case involves a novel issue of statutory construction—whether CR 6(e) applies to RCW 11.40.100(1). This issue was litigated both at trial and on appeal. We deny the estate's appellate fee and cost requests. Given our disposition, we likewise vacate Vaux-Michel's attorney fee judgment.[11]

CONCLUSION[12]

For the reasons discussed above, we hold that Vaux-Michel's suit is untimely under RCW 11.40.100(1) and CR 6 does not apply to this statute. The trial court erred when it denied the personal representative's motion to dismiss the claim and, after trial, entered judgment and awarded fees and costs to Vaux-Michel. We reverse and remand with instructions to vacate the judgment and fees and costs award. We decline

[11] We note that the trial court's findings of fact and conclusions of law supporting Vaux-Michel's fee award identified no statutory, contractual, or equitable justification for the award. "In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity." Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004).

[12] Given our resolution, it is unnecessary to address Vaux-Michel's remaining contentions.

to award fees and costs on appeal. The personal representative's request for fees in the trial court may be taken up on remand.

WE CONCUR:

Lau, J.

Lau, C.J.

Becker, J.

RICHARD D. JOHNSON,
Court Administrator/Clerk

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of the
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CASE #: 68458-2-I
In Re Estate of T. Mark Stover. Teresa Vaux-Michel, Respondent v. Anne Victoria Simmons, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on May 15, 2012, regarding petitioner's motion for discretionary review:

"Anna Simmons, the personal representative of the Estate of T. Mark Stover, seeks discretionary review of the February 17, 2012 trial court order denying the Estate's motion to dismiss the creditor claim of Teresa Vaux-Michel as untimely.

Mark Stover disappeared, and it was later determined that he had been murdered in October 2009. Stover died without a will. His sister, Anna Simmons, was appointed administrator of the estate. Vaux-Michel claimed she had a relationship with Stover and that they had intended to marry. In a December 2009 search of Stover's home, Simmons and another person found a check for $150,000 made out to Vaux-Michel hidden in a desk drawer. Vaux-Michel claims that the check was a gift causa mortis.

On September 16, 2011, Vaux-Michel filed a creditor's claim for $150,000. Simmons did not allow or reject the claim within 30 days, as required by RCW 11.40.080(2). On October 19, 2011, Vaux-Michel filed a notice of intent to petition the court to have the claim allowed. Simmons did not notify Vaux-Michel whether the claim would be accepted or rejected within 20 days, as required by RCW 11.40.080(2). On December 19, 2011, Simmons sent a formal rejection of the claim by certified mail to Vaux-Michel, as provided for in RCW 11.40.100(1). On January 23, 2012, 35 days after notification of the rejection of the claim, Vaux-Michel brought suit against Simmons.

The Estate filed a motion to dismiss the action as untimely under RCW 11.40.100(2), which requires a creditor to bring suit **"within 30 days after notification of the rejection or the claim is forever barred."** Vaux-Michel opposed the motion, arguing that her suit was timely on two bases. First, she argued that because Simmons failed to timely accept or reject her claim within the time periods provided in RCW 11.40.080(2), her claim was ripe for adjudication, rejection of the claim no longer served a purpose, and she filed suit within a reasonable time. Second, Vaux-Michel argued that applying CR 6(e), which adds three days to the prescribed time period when service of the notice was by mail, she timely filed suit.

On February 17, 2012, the trial court denied the motion to dismiss.

The Estate seeks discretionary review under RAP 2.3(b)(1), obvious error that renders further proceedings, and/or (b)(2), probable error that substantially alters the status quo. RAP 2.3(b)(1) is the applicable rule here because if the Estate is correct that the action should have been dismissed as untimely, there would be no trial, and further proceedings would be useless within the meaning of the rule. See, e.g., Douchette v. Bethel Sch. Dist. No. 403, 117 Wn.2d 805, 808, 818 P.2d 1362 (1991) (discretionary review appropriate under RAP 2.3(b)(1) to avoid a useless trial where claims barred by statute of limitations). Hartley v. State, 103 Wn.2d 768, 773–74, 698 P.2d 77 (1985) (granting discretionary review of trial court order denying summary judgment to avoid a useless trial, where as a matter of law there was no causation between State's alleged negligence and plaintiff's injury). The issue, then, is whether the trial court order denying the Estate's motion to dismiss Vaux-Michel's creditor suit is obvious error.

In support of and opposition to discretionary review, Simmons and Vaux-Michel make the same two arguments they made in the trial court. As to the first issue, neither party has cited controlling authority regarding the effect of the personal representatives' failure to meet the time requirements of RCW 11.40.080(2) on the time requirement of RCW 11.40.100(1) for a creditor to file suit. To the extent the trial court denied the motion to dismiss on this basis, Simmons has not demonstrated obvious error.

Moreover, as to the second issue, the parties assume that the trial court applied CR 6(e) to extend the time for Vaux-Michel to file suit. Both parties rely on a will contest case that they did not cite in the trial court, In re Estate of Toth, 138 Wn.2d 650, 981 P.2d 439 (1999).

In Toth, the court initially explained why CR 6(e) was inapplicable:

> The question of whether CR 6(e) applies to probate proceedings, or to the four-month statute of limitation in RCW 11.24.010 specifically, has not been addressed by this court. However, . . . the clear language of [the statute] provides that a person contesting a will shall do so "within four months immediately following" the will's admission to probate. Nothing in the language of the statute suggests that this time period is extended depending upon the interested parties' receipt of notice that the will has been admitted to probate.
>
> Furthermore, the language of CR 6(e) indicates that the rule is inapplicable to will contests. . . . **CR 6(e) operates to toll the response time only in cases in which a party is required to respond within a certain time after being served or notified.** The rule does not apply when the prescribed period of time in which the parties are required to respond is triggered by an event other than the service of the notice. . . . The will contestant's time period in which to act is tied to the date the will is admitted to probate, regardless of when the contestant receives notice. . . . [I]f a statute requires parties to respond within a certain time period not tied to their receipt of notice, there is no reason to apply CR 6(e) to extend the response time.

Toth, 138 Wn.2d at 654-55. The court then went on to state an arguably broader rule:

> This court has strictly enforced the statutory period for filing will contest petitions. "Where a statute authorizes the contest of a will, and specifies the time within which such contest may be instituted, the court has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute." . . . We therefore conclude that the four-month period in which to contest a will under RCW 11.24.010 is not extended by three days under CR 6(e), even if the interested parties receive notice of the will's admission by mail. As acknowledged by the Court of Appeals, **'[t]here is no controlling authority to support the . . . position that CR 6(e) applies to probate proceedings**. We are not unmindful of the inequities of this case. However, factual inequities do not justify circumventing a clear rule articulated by the Legislature.

Toth, 138 Wn.2d at 656-57.

The Estate relies on the broad rule that CR 6(e) does not apply to probate proceedings. Vaux-Michel relies on the language explaining the circumstances when CR 6(e) applies, i.e., cases in which a party is required to respond within a certain time after being served or notified, which is what RCW 11.40.100(1) requires. It is undisputed that if CR 6(e) applies, Vaux-Michel timely filed her claim.

Toth certainly is open to different readings. I agree with petitioner Simmons that this is an important issue that warrants appellate review. The question is whether review is warranted now, or whether it should await a final judgment. Trial is set for June 18, 2012. If Simmons' position is correct, there should be no trial. But given the language in Toth, Simmons has not demonstrated obvious error in denying the motion to dismiss Vaux-Michel's suit on her creditor claim.

Therefore, it is

ORDERED that discretionary review is denied."

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

emp

c: The Honorable John M. Meyer

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Estate of T. MARK STOVER, Deceased.	)	No. 68458-2-I
TERESA VAUX-MICHEL, Respondent,	)	ORDER DENYING MOTION TO MODIFY
v.	)	
ANNE VICTORIA SIMMONS, as Personal Representative of the ESTATE OF T. MARK STOVER, Deceased, Petitioner.	)	

Petitioner Anne Simmons has moved to modify the commissioner's May 15, 2012 ruling denying discretionary review. Respondent Teresa Vaux-Michel has filed a response, and Simmons has filed a reply. We have considered the motion under RAP 17.7 and have determined that it should be denied.

Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 3rd day of August, 2012.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE SKAGIT COUNTY

IN RE THE ESTATE OF T. MARK. STOVER, Deceased. TERESA VAUX-MICHEL, Petitioner, v. ANNE VICTORIA SIMMONS, as Personal Representative of the ESTATE OF T. MARK STOVER, Deceased, Respondent.	**NO. 09-4-00411-1** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After considering the testimony of the witnesses, the exhibits admitted, adjudicative facts taken notice of pursuant to ER 201, argument of counsel and after review of the pleadings filed by the parties and admitted by the Court, the Court makes the following:

FINDINGS OF FACT

1. Petitioner, Teresa Vaux-Michel (Vaux-Michel) is a claimant against the estate of T. Mark Stover (Stover), deceased.

2. Respondent, Anne Victoria Simmons, is the Decedent's sister and the personal representative of the Estate of T. Mark Stover. She had communicated with her brother one time in the twenty years that preceded his death. There was estrangement to some extent in the family, making it less likely that relatives would necessarily be the natural objects of Mr. Stover's bounty.

3. Mr. Stover's sole legal heir was his mother, Anne W. Hamilton. Respondent is the guardian of the person and estate of Anne W. Hamilton, who is in her 90's.

4. Respondent and her half-brother, James Bolerud, are the sole heirs of Anne W. Hamilton.

5. On January 4, 2010, letters of administration were issued to Respondent.

6. During the summer of 2009, Mr. Stover began to suspect that his ex-wife, Linda Opdycke and her father, Wally Opdycke, were plotting to have him murdered.

7. In August 2009, after drugs were found in his car upon the execution of a search warrant, Mr. Stover hired an attorney, Jeffrey Kradel, who hired a private investigator, Leigh Hearon, to assist him in determining who may have planted the drugs.

8. During the period from August 2009 until his death in October 2009, Mr. Stover became very frightened and told numerous people of his fear that Linda Opdycke and her father, Wally Opdycke, were going to have him murdered. He expected them to be successful in doing so.

9. Mr. Stover and Ms. Vaux-Michel were introduced by Ted and Gerri Frantz in 2008. They dated for a while until Ms. Vaux-Michel decided to "slow things down" sometime in the Spring of 2009. In August of 2009, Ms. Vaux-Michel and Mr. Stover began

to date again and continued to date until his death. Mr. Stover wanted to take care of her in case he was murdered, and he prepared for that eventuality.

10. Ms. Vaux-Michel helped Mr. Stover with his business and had access to his home and in-home office. They communicated by telephone several times per day. Ms. Vaux-Michel in fact reported Mr. Stover as missing.

11. In late August or early September 2009, Mr. Stover told Jeannie Nordstrom, a client of his for 10 years, that Ms. Vaux-Michel had "saved his life" and that he wanted to marry her.

12. Sometime in late August 2009, Mr. Stover told Mr. Kradel that he wanted to marry Ms. Vaux-Michel and to provide for her in the event the Opdyckes had him murdered.

13. Sometime in late August 2009, Mr. Stover told Ms. Hearon that he planned to marry Ms. Vaux-Michel, that he wanted to provide for her in the event the Opdyckes had him murdered, and that he had written a check to Ms. Vaux-Michel and left it on his desk in plain view for her in case his fear that he would be murdered came to pass. Mr. Stover often told Ms. Hearon of his love and affection for Ms. Vaux-Michel.

14. Sometime in October 2009, Mr. Stover told Elizabeth Dorris that he had left a check for Ms. Vaux-Michel in the event he was murdered. Mr. Stover often told Ms. Dorris of his love for Ms. Vaux-Michel and that he was going to marry her.

15. Sometime in late October 2009, Mr. Stover told Andrea Franulovich that he had left a check for Ms. Vaux-Michel in the event he was murdered. Mr. Stover told her that he planned to marry Ms. Vaux-Michel and showed Ms. Franulovich the engagement ring he

had purchased. Mr. Stover often expressed his love for Ms. Vaux-Michel and his plan to marry her to Ms. Franulovich.

16. On or about October 28, 2009, T. Mark Stover went missing, and on October 22, 2010, a Skagit County jury returned a guilty verdict of murder in the first degree for Stover's murder against Michiel Oakes, who was the boyfriend of Linda Opdycke.

17. In early November 2009, Detective Dan Luvera of the Skagit County Sheriff's Office searched Mr. Stover's desk and, among other items, found on top of the desk a check made out to Teresa Vaux-Michel in the amount of $150,000. The check was a single check not in a check register or check book. It had been left in a place where it was easily discoverable.

18. Detective Luvera called Respondent, who was in Georgia, and told her about the check made out to Ms. Vaux-Michel.

19. Detective Luvera sent that check, and other items found on Mr. Stover's desk, to Respondent in pre-addressed, pre-stamped boxes provided by her.

20. In December, 2009, Ms. Hearon and the Respondent went to Mr. Stover's house to go through his personal effects, primarily to look for a will. Respondent also told Ms. Hearon she was going to look for the check made out to Ms. Vaux-Michel. Ms. Hearon had not yet told Respondent that she knew about the check.

21. As they were going through Mr. Stover's effects, Respondent either found or represented that she had found a check in the amount of $150,000, dated August 9, 2009, and made out to Ms. Vaux-Michel. Responded testified she found the check "hidden" in an inconspicuous place in Mr. Stover's desk drawer. The check, No. 1002, was still attached to a

Vanguard check register. Check Nos. 1001, 1003 and 1004 are missing from the check register and Respondent testified she did not know where they were. The check register contained no written recordings.

22. After Respondent found the check, Ms. Hearon told her of Mr. Stover's intent to marry Ms. Vaux-Michel, of his fear that he would be murdered, and that he had written the check to Ms. Vaux-Michel because he wanted her to be taken care of if he was murdered. Ms. Hearon also told Ms. Vaux-Michel that she should tell law enforcement about the check.

23. Detective Luvera emphasized, when shown in court the check found by Respondent, that it was a different check than the one he found. The check he had found and told Respondent about was a single detached check and it was not attached to a check register.

24. As she was searching Mr. Stover's bedroom, Ms. Hearon found a letter to Mr. Stover on the night stand. The letter, from close friend Gerri Franz, explained to Mr. Stover how he could "win [Ms. Vaux-Michel's] heart."

25. On September 21, 2009, Mr. Stover "rescinded" a writing dated November 21, 2007, wherein he expressed his intent to leave his business to two employees if he were to die.

26. Mr. Stover never revoked the $150,000 check he wrote to Ms. Vaux-Michel.

27. Mr. Stover died intestate.

28. On January 6, 2011, an order adjudicating solvency of the Estate of T. Mark Stover and granting Respondent nonintervention powers was entered.

29. Respondent did not give Ms. Vaux-Michel actual notice of her appointment as personal representative of Mr. Stover's estate as permitted and provided for by RCW 11.40.020(1)(c).

30. Ms. Vaux-Michel presented and filed her claim pursuant to RCW 11.40.070 on September 16, 2011.

31. Respondent did not allow or reject Ms. Vaux-Michel's claim within thirty days from presentation of the same as required by RCW 11.40.080 ("The personal representative shall allow or reject all claims presented in the manner provided in RCW 11.40.070").

32. On October 19, 2011, Ms. Vaux-Michel served, via certified mail, written notice on Respondent that she would petition the court to have the claim allowed. RCW 11.40.080(2).

33. Respondent did not notify Ms. Vaux-Michel, within twenty days after her receipt of written notice, that she was either allowing or rejecting her claim. *Id.*

34. On December 20, 2011, Respondent filed a rejection of Ms. Vaux-Michel's claim.

35. Ms. Vaux-Michel filed her petition to restrict Respondent's non-intervention powers and to allow Petitioners claim on January 23, 2012. For purposes of this proceeding only, the Court has assumed that Ms. Vaux-Michel had standing to raise the issue in light of the solvency of the Estate.

36. There is no evidence of fraud or undue influence, and the circumstances show that Mr. Stover did all that, in his opinion, was necessary to do to accomplish delivery of the

checks.

37. There are no conflicting interests by creditors or other assignees or donees of Mr. Stover.

38. The estate is presently worth in excess of $700,000.

39. The estate began and has remained solvent and will continue to remain solvent upon the payment or provision for payment of all Creditor's Claims lawfully filed and allowed, including Ms. Vaux-Michel's.

40. Other than the unusual and perhaps suspicious circumstances surrounding the location and number of checks written to Ms. Vaux-Michel, no evidence suggests that the personal representative has discharged the business of the Estate sufficiently inappropriately to justify her removal or limitation of her non-intervention powers. However, the Estate shall not be closed until the personal representative has taken the steps required by the terms of this ruling.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter in this TEDRA action.

2. Because Respondent failed to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within thirty days of notice of the claim, RCW 11.40.100, and then failed to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within twenty days after receiving notice that Ms. Vaux-Michel would petition the Court to allow the claim, RCW 11.40.080, Respondent no longer had statutory authority to reject Ms. Vaux-Michel's claim

and, therefore, Ms. Vaux-Michel had a reasonable time within which to file her petition. RCW 11.40.080(2). The provisions of RCW 11.40.100 ceased to be applicable when Respondent failed to exercise her rights thereunder by her failure to reject or allow, in part or in whole, Ms. Vaux-Michel's claim within 20 days after receiving notice.

3. Ms. Vaux-Michel filed her petition within in a reasonable time after notifying Respondent that she would petition the court.

4. Even if the thirty day period of RCW 11.40.100 were applicable, Ms. Vaux-Michel timely filed her petition. Respondent mailed her rejection on December 19, 2011, Ms. Vaux-Michel received notice on, and had thirty days after December 19, 2011, to file her petition. Thirty days after December 19, 2011 was Wednesday, January 18, 2012, with three additional days for mailing (CR 6(e)), the date to file fell on Saturday January 20, 2012, which put "the first day other than a Saturday, Sunday or legal holiday, following the third day," on Monday, January 23, 2012. CR 6(e).

5. The parties have stipulated as to the authenticity of Vanguard check #1002 as having been written by Mr. Stover to Ms. Vaux-Michel. The Court accepts that stipulation as clear and convincing evidence of an intended gift. The Court further finds that Detective Luvera did discover a different check for the same amount and to the same payee on October 29, 2010. For purposes of its analysis of the facts in this case, the Court has referred to the check discovered by Detective Luvera.

6. The testimony and declarations of attorney Jeffrey Kradel and private investigator Leigh Hearon regarding statements by Mr. Stover to them do not contain communications protected by the attorney-client privilege. Assuming arguendo that Mr.

Stover's communications were made in confidence and were privileged, he waived that privilege by disclosing the substance of the communications to others. Mr. Stover made no secret of his love for Ms. Vaux-Michel or his desire to take care of her if he were murdered. Mr. Stover's declarations of love for Ms. Vaux-Michel, his intent to marry her and the corresponding desire to take care of her by leaving a check for her in case he was murdered cannot be reasonably considered to be quiet confidences Mr. Stover intended to be silenced by an attorney-client privilege. Mr. Stover hired Jeff Kradel because someone had planted drugs in his car.

Even if the communications were confidential and the privilege was not waived, substantial and clear and convincing evidence over and above that given by Mr. Kradel and Ms. Hearon exists in the record to support the Court's ruling.

7. Mr. Stover was murdered on or about October 28, 2009, the precise peril he feared. Before his murder, he did not revoke the check.

8. The check was constructively delivered by Mr. Stover to Ms. Vaux-Michel. By putting the check on his desk and telling others about the check and its purpose, and because Ms. Vaux-Michel worked at the same desk the check was located. It is a conclusion well supported by the evidence that Mr. Stover told Ms. Vaux-Michel about the check and its purpose, that the gift was accepted by Ms. Vaux-Michel, thereby ensuring that if he was murdered the checks would be retrieved by or given to Ms. Vaux-Michel.

9. Mr. Stover had been through a difficult divorce and, though he gave a present interest in the money in his Vanguard account to Ms. Vaux-Michel as evidence by the fact that the check was made out to her, and because the check was made out to her, Mr. Stover could only guarantee his ability and right to revoke the gift of the check if it remained accessible to him, but also to Ms. Vaux-Michel or anyone who would retrieve it on her behalf in the event he was murdered.

The constructive delivery by Mr. Stover to Ms. Vaux-Michel was the best which the nature and situation of the property and the circumstances of the parties admit of.

10. The evidence of Mr. Stover's donative intent is concrete and undisputed. Mr. Stover could have, but never did revoke the gift.

11. Mr. Stover intended to deliver the gift and believed that he had successfully delivered it. He did all that, in his opinion, was necessary to do to accomplish delivery of the gift.

12. By clear and convincing evidence it has been shown that the check is a gift causa mortis, and Ms. Vaux-Michel is the donee of the gift.

13. The Estate of T. Mark Stover must pay Ms. Vaux-Michel her creditor's claim in the amount of $150,000. The Estate shall not be closed without further order of the Court. To the extent that costs and attorney fees are awardable under statute, the Petitioner shall have same.

Dated this 9/24/12.

JOHN M. MEYER, JUDGE

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA
2012 SEP 24 AM 9:25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE SKAGIT COUNTY

IN RE THE ESTATE OF T. MARK, STOVER, Deceased. TERESA VAUX-MICHEL, Petitioner, v. ANNE VICTORIA SIMMONS, as Personal Representative of the ESTATE OF T. MARK STOVER, Deceased, Respondent.	**NO. 09-4-00411-1** **ORDER ON TEDRA**

AND NOW, this 24 day of September, 2012, in consideration of the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that judgment is entered in favor of Petitioner, Teresa Vaux-Michel, and against Respondent, Anne Victoria Simmons, Personal Representative of the Estate of T. Mark Stover. Respondent's non-intervention powers are revoked and a new personal representative of the Estate of T. Mark Stover will be appointed by the Court. Ms. Vaux-Michel's's *Creditor's Claim* is allowed in the amount of $150,000, plus statutory interest; and Ms. Vaux-Michel is awarded her costs and reasonable attorney's fees as allowed by statute..

BY THE COURT:

JOHN M. MEYER, JUDGE

RCW 11.40.080

Claims — Duty to allow or reject — Notice of petition to allow — Attorneys' fees.

(1) The personal representative shall allow or reject all claims presented in the manner provided in RCW 11.40.070. The personal representative may allow or reject a claim in whole or in part.

(2) If the personal representative has not allowed or rejected a claim within the later of four months from the date of first publication of the notice to creditors or thirty days from presentation of the claim, the claimant may serve written notice on the personal representative that the claimant will petition the court to have the claim allowed. If the personal representative fails to notify the claimant of the allowance or rejection of the claim within twenty days after the personal representative's receipt of the claimant's notice, the claimant may petition the court for a hearing to determine whether the claim should be allowed or rejected, in whole or in part. If the court substantially allows the claim, the court may allow the petitioner reasonable attorneys' fees chargeable against the estate.

[1997 c 252 § 14; 1994 c 221 § 29; 1988 c 64 § 22; 1965 c 145 § 11.40.080. Prior: 1917 c 156 § 114; RRS § 1484; prior: Code 1881 § 1474; 1854 p 281 § 86.]

Notes:

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Effective dates -- 1994 c 221: See note following RCW 11.94.070.

Captions -- Severability -- 1988 c 64: See RCW 83.100.904 and 83.100.905.

RCW 11.40.100

Rejection of claim — Time limits — Notice — Compromise of claim.

(1) If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection or the claim is forever barred. The personal representative shall notify the claimant of the rejection and file an affidavit with the court showing the notification and the date of the notification. The personal representative shall notify the claimant of the rejection by personal service or certified mail addressed to the claimant or the claimant's agent, if applicable, at the address stated in the claim. The date of service or of the postmark is the date of notification. The notification must advise the claimant that the claimant must bring suit in the proper court against the personal representative within thirty days after notification of rejection or the claim will be forever barred.

(2) The personal representative may, before or after rejection of any claim, compromise the claim, whether due or not, absolute or contingent, liquidated, or unliquidated, if it appears to the personal representative that the compromise is in the best interests of the estate.

[1997 c 252 § 16; 1974 ex.s. c 117 § 47; 1965 c 145 § 11.40.100. Prior: 1917 c 156 § 116; RRS § 1486; prior: Code 1881 § 1476; 1854 p 281 § 88.]

Notes:

Application -- 1997 c 252 §§ 1-73: See note following RCW 11.02.005.

Application, construction -- Severability -- Effective date -- 1974 ex.s. c 117: See RCW 11.02.080 and notes following.