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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,

v.

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

Appellant.

REPLY BRIEF OF APPELLANT/RESPONSE TO CROSS-APPEAL

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A. INTRODUCTION

Teresa Vaux-Michel claimed a relationship with the late Mark Stover. She also claimed that Stover made out a check in the amount of $150,000 to her as a gift causa mortis, leaving it in his desk.[1]

Vaux-Michel presented a creditor claim to the Estate of Mark Stover ("Estate") for the alleged gift, but her lawsuit against the Estate for that claim was untimely and should have been rejected for that reason alone.

Moreover, because a gift causa mortis requires proof of the elements of such a gift on a clear and convincing basis, under the facts in this case, Vaux-Michel failed to establish a gift, under that higher burden of proof, particularly the requisite element of delivery.

Finally, the trial court should not have awarded attorney fees to Vaux-Michel under the Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A.150. Rather, the Estate was entitled to an award of fees from Vaux-Michel and is entitled to its fees in connection with this appeal.

B. RESPONSE TO VAUX-MICHEL'S COUNTERSTATEMENT OF THE CASE[2]

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[1] She contends in a cross-appeal that Stover left her two such checks.

[2] Transcription of the September 12-13, 2012 bench trial appears in two volumes, referenced herein as "1RP" and "2RP," respectively. References to a hearing on February 17, 2012 are designated by date.

Mark Stover disappeared from his Anacortes home and was later determined to have been killed on October 28, 2009. CP 1, 7, 107. Stover was apparently murdered by Michael Oakes, who was convicted of his murder. CP 45. He died without a will. CP 45. Stover was not married or engaged at the time of his death. CP 7. Stover's sister, Anne Victoria Simmons, was appointed administrator of his intestate estate by the Skagit County Superior Court on January 7, 2011. CP 9-10.[3]

Teresa Vaux-Michel claimed a relationship with Stover. CP 14. As Simmons testified, however, she was not aware of a relationship between Vaux-Michel and Stover at the time of Stover's death. CP 78; 2RP at 131. No engagement between Vaux-Michel and Stover was ever announced. 2RP at 92. She did not have a wedding ring. 2RP at 91-92. No wedding date was ever set. *Id.* Vaux-Michel testified that she did not have a key to Stover's house, and detectives had to let her into the house to get food for Stover's dog. CP 79.

Skagit County Sheriff's Detective Dan Luvera testified at trial that he searched Stover's home on October 29, 2009 and found a single check, unattached to a check register, made out to Vaux-Michel for $150,000.

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[3] Vaux-Michel repeatedly asserts in her response brief that Simmons was "estranged" from her brother Mark Stover. Br. of Resp't at 7, 9. But Simmons testified at trial that while she and her brother lived on different sides of the country, it would be inaccurate to describe their relationship as "not close." 1RP at 18-19.

1RP at 76, 84, 86, 92. Luvera testified that he called Simmons, told her about the check and mailed it to her. *Id.* at 87-88. The check was not logged into the Sheriff's Office, Luvera never made a copy of the check, and he did not send any enclosure letter along with the check when he mailed it to Simmons. *Id.* at 89-91. Simmons denied that she ever received any such phone call or letter from Luvera. 2RP at 66-69.

In going through Stover's personal effects in his Anacortes home in early December 2009, Simmons and Leigh Hearon (a private detective hired by Jeffrey Kradel, Stover's legal counsel in a potential criminal case against Stover involving drugs) discovered a check for $150,000 made out to Vaux-Michel. CP 15, 35; 2RP at 8. Simmons found the check hidden in a desk drawer; the police had not found it. 2RP at 66-68; CP 80-81. Vaux-Michel claimed the check was a gift causa mortis. CP 15. However, Vaux-Michel had never mentioned any such gift to Simmons between the time of Stover's disappearance and Simmons' canvassing of Stover's home in early December, a period of many weeks. 2RP 67; CP 80-81.

Approximately two years after Stover's death, on September 16, 2011, Vaux-Michel filed a creditor's claim in this matter and mailed a copy to the Estate's counsel, claiming the Estate owed her $150,000. CP 7, 14, 41.

The Estate sent Vaux-Michel's attorney a formal rejection of the claim by certified mail on December 19, 2011. CP 18. It was filed with the trial court on December 20, 2011. CP 18. On January 23, 2012, Vaux-Michel filed the present petition seeking an order that her creditor's claim be paid. CP 19. In support of her petition, Vaux-Michel filed declarations from herself, Kradel, and Hearon, each of which related statements allegedly made by Stover. CP 27, 31, 35. The Estate responded, in part, that the petition was time-barred. CP 83. The Estate also filed a motion to strike the noted declarations for a variety of reasons, including that statements therein were not based on personal knowledge, or that such statements were hearsay (ER 801-02), or they violated Washington's Dead Man Statute, RCW 5.60.030, or were barred by the attorney-client privilege. CP 92-95.

The case was initially heard before the Honorable John M. Meyer on February 17, 2012. CP 76. The trial court rejected the Estate's argument that the creditor claim was untimely and set the claim over for trial by an order entered on February 17, 2012. CP 76. The trial court did not rule on the Estate's motion to strike which was also set for the February 17, 2012 hearing. CP 58-61, 76; RP (2-17-12) at 3-15. The Estate sought discretionary review, which this Court denied. CP 106-10.

The case was tried to the bench over 2 days. 1RP at 3-140; 2RP at 3-100. At the beginning of trial, the trial court heard the Estate's outstanding motion objecting to the declarations and testimony of Kredel, Hearon, and Vaux-Michel. 1RP at 3-13. The trial court ruled that in the interest of time, it would hear all testimony and rule at the conclusion of the case determining what was admissible and what was not admissible. 1RP at 28. The trial court ruled that the Estate had a "continuing objection." 1RP at 28. The Estate noted that its list of objections included references to Stover's statements as hearsay. 1RP at 31. The trial court acknowledged that the Estate's "continuing objection touches all issues that were raised in [the Estate's] argument." 1RP at 31-32. Throughout the trial, the Estate periodically reiterated its hearsay objection to witnesses' testimony about statements that Stover made to them, which the trial court acknowledged. *See* 1RP at 74, 95, 106, 125, 131, 138; 2RP at 6. *See also,* 2RP at 16. The trial court's findings and conclusions, which contain its rulings on admissibility, do not mention hearsay. *See* CP 111-20. In closing argument, Vaux-Michel moved for an award of $300,000 arguing that witness Detective Dan Luvera described finding a $150,000 check for Vaux-Michel in addition to the check found by Simmons. 1RP at 86, 91; 2RP at 77-78.

The trial court ruled in favor of Vaux-Michel, ordering the Estate to pay her claim of $150,000, entering findings and conclusions on September 24, 2012 and an amended order on TEDRA on October 1, 2012. CP 111-21, 127-28. The trial court subsequently entered findings and conclusions and a judgment and an order on attorney fees on October 18, 2012. CP 186-91.[4] The Estate filed a timely notice of appeal from the judgment. CP 196. Vaux-Michel cross-appealed the award based on one check and the amount of her attorney fees. CP 202-07.

C. SUMMARY OF ARGUMENT

Because Vaux-Michel's creditor claim was untimely, the trial court was without jurisdiction to consider her claim. Even if Vaux-Michel's creditor claim was timely brought, she failed to establish a gift causa mortis because the essential element of delivery was lacking, particularly where the trial court's decision is based on hearsay evidence.

Because Vaux-Michel's creditor claim fails, she was not entitled to fees and costs, and the Estate is equitably entitled to fees and costs at trial and on appeal under RCW 11.96A.150(1) and RAP 18.1.

For the same reasons Vaux-Michel's cross-appeal fails. Her suit is time barred. If there was as second check to Vaux-Michel, her gift causa

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[4] Vaux-Michel requested $60,000 in fees but the trial court awarded her $40,000. CP 191.

mortis claim fails for lack of delivery. The trial court did not err in reducing her request for fees, but no fees are warranted in any event because her claim is untimely and fails.

D. ARGUMENT

(1) Vaux-Michel's Lawsuit Is Time Barred Under RCW 11.40.100[5]

Vaux-Michel contends that the trial court did not err in ruling that she had timely filed her petition. Br. of Resp't at 14. She is incorrect. The timeliness of her petition turns on the plain language of RCW 11.40.100, which states in pertinent part:

> (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*

[5] Vaux-Michel contends that the Estate improperly conflates her creditor claim with her petition to have the claim allowed. Br. of Resp't at 15. That is not so. The threshold issue concerning the time bar contained in RCW 11.40.100 and its application to this case is clearly stated in the Estate's Issues Pertaining to Assignments of Error in section B.(2)1. *See* Br. of Appellant at 4. Moreover, the Estate's discussion of RCW 11.40.100 in the Argument section of its brief clearly addresses Vaux-Michel's failure to file her lawsuit within the time period required by RCW 11.40.100 following rejection of her claim by the Estate. *See* Br. of Appellant at 9-17. There is no doubt that the event the Estate is challenging is Vaux-Michel's failure to file her lawsuit within the time limit imposed by RCW 11.40.100. *See id.*

> *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.

(emphasis added).

It is undisputed that Vaux-Michel submitted to the personal representative of the estate of Mark Stover a claim for $150,000 against the Estate on September 16, 2011, and that such claim was rejected by the Estate on December 19, 2011 when the rejection was mailed to Vaux-Michel's attorney by certified mail at the address listed on the claim. CP 14-18. On the face of the rejection, the declaration of service states that the rejection was mailed on December 19, 2011. CP 18. The rejection on its face notified Vaux-Michel that she "must bring suit in the proper court within 30 days after the notification of rejection or the claim will be forever barred." CP 18. The rejection and affidavit of service was contemporaneously filed with the superior court. CP at 18. To be timely, any suit by Vaux-Michel regarding her claim for $150,000 had to be filed with the court under RCW 11.40.100 *no later than January 18, 2012*. It is undisputed that Vaux-Michel commenced the present action for her creditor claim in the trial court on January 23, 2012, 35 days after the

postmarking of the Estate's rejection of her claim on December 19, 2011. CP 18, 19.

The above quoted provision expressly identifies "the date of notification" for purposes of commencing calculation of the 30-day window in which a claimant must file suit against the personal representative or her claim will be "forever barred." RCW 11.40.100. The third and fourth sentences of the above quoted text spell out requirements for alternative service upon the claimant regarding the rejection of her claim, providing for personal service or certified mail, and the date of notification for each type of service, i.e. the date of the personal service, or the date of the postmark if service is by certified mail. *See* RCW 11.40.100.

Despite this clear language, Vaux-Michel argues that the Estate's contention that the postmark (i.e. date of certified mailing) triggers calculation of RCW 11.40.100's 30-day filing window is in error. She contends that "controlling authority is precisely to the contrary." Br. of Resp't at 27. She relies on *Van Duyn v. Van Duyn*, 129 Wash. 428, 225 P. 444 (1924), and *Johnston v. Von Houck*, 150 Wn. App. 894, 209 P.3d 548 (2009), but neither case assists her. RCW 11.40.100 was substantially rewritten into its present form in 1997. *See* Laws of 1997, ch. 252, § 16. *Van Duyn* predates that event by more than 70 years, and in the statutes

discussed therein, there is no provision similar to RCW 11.40.100's fourth sentence as above quoted. In any event, Vaux-Michel cites *Van Duyn* for the proposition that in calculating the 30-day window for filing her lawsuit the first day of such period begins on the day after notification of rejection. Br. of Resp't at 27. *See also*, *Van Duyn*, 129 Wash. at 433. But that is precisely how the Estate is calculating RCW 11.40.100's 30-day window. The 30th day *after* the date of notification, December 19, 2011, is January 18, 2012, which is five days before Vaux-Michel filed her lawsuit.

Vaux-Michel's reliance on *Johnston* is also misplaced. That case supports the Estate's position here, stating: "RCW 11.40.100(1) . . . sets forth a sequence of events and a time period within which a claimant *must* sue." *Johnston*, 150 Wn. App. at 901 (emphasis added). Therein, Division II explained: "RCW 11.40.100(1) clearly contemplates a sequence in which a claimant will notify an estate of a claim, the estate will notify the claimant of the claim's rejection, and the claimant will then sue within 30 days or be forever barred from such action." *Id.* at 903. That is precisely what happened here. Vaux-Michel submitted a claim, the Estate rejected it, and 35 days after the rejection, she filed suit. Her claim is barred under RCW 11.40.100.

(2) RCW 11.40.080 Does Not Negate Vaux-Michel's Obligation To File Her Lawsuit Within RCW 11.40.100's Mandatory Filing Deadline

Vaux-Michel contends, with no relevant supporting authority, that Simmons's failure to reject her claim within the time frames noted in RCW 11.40.080(2), dispensed with any obligation by Vaux-Michel to comply with the time requirements of RCW 11.40.100 and instead, permitted her to file her lawsuit within what she deemed as a reasonable time. *See* Br. of Resp't at 17-21. That approach ignores the express claim foreclosure provisions of RCW 11.40.100 as discussed above.

Moreover, nothing in the language of RCW 11.40.080 supports Vaux-Michel's contention. That statute states:

> (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.

RCW 11.40.080.

As can be seen, RCW 11.40.080 addresses the circumstance of a personal representative who will not make a decision about a submitted claim. RCW 11.40.080 describes a permissive, tiered approach clearly intended to goad the personal representative into making a decision about a submitted claim. Where a personal representative does not respond to such promptings and fails to make any decision regarding a submitted claim, RCW 11.40.080 permits the claimant to then petition a court to make a determination on whether the claim should be allowed. *See* RCW 11.40.080. That is not the circumstance here. In this case, Simmons *rejected* Vaux-Michel's claim. CP 18. That rejection triggered application of RCW 11.40.100. "*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." RCW 11.40.100 (emphasis added). Nothing in RCW 11.40.080 negates the claimant's obligation to file her lawsuit within 30 days as required by RCW 11.40.100 when the event triggering RCW 11.40.100's filing window (i.e. Simmons's rejection of Vaux-Michel's claim) is present.

(3) CR 6(e) Does Not Apply

Vaux-Michel argues that CR 6(e) adds three days to her filing deadline resulting in her suit being timely filed. Br. of Resp't at 29. Her argument fails.

It is undisputed that Vaux-Michel commenced the present action for her creditor claim in the trial court on January 23, 2012, 35 days after the postmarking of the rejection. CP 19. Vaux-Michel argues in her response, as she did below, that her action was timely under RCW 11.40.100 because CR 6(e)[6] allowed her 3 additional days upon which to act, because the rejection had been mailed to her. *See* Br. of Resp't at 29; *see also*, RP (2-17-12) at 9-12. Vaux-Michel's argument, relying on the general applicability of the civil rules, ignores the express provisions of Title 11 that except from those rules any Title 11 "special proceeding" for which the Legislature has expressly provided procedures within Title 11. RCW 11.96A.090(1) provides: "A judicial proceeding under this title is a special proceeding under the civil rules of court.[7] *The provisions of this*

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[6] CR 6(e) states:

> **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.

[7] CR 81(a) provides that the superior court civil court rules "shall govern all civil proceedings," "[*e*]*xcept* where inconsistent with rules or statutes applicable to special proceedings." (emphasis added). Subsection (b) of CR 81 reiterates the exception, noting "*Subject to* the provisions of section (a) of this rule, these rules

title governing such actions control over any inconsistent provision of the civil rules." (emphasis added). RCW 11.96A.090(4) provides in relevant part: "The procedural rules of court apply to judicial proceedings under this title *only to the extent that they are consistent with this title.*" (emphasis added). *See also*, RCW 11.96A.100(2) ("A summons *must* be served in accordance with *this* chapter and, *where not inconsistent with these rules, the procedural rules of court....*" (emphasis added)).

Accordingly, the express procedural provisions of Title 11 will prevail over any inconsistent civil rules in this context, as demonstrated in *In re Estate of Toth*, 138 Wn.2d 650, 981 P.2d 439 (1999) and its progeny. In *Toth,* our Supreme Court ruled that CR 6(e) does not apply to probate proceedings generally. A will contest, like any other Title 11 proceeding, is subject to RCW 11.96A.090(1). In *Toth*, the Supreme Court addressed the timeliness of the commencement of a will contest, ultimately finding that the action was not timely filed under the will contest statute, RCW 11.24.010. The Court rejected the application of CR 6(e) to extend the period for a will contest, specifically noting that a will contest, like a creditor's claim, is a statutory proceeding, and the statutory provisions control. *Id.* at 653. The Court rejected applying CR 6(e) to the time

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supersede all procedural statutes and other rules that may be in conflict." (emphasis added). *See* CR 81(a) and (b).

periods for commencement of a will contest because nothing in the statute contemplated such an extension. *Id.* at 654. The Court determined that by its terms, CR 6(e) did not apply to will contests because the obligation of the party to act was triggered by the admission of the will to probate, not by the service of a notice on such party. But the Court also subscribed more broadly to the observation of the Court of Appeals in *Toth* that "[t]here is no controlling authority to support the ... position that CR 6(e) applies to probate proceedings." *Id.* at 656-57.

Applying *Toth*, Division III subsequently held that "[a] will contest is a purely statutory proceeding, and the court must be governed by the provisions of the applicable statute. The jurisdiction of the trial court is derived exclusively from the statute, and may be exercised only in the mode and under the limitations therein prescribed." *In re Estate of Kordon*, 126 Wn. App. 482, 485, 108 P.3d 1238 (2005), *affirmed*, 157 Wn.2d 206 (2006) (quotation marks and citations omitted). This Court effectuates the legislative intent by looking no further than the statutory language when that language is clear. *Id.* In affirming Division III, the Supreme Court opined: "A court has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute; neither does a court of equity have power to entertain such jurisdiction." *Estate of Kordon*, 157 Wn.2d at 214 (internal quotation marks and citations

omitted). The same is true for the statutory deadlines set forth in RCW 11.40.100 as discussed above.

No statutory language, and no case law, supports the argument advanced by Vaux-Michel that CR 6 should be imported into the calculation of time deadlines under RCW 11.40.100.[8] The principal authority cited by Vaux-Michel in support of her position is an unlawful detainer case. *Canterwood Place v. Thande,* 106 Wn. App. 844, 5 P.3d 495 (2001).[9] RP (2-17-12) at 11-12. In that case the Court chose to apply CR 6 to the statutory time deadlines under RCW 59.12 because the statute did not contain a complete rule regarding time deadlines. *See Canterwood,* 106 Wn. App. at 848-49. By contrast, RCW 11.40.100 is complete. It defines when rejection of the claim by the personal representative is effective. It advises that claimants like Vaux-Michel must file their litigation to uphold a creditor claim within 30 days of the personal representative's rejection of that claim. It deliberately does not

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[8] Vaux-Michel in fact *conceded* on discretionary review that "there is no controlling authority that Rule 6 applies to probate proceedings..." Answer to Motion for Discretionary Review at 12. She repeats that concession in her response. *See* Br. of Resp't at 21. She is correct. She can cite *nothing* that supports the argument that CR 6 relieves her of the obligation to strictly comply with the time deadlines set forth in RCW 11.40.100.

[9] The Legislature promptly amended the summons period for unlawful detainer actions after *Canterwood Place,* Laws of 2005, ch. 130, § 1, effectively *overruling* it. *See Christensen v. Ellsworth,* 162 Wn.2d 365, 375 n.3, 173 P.3d 228 (2007).

provide for a mailing rule like CR 6.[10] Under the plain language of RCW 11.40.100, Vaux-Michel's lawsuit regarding her claim against the Estate was time barred.[11]

(4) Lacking The Essential Element Of Delivery, There Is No Gift Causa Mortis In This Case

Vaux-Michel contends that the trial court did not err in finding that the check found at Stover's desk made out to Vaux-Michel was a gift causa mortis. She relies on *McCarton v. Estate of Watson*, 39 Wn. App. 358, 693 P.2d 192 (1984), and cases cited therein arguing that here Stover's intent can substitute for the lack of delivery of the check. Br. of Resp't at 31-38. This argument fails under the facts of this case.

As explained in the Estate's opening brief, the trial court here concluded that Stover made a gift causa mortis to Vaux-Michel, but its finding number 36 regarding "delivery," which is an essential element of a

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[10] Vaux-Michel also cites to *Capello v. State*, 114 Wn. App. 739, 60 P.3d 620 (2002), *review denied,* 149 Wn.2d 1032 (2003), in which this court, agreeing with the policy considerations in *Canterwood Place,* held that the computation of time provisions of CR 6(a) would be applied in calculating the time for a hearing under RCW 71.09.040 (providing for a probable cause hearing within 72 hours for a person taken into custody as a sexually violent predator). That determination, as did the determination in *Canterwood Place,* turned on the fact that the statute in question was "incomplete because it is silent on the issue of the computation of time." *Capello*, 114 Wn. App. at 749. As discussed above, RCW 11.40.100 does not have that failing.

[11] This threshold issue of the untimeliness of Vaux-Michel's lawsuit concerning her claim against the Estate is dispositive of this appeal and the Court need not reach the gift causa mortis issue.

gift causa mortis, was not supported by substantial evidence. *See* Br. of Appellant at 17.[12] CP 116.

A gift causa mortis requires three elements: (1) the gift is made in view of approaching death from some existing sickness or peril; (2) the donor dies from such sickness or peril without having revoked the gift; (3) there was a delivery, either actual, constructive, or symbolical, of the subject of the gift to the donee or to someone for him, with the intention of passing title thereto, subject, however, to revocation in the event of recovery from sickness. *In re McDonald's Estate*, 60 Wn.2d 452, 454, 374 P.2d 365 (1962); *McCarton*, 39 Wn. App. at 363. The burden of proof to establish the essential elements of a gift causa mortis must be *clear and convincing*. *In re White's Estate*, 129 Wash. 544, 547, 225 Pac. 415 (1924).

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[12] This Court's review is limited to ascertaining whether the findings of fact are supported by substantial evidence, and if so, whether the findings support the conclusions of law and the judgment. *In re Dependency of P.A.D.*, 58 Wn. App. 18, 25, 792 P.2d 159, *review denied*, 115 Wn.2d 1019 (1990). *See also, In re Disciplinary Proceeding Against Marshall*, 167 Wn.2d 51, 66-67, 217 P.3d 291 (2009), *cert. denied*, ___ U.S. ___, 130 S. Ct. 3480, 177 L. Ed. 2d 1059 (2010) ("*Marshall II*"); *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 329-30, 157 P.3d 859 (2007) ("*Marshall I*"). Findings of fact will not be disturbed if supported by substantial evidence. *Dependency of P.A.D.*, 58 Wn. App. at 25. However, the determination must be made in light of the degree of proof required. *Id.* Where, as here, the proof required is clear and convincing, then the question on appeal is whether there is substantial evidence to support the findings in light of the highly probable test. *Id.* Accordingly, the substantiality of the evidence must be higher to sustain the requisite higher burden of proof for a gift causa mortis. *See Marshall II* at 67; *Marshall I* at 330 (substantial evidence review must take into account the heightened burden of proof).

The *McCarton* court discussed at length what constitutes sufficient evidence of delivery to show a gift causa mortis. Therein, this Court generally explained:

> A gift will not be presumed, but he who asserts title by this means must prove by evidence which is clear, convincing, strong and satisfactory a clear and unmistakable intention on the part of the donor to make a gift of his property, *and the delivery of the property must be as perfect as the nature of the property and the circumstances and surroundings of the parties* will reasonably permit.

McCarton, 39 Wn. App. at 364 (quoting *In re Gallinger's Estate*, 31 Wn.2d 823, 829, 199 P.2d 575 (1948) (emphasis added)). Regarding delivery, this Court further explained

> It is not necessary that there be a manual delivery or an actual transition from hand to hand. The *delivery may be constructive or symbolical, but the general rule is that it must be as perfect and complete as the nature of the property and the attendant circumstances and conditions will permit.*

Id. (quoting *Phinney v. State*, 36 Wash. 236, 246, 78 P. 927 (1904) (emphasis added)). Accordingly, "[c]ourts must scrutinize such transactions carefully and judge each case on its own facts." *Id.* at 368.

The *McCarton* court applied the rule that "where the intent to bestow is obvious and clear and there is no evidence of fraud or undue influence, *and the circumstances show that the donor has done all that, in his opinion, is necessary to do to accomplish his purpose*, the intent of the

donor will answer for the act of delivery." *McCarton*, 39 Wn. App. at 365 (quoting *MacKenzie v. Steeves*, 98 Wash. 17, 23, 167 P. 50 (1917) (emphasis added)). Restated, the rule is that "constructive delivery" to support a gift causa mortis may be found "when the evidence of donative intent is concrete and undisputed, when there is every indication that the donor intended to make a present transfer of the subject matter of the gift, *and when the steps taken by the donor to effect such a transfer must have been deemed by the donor as sufficient to pass the donor's interest to the donee*." *Id.* at 367 (emphasis added) (quoting *Scherer v. Hyland*, 75 N.J. 127, 380 A.2d 698, 701 (1977)).

Here, the trial court purportedly applied this rule in finding of fact number 36, stating "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 accomplish delivery of the check." CP 116-17. But the facts of this case are equivocal at best and they are certainly not of the same compelling character as the circumstances presented in *McCarton*. As discussed below, the facts here simply do not meet the heightened clear and convincing burden of proof threshold.

In *McCarton*, the court concluded that "the constructive delivery here was as perfect and complete as the attendant circumstances and conditions permitted. [The donor] felt she had done all that was necessary

to accomplish her stated purpose." *McCarton*, 39 Wn. App. at 369. That determination turned on facts that are not present in this case. In *McCarton*, the donor had instructions transcribed and witnessed directing that her stock certificates and bank accounts (the purported gifts causa mortis) were to go in part to the donee and to others upon her death; she discussed these instructions with the donee, and granted the donee power of attorney over her affairs. *Id.* at 367-68. Such actions showed concrete and unequivocal evidence of the donor's *present* intent to transfer the subject matter of the gifts. *Id.* Moreover, by virtue of the power of attorney, the donee was in constructive possession of the gift items. *Id.* at 368. Also, the donor "inquired of [the donee] as to his knowledge of where the items were. Upon [the donee's] affirmative indication that he knew where the items were, the manifestation of intent and constructive delivery was complete." *Id.* at 369.

Here, there are no similar written instructions regarding the check, no discussions between Stover and Vaux-Michel regarding the check,[13] and no power of attorney or similar authority granted to Vaux-Michel by Stover. There is also no similar constructive possession of the check by Vaux-Michel, as she had no key to Stover's house and thus she had no

[13] Vaux-Michel admits in her response that "there is no direct evidence" that Stover discussed any such check or its alleged purpose with Vaux-Michel. Br. of Resp't at 38.

control over, or even access to, his home office where the check was found.[14] There is simply no delivery of the check, actual, constructive, symbolic or otherwise. Stover's act of leaving a check payable to Vaux-Michel at his desk evidenced neither a present intent to relinquish control of the purported gift nor could such action qualify as "delivery" of such item to Vaux-Michel. Notably, Stover easily could have effectuated delivery of the check to Vaux-Michel by placing it in a sealed envelope and hand delivering it to her, or mailing it to her, or placing it in another's hands for her, but he did none of those things. Accordingly, it cannot be said that Stover did all that was necessary to do to accomplish delivery of the gift item or that under the circumstances there was delivery "as perfect and complete as the attendant circumstances and conditions permitted." *McCarton*, 39 Wn. App. at 369. The evidence here does not meet even a standard substantial evidence test, thus, it cannot meet the *enhanced* substantial evidence test reflecting the more demanding clear, cogent, and convincing burden of proof placed on Vaux-Michel at trial. *See Marshall II* at 67; *Marshall I* at 330. The record simply does not support the trial court's determination in finding number 36 that Stover accomplished "delivery" of the check.

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[14] Vaux-Michel testified that she had no key to Stover's house and that while he was alive she was on his property only when he was present. 2RP at 52-53.

(5) Stover's Hearsay Statements To Vaux-Michel's Witnesses Were Improperly Admitted

Vaux-Michel argues that Stover's statements to witnesses about his relationship with Vaux-Michel, about which Vaux-Michel's witnesses testified at trial, falls within the "admission by party opponent" exception to the hearsay rule and, thus, all such statements were properly admitted. That is not so.

In its opening brief, the Estate argued that Vaux-Michel's claim utterly fails when hearsay evidence is properly excluded, noting that the trial court found delivery because of the putative relationship between Stover and Vaux-Michel, but such relationship was not proved at trial, except by hearsay evidence. Br. of Appellant at 23-24. As explained therein, the Estate had a continuing hearsay objection to testimony that relied on Stover's statements, the trial court reserved ruling on that objection, but never issued a ruling. *Id.*

The hearsay rule bars admission of out-of-court statements offered to prove the truth of the matter asserted unless a recognized exception to the rule applies. *See* ER 801, 802. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 619, 762 P.2d 1156 (1988) (a witness's testimony is inadmissible hearsay where he has no personal knowledge on which to base the statements and

he was relying on statements made to him out of court). That is precisely the circumstance here. Each of Vaux-Michel's witnesses who testified about her relationship with Stover related what Stover had *told* them.[15] Because such statements were offered as proof of Stover's relationship with Vaux-Michel they were hearsay and improperly admitted over the Estate's continuing hearsay objection.

In her response, Vaux-Michel relies on *In re Estate of Miller*, 134 Wn. App. 885, 143 P.3d 315 (2006), *review denied,* 161 Wn.2d 1003 (2007) to support her proposition that Stover's statements qualify as "admissions by party opponent" and thus are not hearsay. *See* ER 801(d)(2). In *Miller*, the mother of the deceased testator brought a claim against the testator's estate for loans she had made to her son during his life. The testator's stepchildren opposed the mother's claim. The mother offered the declaration of the testator's natural daughter that said the testator had told the daughter he intended to repay the loans from his mother. Division III held that the daughter's declaration was not barred as hearsay. The relevant passage from *Miller* is quoted in full as follows:

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[15] *See, e.g.*, 2RP at 4-5 (Margaret Jean Nordstrom testified that Stover told her that Vaux-Michelle had saved his life and they were going to be married). 1RP at 32 (Jeffrey Kradel testified that Stover told him he wanted to marry Vaux-Michel). 2RP at 10 (Leigh Hearon testified that in conversations with Stover he referred to Vaux-Michel as his significant other). 1RP at 115 (Elizabeth Dorris testified that Stover told her he was going to marry Vaux-Michel). 1RP at 109 (Andrea Franulovich testified that Stover told her Vaux-Michel was the love of his life and he wanted to marry her).

> [11] ¶ 28 Hearsay is defined in ER 801(c). ER 801(d)(2) excludes the admission by party-opponents from the hearsay definition. "The death of a party-opponent does not affect the admissibility of that party's admissions under Rule 801, but under some circumstances the admissions may be barred by the dead man statute." 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 801.34, at 336 (4th ed.1999) (footnotes omitted).
>
> ¶ 29 The deceased is a party to this lawsuit and his admissions are not inadmissible hearsay pursuant to ER 801(d)(2). Ms. Freeman's declaration is not inadmissible hearsay.

Miller, 134 Wn. App. at 895.

Notably, no case cites to or relies upon this section of *Miller*. And, more to the point, the language purportedly from the 4th edition of the Washington Practice upon which *Miller* relies does not appear in the current 5th edition (2007) of the Washington Practice. Indeed, in discussing ER 801(d)(2) the current Washington Practice states, "an admission by a predecessor in interest (the decedent) is not admissible against a successor in interest (the estate)." 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 801.34 at 388 (5th ed. 2007). Professor Tegland further explains,

> Occasionally, situations may arise in which a party seeks to offer a statement by a person who is in some sort of privity with the opposing party, but who does not qualify as an speaking agent, partner, or co-party. Predecessors and successors in interest are common examples, as are joint tenants and assignees.

> In cases involving a death and subsequent litigation in which the decedent's estate is a party, or in which family members are parties, issues often arise about whether the opposing party may introduce statements by the decedent on a privity theory.
>
> Prior to the adoption of the Federal Rules of Evidence and their state counterparts, [a] statement by a person in privity with a party was considered an admission by party-opponent, and such statements were often admissible on that theory. The drafters of the current rules, however, deliberately chose to change the law in this regard, and *statements by persons in privity with a party are no longer admissible as admissions by party-opponent*.

Id. § 801.51 at 423 (footnotes omitted) (emphasis added).

The evidence rules, as above described in the current Washington Practice, were in force when this case was tried in September 2012. Accordingly, Stover's statements do not qualify as admissions by a party opponent in Vaux-Michel's present case against the Estate as Vaux-Michel contends in her response. Vaux-Michel has not identified a valid exception to the hearsay rule. As explained in the Estates opening brief, all of Vaux-Michel's witnesses' statements based upon what Stover *told* them are barred by the hearsay rule and were improperly admitted over the Estate's continuing objection. This is an additional basis for reversing the trial court.

(6) The Trial Court's Award Of Attorney Fees To Vaux-Michel Was Improper

In a single paragraph, Vaux-Michel contends that the trial court correctly awarded her attorney fees because her case is similar to *Johnston v. Von Houck*, 150 Wn. App. 894, 209 P.3d 548 (2009), and fees were awarded to the claimant therein. *See* Br. of Resp't at 41. Vaux-Michel is wrong.

First, Vaux-Michel's case is not like *Johnston,* wherein the personal representative/estate essentially conceded that the claim against the estate was valid except for a procedural flaw. *See id.* at 904. There is no such concession here. Moreover, Vaux-Michel's response completely fails to address the Estate's arguments in its opening brief that an award of fees to Vaux-Michel was improper because (1) there was no gift causa mortis, (2) Vaux-Michel's action did not benefit the Estate or the beneficiaries, and (3) Vaux-Michel advanced a novel (and specious) statutory interpretation argument. *See* Br. of Appellant at 24-27. Vaux-Michel provides no answer to the Estates specific arguments that she is not entitled to attorney fees. She thus concedes those points. *See State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (respondent's failure to respond to appellant's arguments concedes the point).[16]

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[16] Similarly, Vaux-Michel completely fails to respond to the arguments presented in section E.(4) of the Estate's opening brief stating why the Estate is entitled to its fees at trial and on appeal. *See* Br. of Appellant at 27-28. Because Vaux-Michel fails to respond, she concedes the points. *See Ward*, 125 Wn. App. at 144.

(7) Vaux-Michel Has Established No Basis For A $300,000 Award

In single paragraph in her cross-appeal, Vaux-Michel contends that she is entitled to an award of $300,000. Br. of Resp't at 41-42. Her contention fails.

Vaux-Michel relies on the fact that Detective Luvera testified that the check he found on Stover's desk was not the check in evidence at trial.[17] But as discussed in section D.(4), Vaux-Michel's burden of proof to establish the essential elements of a gift causa mortis is clear and convincing. That heightened burden is not met here, especially regarding two checks. Indeed, Vaux-Michel's brief admits that her witnesses testified about Stover's provision of "a check." *See* Br. of Resp't at 36. Further, Vaux-Michel's request for an award of $300,000 appears to have been an afterthought by her trial attorney raised for the first time at the end of his closing argument. *See* 2RP at 77-78. The trial court reminded counsel that his burden of proof was clear and convincing, *id.* at 78, suggesting that, in the fact finder's view, such enhanced burden had not been met regarding Vaux-Michel's late request for a $300,000 award.

[17] Luvera testified that he found a check made out to Vaux-Michel for $150,000 on Stover's desk and that he mailed that check to Simmons. Simmons testified that she never received a check from Luvera or any such communication from Luvera about a check. Simmons also testified that she found a check in Stover's desk still attached to a check register and made out to Vaux-Michel for $150,000. Such a check would certainly

More to the point, however, regardless of whether the evidence suggests that one check or two checks for $150,000 each were discovered at Stover's desk, the same fatal failing to Vaux-Michel's gift causa mortis claim is present. As discussed in section D.(4), there is no gift causa mortis in this case regarding *any* check because the essential element of delivery has not been proven by clear and convincing evidence. For the same reasons discussed in section D.(4) above, as no delivery of any check occurred Vaux-Michel's request in her cross-appeal for an award of $300,000 fails.

(8) The Trial Court Did Not Improperly Reduce Vaux-Michel's Attorney Fee Award

Vaux-Michel contends that the trial court abused its discretion in awarding her attorney fees in an amount 1/3 less than the fees she requested. Br. of Resp't at 42-48. In particular, she contends the trial court miscalculated the lodestar fee and denied her a multiplier. *Id.* She is incorrect.[18]

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indicate even less of an intent on Stover's part to deliver it. Only the check found by Simmons was produced at trial.

[18] For the reasons addressed in the Estate's opening brief, and incorporated by reference here, Vaux-Michel is not entitled to *any* attorney fees because her present suit is barred as untimely, she failed to prove a gift causa mortis by clear and convincing evidence, and no fee award is appropriate in any event because her suit does not benefit the Estate or beneficiaries. *See* Br. of Appellant at 24-27.

"'[I]t is the trial judge who watches a case unfold and who is in the best position to determine the proper lodestar amount.'" *Fiore v. PPG Industries, Inc.*, 169 Wn. App. 325, 351, 279 P.3d 972, *review denied*, 175 Wn.2d 1027 (2012) (quoting *Morgan v. Kingen*, 141 Wn. App. 143, 163, 169 P.3d 487 (2007)). "Accordingly, '[f]ee decisions are entrusted to the discretion of the trial court.'" *Id.* (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632, 966 P.2d 305 (1998)). Thus an appellate court "will reverse an attorney fee award only where the trial court exercised its discretion on untenable grounds or for untenable reasons." *Id.* (citing *Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007)). "The trial court determines the proper amount of an attorney fee award using the lodestar method, 'calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result.'" *Id.* (quoting *Mahler*, 135 Wn.2d at 434). The trial court "must determine 'that counsel expended a reasonable number of hours in securing a successful recovery for the client' and that counsel's hourly rate was reasonable." *Id.* (quoting *Mahler*, 135 Wn.2d at 434). The trial court must enter findings of fact and conclusions of law in support of its fee award order to provide an adequate record for review. *Id.*

The trial court here properly concluded that Vaux-Michel's counsel's fee request, a thinly-disguised effort to obtain his contingent fee, was excessive, particularly as to the time spent on the case. *See* CP 188 (determining lodestar reduction of 1/3 appropriate where counsel's records were inadequate and time claimed was excessive).

Vaux-Michel also contends that the trial court erred by not adjusting the lodestar by adding a multiplier to account for the high risk of nonpayment. Br. of Resp't at 46-48. But no such adjustment was warranted here.

In *Fiore*, this Court held that the trial court erred in applying a .25 multiplier to fees awarded to a successful plaintiff in a minimum wage "test case." *Fiore*, 169 Wn. App. at 355-56. The *Fiore* court explained, "Although it is 'presume[d] that the lodestar represents a reasonable fee, occasionally a risk multiplier will be warranted because the lodestar figure does not adequately account for the high risk nature of a case.'" *Id.* at 355 (quoting *Pham*, 159 Wn.2d at 542). "Such an adjustment to the lodestar 'is based on the notion that attorneys generally will not take high risk contingency cases, for which they risk no recovery at all for their services, unless they can receive a premium for taking that risk.'" *Id.* (quoting *Pham*, 159 Wn.2d at 541). "However, 'to the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the

contingent nature of the availability of fees, no further adjustment duplicating that allowance should be made.'" *Id.* at 356 (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 598, 675 P.2d 193 (1983)). Accordingly, a trial court "abuses its discretion in granting a multiplier 'when it takes irrelevant factors into account.'" *Id.* (quoting *Pham*, 159 Wn.2d at 543).

Like this case, the *Fiore* court held that the litigation was not high risk because it did not involve novel problems of proof or require the pursuit of risky trial strategy, it was "a straightforward wage and hour case . . . made complicated only by the amount of time and skill that it required—a consideration already accounted for in the lodestar amount." *Fiore*, 164 Wn. App. at 357. Here, the trial court noted in its findings and conclusions that while gift causa mortis cases are rare, the law is relatively clear and this case was simple to try. CP 187. The trial court also noted that any novelty or difficulty regarding the questions in this case were reflected in the additional time and labor taken by counsel in preparing the case. In other words, all such considerations were covered by the lodestar calculation.[19] The trial court also specifically addressed the contingent fee agreement between Vaux-Michel and her counsel noting that it

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[19] "'The difficulty of establishing the merits of the case is ... already reflected in the lodestar amount because the more difficult a case is, the more hours an attorney will

"appropriately accounts for the risk that there would be no fee recovery." CP 189. The trial court's fee award is sustainable under *Fiore*. Vaux-Michel shows no error or abuse of discretion in the trial court's calculation of her fee award.

(9) Attorney Fees On Appeal

Finally, Vaux-Michel contends that if she prevails on her cross-appeal she should be awarded fees on appeal. Br. of Resp't at 48. For the reasons discussed herein, Vaux-Michel's cross-appeals fails. The Estate argued in its opening brief that it is entitled to fees and cost in the trial court and on appeal. *See* Br. of Appellant at 27-28 (section E.(4)). That discussion is incorporated by reference and relied upon herein.

E. CONCLUSION

The trial court committed error in engrafting the time periods of CR 6(e) onto the statutory time deadlines for a creditor's claim against the Estate under RCW 11.40.100. This Court should reverse the trial court's order on timeliness and remand the case to the trial court with directions to dismiss Vaux-Michel's petition.

Alternatively, if the Court concludes the creditor claim was timely, the trial court erred in concluding that Stover made a gift causa mortis to

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have to prepare and the more skilled an attorney will have to be to succeed.'" *Fiore*, 164 Wn. App. at 357 (quoting *Pham*, 159 Wn.2d at 541).

Vaux-Michel. Vaux-Michel did not establish that *any* check was delivered to her by clear and convincing evidence.

Although Vaux-Michel's contention, that the trial court erred in reducing her requested fee award, fails, more fundamentally, this Court should vacate any fee award to her because her suit is time barred and fails in any event as described above. Costs, on appeal, including reasonable attorney fees should be awarded to the Estate.

DATED this 14th day of June, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of:

Reply Brief of Appellant/Response to Cross-Appeal in Court of Appeals Cause No. 69546-1-I to the following:

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Original filed with:

Court of Appeals, Division I
Clerk's Office

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: June 19, 2013, at Tukwila, Washington.

Christine Jones
Talmadge/Fitzpatrick