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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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IN RE THE ESTATE OF CATHERINE HENINGTON

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APPELLANT'S REPLY BRIEF

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2/1/13

## TABLE OF CONTENTS

	Page
I. Motion for Sanctions .....	1
II. Reply to Respondent's Statement of the Case ...	3
III. RCW 11.96A.020(2) Authorizes The Probate Court to Exercise Jurisdiction; It Does Not Permit The Court To Act Contrary To Governing Statutes .....	4
IV. The Superior Court's Order Requires Distribution of the Estate in Violation RCW 11.76.110 .....	5
V. The Superior Court Erred In Barring Mr. Bradley's Claims .....	9
VI. Respondent's request for attorney fees should be denied.....	10

## TABLE OF AUTHORITIES

		Page
<i>Statutes</i>	26 U.S.C. § 6901 .....	5
	31 U.S.C. §3713(b) .....	5, 6
	RCW 4.16.200 .....	10
	RCW 4.84.185 .....	12
	RCW 11.40.051 .....	10
	RCW 11.40.070 .....	9
	RCW 11.68.090(1) .....	6
	RCW 11.68.110 .....	6
	RCW 11.68.114 .....	5, 6
	RCW 11.76.110 .....	5, 6, 7, 9
	RCW 11.96A.020(2) .....	4, 5
	RCW 83.110A.030 .....	5
	<i>Case Law</i>	<i>Goad v. Hambridge</i> , 85 Wn. App. 98, 105, 931 P.2d 200, 204 (1997) .....
<i>In re Estate of Overmire</i> , 58 Wn. App. 531, 534, 794 P.2d 518 (1990) .....		6
<i>In re Estate of Templeton</i> , 37 Wn. App. 716, 717-18, 683 P.2d 224 (1984) .....		5, 6
<i>Seattle-First Nat'l Bank v. Macomber</i> , 32 Wn.2d 696, 701, 203 P.2d 1078 (1949) .....		5, 6

<i>Court Rules</i>	RAP 10.3(a)(6), (b) .....	2
	RAP 18.9 .....	1, 2

**I. Motion for Sanctions**

Respondent Mr. Henington's brief in response to Appellant Mr. Wills's opening brief contains multiple violations of the Rules of Appellate Procedure. Pursuant to RAP 18.9(a), Mr. Wills moves this Court to impose sanctions and order that terms be paid to Mr. Wills by Mr. Henington, or his counsel, in the amount of \$600.00. This amount is the equivalent of one-third of the combined cost of attorney fees to prepare this Reply and motion. (Declaration of Mona K. McPhee submitted as an Appendix to this Reply.) Mr. Wills seeks this sanction because Mr. Henington violated both the RAP as well as the court clerk's order requiring Mr. Henington to file his responsive brief on or before July 1, 2013, and because the violations by Mr. Henington have caused Mr. Wills prejudice in requiring his counsel to spend additional time and effort in preparing this Reply and motion.

Only two days before it was due, Mr. Henington sought a thirty-day extension to file his brief. (Mot. for Extension of Time to File Rspdt.'s Br. filed 5/28/13.) Mr. Wills did not oppose the motion on the condition that no additional time be afforded, which condition was based on Mr. Henington's repeated and multiple late filings and requests for delay before the probate court. (Applt.'s Rsp. filed 5/29/13.) The court clerk granted the extension to July 1st. Late in the afternoon of July 1<sup>st</sup>, Mr.

Henington notified Mr. Wills that his brief would be filed and served late by up to two days, and probably on July 3<sup>rd</sup>. (Appx., McPhee Decl.) Mr. Wills did not agree to a further extension of time but agreed to accept service by electronic means if the brief was served by midnight on July 1st. (Id.) Mr. Henington did not seek additional time from the court. Mr. Henington did not file his brief until July 9<sup>th</sup> and he did not serve Mr. Wills with the brief until July 10<sup>th</sup>. (Id.; Rspdt.'s Reply Br. filed 7/9/13 and related Cert. of Svc dated 7/10/13.) Mr. Henington had not communicated again with Mr. Wills about late filing and service of the response brief until it was filed. (Appx., McPhee Decl.)

In addition to being untimely, Mr. Henington's brief includes multiple violations of RAP 10.3(a)(6), (b). Mr. Henington fails to address in his argument the issue of "conflict of interest," that he purports to raise in his "Additional Issues." (Rspdt.'s Reply Br. [sic] at 4.) He also purports to address the "due process" issue, (id.) but fails to include any substantive argument in his response. The "due process issue" raised by Mr. Wills points out that the lower court's orders are void, or voidable, for failure to comport with due process because the lower court erred by ordering the estate to be closed and distributed when proper notice to all potential parties in interest had not been given.

Mr. Henington also laces his argument with repeated factual allegations and claims without citation to the record making it extremely difficult for Mr. Wills to reply. Therefore, Mr. Wills requests that sanctions be imposed in the amount of \$600.00 to be paid to Mr. Wills.

## **II. Reply to Respondent's Statement of the Case.**

The following findings of facts and conclusions of law entered by the superior court are challenged and should not be considered verities on appeal:

- that all notices required by law had been given;
- that there is good reason to close the estate and make final distributions;
- that Mr. Bradley's claims were based upon alleged oral promises; and
- that all amounts due to the Internal Revenue Service, according to the Personal Representative, have been paid.

Although not specific findings of the superior court, but raised by Mr. Henington in his brief, Mr. Wills also disputes any statements that the estate is solvent or that there are sufficient assets to distribute to the estate's beneficiary and the community estate.

The claims filed by Ford Motor Credit's claims are not at issue in this appeal.

The fact that he had received notice from the IRS that additional liabilities would be imposed against the estate was not raised by Mr. Wills for the first time in his opening brief. Mr. Wills sought review of the court commissioner's Final Order and informed the superior court that he had, in fact, "received notice from the IRS that it has assessed penalties & interest due resulting from the late filing of the estate's fiduciary income tax returns." (CP 81; *see also* CP 82 ("the estate remains liable to the IRS for payment of penalties & interest & likely additional taxes (because Mr. Henington appears not to have consented to filing Decedent's four years of income taxes due as jointly filed).)

**III. RCW 11.96A.020(2) Authorizes The Probate Court to Exercise Jurisdiction; It Does Not Permit The Court To Act Contrary To Governing Statutes.**

Although RCW 11.96A.020 authorizes broad, discretionary powers, it is only a grant of jurisdictional authority and does not authorize the superior court to distribute estate assets contrary to governing statutes. The superior court remains constrained to act within the law governing the issue before it. In this case, the superior court acted contrary to governing statutes when it closed the estate and ordered distribution without taking into account IRS liabilities, priorities of distribution, and the successor personal representative's discretion authorized by statute. (*See* Applt.'s

Op. Br.) The jurisdictional authority granted by RCW 11.96A.020 does not correct the lower court's findings and orders made in error of the law.

**IV. The Superior Court's Order Requires Distribution of the Estate in Violation RCW 11.76.110.**

The parties agree that RCW 11.76.110 governs the order of distribution of Catherine Henington's estate. (Rspdt.'s Reply Br. [sic] at p. 8, 11.) RCW 11.76.110 provides, in relevant part, "After payment of costs of administration the debts of the estate shall be paid in the following order: ... (4) Debts having preference by the laws of the United States ... (7) All other demands against the estate."

Federal and state law both mandate the payment of federal tax liabilities by the estate. 31 U.S.C. §3713(b); *In re Estate of Templeton*, 37 Wn. App. 716, 717-18, 683 P.2d 224 (1984); *Seattle-First Nat'l Bank v. Macomber*, 32 Wn.2d 696, 701, 203 P.2d 1078 (1949) (it is a well set out rule that in the absence of statute, or in the absence of a contrary provision by the decedent, the federal taxes shall be paid out of the estate); *see also* 26 U.S.C. § 6901 (making a personal representative personally liable to for tax liabilities if the personal representative distributes the estate before paying debts due to the IRS); RCW 83.110A.030 ("estate tax is apportioned ratably to each person that has an interest in the apportionable estate"); *see also* RCW 11.68.114. The superior court, therefore, erred

when it ordered that the estate should be closed and final distributions made without holding any amount in reserve for the federal tax liabilities that were expected to be and known to have been assessed.

Even if the estate had been solvent, the trial court's order was entered contrary to the laws that the IRS must be paid tax liabilities before beneficiaries receive distributions, 31 U.S.C. § 3713(b), that tax liabilities must be paid from the estate, *In re Estate of Templeton*, 37 Wn. App. at 717-18, and that amounts may be held in reserve to accomplish these statutory mandates, RCW 11.68.114. *See also* RCW 11.68.090(1), 11.68.110, 11.76.110; *In re Estate of Overmire*, 58 Wn. App. 531, 534, 794 P.2d 518 (1990); *Macomber*, 32 Wn.2d at 701. Therefore, the orders should be vacated and Mr. Wills permitted to pay the tax penalties and interest out of the estate assets, if assets to do so are available according to the priority required by RCW 11.76.110, prior to distribution to the heirs.

When faced with entering an order that is contrary to federal and state law, the trial court's findings of fact may not be based on findings of fact that arise out of a lack of evidence. (*C.f.* Rspt.'s Reply Br. [sic] at 3, 7 (arguing that the trial court's finding of fact that all amounts due to the IRS had been paid is "based on a complete lack of evidence to the contrary")). Here, the record does not support the trial court's findings of fact and corresponding orders closing and distributing the estate without

holding in reserve funds from the estate to pay potential and known tax liabilities.

Furthermore, Mr. Henington *concedes* that there was “delay” over the payment and filing of returns for the income taxes owed by the decedent and Mr. Henington. (Rspdt.’s Reply Br. [sic] at p. 8.) The agreed fact of delay, alone, is substantial evidence undermining the superior court’s findings and supporting the fact that potential liabilities to the IRS for penalties and interest existed at the time the superior court entered its order. The record demonstrates the “delay” was significant: income taxes from 2005-08 had not been paid and returns had not been filed by the decedent or Mr. Henington until Mr. Wills, as successor personal representative, had the estate pay the estimated income taxes (based on joint filing) in May 2010. (CP 14; CP 54- 57; CP 412, 414 (requesting superior court to order Mr. Henington’s cooperation); CP 458.) It is well-known and a matter of general knowledge that the IRS levies penalties and interest for late paid taxes and for late filed returns. Furthermore, Mr. Henington himself acknowledged to the superior court that “additional payments [] may be necessary” by suggesting (contrary to RCW 11.76.110, which requires the administrative debts of the estate including the personal representative’s fees be paid first in priority) that any

remaining amounts owed to the IRS or any other creditor be paid from “the Personal Representative’s fee.” (CP 61.)

The record also demonstrates that Mr. Wills informed the superior court that (1) the amount of income taxes paid was an estimated amount based on a jointly filed return that Mr. Henington had not signed, and therefore, the IRS was likely to consider the return as individually filed and the potential for additional income taxes owing was significant; (2) the delays caused by Mr. Henington as to both the income tax returns and the estate fiduciary returns was expected to and did in fact result in additional penalties and interest levied by the IRS. ((CP 15-17; CP 80-82; VRP.B 4:6-23, 10:12-17; *see also* CP 11-13 (referencing the previously filed status reports); CP 341-54; CP 366-78; CP 413-14, 417; CP 427-32; CP 453-57.)

On the other hand, Mr. Henington fails to point to any evidence supporting the superior court’s finding that “all amounts due to the Internal Revenue Service, according to the Personal Representative, have been paid.” Because the record is devoid of any evidence that the IRS liabilities for decedent and Mr. Henington’s tax liabilities had been fully satisfied, there is not substantial evidence supporting the superior court’s finding and the court erred in entering its order. Therefore, the superior

court's order should be vacated and the matter remanded for further proceedings consistent with RCW 11.76.110.

**V. The Superior Court Erred In Barring Mr. Bradley's Claims.**

Mr. Henington *concedes* that “[t]he record is completely silent” as to the question of whether Mr. Bradley’s claims are supported by written documentation or based on oral promises. (Rspdt.’s Reply Br. [sic] at 5.) This concession is appropriate because there is no evidence in the record that suggests that Mr. Bradley’s claims are based on oral promises. In fact, the Superior Court could only have based its finding of fact (which was drafted by Mr. Henington) that, “Mr. Bradley’s claims were based upon alleged oral promises prior to the decedent’s date of death,” (*see* CP 70), on the only part of the record that suggests the claims are based on oral promises: a speculative statement made by Mr. Henington’s counsel, Mr. Parks. (VRP.A at 14: 12-15.) Therefore, this Court should vacate the Finding of Fact.

Mr. Henington also *concedes* that Mr. Bradley’s claims against the estate are timely. (Rspdt.’s Reply Br. [sic] at 10.) And, Mr. Henington *does not dispute* that Mr. Bradley met the other statutory requirements for a filing a claim against the estate. RCW 11.40.070; (CP 1-3). Because Mr. Bradley’s claims were timely, and there is no evidence in the record

supporting the finding of fact that his claims are based on oral promises, the superior court erred in finding that his claims are time-barred.

What Mr. Henington fails to recognize, and the basis for concluding that the superior court erred in determining that Mr. Bradley's claims are time-barred, is that RCW 4.16.200 removes a claim from the limitations set forth in Chapter 4.16 RCW upon the death of the person against whom the claim is made. Instead, the limitations of chapter 11.40 RCW govern. RCW 11.40.051 governs time limits for bringing claims against a decedent. Mr. Bradley, in fact, complied with those time limitations by filing his claims within two months of Ms. Henington's death. And, Mr. Henington concedes the claims were timely brought. Moreover, the claims met the statutory requirements of RCW 11.40.051 in content. Therefore, Mr. Henington's claims were not time-barred or otherwise barred. The superior court's erred in concluding otherwise and, therefore its order barring Mr. Bradley's claims must be vacated and remanded for further proceedings of the probate court.

**VI. Respondent's request for attorney fees should be denied.**

Mr. Henington's request for attorney fees should be denied. Mr. Henington's sole basis for seeking attorney fees is that Mr. Wills's appeal is frivolous.

An appeal is frivolous only “if no debatable issues are presented upon which reasonable minds might differ, and it is so devoid of merit that no reasonable possibility of reversal exists.” A party has a right to appeal, and an appeal is not frivolous simply because the party’s arguments are rejected. The entire record should be considered, and all doubts should be resolved in favor of the appellant.

*Goad v. Hambridge*, 85 Wn. App. 98, 105, 931 P.2d 200, 204 (1997)  
(internal citations omitted).

Although Mr. Henington sets forth the standard for determining whether an appeal is frivolous, his request is without any substantive argument of the facts and issues in the case. And, most importantly, the standard for whether an appeal is frivolous or without merit is not met because the issues raised by Mr. Wills on appeal are those reasonable minds could debate. *See id.* Whether IRS tax liabilities exist or may exist and have priority over distribution to heirs and the community estate, whether a claimant’s claims are barred by a statute of limitations, and the other issues raised by Mr. Wills on appeal are neither frivolous nor meritless issues.

Moreover, the limited issues addressed in Mr. Henington’s responsive brief are the same that he addressed before the trial court, yet there is no finding from the trial court that the issues are frivolous or meritless. In addition, there is no finding from the trial court that the issues raised by Mr. Wills are frivolous and advanced without reasonable cause;

and, Mr. Henington failed to bring a motion for such findings following the trial court's final order. *See* RCW 4.84.185; *see also* RAP 18.9. In addition, Mr. Henington vigorously argued the issues both before the trial court and in his brief to this court. Therefore, Mr. Henington waived the issue of whether Mr. Wills's issues, the same below as raised on appeal, are meritless and the appeal frivolous. Mr. Henington's request for attorney fees should be denied.

DATED this 9th day of August, 2013.

MCPHEE LAW OFFICE

/s/ Mona K. McPhee

MONA K. MCPHEE, WSBA No. 30305  
Counsel for Appellant

**CERTIFICATE OF SERVICE**

I hereby certify that on August 8th, 2013, I caused to be served the foregoing Appellant's Reply Brief; Appendix to Appellant's Reply Brief; Declaration of Mona K. McPhee in Support of Appellant's Motion for Sanctions; and this Certificate of Service on the following interested parties by first class mail with a courtesy copy transmitted by email if an email address has been provided:

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DATED this 9th day of August, 2013.

/s/ Mona K. McPhee \_\_\_\_\_  
MONA K. MCPHEE

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STATE OF WASHINGTON

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IN RE THE ESTATE OF CATHERINE HENINGTON

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APPENDIX TO APPELLANT'S REPLY BRIEF:  
DECLARATION OF MONA K. MCPHEE IN SUPPORT OF  
APPELLANT'S MOTION FOR SANCTIONS

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I, MONA K. MCPHEE, hereby declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct to the best of my knowledge:

1. I am appellate counsel for Appellant in this matter. I am over the age of 18 years, competent to testify as a witness herein, and make this declaration based on my personal knowledge.

2. After 4:00 PM on the afternoon of July 1<sup>st</sup>, I received an email and several voice messages from Respondent Roy Henington's legal counsel, A. Colby Parks, informing me that he was not expecting to file and serve Mr. Henington's response brief that day. He explained that he would be out of the office the following day on other work. Therefore, he expected to file and serve the brief on July 3<sup>rd</sup>.

3. I did not agree to a second extension of time but did tell Mr. Parks that if he emailed the brief to me by midnight on July 1<sup>st</sup>, I would consider it timely served. We did not, otherwise, have an existing agreement for electronic service despite a request by me to Mr. Parks for the same when I first appeared in this matter. He has never responded to that request.

4. After July 1<sup>st</sup>, I did not hear from Mr. Parks about the late filing and service of Respondent Roy Henington's brief again until July 9<sup>th</sup> when I received an email attaching the brief and telling me it had been

filed. I received Mr. Henington's brief by email on July 9th, and according to the Certificate of Service enclosed with the mailed version of the brief, it was also placed in the mail to me on July 10<sup>th</sup>. The brief was, therefore, served on me on July 10<sup>th</sup>.

5. I am admitted to the bars of Washington State, the federal bar for the Western District of Washington and the Court of Appeals for the Ninth Circuit. I spent one year as senior law clerk for then-Chief Justice Gerry L. Alexander. I have handled appeals before the Superior Court, the Washington Court of Appeals, the Washington Supreme Court, and the Court of Appeals for the Ninth Circuit.

6. My rate for appellate work in this case is \$200 per hour. I have spent a combined 9 hours reviewing Respondent's brief, conducting legal research, preparing Appellant's Reply, and the motion for sanctions including this declaration. The requested amount of terms of \$600.00 is the equivalent one-third of the combined attorney fees for those activities.

DATED this 9th day of August, 2013.

MCPHEE LAW OFFICE

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