No. 321924

COURT OF APPEALS
DIVISION III

STATE OF WASHINGTON

Spokane County Cause No. 11-4-01394-6

In the Matter of:

ESTATE OF BETTY L. LOWE,

Deceased.

AARON L. LOWE, Son of Decedent

Petitioner/Appellant,

v.

LONNIE D. LOWE, Individually and as Personal Representative of the Estate of Betty L. Lowe, Deceased,

Respondent/Appellee.

REPLY BRIEF OF APPELLANT

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OBJECTIONS TO RESPONDENT'S INTRODUCTORY STATEMENT.

Lonnie did not inherit all of the hoard.

The statement at page 1 that Betty Lowe left the "majority" of her estate to Lonnie is false. The statement on page 1 that Betty inherited "all" of Don's estate is also incorrect. Betty Lowe's last will was executed on September 15, 2003, Ex. P-15. It gave twenty percent (20%) of the residuary estate to her surviving grandchildren and great grandchildren. Her will only passed her community half of the property. At page 7, the Brief provides that "These metals were not specifically listed in the probate of Donald's estate, but it is undisputed the entirety of the estate went to Betty as community property." This statement by Respondents is false. Lonnie and Betty kept their knowledge of the hoard secret so it would not be inventoried in Don's estate. Don's testamentary intent clearly was that Don wanted Aaron to inherit Don's residuary estate. Aaron testified that Don's estate should go to him under Don's will, and this is also supported by the case authority cited earlier. VRP 172-3. Respondents' cumulative jargon is false and misleading. Aaron, in his opening at page 15 and 39-41, completely disputes Betty's receipt of anything from Don's estate. None of the hoard was inventoried in Don's estate. The rule in estate cases in Washington is that the discovery

rule, the cause of action, does not run until discovery. See, e.g., *August v. U.S. Bancorp,* 146 Wash.App. 328, 342, 190 P.3d 86 (Wash.App. 2008); *Estate of Aguirre v. Koruga,* 42 Fed.Appx. 73, 77 (9th Cir. 2002). Unless inventoried, the hoard is not received by Betty or anyone. Accordingly, Aaron should receive Don's portion of the hoard.

The Written Instructions did not pass any asset to Lonnie

The statute, RCW § 11.12.260, was enacted in 1984. No reported case has yet construed the statute. RCW § 11.12.260(1) in part provides:

> Such a writing shall not be effective unless: (a) an unrevoked will or trust refers to the writing, (b) the writing is either in the handwriting of, or signed by, the testator or grantor, and (c) the writing describes the items and the recipients of the property with reasonable certainty. (Underlining added.)

All three conditions must be satisfied to be an effective instruction. Betty's will was executed on September 15, 2003. It referred at Article II to written instructions. Ex. P-8. The first written instruction was signed by Betty on September 3, 2007, almost four (4) years after the will and after all the coins and bars were taken by Lonnie to Olympia. When Lamp inventoried Don's estate on January 27, 2004, Lamp was not informed of any of the hoard that Lonnie already found in the flume and took to Olympia. Don owned at least half of the hoard. VRP 436. Lamp drew Betty's will that

was signed on September 25, 2003; Don's inventory was filed on January 27, 2004. Lonnie kept the hoard secret from Lamp during the time the probate was pending. VRP 467. When Lamp wrote the instructions in 2007, however, Lamp was aware "that they were worth four to five hundred thousand dollars." VRP 441. Lamp also testified that written instructions "would be specific bequests rather than a residuary bequest." VRP 443. Lamp stated at the time of the will interview that Betty and Lonnie never mentioned what was the largest asset of the Lowe estate, i.e. the "precious metals and coins." VRP 469. The rest of the estate of both spouses was a modest $138,700. Inventory of Don Lowe, Ex. R-22, including the houses, was valued at $110,000 together. Betty's will was 20% grandchildren, 80% equally to the three surviving children. It is highly unlikely that Betty would have left 4 times as much to Lonnie outright than she gave the rest of the family, especially when she had plenty of time to draft a new will to make sure Lonnie got it all. Betty never saw the hoard before 2003, if in fact she ever saw it, and she never made a list of the hoard. VRP 324. She did not contemplate the transfer of 50,000 coins, worth hundreds of thousands of dollars, by written instruction. More importantly, Betty was legally incapable of transferring U.S. coins by way of this instruction. RCW § 11.12.260(4)

does not pass U.S. coins.

The statute requires reasonable certainty. There were other collectible coins around the house that Betty knew about that were not hidden in the flume. VRP 72, VRP 138. Betty knew about the collectible coins in the upstairs rooms, but not the precious coins and silver bars hidden in the basement. Lonnie dug them out and took them. VRP 185. The recipients were not designated with any certainty as it gave Lonnie Lowe discretion to choose to distribute to anyone he wanted. Ex. P-42. The first instruction, dated September 5, 2007, is binding by its terms. It is inconsistent with the September 11, 2007 instruction that adds "or to retain for himself." This addition is no more than a will itself for the reason that Lonnie, who was personal representative, could decide in kind who among the residuary beneficiaries would get a distribution in kind. Betty knew specifically who was to get the Pontiac and jewelry, but did not know who was to get the half million dollars of coins and bars. The statute requires reasonable certainty. The instruction language, "to distribute" does not have any limitation or specificity. Price and Donaldson "*Price on Contemporary Estate Planning*" § 4.19.4 page 4033 (Wolters Kluwer 2015) cautions against substantial value by informal lists stating:

> As a precaution, items of substantial value should not be disposed of by an informal list. For example, valuable jewelry should be disposed of in the will and any changes made by codicil. If that is done, the transfer tax consequences will also be more straightforward.

Respondents' Brief never addressed the definition of money cited at 43 of Aaron's Opening Brief. 31 U.S.C. § 5103 applies and defines money as "United States coins." This is undisputed by Respondents. Lonnie stated that all that he found were U.S. coins. A disinterested witness, Donald Poindexter, however, stated that there was one large bag of gold coins. VRP 213. RCW § 11.12.260(4) clearly states that tangible personal property does not include "money that is normal currency or normal legal tender." Aaron testified that Don obtained the U.S. coins from the banks. VRP 118. These U.S. coins were, and are, normal legal tender.

"Coins and currency should not be disposed of under this provision because the section applies to items 'other than money'." Price and Donaldson "*Price on Contemporary Estate Planning*" § 4.19.4, page 4033 (Wolters Kluwer 2015). U.S. currency must be distributed by a will and not an instruction. The instruction statute cannot convey four hundred thousand dollars of a modest estate that consists of a large amount of U.S. coins. The statute's stated purpose is to allow disposition of "articles of personal or

household use or ornament", and specifically not U.S. currency. RCW § 11.12.260(4). When a statute at issue or a related statute includes an applicable statement or purpose, the statute should be read in a manner consistent with that stated purpose. *Protect the Peninsula's Future v. Growth Management Hearings,* ____ P.3d ____, 2015 WL 686883 *4 (Wash. 2015). These U.S. coins must be returned to Don's and Betty's estates to be part of the residue in each estate.

The Brief of Respondents at page 8 of their brief carelessly states: "No evidence was presented that Lonnie influenced or controlled Betty in her decision. . .or the written instructions." This statement is false. On August 14, 2006, before the written instructions, Lonnie stated in an email that "I won't let Mom do anything he (Aaron) says." Lonnie had possession of the original instructions and made sure his mother went to Lamp to try to obtain the coins for himself. Lonnie never consulted Aaron to get a referral of an attorney to draft Betty's will. Aaron had practiced law in Spokane for many years. Instead, he consulted an Olympia attorney to refer him to a Spokane attorney. VRP 241.

At page 7, Respondents Brief states: "Betty directed that it be sold" referring to the 1,000 ounce silver bar. Lonnie was asked: "How much did

you get for the thousand ounce bar of silver?" His answer was: "I don't remember." VRP 110. Lonnie also admitted that he sold some of the pure silver bars for cash. VRP 110.

Lonnie started taking the coins and bars from the house in 2003. VRP 311-12. Lonnie never made a list of what he took and Betty never made a list of the coins and bars that Lonnie secretly took from the Lowe family home. VRP 324. Lonnie sold 35,896 silver coins for $226,000. VRP 81-85, Ex. P-21. The estate inventoried an aggregate of $430,000 of U.S. coins and silver bars. The record indicates that coins were sold from 2003 to Betty's death on October 1, 2011. Ex. P-19. Don died on April 16, 2003. Ex. P-45. Bob Lamp prepared the inventory in Don's estate with Lonnie's help. The inventory was dated January 27, 2004. VRP 437. During the will interview in 2003, Betty never told Lamp about the hidden hoard even though it amounted to possibly over a million dollars and were already discovered by Betty and Lonnie. VRP 469. A reasonable estimate is that over 50,000 coins were in the estate of Betty, but the coins were never counted or properly inventoried. It is preposterous to speculate without any statement in the record that Betty, who suffered from dementia, could remember over what, at the least, would be over 50,000 coins that she never inventoried and which

had been stored for years by Lonnie in a safe in Olympia. All the hoard was obtained from the flume and was the largest asset in Don's estate. Betty had no access to Lonnie's safe. Betty could not instruct Lonnie of what coins to sell. Added to that was that Lonnie kept at least three or four hundred dollars on each transaction he performed. This Court cannot venture outside the record. The statement of Respondents is not capable of belief, because Betty never directed Lonnie to anything. Lonnie always directed Betty, and admitted it in his email "I won't let mom." VRP 53-4, Ex. P-27. Aaron testified that Lonnie wrote himself checks from Betty's bank accounts and took the hidden hoard from Betty who had mental and addiction issues. VRP 150-1, 185-6. Betty didn't know about the coins and bars until Lonnie took them. VRP 188. The statements on Betty's direction at page 7 of Respondents' Brief are unsupported, illogical and false.

If Aaron did not want the property from Don's estate, he had nine (9) months to disclaim. Ex. P-35, Art. 5, Art. 4. Aaron did not disclaim, even though Lamp testified that Aaron disclaimed. VRP 507-8, 516. [1]

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[1] At trial, Lamp had his own memory issues. He stated under oath that Aaron executed a disclaimer. VRP 481-2, 508, 516. He forgot that he was the attorney who probated Don's estate, VRP 387. He erroneously thought that the Lowe's had separated, VRP 393 and that they owned the Redtop Motel. All of these statements were false. VRP 397, 435.

Accordingly, half of the hoard of Don's estate should have been inventoried in Don's estate as it was known to Lonnie, but not Aaron or the other children. Lonnie was also present at the will interview of Betty with Lamp in 2003. VRP 384-5, 388. Lamp didn't think the hidden hoard was mentioned in the 2003 estate planning conference. VRP 389. Don's estate inventory was completed after the will conference. The majority of assets in either estate was never left to Lonnie (at most, he would be a 1/3 residuary beneficiary of Betty's will and of half of the assets, which would include the cash hoard). Lonnie, however, is an abuser and he receives nothing from the estate. The statement of majority beneficiary is misleading and incorrect. Lonnie should receive nothing, and Aaron should receive Don's portion of the hoard.

Betty did not inherit Don's estate.

At page 2 of Respondents' Brief, it states that Betty "inherited all" of Donald's assets. Lamp, who probated Don's estate, stated that the will was ambiguous. VRP 438. No one knew who drafted Don's will. VRP 394. Aaron did not draft the will (VRP 144). Aaron never saw Don's will until after his father's death. VRP 144. The original was never found. VRP 391. Lamp had the handwritten note of Don after Don died that Aaron was to be

trustee of his estate. Ex. P-35, VRP 457. Lamp never mentioned Don's handwritten letter in his Petition to Probate Don's will even though it was in Lonnie's possession. Ex. P-118, page 3.

RCW § 11.12.230 instructs that "All courts. . .shall have due regard to the direction in the will, and the true intent and meaning of the Testator." The block letter title is **"Intent of Testator Controlling."** Lamp's unsupported conclusion regarding "ambiguity" of Don's testamentary intent is false as the undisputed handwriting proves Don did not want Betty to have the family's money due to Betty's addiction. Don handled all the finances of the couple. VRP 132. Don did not want Betty to have access to over half million dollars in cash assets. There is no doubt that Don wanted Aaron to handle the family fortune and take care of his mother. RCW § 11.12.250 upholds a trust executed by a testator prior or concurrent to a will. There is no doubt that Lamp never carried out Don's testamentary intent. Lonnie and Lamp thwarted Don's plan and expressed intent in his own handwriting. Aaron, in accordance with Don's intent, should inherit half of Don's residuary estate and also one third or one half of the residue of Betty's estate.

Betty did not and could not direct Lonnie.

At pages 1, 2 of the Respondents' Brief, the false statement is made

that Betty "directed" the sale of funds "while she was alive."

Lonnie removed the hoard from the secret hiding place over a four (4) year period from 2003 to 2007. VRP 68-91. Lonnie had to open the chimney flume with a hammer and chisel and de-construct the base of the chimney flume. VRP 71. Lonnie kept personal control over the hoard from 2003 to date by putting all that he removed in his safe at his house in Olympia. Lonnie sold the gold and silver that was in his safe and kept some for himself. VRP 94-5, VRP 97. Lonnie never kept any records at the time and has no proof of any gift from Betty to himself. VRP 96. Lonnie could sign on Betty's bank account. VRP 98. Lonnie paid for expenses from his mother's bank account. VRP 109. Lonnie sold the gold and silver, not Betty. VRP 110. For years, Lonnie denied to his brothers that he had any gold or silver belonging to Betty or Don. VRP 148, 149. Betty told Aaron "Lonnie's got my money" and asked Aaron regularly for money. VRP 153. Aaron gave her money every time she asked. VRP 133. Lonnie doled out money to Betty. Betty never directed Lonnie. It was the other way around.

STANDARD OF REVIEW

Contrary to Appellant's assertion at page 9 of their Brief, there is no presumption in favor of the trial court's findings. Interpretation of a statute

is *de novo. In re Estate of Hambleton,* 181 Wash.2d 802, 817, 335 P.3d 398 (Wash. 2014). Statutory interpretation is reviewed de novo, *Jametsky v. Olsen,* 179 Wash.2d 756, 761, 317 P.3d 1003 (Wash. 2014). Pleading amendment is reviewed *de novo. Martin v. Dematic,* ____ Wash.2d ____, 340 P.3d 834, 837 (Wash. 2014). The party claiming the gift, like Lonnie, must prove the gift by clear, cogent and convincing evidence. *Estate of Lennon v. Lennon,* 108 Wash.App. 167, 29 P.3d 1258 (Wash.App. 2001). This appellate court is not a rubber stamp for the trial court's actions. *In re G.W.-F.,* 170 Wash.App. 631, 637, 285 P.3d 208 (Wash.App. 2012).

This case did not turn on credibility. The essential facts needed to reverse this case are Lonnie's admissions or other facts not disputed. Disputed facts, if any, are few and immaterial. In this case, essential review is at the least a mixed question of fact and law. Therefore, the review is *de novo. Weyerhauser Co. v. Department of Revenue,* 16 Wash.App. 112, 115, 553 P.2d 1349 (Wash.App. 1976). "The application of the law to the facts is *de novo.*" *Western Ports v. Empl. Sec. Dept.,* 110 Wash.App. 440, 450, 41 P.3d 510 (Wash.App. 2002).

Judicial review must be conducted on the entire record to determine whether the decision is supported by the facts. *Franklin County Sheriff's*

Office v. Sellers, 97 Wash.2d 317, 324, 646 P.2d 113 (Wash. 1982). Accordingly, Lonnie has the burden of proving his actions were lawful and permitted under the statute. Lonnie never attempts to claim his actions complied with the statutes and case law cited herein. An example is Lonnie's incorrect contention that the power of attorney was only effective when Lonnie said it was. In reality, it was effective when executed from 2003 on. Therefore, Lonnie could not give gifts to himself after Betty executed her POA. Lonnie, as fiduciary, was not free to choose what was an appropriate gift, or not.

The evidence of tortious interference is overwhelming and conclusive.

At page 13, the Respondents contend that no evidence of tortious interference exists. Aaron's Opening Brief cites Restatement of (Second) of Torts § 774B as stating the tort. It is: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would other wise have received is subject to liability to the other for loss of inheritance or gift." Lonnie's own admissions establish Lonnie's intention to deprive Aaron's right and Lonnie's interference. Lonnie states in a 2006 email, Ex. P-23, "But I don't trust Aaron with anything and I won't let Mom do anything he says and I will fight

him with anything I have." Lonnie admitted that he wrote and sent the email vowing to prevent his mother from following anything Aaron requested. VRP 54, 299, 306. This action alone, made to spite Aaron, is an improper purpose especially when Don wanted Aaron to handle Don's Estate. This admission is probably the strongest evidence that could ever be presented of intentional interference. Lonnie insisted that his mother go to attorney Lamp to have the instructions redrawn because he would be "on the short end of a lawsuit." VRP 248. Lonnie, not Betty, selected Lamp. VRP 248. Lonnie's words were followed by performance "I told her that knowing Aaron, he would sue me, so she should go to Bob Lamp and have it done that way". VRP 323. Failure to keep any record of what was taken or inform Aaron also adds to Lonnie's fraud and intentional interference. VRP 75, 79-80, VRP 324, 325. Lonnie lied to his brothers about removing and keeping the hoard until Lonnie found out about Poindexter's Affidavit. VRP 184. Lonnie took at least three or four hundred dollars of Betty's money many times over the years. VRP 95. Lonnie had Don's handwritten letter as early as 2003 (VRP 65, 316), but never mentioned it to Aaron who never knew about it until 2013 when he attempted to file a Second Amended Complaint. VRP 146.

Lonnie procured a general power of attorney for Betty Lowe in 2003.

Lonnie also was present at Betty's will conference. Lonnie also supervised the written instructions for Betty. VRP 101, VRP 468-9. Betty's final will was executed in 2003; written instructions in 2007. Without the written instructions, Aaron, a natural object of his Mother's estate and would inherit. Betty had plenty of time to execute a new will. VRP 500. The entire record proves that Lonnie controlled the finances of his mother, that he had sole and complete possession of the million dollars of the hoard and with Lamp's help prevented Aaron from Aaron's right to inherit. All the elements of intentional interference have been proven. This Court's review of the entire record requires reversal and a finding that Lonnie interfered with Aaron's right to inherit. *Franklin County Sheriff's Office v. Sellers*, 97 Wash.2d 317, 324, 646 P.2d 113 (Wash. 1982). The record proves tortious interference with right of inheritance. See, e.g., *Allen v. Hall,* 974 P.2d 199 (Ore. 1999) citing Restatement (Second) of Torts Section 774 B. at 287 and *Beckwith v. Dahl,* 205 Cal.App.4th 1039, 141 Cal.Rptr.3d 142 (2012). *Beckwith, supra,* also cites the Restatement of Torts § 774 B and reviews current law. *Id.* at 1050. Lonnie's email and subsequent activity was directed against Lonnie and damaged Aaron's future expectancy. Don's handwritten letter, kept from Aaron until 2013, also satisfies the element of intentional interference.

DeHart v. DeHart, 978 N.E.2d 12, (Ill.App. 2012). Wrongful conduct to induce action of the donor or testator to disinherit the beneficiary, is all that is required. *Id.* at 22. Lonnie's actions amounted to tortious interference of Aaron's right of inheritance. The trial court should also reverse on this issue.

Leave to amend should have been freely given and allowed.

In this case, the Respondents failed to produce evidence that allowed Aaron to file for the second amendment. The second amended complaint could not have been filed earlier because Aaron did not know of the facts that would warrant an amendment. No discovery cutoff was scheduled as no updated schedule or pre-trial was held in the case. The major disclosures were only made by Lonnie and Lamp shortly before the second amendment was offered. Lonnie did not produce estate records; the power of attorney that he had since 2003 (VRP 50) or his father's written instructions that appointed Aaron to handle the parents estate. VRP 108. Aaron first saw Don's handwritten note in 2013 just before trial. VRP 146. Lonnie stated that he didn't remember the documents. VRP 103. "Lonnie always denied having any silver", VRP 148, and hid the information. VRP 107, 149, VRP 131. Lamp only produced Don's estate file on the third deposition. Initially, Lamp denied that he was the attorney for Don's estate. All of the delayed

discovery was in the possession of the Respondents from 2003 on. VRP 13. Basically, the Respondents caused the reason for the amendment. The probate is still ongoing and has not been closed.

This case should be decided on the merits. *Watson v. Emard,* 165 Wash.App. 691, 267 P.3d 1048 (Wash.App. 2011). "[O]utright refusal to grant the leave without any justifying reason is not an exercise or discretion; it is an abuse of discretion." *Id.* at 703. No sufficient reason was given for denying the motion. Aaron commenced and continued discovery. Respondents were in sole possession and knew the facts. Respondent was not prejudiced and did not specify sufficient substantive reasons against the amendment. *Caruso v. Local Union No. 690,* 100 Wash.2d 343, 350-1, 670 P.2d 240 (Wash. 1983) requires specificity. Accordingly, Aaron's amendment was timely filed for the reason that through late discovery he found out the full extent of Lonnie's improper and illegal acts. Accordingly, this court should reverse the trial court on this issue and allow the amendment on remand.

Lonnie breached his fiduciary duty to Betty.
He cannot receive gifts he cannot prove.

Lamp testified that a fiduciary has to act reasonably. He also stated

that gifts made as an attorney in fact have to be documented. VRP 460. Lonnie testified that he retained cash gifts from his mother from the sales of silver. VRP 95. Lonnie never kept any records and had no proof of the alleged gifts. VRP 96. Lonnie testified that when the hoard was sold at various times, Betty gave him three or four hundred dollars at a time. Lonnie possessed the hoard; Betty never made any sales from the hoard; she could not deliver the coins to Lonnie as he already possessed all of them. Lonnie had no receipts so he could not establish when the alleged gifts were made to him by him. This conduct took place from "periods of time" over nine (9) years without any dates or records. VRP 95.

The respondents contend mistakenly that Lonnie never exercised the power of attorney (Respondents' Brief page 7). The power of attorney, however, Ex. P-10, was effective immediately (page 3) in 2003 when Betty signed it, and continued during Betty's lifetime thereafter, without change. Lonnie incorrectly contends that he had to do something before it became effective. This POA was effective immediately. The POA operated from time of Betty's signature. The POA allowed access to her safety deposit box. The alleged gifts to Lonnie occurred during transactions managing Betty's assets. The POA gave full financial control to Lonnie from 2003 on.

Lonnie's arguments, regarding this issue, are disingenuous and, if upheld, will release all trustees from abiding by any fiduciary duties in contradiction of RCW § 11.94.050. When money of a beneficiary is withdrawn and part kept as a cash gift, the part kept as a gift must be allowed by the statute, RCW § 11.94.050. In *Estate of Lennon v. Lennon,* 108 Wash.App. 167, 29 P.3d 1258 (Wash.App. 167, 29 P.3d 1258 (Wash.App. 2001), a signatory and a joint tenant who also had a power of attorney "Did not have any ownership on the interest in the funds prior to Elsie's death and had no right to make gifts from that account." *Id.* at 182. *Lennon*, at 180-1, establishes the Washington Rule on Gifts:

> The essential elements of a valid gift are (1) an intention on the part of the donor to presently give; (2) a subject matter capable of passing by delivery; and (3) an actual delivery at the time... Roger will bear the heavy burden at trial of proving that a gift occurred by clear, cogent, and convincing evidence.

All the alleged gifts must be returned to the estates since the POA did not allow Lonnie to give gifts to himself.

Attorney's Fees to Greg Devlin are not allowable.

Price and Donaldson "*Price on Contemporary Estate Planning*" § 1.6.1, page 1023 (CCH Wolters Kluwer 2015 Ed.) states:

> Thus, a lawyer who represents a fiduciary generally should not assist the fiduciary in pursuing a claim against the estate

or otherwise taking a position adverse to the interests of the beneficiaries of the estate.

Greg Devlin asked Lamp if Betty and Lonnie had told Lamp about the precious metals and they would have been listed, and the answer was the hoard should have been listed in Don's estate. VRP 436. Don's handwritten letter was sent from Lonnie to Lamp in 2003. VRP 316. As holder of the POA, the fiduciary has a duty to act responsibly, and not make gifts to himself. VRP 460. Lonnie wants to keep assets that should have been included in the estate and those that were devised to Aaron in Don's Estate. Lamp testified that if there is a dispute over who gets the estate, like here, there is a conflict. VRP 490. An attorney cannot represent both parties, but that is exactly what Devlin did in this case. Devlin throughout represents Lonnie personally and also as Personal Representative which is a conflict. No attorney's fees can be awarded to Lonnie since there was a conflict with Devlin's representing Lonnie personally and the estates. Simultaneous representation violating ethics rules of conflict will not allow an award of attorney fees. *LK Operating, LLC v. Collection Group, LLC,* 181 Wash.2d 117, 121, 126, 330 P.3d 190 (Wash. 2014). If a conflict exists, all legal fees are forfeited. See, e.g., *Eriks v. Denver,* 118 Wash.2d 451, 463, 824 P.2d 1207 (Wash. 1992). Where an attorney failed to augment an estate due to a

conflict, the attorney's fees can be reduced. *Ivancic v. Enos,* 978 N.E.2d 927 (Ohio App. 2012). Respondents' at page one (1) of their brief, in a footnote coyly announce that the estate is now represented on appeal by William O. Etter. Etter never questioned any witness at trial and never requested any fees. Etter did not represent anyone. The litigation resolves the rights of beneficiaries. Aaron had to defend the estate against Lonnie and all the hats Lonnie wore. Aaron obtained an appraisal to prove the financial fortune amount when it was hidden. Aaron explained the benefit to everyone. "But if all these other things happened, everybody else that's mentioned in that will also benefits. And I think that's truly what needs to happen here because of Lonnie's improper actions here." VRP 187. Accordingly, once all the assets that Lonnie stole are returned to the Lowe estates, all beneficiaries will benefit.

Further reasons are that no attorney's fees are to be awarded if the estate receives no benefit. See, e.g., *Matter of Estate of Niehenke,* 117 Wash.2d 631, 818 P.2d 1324 (Wash. 1991).

In re Estate of Black, 116 Wash.App. 476, 66 P.3d 670 (Wash. 2003) states: "Where both sides advance reasonable and good faith arguments in support of their respective positions, the trial court may order costs and fees

to be chargeable against the estate, so that all the contesting parties bear the cost of the proceeding. *Id.* at 677-8. Aaron pointed out and submitted evidence of hidden assets and legal rights of the will beneficiaries. The fee award against Aaron should be reversed. Aaron proved assets that would be part of the estate residue, he should get his fees in both courts.

Lonnie was a financial abuser of Betty.

In re Estate of Evans, 181 Wash.App. 436, 452, 326 P.3d 755 (Wash.App. 2014) reviews the application of the financial abuser statutes in estate matters. Lonnie was a financial abuser. RCW § 74.34.020(2) includes exploitation as abuse. Financial exploitation includes withholding of property or control for advantage to the abuser. RCW § 74.34.020(6). Betty had high blood pressure, low bone density, osteoporosis, and elevated cholesterol. VRP 416. She was tested for dementia. Betty suffered from "moderate-severe dementia." VRP 429. Dementia doesn't get any better with time. VRP 430. With all these medical problems, she had to decline medications "if the cost was too high." VRP 431. She complained to Aaron that "Lonnie's got my money." VRP 153. Betty asked Aaron for money from at least 2010 on. VRP 133. Aaron gave her $100 each time she asked. VRP 133. The entire record proves that Lonnie kept Betty's financial fortune

from his demented and unhealthy elderly mother. Betty had to forgo medications and ask her son, Aaron, for money since Lonnie took the hoard to Olympia. Betty went downhill mentally after Don died. VRP 132. At times she was "not there mentally." VRP 189. Lonnie controlled Betty's financial assets. VRP 151-152. RCW § 11.84.900 prevents an abuser from receiving property. "The language plainly seeks to prevent a financial abuser from receiving any property of other benefits from a decedent's estate." *In re Estate of Haviland,* 177 Wash.2d 68, 76, 301 P.3d 31 (Wash. 2013). *Haviland, supra,* applies to this case. Financial exploitation of a father by his son, by expending money on the father's ranch where the son lived, constituted financial abuse. See, e.g., *In re Estate of Evans,* 181 Wash.App. 436, 326 P.3d 755 (Wash.App. 2014). The abuser statute applies. Since Lonnie was an abuser, he should receive nothing from the Lowe estates.

Lonnie operated in a dual conflicted capacity and should be removed as personal representative.

At page 21-2 of Respondents' Brief, Respondents cite the record, VRP 68-69, to argue that Betty directed Lonnie to remove the hoard. The record does not support Betty's consent or direction. The testimony throughout was "Lonnie's got my money." VRP 153. Betty never told Aaron, or any of her other children. VRP 185. Lonnie said he removed the

hoard, VRP 76, and always had it in his personal possession. VRP 78. Financial abuser is cause for removal. *Haviland, supra,* at 73.

Lonnie was Betty's fiduciary. VRP 460. A fiduciary has a duty to account. Lonnie stated that he took the property to Olympia but he did not make an accounting of what he took from the flume. VRP 263. Lonnie thought he could fool all of his siblings and others. The hoard included 22 silver bars from 55 to 67 pounds each, bags of U.S. silver coins and a large bag of gold coins. VRP 219, 222. Donald Poindexter was the only person who inventoried the hoard. VRP 218. A person in possession of over a million dollars of precious coins and bars that have no recorded titles who fails to make any itemization in writing of an opening inventory when found, must account for his bailment. See, *White v. Burke,* 31 Wash.2d 573, 197 P.2d 1008 (Wash. 1948).

In re Estate of Jones, 152 Wash.2d 1, 93 P.3d 147 (Wash. 2004) holds that waste and mismanagement of one who is about to commit fraud "or for any other cause or reason which to the court appears necessary." *Id.* at 10. The purpose of the statute is "protection of beneficiaries." Lonnie declared war on Aaron in 2007. Aaron is a beneficiary of the half million of the hoard Lonnie kept and still keeps thousands of coins in his safe that is commingled with his own property. VRP 79. Lonnie sold 35,000 of coins after Betty died

without formal appraisal and never properly detailed the sale on his 2011 tax return. VRP 87, 91-2. He contended that he had a loss, but has no computations. VRP 297. Lonnie never inventoried the hoard in Don's estate. Lonnie cannot balance the number of coins he removed to the number of coins left. VRP 321. He also cannot reconcile what Poindexter put in the flume to what Lonnie took out.

From Poindexter, we know what went into the basement flume, but Lonnie callously and flagrantly failed to keep track of the hoard, and admitted that he received some of it. The argument of Respondents that there was no breach of a fiduciary duty or any duty at all that caused the damage defies credibility and logic. Lonnie completely ignored his duty as a power of attorney fiduciary. At the least, he was a bailee and had a duty of safekeeping even as a bailee and to give a receipt. If the money was not returned, he is liable to the estate.

CONCLUSION

For all of the above reasons, this matter must be reversed and remanded.

DATED this 9th day of March, 2015.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the Reply Brief of Appellant was served on Counsel for Plaintiff/Appellee by hand delivery addressed as follows:

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