

NO. 63719-3-1

King County Superior Court Cause No. 06-4-02161-1 SEA

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

ESTATE OF SHIRLEY A. HARTY, J. PATRICK HARTY,
BENJAMIN HARTY AND JASON HARTY,
Plaintiffs/Appellants

v.

GREG HARTY,
Defendant/Respondent

2010 JUL 26 AM 11:24
CORRECTION CENTER
FILED

OPENING BRIEF OF APPELLANTS LIMITED TO
SUPPLEMENTAL NOTICE OF APPEAL ISSUE
REGARDING "SUPPLEMENTAL JUDGMENT" ENTERED
APRIL 27, 2010

Attorneys for Plaintiffs/Appellants Harty
Charles E. Watts
Oseran Hahn Spring Straight & Watts, P.S.
10900 NE Fourth Street #850
Bellevue, WA 98004
425-455-3900

ORIGINAL

APPENDIX

- A Supplement Judgment
- B Order Denying Reconsideration
- C Deed of Trust
- D Motion for Reconsideration
- E Response of Petitioners
- F Reply of Respondents

TABLE OF CONTENTS

I.	Introduction	1
II.	Assignment of Error.....	2
III.	Statement of the Case.....	2
IV.	Argument/Authority.....	5
V.	Conclusion/Relief Sought	9

TABLE OF AUTHORITIES

Cases

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 829 P.2d 1099 (1992)..... 7
Marassi v. Lau, 71 Wn. App. 912, 859 P.2d 605 (1983) 8

Rules

CR 11 passim
RCW 11.96A.150(1) 3, 6, 7, 9
RCW 26.16.010 3
RPC 1.8 4

I. INTRODUCTION

By letter dated June 22, 2010, the Court of Appeals accepted a Supplemental Notice of Appeal filed on June 7, 2010. The Supplemental Notice of Appeal was filed by appellants and arose out of a “Supplemental Judgment” entered by the Superior Court in the main action on April 27, 2010 (App. A) (CP 533-537). A Motion for Reconsideration of the April 27, 2010 “Supplemental Judgment” was subsequently denied by the Superior Court. (App. B) (CP 605).

The “Supplemental Judgment” is an award of additional attorneys’ fees claimed by respondent Greg Harty in responding to the appellants’ Motion for Reconsideration of the award by the trial court of attorneys’ fees (from which appeal is taken in this action). (CP 361-406, App. D.) The Superior Court awarded additional attorneys’ fees in favor of respondent Greg Harty under Civil Rule 11 and describes the justification for the CR 11 violation as being based upon “. . . the recent discovery of the recording of the Deed of Trust, and the inconsistent arguments that caused Greg Harty to incur additional costs in responding to the Motion for Reconsideration.” (Order on Reconsideration; App. B.) The fees are ordered to be paid by Pat and Christine Harty – not the attorney representing Pat Harty and his sons in this case.

Nothing in CR 11 supports the sanction of \$7,040 awarded by the court. It should be reversed.

II. ASSIGNMENT OF ERROR

Error is assigned to the imposition of CR 11 sanctions against J. Patrick and Christine Harty, husband and wife, in the form of \$7,040 in attorneys' fees by the "Supplemental Judgment" of April 27, 2010. Error is also assigned to the denial of the appellants' Motion for Reconsideration of the Supplemental Judgment entered on May 21, 2010

III. STATEMENT OF THE CASE

Because this is a supplemental appeal, the Statement of the Case will be limited to the facts relating only to the "Supplemental Judgment" of April 27, 2010. The facts are quite simple.

Following trial of this action to the Honorable Mary Yu of the King County Superior Court, the court entered a judgment awarding attorneys' fees against all appellants and the marital community of J. Patrick Harty and Christine Harty, and against Christine Harty individually. (CP 313-316.) Christine Harty was not a named party to the proceeding and had participated in the proceeding only as a witness. The marital community of J. Patrick Harty and Christine Harty was not a named party to the proceeding. (CP 1-9.) Under the laws of the State of Washington Christine Harty and her marital community would not benefit

from the receipt by J. Patrick Harty of his inheritance from his mother.

RCW 26.16.010. A copy of the April 16, 2009 Motion for Reconsideration of the breadth of the attorneys' fee award together with its attachments is attached hereto as Appendix D. (CP 361-406.)

Respondent Greg Harty at the request of the court filed a response to the reconsideration motion (CP 410-422, App. E) and appellants filed a reply to the Greg Harty response (App. F). The reconsideration motion was denied. (CP 153.)

The issue of the scope of the award of attorneys' fees by the trial court is before this court on the main appeal. It raises serious issues of the allowable limits of responsibility for an award of attorneys' fees under RCW 11.96A.150(1). This statute permits attorneys' fee award in a probate proceeding only against a "party." Neither Christine Harty nor the marital community of she and J. Patrick Harty were "parties" to the proceeding, and therefore, not susceptible of an attorneys' fees award under the statute by its plain language. The court also jointly and severally imposed attorneys' fees obligations without limitation on the children of J. Patrick and Christine Harty, Ben and Jason. Ben and Jason were parties to the proceeding, but had a very different monetary issue than that presented by J. Patrick Harty, their father. Ben and Jason had claims to accounts that previously had been payable on death to them by

their grandmother of a much lesser amounts than the \$330,000-some thousand dollar accounts at issue in the claims of J. Patrick Harty. These disparities in the claims justified only a proportional award of attorneys' fees, rather than a joint and several award imposing on the children an obligation to pay attorneys' fees arising out of disputes from which they would gain no benefit if they were successful in the action.

The basis of the "Supplemental Judgment" imposing sanctions on appellants under CR 11 is that after the Motion for Reconsideration of the attorneys' fees award had been filed, Christine Harty, in order to assist her husband in paying the attorneys' fees that he incurred in the trial of the proceeding, allowed the community interest in the family home to be placed as security for an obligation to the appellants' law firm. (App. C.)¹

As demonstrated below, the serious issues regarding the scope of the award of attorneys' fees by the trial court justified the Motion for Reconsideration and the fact that the trial court sought a response to it by Greg Harty demonstrates this. The trial court in seeking the response apparently saw the seriousness of the issues raised by appellants in the

¹ The arrangement for and documentation of this security transaction was accomplished and documented in total compliance with RPC 1.8. At all times in connection with the transaction involving the documentation of the secured obligation to pay attorneys' fees, Mr. and Mrs. Harty were represented by separate counsel from their trial counsel and from the law firm representing them in this matter. The writer of this brief assures the court that scrupulous attention and adherence was paid to RPC 1.8 in regard to this documentation of a security interest in the Harty family home to secure an existing attorneys' fees obligation.

Motion for Reconsideration or the court would have denied it out of hand. No CR 11 sanctions were sought by Greg Harty in his response to the Motion for Reconsideration. It was not until 11 months later that the CR 11 sanctions motion was filed.

The fact that in an unrelated transaction at a later time, Christine Harty agreed to subject to the community home to a Deed of Trust securing the attorneys' fees obligation to counsel for the appellants should not and cannot render her liable for the attorneys' fees. Her doing so should not and cannot justify subjecting J. Patrick Harty and Christine Harty, husband and wife, and the marital community comprised thereof, to sanctions under CR 11 (the award runs only against the Harty marital estate, and does not run against counsel) (App. A).

IV ARGUMENT/AUTHORITY

The stated legal basis for the Supplemental Judgment awarding attorneys' fees in favor of Greg Harty against the marital community of Pat and Christine Harty is CR 11. In the order denying reconsideration, the court "explained" the decision as being caused by the "recent discovery of the recording of the Deed of Trust," and "inconsistent arguments" apparently said to have been submitted by counsel in the Motion for Reconsideration. None of this is true, nor, even if true, would

have provided a basis for CR 11 sanctions against Pat and Christine Harty and their marital community.

Not only does the court fail to cite any “inconsistent arguments” in the Motion for Reconsideration, there are none. The Motion for Reconsideration was based upon the plain language of RCW 11.96A.150(1), which limits the ability of the court to award attorneys’ fees only against a “party.” (CO 361-406, App. D.) The fact that Christine Harty, post-trial, determined to allow the encumbrance of the family home with a Deed of Trust to secure her husband’s obligation for attorneys’ fees does not make her a “party” to the proceeding. It is inescapable that at the time of the filing of the Motion for Reconsideration, the Deed of Trust signed by Christine Harty had not been executed or, of course, recorded. (App. C.)

CR 11 applies only to persons/parties signing “pleadings, motions, and legal memoranda.” In the present case, the Motion for Reconsideration as to the breadth of the attorneys’ fees award was signed only by counsel for J. Patrick Harty and his sons Ben and Jason Harty. In the present case the award was only against the party, and not against the attorney who signed the pleadings, calling into fundamental question the court’s award of sanctions under CR 11 against the client.

In addition, the award of sanctions under CR 11 is allowed only where one of two situations exist:

1. Filings that are not “well grounded in fact and warranted by law” (frivolous and baseless findings); and/or

2. Filings that are “interposed for an improper purpose such as harassment or unnecessary delay” (bad faith filings). *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992).

Presumably, the first of the two alternative grounds is what the court had in mind in entering the Supplemental Judgment sanctioning the marital community of J. Patrick and Christine Harty under CR 11. Getting beyond the fact that neither of them signed the pleading which is claimed to be violative of CR 11, the pleading plainly is not violative of the first prong of CR 11 sanctions. The reconsideration motion was based on the violation of RCW 11.96A.150(1) when the court expanded its “joint and several” award of attorneys’ fees in favor of Greg Harty to non-parties Christine Harty, and the marital community of Christine Harty and J. Patrick Harty.

In addition, there is a well-established legal argument that imposing 100% of the attorneys’ fees of Greg Harty on Ben and Jason Harty, where their claims were only a small percentage of the total claims presented to the estate, violates the principles established in *Marassi v.*

Lau, 71 Wn. App. 912, 859 P.2d 605 (1983) which adopted a “proportionality approach” in the award of attorneys’ fees on multiple claims.

These issues are not frivolous as shown by the fact that the trial court called for a response to the Motion for Reconsideration, and as shown by the extensive briefing of both parties on the main issue in the primary appeal documents in this case.²

The court based its Supplemental Judgment on the fact that Christine Harty subsequent to the submission of the reconsideration motion, agreed to encumber the community interest in the family home to allow attorneys’ fees to be paid to the attorneys representing her husband and her sons in the litigation. The rationale for this decision is not evident. If Christine Harty chooses voluntarily (and with independent counsel advice) to subject her community interest in the family home to an encumbrance for attorneys’ fees incurred by her husband and sons in pursuit of their separate property claims against the brother of her husband (with her husband acting as PR for the his mother’s estate), how does that make Christine Harty a “party” to the proceedings as required by RCW

² A copy of the Motion for Reconsideration is attached as App. D to this brief, the Response is App. E, and the Reply is App. F.

11.96A.150(1)? It does not. She simply made a gift of her community interest for her own reasons.³

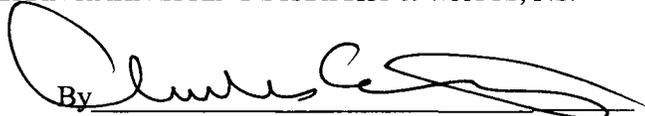
The Superior Court offers no explanation for this decision.⁴

IV. CONCLUSION/RELIEF SOUGHT

As to the supplemental appeal only, appellants ask that the court reverse the CR 11 sanctions imposed by the Supplemental Judgment of April 27, 2010.

DATED: July 22, 2010.

OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.

By 

CHARLES E. WATTS, WSBA #2331
Attorney for Appellants Harty

³ One of many explanations would be that Christine would prefer the family home be used to pay her husband's attorneys' fees – not Greg Harty's attorneys' fees.

⁴ The Superior Court has ruled against appellants J. Patrick Harty and his sons Ben and Jason at every turn in the proceedings. The Superior Court improvidently and in violation of law dismissed their claims against Greg Harty at the close of their evidence. The Superior Court then entered Findings of Fact and Conclusions of Law that included awarding attorneys' fees jointly and severally against all parties and the marital community of J. Patrick and Christine Harty, and Christine Harty individually. The Superior Court denied reconsideration of that decision in spite of the clear violation of RCW 11.96A.150(1) that results from it. The Superior Court awarded 100% of the fees against the two sons of Pat and Christine Harty when their claims were only a small portion of the total issue. From appearance sake, it would be rather easy to conclude that as far as Judge Mary Yu is concerned, Pat Harty and his sons Ben and Jason can do no right, and Greg Harty can do no wrong. The "Supplemental Judgment" from which appeal is sought here further buttresses that conclusion.

CERTIFICATE OF MAILING/SERVICE

The undersigned, Joy Griffin, certifies that on the 23rd day of July, 2010, she caused to be served via e-mail and U.S. Mail, postage prepaid, a copy of the foregoing Opening Brief of Appellants to the Court of Appeals/ Division I, Cause No. 63719-3-I and to the following:

VIA US MAIL

David Lawyer
Inslee, Best, Doezie & Ryder, P.S.
Attorneys at Law
Symetra Financial Center, Suite 1900
777 108th Avenue NE
Bellevue, WA 98004

I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated at Bellevue, WA this 23rd day of July, 2010.



Joy Griffin

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APPENDIX A

Honorable Mary Yu
Consideration requested April 23, 2010
Without Oral Argument

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

IN RE

NO. 06-4-02161-1 SEA

ESTATE OF SHIRLEY A. HARTY

SUPPLEMENTAL JUDGMENT

*Court's modification to proposed order
noted by strikethrough and underline*

Clerks Action Required

JUDGMENT SUMMARY

Judgment Debtors: J. Patrick Harty and Christine Harty, husband and wife

Judgment Creditor: Gregory Harty

Principal Judgment Amount

(for attorneys fees and costs): \$7,040.00 (pursuant to CR 11)

Other recovery amounts: N/A

Principal Judgment amount shall bear interest at the rate of 12% per annum.

Attorney for Judgment Creditor: David Lawyer

JUDGMENT

This matter, having come before the undersigned judge of the above-entitled court,
upon the Respondent Gregory Harty's application for a supplemental judgment for attorneys
incurred in connection with Respondent J. Patrick Harty's motion for reconsideration, the

SUPPLEMENTAL JUDGMENT FOR ATTORNEYS' FEES -
Page 1

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INSLEE, BEST, DOEZIE & RYDER, P.S.

ATTORNEYS AT LAW
777 - 108th Avenue N.E.
Suite 1900
P.O. Box C-90016
Bellevue, Washington 98009-9016
(425) 455-1234

1 court having reviewed Gregory Harty's application, together with the supporting declaration of
2 David Lawyer and exhibits attached thereto, Petitioner's (Patrick Harty) Response, and
3 Respondent Greg Harty's Reply. The court did not consider the "supplemental response" that
4 was filed without leave of court. And deeming itself otherwise fully advised in the premises,
5 the court makes the following findings:

6 1. J. Patrick Harty made a motion in mid-April, 2009, asking this court to
7 reconsider its award of fees and costs in this proceeding in favor of Greg Harty and against the
8 petitioners, jointly and severally, and to include J. Patrick Harty and his marital community;

9 2. Among other arguments, J. Patrick Harty urged the court to consider making
10 any fee award against him be limited to his individual, separate estate, and not against his
11 marital community arguing that the marital estate was not involved and that any inheritance
12 received would be his sole and separate property (Motion for Reconsideration, sub 160);

13 3. After the filing of the motion of reconsideration, but before the court ruled on
14 the motion, J. Patrick Harty and Chirstine Harty, husband and wife, recorded a deed of trust
15 against their community asset in the form of their family residence, in favor of their attorneys,
16 to secure eventual payment of outstanding attorneys fees and costs incurred in prosecution of
17 this action.

18 4. The pledging of a community asset as security for payment of expenses related
19 to the prosecution of this lawsuit is was inconsistent with the argument made in the motion for
20 reconsideration that this undertaking was solely the activity of J. Patrick Harty in his separate,
21 individual capacity, and not as a member of his marital community;
22

1 5. Greg Harty was required to incur expense defending against J. Patirck Harty's
2 motion for reconsideration, unaware that Mr. and Mrs. J. Patrick Harty has pledged
3 community assets to fund the lawsuit that J. Patrick Harty was arguing was his separate
4 undertaking;

5 6. Under Civil Rule 11, J. Patrick Harty's motion for reconsideration was not well
6 grounded in fact, and J. Patrick Harty's denials of factual contentions as to his marital
7 community's stake and involvement in this prosecution were not warranted and caused Greg
8 Harty to spend additional resources. It is appropriate under the circumstances for J. Patrick
9 Harty and his marital community to be required to pay Greg Harty the amount of reasonable
10 expense Greg Harty incurred in reviewing and responding to the motion for reconsideration;

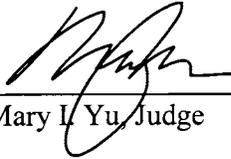
11 7. Because the prospects for recovering on a judgment against J. Patrick Harty's
12 separate estate appeared to be remote, Greg Harty was justified in analyzing carefully and
13 responding vigorously to the motion for reconsideration.

14 8. For the foregoing reasons, the sum of \$7,040.00 incurred by Greg Harty in fees
15 in connection with J. Patirck Harty's motion for reconsideration is a reasonable sum, and a
16 supplemental judgment should be entered in that sum.

17
18 NOW, THEREFORE, having considered the parties' submissions, and having made
19 the foregoing findings with respect to fees and costs and expenses, Supplemental Judgment is
20 hereby entered in the principal sum of \$7,040.00 in favor of Gregory Harty and against J.
21 Patrick Harty and Christine Harty, husband and wife and the marital community comprised

1 thereof. Said principal judgment amount shall bear interest at the rate of 12% per annum from
2 and after the date of entry of this judgment, until paid.

3 ENTERED this 27th day of April, 2010.

4 
5 _____
6 Mary I. Yu, Judge

7 Presented by:

8 INSLEE, BEST, DOEZIE & RYDER, P.S.

9 By s/David J. Lawyer
10 David J. Lawyer
11 W.S.B.A. #16353
12 Attorneys for Respondent

13 Approved as to form, notice of presentation waived:

14 OSERAN HAHN, SPRING STRAIGHT & WATTS, P.S.

15 By _____
16 Charles E. Watts
17 W.S.B.A. # 2331
18 Attorneys for Petitioners

APPENDIX B

me

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

IN RE:)
ESTATE OF SHIRLEY A. HARTY) No. 06-4-02161-1 SEA
ORDER ON RECONSIDERATION

THIS MATTER came before the undersigned upon Petitioners' (Patrick Harty, *et., al*) Motion for Reconsideration.

IT IS HEREBY Ordered that the Motion for Reconsideration IS DENIED. The court agrees that originally there may have been a *legal* question regarding who may be liable for fees in this litigation. However, the entry of sanctions is based on the *factual* representations, the recent discovery of the recording of the deed of trust, and the inconsistent arguments that caused Greg Harty to incur additional costs in responding to the motion for reconsideration.

IT IS SO ORDERED this 21st day of May, 2010.



Judge Mary I. Yu
KING COUNTY SUPERIOR COURT

APPENDIX C



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OSERAN HAHN DT 48.00
PAGE 001 OF 006
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KING COUNTY, WA

Return Address:

MATTHEW B STRAIGHT
OSERAN HAHN SPRING STRAIGHT & WATTS, PS
10900 NE 4TH ST STE 850
BELLEVUE WA 98004

KING COUNTY AUDITOR/RECORDER'S INDEXING FORM

DOCUMENT TITLE(S): 1. DEED OF TRUST
REFERENCE NUMBER(S) OF DOCUMENTS ASSIGNED OR RELEASED: N/A Additional reference numbers are on page <u>N/A</u> of document.
GRANTOR(S): 1. J. PATRICK HARTY and CHRISTINE D. HARTY, husband and wife. Additional names on page <u>N/A</u> of document.
GRANTEE(S): 1. OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S. Additional names on page <u>N/A</u> of document.
LEGAL DESCRIPTION: (abbreviated i.e. lot, block, plat, section, township, and range) Lot 25, Whispering Heights No. 1, Vol. 93, Pgs. 93 & 94 Full legal description is on page <u>2</u> of document.
ASSESSOR'S PROPERTY TAX PARCEL/ACCOUNT NUMBER: 9346900250
The Auditor/Recorder will rely on information provided on the form. The staff will not read the document to verify the accuracy or completeness of the indexing information provided herein.

DEED OF TRUST

(FOR USE IN WASHINGTON STATE ONLY)

THIS DEED OF TRUST is made this 30th day of April, 2009, between J. PATRICK HARTY and CHRISTINE D. HARTY, husband and wife ("Grantors"), whose address is 4630 152nd Pl. SE, Bellevue, WA 98006, and STEWART TITLE INSURANCE COMPANY ("Trustee"), whose address is 1000 Second Avenue, Suite 1620, Seattle, WA 98104, and OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S. ("Beneficiary"), whose address is 10900 NE 4th Street, Suite 850, Bellevue, WA 98004.

WITNESSETH: Grantor hereby bargains, sells and conveys to Trustee, in Trust, with power of sale, the following described real property in King County, Washington:

Lot 25, Whispering Heights No. 1, according to the plat thereof recorded in Volume 93 of Plats, pages 93 and 94, in King County, Washington.

Which real property is not used principally for agricultural or farming purposes, together with all the tenements, hereditaments, and appurtenances now or hereafter thereunto belonging or in any wise appertaining, and the rents, issues and profits thereof.

This Deed is for the purpose of securing performance of each agreement of Grantors herein contained, and payment of the sum of EIGHTY-TWO THOUSAND FIVE HUNDRED DOLLARS (\$82,500) with interest, in accordance with the terms of a Promissory Note of even date herewith, payable to Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

To protect the security of this Deed of Trust, Grantors covenant and agree:

1. To keep the property in good condition and repair; to permit no waste thereof; to complete any building, structure or improvement being built or about to be built thereon; to restore promptly any building, structure or improvement thereon which may be damaged or destroyed; and to comply with all laws, ordinances, regulations, covenants, conditions and restrictions affecting the property.

2. To pay before delinquent all lawful taxes and assessments upon the property; to keep the property free and clear of all other charges, liens or encumbrances impairing the security of this Deed of Trust.

3. To keep all buildings now or hereafter erected on the property described herein continuously insured against loss by fire or other hazards in an amount not less than the total debt secured by this Deed of Trust. All policies shall be held by the Beneficiary, and be in such companies as the Beneficiary may approve and have loss payable first to the Beneficiary, as its interest may appear, and then to the Grantor. The amount collected under any insurance policy may be applied upon any indebtedness hereby secured in such order as the Beneficiary shall determine. Such application by the Beneficiary shall not cause discontinuance of any proceedings to foreclose this Deed of Trust. In the event of foreclosure, all rights of the Grantor in insurance policies then in force shall pass to the purchaser at the foreclosure sale.

4. To defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses, including cost of title search and attorney's fees in a reasonable amount, in any such action or proceeding, and in any suit brought by Beneficiary to foreclose this Deed of Trust.

Handwritten signature and initials in the bottom right corner of the page.

5. To pay all costs, fees and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligation secured hereby and Trustee's and attorney's fees actually incurred, as provided by statute.

6. Should Grantor fail to pay when due any taxes, assessments, insurance premiums, liens, encumbrances or other charges against the property hereinabove described, Beneficiary may pay the same, and the amount so paid, with interest at the rate set forth in the Note secured hereby, shall be added to and become a part of the debt secured in this Deed of Trust.

IT IS MUTUALLY AGREED THAT:

1. In the event any portion of the property is taken or damaged in an eminent domain proceeding, the entire amount of the award or such portion as may be necessary to fully satisfy the obligation secured hereby, shall be paid to Beneficiary to be applied to said obligation.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right to require prompt payment when due of all other sums so secured or to declare default for failure to so pay.

3. The Trustee shall reconvey all or any part of the property covered by this Deed of Trust to the person entitled thereto, on written request of the Grantor and the Beneficiary, or upon satisfaction of the obligation secured and written request for reconveyance made by the Beneficiary or the person entitled thereto.

4. Upon default by Grantor in the payment of any indebtedness secured hereby or in the performance of any agreement contained herein, and upon written request of Beneficiary, Trustee shall sell the trust property, in accordance with the Deed of Trust Act of the state of Washington, at public auction to the highest bidder. Any person except Trustee may bid at Trustee's sale. Trustee shall apply the proceeds of the sale as follows: (a) to the expense of the sale, including a reasonable Trustee's fee and attorney's fee; (b) to the obligation secured by this Deed of Trust; and (c) the surplus, if any, shall be distributed to the persons entitled thereto.

5. Trustee shall deliver to the purchaser at the sale its deed, without warranty, which shall convey to the purchaser the interest in the property which Grantor had or had the power to convey at the time of its execution of this Deed of Trust, and such as it may have acquired thereafter. Trustee's deed shall recite the facts showing that the sale was conducted in compliance with all the requirements of law and of this Deed of Trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchaser and encumbrances for value.

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6. The power of sale conferred by this Deed of Trust and by the Deed of Trust Act of the state of Washington is not an exclusive remedy; Beneficiary may cause this Deed of Trust to be foreclosed as a mortgage.

7. In the event of the death, incapacity, disability or resignation of Trustee, Beneficiary may appoint in writing a successor trustee, and upon recording of such appointment in the mortgage records of the county in which this Deed of Trust is recorded, the successor trustee shall be vested with all powers of the original trustee. The Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Grantors, Trustee or Beneficiary shall be a party unless such action or proceeding is brought by the Trustee.

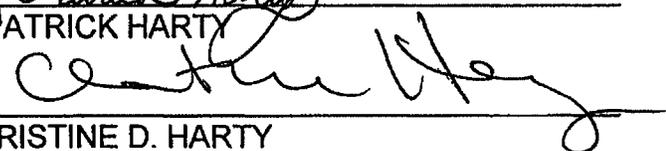
8. This Deed of Trust applies to, inures to the benefit of, and is binding not only on the parties hereto, but on their heirs, devisees, legatees, administrators, executors and assigns. The term "beneficiary" shall mean the holder and owner of the Note secured hereby, whether or not named as Beneficiary herein.

9. If all or any portion of the property described in this Deed of Trust is sold or transferred by Grantor without Beneficiary's prior written consent, then the whole sum of both principal and interest of the Promissory Note secured by this Deed of Trust shall be immediately due and payable without further notice or demand at Beneficiary's option.

GRANTORS:



J. PATRICK HARTY



CHRISTINE D. HARTY



STATE OF WASHINGTON)
) §
COUNTY OF KING)

I certify that I know or have satisfactory evidence that J. PATRICK HARTY and CHRISTINE D. HARTY are the persons who appeared before me, and said persons acknowledged that they signed this instrument and acknowledged it to be their free and voluntary act for the uses and purposes mentioned in the instrument.

Dated: ^{MAY} April ¹⁵ 2009.

(SEAL/STAMP)



[Handwritten Signature]

Print Name CHARLES E. WATTS
NOTARY PUBLIC in and for the state of
Washington residing in Bellevue
My appointment expires 5/4/10

ch
[Handwritten initials]

REQUEST FOR FULL RECONVEYANCE

**DO NOT RECORD.
TO BE USED ONLY WHEN ALL OBLIGATIONS HAVE
BEEN PAID UNDER THE NOTE AND THIS DEED OF TRUST**

TO: _____, TRUSTEE

The undersigned is the legal owner and holder of the Note and all other indebtedness secured by the Deed of Trust. The Note, together with all other indebtedness secured by the Deed of Trust, has been fully paid and satisfied; and you are hereby requested and directed on payment to you of any sums owing to you under the terms of the Deed of Trust to cancel the Note, and all other evidences of indebtedness secured by the Deed of Trust delivered to you herewith, together with the Deed of Trust, and to reconvey without warranty to the parties designated by the terms of the Deed of Trust all the estate now held by you thereunder.

DATED: _____.

BENEFICIARY:



APPENDIX D

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Judge Mary Yu

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN RE

ESTATE OF SHIRLEY A. HARTY

No. 06-4-02161-1 SEA

**MOTION FOR
RECONSIDERATION OF
PETITIONERS HARTY**

Petitioners J. Patrick Harty, Personal Representative of the estate of Shirley A. Harty, Benjamin Harty and Jason Harty, ask the Court pursuant to CR 59 to reconsider its judgment awarding attorneys' fees which was entered on April 10, 2009.¹ Reconsideration is sought for the following reasons, which are in addition to the reasons stated in the Petitioners' Response to the Greg Harty Motion for Award of Attorneys' Fees which is incorporated herein by reference as if fully set forth.

¹ The procedural history of this action reflects that it was originally filed not as a probate petition, but as a petition by J. Patrick Harty and his sons Benjamin and Jason to *inter alia*, require an accounting by Greg Harty of the assets of the decedent. This Summons and Petition for accounting resulted in a citation issued by the court to Greg on March 22, 2006 in this action. On June 7, 2006, J. Patrick Harty filed a Petition in King County Probate Cause #06-4-03511-6 for admission of the lost Will of his mother, Shirley A. Harty, to probate and appointment of himself as Personal Representative as the Will provided. On June 21, 2006, an order appointing J. Patrick Harty as Personal Representative of the estate of his mother was issued. On July 12, 2006, the Clerk issued Letters Testamentary to J. Patrick Harty. The Court is asked to take judicial notice of the Shirley A. Harty probate file in King County Cause #06-4-03511-6 SEA pursuant to ER 201(b).

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1 1. Did the Court Consider the Objection of Petitioners to the Requested Award of
2 Attorneys' Fees? – In its April 10, 2009 order, the Court indicated review of the Reply Brief of
3 Greg Harty, but did not indicate specifically receipt and/or review of the Responsive Brief of
4 Petitioners to the Greg Harty motion for award of attorneys' fees. The Petitioners timely filed a
5 24-page Response accompanied by a motion for leave to file an over length brief. Because of the
6 Court's silence on whether or not the Petitioners' Response was received or considered,
7 Petitioners are left with the concern that their Response was not considered by the Court before
8 its April 10, 2009 decision.

9 A copy of "Response of Petitioners to Greg Harty Application for Attorneys' Fees" is
10 attached to this Motion for Reconsideration and incorporated herein by reference as if fully set
11 forth. It may be that the Court did not consider the response prior to making its award of
12 attorneys' fees although it was attached to the Motion for Leave to File Overlength Brief that
13 was filed with the Clerk and a working copy delivered to the Court along with a note for the
14 motion calendar and a motion and proposed order shortening time for hearing on the overlength
15 brief motion. In any case, the Response to the application for attorneys' fees contains many
16 issues that J. Patrick Harty and his sons Ben and Jason restate here in connection with their
17 Motion for Reconsideration.

18 These incorporated issues include issues identified as 1-4 on pages 7 and 8 of the
19 Response brief, i.e.:

- 20 1. Should the court require all parties to pay and bear their
21 own attorneys' fees and costs?
22 2. Alternatively, if attorneys' fees and costs are awarded in
 whole or in part in favor of Greg Harty, should they be limited to
 an award from the decedent's estate only?

1 3. Alternatively, if costs are awarded in favor of Greg Harty,
2 should the costs be limited to statutory costs provided for in RCW
Ch. 4.84?

3 4. If the estate is insolvent based upon attorneys' fee awards
4 made by the court, should the provisions of RCW 11.76.150
5 regarding payment of claims according to class (administrative
6 claims taking priority over general unsecured claims) and
7 proportionate within a class?

8 Without restating the arguments made in the 24-page Response of Petitioners to the
9 motion of Greg Harty for award of attorneys' fees, the contents of that Response are incorporated
10 herein by reference as if fully set forth.²

11 2. There is an Internal Inconsistency in the Judgment as Modified by the Court – In
12 the handwritten addition to paragraph 6 of the Findings, the Court determines that:

13 A fee award from the estate accomplishes what the Petitioners did
14 not achieve through trial. Fundamental fairness and the Court's
15 prior findings require entry of this Order. (Emphasis supplied.)

16 The Court clearly shows an intention to award attorneys' fees "from the estate" and not
17 from the individual Petitioners. Nevertheless, the Court has signed off on a proposed judgment
18 prepared by counsel for Greg Harty that makes the judgment personally run against J. Patrick
19 Harty, his wife Christine, his marital community, and his two children, jointly and severally.
20 The Court in its handwritten addition to the judgment makes clear that this was not the intention
21 of the Court and that equity requires only that the judgment run against the estate of Shirley A.
22 Harty.

² According to the Clerk's docket, the proposed Order Authorizing Overlength Brief was entered by the Court on April 10, 2009. This is the same day the Judgment awarding fees was entered by the Court which did not allow time for Petitioners to see to the filing of the original of the Brief, although the Court did at the time have available to it a copy that accompanied the Motion to File Overlength Brief. Whether or not the Court read the Response of Petitioners is uncertain since it is not referred to in the Judgment itself entered the same day.

1 The judgment should be modified to provide only for an attorney's fee and cost award
2 against the estate of the decedent as the Court intended as shown by its handwritten addition to
3 the judgment.

4 3. The Judgment is Overbroad – The April 10, 2009 Judgment is entered against “J.
5 Patrick Harty and Christine Harty, husband and wife and the marital community comprised
6 thereof, Benjamin Harty and Jason Harty, jointly and severally.” RCW 11.96A.150(1) allows the
7 Court only to enter a judgment against “any party to the proceedings” based on equitable
8 principles.

9 J. Patrick Harty was a party to this action in his separate estate capacity as PR of his
10 mother's estate as reflected by Letters Testamentary issued by the Clerk on July 12, 2006.³
11 Christine Harty and the marital community of J. Patrick Harty and Christine were not Petitioners
12 and were not, therefore, before the court and were not, therefore, subject to an award of
13 attorneys' fees. There is no legal basis for an award or judgment against either Christine Harty
14 or the marital community. RCW 11.96A.150(1).

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17 ³ Technically, J. Patrick Harty is named as the party without his descriptive appellation of “Personal Representative”
18 in the TEDRA action. However, this is because at the time the action was initially commenced in March of 2006,
19 there was no probate of the estate of Shirley A. Harty pending and, of course, J. Patrick Harty could not have been
20 acting as Personal Representative at that time. The original Petition in the TEDRA action was, therefore, filed by J.
21 Patrick Harty in his individual capacity and did name his wife, Christine, as a party. The record does not reflect that
22 ever having been changed even after J. Patrick Harty was appointed the Personal Representative of the estate of his
mother in June 2006 in cause 06-4-03511-6 (Judicial Notice requested). Nonetheless, throughout the TEDRA
litigation and specifically in the trial memorandum submitted by Petitioners, the relief sought by J. Patrick Harty has
always been to recover the disputed bank account assets for inclusion in his mother's estate for distribution in
accordance with her Will equally to her three sons. The relief sought in the TEDRA action is identical to that which
a Personal Representative would seek, and did not benefit J. Patrick Harty beyond what his testamentary share in his
mother's estate would have otherwise been. The estate is the beneficiary, J. Patrick Harty as Personal
Representative is the real party in interest, and it was simply a ministerial failure to note the change in his role in the
TEDRA action after he was appointed Personal Representative of his mother's estate.

1 An award against Christine Harty individually and against the marital community of she
2 and Patrick Harty fails to take into account the fact that Christine's husband was not suing on
3 behalf of the marital community but was suing in his separate capacity as PR of his mother's
4 estate and as a designated beneficiary under his mother's Will. Any inheritance received from
5 his mother by J. Patrick Harty would be his sole and separate property under Washington
6 community property laws and, therefore, could not benefit the community of Christine and him.
7 (RCW 26.16.010).⁴

8 The Court went far beyond any statutory authority in entering a judgment against
9 Christine Harty individually and against the marital community of her and her husband Patrick
10 who were not a "party" to the TEDRA suit. The judgment must be modified to conform to the
11 statute under which it was granted to reflect only a judgment against J. Patrick Harty in his
12 capacity as Personal Representative against his separate estate, if any.

13 4. Making the Judgment Joint and Several – The April 10, 2009 Judgment against
14 Petitioners is said to be "joint and several." This is an improper award under the statute upon
15 which it is based, particularly under the equitable principles which are required to be the basis of
16 an award under RCW 11.96A.150(1). By making any judgment for attorneys' fees "joint and
17 several," the Court is effectively imposing upon the sons of Pat Harty, Ben and Jason, total
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21 ⁴ The Last Will and Testament of Shirley A. Harty admitted to probate in King County Cause #06-4-03511-6
22 identifies only J. Patrick Harty in the identification paragraph and leaves the estate to her three named sons including
J. Patrick Harty, but says nothing anywhere about Christine Harty. Clearly, the cited statute makes the testamentary
bequest to J. Patrick Harty his separate property.

1 liability on either of them for the entire amount awarded as attorneys' fees to their uncle Greg
2 Harty.⁵

3 The Court is well aware that the claims of Benjamin and Jason Harty were based on
4 entirely different facts and legal theories than the claims of J. Patrick Harty on behalf of his
5 mother's estate. Ben and Jason had claims for two individual bank accounts in which they were
6 the designated Payable on Death beneficiaries, neither account exceeding \$20,000 in value at the
7 time of the death of their grandmother. This compares to the claim of Petitioner J. Patrick Harty
8 as Personal Representative of his mother's estate which involved bank accounts totaling over
9 \$330,000, accounts 16 times larger than the accounts at issue with Ben and Jason. To impose the
10 entire attorneys' fee burden on either Ben or Jason, which is the result of the joint and several
11 language used by the court in the judgment, is to impose on both of these young people liability
12 for attorneys' fees not demonstrably arising out of their claims which are very modest in size
13 compared to the claims of their father as Personal Representative of his mother's estate.

14 The Court is required to apportion attorneys' fees awards between claims upon which a
15 party was successful and those upon which a party was not successful, or upon claims for which
16 there is an entitlement to fees against claims for which there is no entitlement to fees. *Boeing*
17 *Company v. Sierracin Corp.*, 108 Wn.2d 38, 65-6, 738 P.2d 665 (1987). Applying the same
18 principle to the present situation, at worst, Ben and Jason should only be responsible for a *pro*
19 *rata* share of the attorneys' fees awarded based on their proportionate share of the total claim.
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21 ⁵ The strong feelings expressed by the Court in its annotation to the Judgment do not distinguish on their face
22 between J. Patrick Harty and his sons Ben and Jason. It is assumed that the characterization by the Court of motives
(however inaccurate) is addressed to J. Patrick Harty as regards his brother Greg, and not Ben and Jason Harty as
regards their uncle. Imposing all of the attorneys' fee award on these two young men, jointly and severally, is
without support legally or equitably.

1 The same should be true of the award against J. Patrick Harty as PR of his mother's estate, it
2 should only reflect fees awarded in connection with claims made by him as PR for the benefit of
3 his mother's estate, and not reflect those fees incurred in connection with the claims of Ben and
4 Jason.

5 By not allocating fees, the Court has violated a fundamental principle of attorneys' fee
6 awards in the State of Washington.

7 5. The Interlineated Addition to the Findings by the Trial Court Cannot Apply to
8 Claims by Benjamin Harty and Jason Harty – The footnote on page 4 of the April 10, 2009
9 Judgment handwritten by the court describes the claims of Petitioners as “mean spirited” and
10 “filed as a means to punish Greg Harty. . . .” Is the Court actually finding that Benjamin Harty
11 and Jason Harty, Greg Harty's nephews, were “mean spirited” and motivated by “punishment”
12 of their uncle? No evidence supports such a conclusion and it is grossly unfair to paint all
13 Petitioners with a broad brush rather than being specific as to the accusations in the handwritten
14 insertion. The language is the court-added addition to paragraph 6 of the Findings of Fact is
15 unsupported by the record at trial at least as to Benjamin and Jason Harty and should be
16 corrected (or stricken).

17 6. The Court Erred in Its Handwritten Insertion as to the Motivations of J. Patrick
18 Harty, Personal Representative of His Mother's Estate – J. Patrick Harty commenced this
19 TEDRA action as PR of his mother's estate.⁶ J. Patrick Harty would only have personally
20 benefitted from the TEDRA action to the extent of his share in the estate which was one-third
21

22 ⁶ J. Patrick Harty was appointed Personal Representative of his mother's estate in King County Superior Court Cause #06-4-03511-6 on June 7, 2006. Letters Testamentary were issued to J. Patrick Harty on July 12, 2006. The estate remains open.

1 shared with his brothers Doug and Greg. To attribute to J. Patrick Harty mean spirited motives
2 and a personal vendetta against his brother Greg ignores the fact that Greg would have shared in
3 one-third of the estate recovery had the Personal Representative prevailed in the action as well as
4 would brother Doug.

5 Paragraph 6 of the Court's Findings originally proposed by counsel for Greg Harty,
6 shows beyond doubt that there were genuine and serious fact disputes to be decided by the trier
7 of fact.⁷ The action was not frivolous. Greg Harty does not claim that the TEDRA action
8 commenced by the Personal Representative of this mother's estate and by his nephews was
9 frivolous under RCW 4.84.185 or violative of CR 11. The finding by the Court in the
10 handwritten addition to paragraph 6 of the April 10, 2009 Judgment is unsupported by the record
11 at trial, and it also unsupported by the law which requires a Personal Representative to take
12 possession of all assets of the decedent and distribute in accordance with the Will

13 7. The Question of Liability for Attorneys' Fees is Reviewable as a Legal
14 Conclusion, Not by the Manifest Abuse of Discretion Standard – It is axiomatic that the amount
15 of an award of attorneys' fees is not reversed by an appellate court except for "manifest abuse of
16 discretion." *Boeing Company v. Sierracin Corp.*, supra, at p. 65. However, that standard applies

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18 _____
19 ⁷ The cited Finding reads:

20 6. The nature of this dispute included intense disagreement over the facts
21 in dispute such that there was no reasonable opportunity to dispose of this case
22 by dispositive motion, prior to trial.

21 This is certainly not a determination by the court that the TEDRA Petition was frivolous or "mean-spirited." There
22 were genuine disputes of fact and application of law to facts which required determination by the Court at trial.
Greg Harty concedes this in proposing the finding adopted by the Court in paragraph 6 quoted above. The purity of
J. Patrick Harty's motives is immaterial as his claims were legitimate factual and legal disputes presented to the
Court for resolution. There is no finding to the contrary.

MOTION FOR RECONSIDERATION OF PETITIONERS
HARTY -8
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1 to the amount of attorneys' fees and costs awarded, not the liability for the fees and costs which
2 is the issue presented by this motion for reconsideration. *Id.* at p. 65.

3 The Court has erred as a matter of law in entering judgment against persons and marital
4 communities not parties to the TEDRA action, and therefore, not subject to an award of fees
5 under RCW 11.96A.150. Moreover, the Court has awarded fees "jointly and severally" against
6 parties who should only bear a portion of the fees under well-established principles of attorney
7 fee award. These are issues that are reviewable as a matter of law, under normal review
8 standards, not under the very generous "manifest abuse of discretion" standard which applies
9 only to the amount of attorneys' fees awarded against a party obligated to pay them.

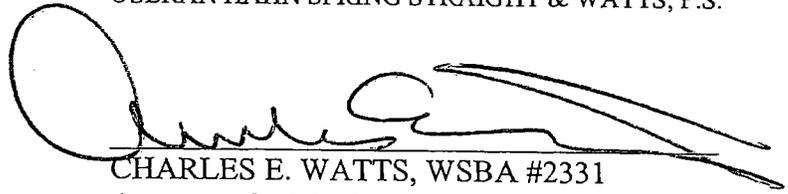
10 **CONCLUSION/RELIEF SOUGHT**

11 Petitioners seek reconsideration of the award of attorneys' fees in favor of Greg Harty
12 against them personally. In addition, Petitioner J. Patrick Harty seeks reconsideration of the
13 award against his wife Christine personally and his marital community. Neither Christine nor
14 the marital community were parties to the TEDRA proceeding. Benjamin and Jason Harty had
15 relatively minor claims at stake in the TEDRA proceeding. J. Patrick Harty was suing in the
16 TEDRA proceeding only as Personal Representative of his mother's estate and performing his
17 statutory duties to gather estate assets. The Court found genuine issues of material fact.

18 Since equitable principles apply in the determination of the award of attorneys' fees
19 under TEDRA by virtue of RCW 11.96A.150, the Court should vacate the April 10, 2009 order
20 and enter an order in accordance with its handwritten stated intention of awarding fees against
21 the estate only or not at all.

1 Dated this 16th day of April, 2009.

2
3 OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.

4 

5 CHARLES E. WATTS, WSBA #2331
6 Attorneys for Moving Parties

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Judge Mary Yu
Hearing: April 13, 2009
Without Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN RE

ESTATE OF SHIRLEY A. HARTY

No. 06-4-02161-1 SEA

**RESPONSE OF PETITIONERS
TO GREG HARTY
APPLICATION FOR
ATTORNEYS' FEES**

I. RELIEF REQUESTED

Petitioner seeks the following relief with regard to the Greg Harty application for attorneys' fees and costs.

1. Deny fees and costs to all parties; i.e., all parties should bear their own costs and attorneys' fees in accordance with the provisions of RCW 11.96A.150 (Petitioners to retain fees previously paid by estate funds totaling \$19,573.42);

2. If attorneys' fees are awarded Respondent, Greg Harty, the fees should be awarded only against estate assets of Shirley A. Harty, not against the individual Petitioners;

3. If attorneys' fees are taxed against estate assets, establish a reasonable amount of fees based upon the factors of RPC 1.5;



1 4. If fees awarded against estate in favor of Greg Harty, those fees be apportioned as
2 an estate claim with fees of Petitioners and any other claimants pursuant to RCW 11.76.150;

3 5. If "costs" are taxed against any party, the "costs" should be statutory costs
4 pursuant to RCW Ch. 4.84 and the claimed costs should be reduced accordingly.

5 **II. STATEMENT OF FACTS**

6 The writer of this brief was not involved in the prosecution of the TEDRA litigation by
7 Petitioners against Respondent Greg Harty. Craig Blackstone, the primary attorney representing
8 Petitioners is no longer employed by the firm. Ginger Buetow, who participated in the trial of
9 the TEDRA action, assisted on this brief.

10 The court heard the evidence submitted by Petitioners and determined at the close of the
11 Petitioners' case that they had not met the high burden of proof imposed on the claims asserted –
12 "clear, cogent and convincing evidence." The court did not conclude that the action was
13 frivolous or violative of the standards of CR 11. The individuals who commenced the action did
14 so in good faith (see attached Declaration of J. Patrick Harty). The circumstances surrounding
15 the claim, while perhaps not rising to the required level of proof, very much support the concerns
16 of the Petitioners in regard to the change by their mother/grandmother shortly before her death of
17 her significant estate distribution plan so as to effectively cut out two of her sons and two of her
18 grandsons. The decedent did this by signing new bank forms filled out for her in her company
19 by her son, Greg, who became the sole recipient of these significant accounts less than 90 days
20 before the death of the account owner.

21 The Petitioners became concerned when Greg Harty, the appointed personal
22 representative, was less than forthcoming with information about the estate and did not appear to

1 be pursuing the conduct and closing of the estate. When asked about the lack of progress in the
2 estate by Pat Harty, Greg Harty's response was that he would handle the estate in his own way,
3 and that Pat should back off. Petitioners sought legal advice as to how to protect themselves
4 when Greg was not carrying out his functions as PR. Petitioner, at the same time, sought legal
5 advice regarding the change on bank account successor designation by the decedent shortly
6 before her death favoring Greg and very much disfavoring the decedent's other two children and
7 two grandchildren. As was demonstrated by the briefing submitted to the court prior to trial,
8 there is legal authority supporting a challenge to the change of beneficiary designation based on
9 questions surrounding the intention of the decedent at the time and also the question of undue
10 influence on the decedent in making the beneficiary designation changes to her savings accounts.

11 Petitioners were advised by counsel and on that advice pursued the litigation in the
12 probate court. Substantial attorneys' fees were incurred in both sides and it is not the intention of
13 Petitioners to challenge the amount of attorneys' fees incurred by Respondent Greg Harty in this
14 action. Petitioners themselves have incurred attorneys' fees of over \$108,000. While these
15 attorneys' fees remain largely unpaid, there is in existence a partially fulfilled court order
16 authorizing and directing the estate to pay up to \$40,000 of those attorneys' fees from estate
17 assets.

18 Pat Harty and Craig Blackstone both read the Declaration of David Lawyer in Support of
19 the Attorneys' Fee Application. Mr. Lawyer was not involved in the mediation/settlement
20 negotiation process and appeared not to have been involved at all in the case prior to or during
21 the mediation. Judge Rosselle Pekelis conducted the mediation at JDR and it went on for 10
22 hours without apparent success. (See J. Patrick Harty Declaration.) As mediation ground to a

1 close at about 6:00 p.m., Judge Pekelis advised Pat Harty that she was not able to get an offer
2 from Greg and thought that it would be best if Pat Harty made a written offer to Greg for him to
3 consider. Mr. Blackstone representing Pat Harty and Pat Harty made a handwritten CR2A
4 settlement offer which gave Pat Harty nothing, but provided for a cash payment of less than
5 \$100,000 to Doug Harty, the third brother. In return for that cash payment to Doug, Pat Harty
6 agreed to drop all claims and dismiss the TEDRA action with prejudice. The written offer was
7 given to Judge Pekelis who said she would give it to Greg Harty that evening. Judge Pekelis did
8 so and came back and told Pat Harty and Craig Blackstone that Greg could not act on the offer
9 that night, "because he did not have a trial attorney present." What this meant to Craig
10 Blackstone and Pat Harty is that they had wasted an entire day of mediation because Greg Harty
11 did not have confidence in the lawyer with him to evaluate settlement negotiations. (Craig
12 Blackstone Decl.)

13 The offer that was extended by Pat Harty at mediation was so unfavorable and one-sided
14 in favor of Greg that Pat Harty's family persuaded him to withdraw the offer which he did by
15 advising his attorney to do so the next morning before it was accepted. Later in the day, Greg
16 Harty, finally coming to his senses about how favorable the offer was to him, attempted to accept
17 the offer but he was too late. David Lawyer's characterization of the settlement situation in his
18 declaration is completely at odds with the actual facts which demonstrate that Greg Harty never
19 made an offer, could not meaningfully engage in the mediation because he did not have "the
20 right attorney present," and declined to accept a written offer made to him at the end of the
21 mediation.
22

1 As shown by the Declaration of J. Patrick Harty submitted in connection with this
2 response, all of the Petitioners are individuals without significant assets and of modest middle-
3 class income, or no income at all. None of the Petitioners have surplus assets and none of the
4 Petitioners have surplus incomes. All of the Petitioners are truly "middle-class" in terms of
5 assets and income and none have the ability to respond to a judgment against them individually
6 for Greg's attorneys' fees.

7 J. Patrick Harty works in private accounting as an accountant/bookkeeper for a private
8 firm. He and his wife Christine have accumulated some equity in their home, and very small
9 assets over and above that equity. Their retirement plan has been significantly depleted due to a
10 forced change in employment by Pat Harty and an interval of unemployment resulting from it.
11 At the present time, exclusive of a 401(k) retirement plan (which has about \$50,000 in it),
12 Patrick and Christine Harty have equity of about twice the homestead amount in their family
13 home (\$200,000-\$250,000), and net assets above that equity in the home of about \$25,000-
14 \$30,000. Petitioner Jason Harty is 29 years of age, married, and employed by the federal
15 government. He and his wife of three years have no appreciable assets. Petitioner Ben Harty is
16 21 years of age and in his junior year in college at New Mexico State University. He is single
17 and has no assets. Pat and Christine are helping Ben with his college education, as they did with
18 their son Jason.

19 Pat and Christine Harty are in their mid-50s, have almost nothing saved for retirement,
20 and have no conceivable means of responding to a personal judgment against them for any of
21 Greg's attorneys' fees. Obviously, the sons Ben and Jason are not approaching retirement, but
22 have no assets and a judgment against them would be a huge and unwanted financial burden on

1 their future. Bankruptcy would be the only result of a judgment *in personem* for Greg's
2 attorneys' fees against the grandsons Ben and Jason. Financial ruin would be the result of an *in*
3 *personem* judgment against Pat and Christine Harty, including impoverishment in their
4 retirement/sunset years.

5 On the other side of the coin, Greg leaves the litigation with cash assets of over \$350,000
6 from which he will be required to pay his attorney less than one-third in connection with the
7 recovery of those assets. Greg leaves the litigation very financially solvent; the Petitioners do
8 not. Equity suggests, indeed requires, that all parties bear their own attorneys' fees and costs in
9 this litigation with the exception of those fees and costs which have previously been distributed
10 by the estate to counsel for Petitioners pursuant to court order.

11 The grandsons of decedent, Jason and Ben, were minor players in the litigation. The
12 accounts at issue concerning their claims totaled about \$32,000 or 10% or less of the accounts at
13 issue in the claims involving Pat and Doug Harty, two of the three sons of decedent. The
14 grandchildren, Jason and Ben, were not involved in the regular consultation with attorneys
15 regarding the litigation, and had limited involvement in the trial itself, although both did testify.
16 Even if the court were inclined to award attorneys' fees *in personem* against any Petitioner, Jason
17 and Ben would be the parties least susceptible to such an award. In any case, an award against
18 Jason and Ben, if made, should reflect the percentage interest they had in the outcome of the
19 litigation.

20 Pat Harty explains in his declaration his shock and surprise at the last-minute change by
21 his mother to her estate distribution plan, and the apparent involvement of his brother Greg in
22 bringing about that change. He also explains that he had a very friendly relationship with Greg

1 until after their mother died (“he was my best friend”). The court we are sure will remember the
2 facts of the case and, therefore, they will not be recited here. It is sufficient to say that, whether
3 or not the burden of proof was met, there were certainly substantial and genuine facts supporting
4 the concerns about Greg’s involvement in bringing about the pre-death account beneficiary
5 designation changes.

6 The outcome of this case was, it is respectfully suggested, not premised on the lack of
7 merit for the concerns of the Petitioners about the way the bank accounts were handled in terms
8 of beneficiary designation change, but, rather, by the inability of the Petitioners to meet the very
9 heavy burden of proof placed upon them regarding their claims based on the decedent’s
10 intentions and mental state. No where in its decision does the court suggest that the Petitioners
11 acted in bad faith or for improper motives in commencing the action.

12 The decedent’s estate has paid the Petitioners’ attorneys \$19,573.42 in attorneys’ fees,
13 \$10,000 of which was paid on January 21, 2009. An earlier payment by the estate was made on
14 December 21, 2007. On December 24, 2008, an order was entered by the Probate Department
15 authorizing the payment of two-thirds of the estate assets to the Petitioners for attorneys’ fees
16 (the Doug and Pat Harty share of their mother’s estate). A copy of the order is attached to the
17 Declaration of Craig Blackstone.

18 **III. ISSUES PRESENTED**

- 19 1. Should the court require all parties to pay and bear their own attorneys’ fees and
20 costs?
21 2. Alternatively, if attorneys’ fees and costs are awarded in whole or in part in favor
22 of Greg Harty, should they be limited to an award from the decedent’s estate only?

1 status of compensated PR or trustees or corporate parties. Their assets and their income are
2 modest. to say the least, and any judgment against them for fees or costs in favor of Greg would
3 be highly inequitable; and, it is respectfully suggested, a manifest abuse of discretion under the
4 case law and under the express terms of the statute itself.

5 Crucial to an analysis of Greg Harty's claim for attorneys' fees and costs from the
6 Petitioners is the fact that RCW 11.96A.150 does not compel an award of attorneys' fees at all.
7 The language in the statute, and the case law under the statute, provides that the court "may, in
8 its discretion" provide for costs and attorneys' fees to be awarded to any party. The court is not
9 required to award attorneys' fees, but is required to exercise its equitable discretion in
10 determining whether or not to do so on the particular facts before it. In 2007, a final sentence
11 was added to subsection (1) of the statute further affirming the discretion of the court in making
12 an attorneys' fees award at all and confirming the breadth of the information which the court
13 may consider in exercising its discretion under the statute:

14 In exercising its discretion under this section [RCW
15 11.96A.150(1)], the court may consider any and all factors that it
16 deems to be relevant and appropriate, which factors may but need
 not include whether the litigation benefits the estate or trust
 involved.

17 This final sentence added to subsection (1) of the statute, comes on top of the previous
18 final sentence which remains in the statute, which reads:

19 The court may order the costs, including reasonable attorneys'
20 fees, to be paid in such amount and in such manner as the court
 determines to be equitable. (Emphasis supplied.)

21 Awards of attorneys' fees under this statute as well as under all other provisions of the
22 law are reviewed by the appellate courts for "manifest abuse of discretion." *In Re Estate of*

1 *Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985); *Estate of Black*, 153 Wn.2d 152, 173, 102
2 P.3d 796 (2004). The fee statute makes abundantly clear, including through the recent
3 amendment in 2007, that the court is to exercise equitable discretion in deciding whether and to
4 whom and against whom and in what amount attorneys' fees and costs should be awarded, if at
5 all.

6 As noted above, Washington case law is to the effect that attorneys' fees are awarded *in*
7 *personem* against litigants in proceedings governed by the probate fee statute only where the
8 losing party against whom fees are awarded personally has been guilty of actions such as
9 misfeasance, misconduct, vexatiousness, bad faith, and the like. For example, in *Allard v.*
10 *Pacific National Bank*, 99 Wn.2d 394, 405-6, 663 P.2d 104 (1983), the Supreme Court upheld a
11 trial court determination that a trustee bank had "... breached its fiduciary duties regarding
12 management of the Stone trusts by failing to obtain the best possible price for ... property."

13 With regard to awarding attorney's fees the court held that,

14 the award of attorney fees against the trust estate is vested in the
15 discretion of the trial court (*citing Jarvis and Tucker*). A trial
16 court's discretion to award attorney fees, however, is not absolute.
17 The court must determine the litigation is indispensable to the
18 proper administration of the trust; the issues presented are neither
19 immaterial nor trifling, the conduct of the parties or counsel is not
20 vexatious or litigious; and that there has been no unnecessary delay
21 or expense. (*Citing Jarvis*). Furthermore, the trial court must
22 consider the result of the litigation. (*Citing Bogert, Trusts and*
Trustees, Section 871).

23 In *Estate of Cooper*, 81 Wn. App. 79, 87-92, 913 P.2d 393 (1996) the court had a case
24 where the court found that all parties to the case have succeeded in some degree "and have
25 worked for the benefit of the estate and of their respective clients." The court awarded all parties
26 a portion of their attorneys' fees on that ground. Citing the predecessor to the current statute

1 (RCW 11.96.140) and the case of *In re Estate of Burmeister*, 70 Wn. App. 532, 539, 854, P.2d
2 653 (1993), the court refused to award fees “against a party personally.” The court described the
3 basis of the *Burmeister* decision to be “. . . that the Legislature in enacting RCW 11.96.140
4 intended to leave that decision to the discretion of the trial judge, to whom it gave the authority
5 to award fees “as justice may require.”” The court in *Cooper* distinguished the outcome and
6 reasoning in *Burmeister* because: “. . . the personal representative had not breached his
7 fiduciary duties. If there is a breach of fiduciary duties, the plaintiff has a right to recover fees
8 against the trustee personally. *Allard v. Pac. Nat’l Bank*, 99 Wn.2d 394, 407, 663 P.2d 104
9 (1983).”

10 The court in *Cooper* continued (at p. 92): “The [trial] court, however, should have
11 awarded a portion of Joyce’s fees against Mr. Cooper personally, because it found he breached
12 his fiduciary duties. We there remand to the trial to determine what part of Joyce’s fees were
13 attributable to her challenge to Mr. Cooper’s investment strategy.” The court then continued to
14 require an analysis of whether the attorneys’ fees requested “caused a benefit to the trust.” The
15 court concluded that it would be improper to award fees in favor of a trustee who have been
16 found guilty of misconduct holding that “. . . a trial court abuses its discretion when it awards
17 attorney fees to a trustee for litigation caused by a trustee’s misconduct.” (At p. 407). The court
18 concluded that an award of fees by the trial court to the trustee was “an abuse of discretion.” The
19 court concluded that a trustee could recover attorneys’ fees from the trust assets only if it
20 successfully defended its claim of misconduct. The court concluded, “where litigation is
21 necessitated by the inexcusable conduct of the trustee, however, the trustee individually must pay
22

1 those expenses. (Citing numerous out of state cases and *People's Nat'l Bank v. Jarvis*, 58 Wn.2d
2 627, 632-3, 364 P.2d 436 (1961).

3 In *Irrevocable Trust of McKean*, 144 Wn. App. 333, 345, 183 P.3d 317 (2008) the court
4 affirmed an award of attorneys' fees. In this case the appellate court affirmed the trial court
5 award of attorneys' fees personally against the trustor of his children's trust seeking to challenge
6 the removal of the trustee (a close friend) and replacement with a corporate trustee. The trust
7 required management of rental property among other things. The replacement trustee was
8 ordered to commence litigation against the trustor and the previous trustee by the court making
9 the replacement appointment. The court found that the replacement of the original trustee was
10 necessary to avoid "waste, theft and fraud" by the trustor and trustee. Following trial and
11 affirmation of the replacement trustee actions and appointment, the replacement trustee sought
12 an award of attorney fees against the trustor, Michael. The trial court had awarded attorneys'
13 fees against Michael. The court upheld the determination that Michael had "acted in bad faith."
14 The court concluded, "The Trust assets should not be further depleted by Michael's continuing
15 efforts to frustrate the purposes of the Trust he established for his children in 1992.
16 Commencement Bay is entitled to its fees and costs on appeal and we award them against
17 Michael."

18 In *Estate of Jones*, 152 Wn.2d 1, 21, 100 P.3d 805 (2004) attorneys' fees were awarded
19 against Jones in favor of beneficiaries of a testamentary trust suing for an interim accounting and
20 alleging breaches of fiduciary duty by the trustee. The Supreme Court ordered attorneys' fees to
21 be paid personally by the offending trustee holding, "further, Russell [the trustee] should
22 personally pay these fees because the litigation was necessitated by his multiple breaches of

1 fiduciary duty to Peter and Jeffrey (*citing Allard*). This case involved the removal of the trustee,
2 Russell, for misconduct involving “several egregious breaches of his fiduciary duty.”

3 In *Vallegas v. McBride*, 112 Wn. App. 689, 697, 50 P.3d 678 (2002) the successful party
4 “. . . argues the estate is entitled to fees and costs because Vallegas’ claim did not comply with
5 RCW 11.40.070(1), this litigation deprived Frausto’s children of part of their inheritance, and
6 Frausto’s estate is not a wealthy one. . . . we agree that these are proper grounds for an award
7 under RCW 11.96A.150(1) . . .” The case involved an action by the decedent’s sister to recover
8 monies claimed to have been advanced to the decedent “upon his oral agreement to repay.”
9 Creditor’s claim was denied and summary judgment was granted in favor of the claimant but was
10 reversed on appeal because of failure to comply with the claim statute.” The question was
11 whether or not the claimant has “substantially misled” the estate in the contents of the claim.
12 Here the amount of the claim differed substantially from what she claimed in the later lawsuit
13 against the estate. The appellate court awarded fees against the unsuccessful creditor claimant
14 and remanded for entry of fees against the same party by the trial court below. Presumably these
15 fees would have been paid by the claimant’s personal assets although there is no discussion in
16 the opinion as to whether the unsuccessful claimant was also an heir to the estate.

17 In *Estates of Palmer*, 145 Wn. App. 249, 268, 187 P.3d 758 (2008), the appellate court
18 affirmed an award of attorneys’ fees against a fiduciary holding a power of attorney where the
19 trial court had found that the fiduciary had, among other things, converted funds from the
20 account of the victim (totally disabled by a stroke), loaned funds from the victim’s assets to
21 friends in breach of her fiduciary duties as attorney-in-fact, removed or allowed others to remove
22 personal property and fixtures from the victim’s home, and made gifts of property of the victim.

1 On these facts, the appellate court affirmed the trial court awarding fees under RCW 11.96A.150,
2 and awarded fees on appeal as well.

3 In *Estate of Frank*, 146 Wn. App. 309, 327, 189 P.3d 834 (2008), the Court of Appeals
4 affirmed an award of attorneys' fees against the personal representative of the estates involved in
5 the litigation. There is no indication in the decision that the award went against the personal
6 representative in his individual capacity as compared with his capacity as personal
7 representative, nor is there any indication in the decision that the personal representative acted in
8 bad faith or in violation of fiduciary responsibilities giving rise to the award of fees. The case
9 involved a dispute regarding the existence or non-existence of an "ademption" regarding real
10 estate assets of the decedents.

11 Courts have denied attorneys' fees to any party in probate litigation involving "novel
12 issues." In *Estate of D'Agosto*, 134 Wn. App. 390, 401-2, 139 P.3d 1125 (2006), the court
13 concluded that "Courts may, in their discretion, award costs and reasonable attorney fees in
14 estate proceedings. The award may be paid by a part from the estate's assets, or from a non-
15 probate asset that is the subject of the proceedings. . . . Here, there are novel issues of statutory
16 construction. An award of fees to either party is unwarranted. We reverse the award of fees
17 below and deny the Estate's request on appeal for fees." The case involved interpretation of a
18 stockholders agreement and the question of whether or not the widow or the estate had the right
19 to certain life insurance benefits payable to the corporation to which the decedent had transferred
20 stock.

21 In a case involving a "simple difference of opinion" the court denied attorneys' fees to all
22 parties under the statute. *Bay v. Estate of Bay*, 125 Wn. App. 468, 477, 105 P.3d 434 (2005).

1 “The trial court concluded it was equitable that ‘each beneficiary should pay all fees incurred by
2 that beneficiary.’ We will not disturb that decision. The same result is equitable on appeal. As
3 the court stated below, the court involves a simple difference of opinion as to the application of a
4 new statute that is not so clear as to make the litigation seem unnecessary or unreasonable.” The
5 case involved a spouse whose marriage to the decedent occurred after the decedent’s Will was
6 executed. The “omitted spouse” statute was at issue. The question was whether the statutory
7 rebuttable presumption had been overcome.

8 In *Estate of Burks*, 124 Wn. App. 327, 333 100 P.3d 328 (2004) the court in a case
9 involving a beneficiary designation on a bank account denied attorneys’ fees to all parties in a
10 probate proceeding, holding that:

11 Superior or appellate courts may, in their discretion, award cross
12 and attorney fees in a state proceedings. (*Citing statute*). The
13 award may be paid by a party from the estate assets or from a non-
14 probate asset that is the subject of the proceedings (*again citing
statute*). . . . Given the unique issues in this case, we also decline
to award attorney fees and costs to Popplewell.

15 The case involved “payable-on-death account beneficiary designation issues and whether
16 the accounts were probate assets to be distributed under the Will, rather than to be distributed
17 pursuant to the account beneficiary designation. The account designees prevailed over the estate
18 claims on appeal after the trial court had ruled against them.

19 In *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 184, 29 P.3d 1258 (2001), the court
20 held: “In *Gillespie v. Seattle-First Nat’l Bank*, 70 Wn. App. 150, 855 P.2d 680 (1993), the court
21 held that an award of attorney fees was necessary to make the beneficiaries whole following a
22 breach of fiduciary duty. (*At p. 178*).” In the present case the trial court denied an award of fees
and costs under RCW 11.96.140 (the predecessor statute). In this case the court of appeals

1 affirmed the denial of attorneys' fees to the successful party alleging breach of fiduciary duty by
2 a step-son of the decedent selling stock certificates of the decedent which he claimed were
3 "Christmas gifts." In affirming the denial of attorneys' fees, the court of appeals held that the
4 step-son

5 did not produce enough admissible evidence to prove the elements
6 of an *inter vivos* gift and overcome the estate's motion for
7 summary judgment. [However], It does not automatically follow
8 that Roger flagrantly breached his fiduciary duty to Elsie by taking
9 the stock certificates without her knowledge and cashing them for
his own benefit. Under these circumstances, we hold that the trial
court did not abuse its discretion in declining the estate's request
for attorney fees. We also deny the estate's request for attorney
fees incurred in this appeal.

10 Most cases in Washington dealing with the current statute or its predecessor involve an
11 award of attorneys' fees and costs to be payable out of the estate or trust assets only. These cases
12 include, *Bartlett v. Betlach*, 136 Wn. App. 8, 22, 146 P.3d 1235 (2006) where the court held
13 "Attorney fees may generally be awarded against a trust only when the litigation results in a
14 substantial benefit to the trust. *In re Estate of Niehenke*, 117 Wn.2d 631, 648, 818 P.2d 1324
15 (1991). Fees may be awarded to both parties where all the beneficiaries are involved and where
16 the litigation affects the rights of all the beneficiaries. . . . The litigation benefited the trust since
17 it furthered Bernadine's intent that Shelley managed the trust. . . . We [the court] have broad
18 discretion to award attorneys' fees and costs on appeal. Here, Shelley is the only prevailing
19 party. The litigation benefited the trust and it involved all the beneficiaries. The trust must pay
20 Shelley's attorneys' fees and costs on appeal."

21 In a case that extensively discussed the question of whether to award attorneys' fees, an
22 estate in litigation involving the estate, the court in *Estate of Black*, 116 Wn. App. 476, 489-90,

1 66 P.3d 670; aff'd 153 Wn.2d 152, 102 P.3d 796 (2003) held that: "Because of the "almost
2 limitless set of factual circumstances that might arise in the probate proceeding" the legislature
3 "wisely" left the matter of fees to the trial court, directly only that the award be made "as justice
4 may require." (*In re Estate of Burmeister*, 70 Wn. App. 532, 539, 854 P.2d 653 (1993), rev'd on
5 other grounds, 124 Wn.2d 282, 877 P.2d 195 (1994).

6 The touchstone of an award of attorney fees from the estate is
7 whether the litigation resulted in a substantial benefit to the estate.
8 (*Citing Niehenke*). This does *not* mean that attorney fees may
9 never be appropriately awarded against an estate if the estate is not
10 substantially benefited. There is no firm rule. *Estate of Kvande v.*
11 *Olsen*, 74 Wn. App. 65, 71, 871 P.2d 669 (1994). In some
12 situations attorney fees are properly assessed against an estate. *In*
13 *re Estate of Cooper*, 81 Wn. App. 79, 92, 913 P.2d 393 (1996).
14 The trial court must evaluate the particular action to determine if
15 its benefit to the estate was substantial. *In re Estate of Norris*, 89
16 Wn. App. 431, 434, 949 P.2d 401 (1998).¹

17 In the *Black* case the court found that the personal representative of the estate, Burns,
18 "acted in good faith." The court then allowed that when all the beneficiaries of both Wills are
19 involved "... the court may award fees from the estate to both sides because the litigation
20 resolves the rights of all. (*Citing Watlack*, 88 Wn. App. 603 (1997). Where both sides advance
21 reasonable and good faith arguments in support of their respective positions, the trial court may
22 order costs and fees to be chargeable against the estate, so that all the contested parties bear the
costs of the proceedings. (*Cooper*, 81 Wn. App. at 92). . . . We nevertheless reverse the fee
award on equitable grounds, as explained below."

At page 491 the *Black* court stated that the statute does not require the award of
attorneys' fees. The court found no reason to deny one party their fees and to award another

1 party their fees in the litigation. “The court should have either awarded both Mr. Burns and Ms.
2 Black their fees from the estate, or awarded neither their fees.” The court then remanded to the
3 superior court for determination of “all questions of fees.”

4 In *Marriage of Petrie*, 105 Wn. App. 268, 678, 19 P.3d 443 (2001), citing RCW
5 11.96A.150, the court held on attorneys’ fees that, “here, the trust agreement allows the custodial
6 funds to be used for payment of professional fees, to the extent such fees benefited the
7 beneficiaries or the trust estate. Thus, payment of Sharma’s attorney fees from custodial assets is
8 appropriate.” The case involved a finding of the trial court that a trustee on a children’s trust had
9 “breached his fiduciary duty by mishandling funds within the custodial accounts.” The case
10 involved former spouses, one of whom was the trustee of the children’s trust, the other of whom
11 was challenging the actions. The court removed the spouse/trustee. As noted, the court
12 reimbursed the complaining former spouse non-trustee out of trust assets for “professional fees”
13 but did not impose the obligation on the trustee individually.

14 In *Estate of Kvande v. Olsen*, 74 Wn. App. 65, 71, 871 P.2d 669 (1994) the court held
15 that an award of fees against an estate is appropriate where all beneficiaries are equally
16 benefited. The court relied on *Estate of Burmeister, infra*. The court held, “where the award of
17 attorneys’ fees affects the interests of uninvolved beneficiaries and would result in their partially
18 funding the attorneys’ fees for the litigating parties, attorneys’ fees will not be assessed against
19 the estate. (*Citing Burmeister at p. 540*). However, where both sides to a contest over
20 distribution advance reasonable and good faith arguments, the court may properly assess
21 attorneys’ fees against the estate rather than against the parties personally. (*Citing Burmeister at*
22

¹ The 2007 amendment to RCW 11.96A.150(1) seems to have codified the *Kvande* “no firm rule” principle.

1 p. 539-40).” The court in *Kvande* concluded, “Here, similarly, there has been a partial
2 distribution of the estate, with only the residue remaining to be distributed, and therefore the
3 residuary estate is the only part of the estate out of which attorneys’ fees could be paid. . . . As in
4 *Burmeister*, both sides here advanced reasonable and good faith arguments, for which attorneys’
5 fees out of the estate is proper.”

6 A case frequently cited by courts dealing with the statute in question is *Estate of*
7 *Burmeister*, 70 Wn. App. 532, 539, 854 P.2d 653 (1993). This case is frequently cited by all
8 divisions, especially Division One. It comes out of the Snohomish County Superior Court which
9 entered a judgment upholding a pre-nuptial agreement which revoked a portion of an earlier Will
10 which failed to provide for a widow. The widow’s claim as a creditor of the estate or as a
11 homestead claimant were rejected. The appellate court affirmed on appeal and awarded
12 attorneys’ fees and costs to both parties from the estate.

13 Jeanne also contends that the court erred in ordering attorney fees
14 payable out of the estate rather than against the daughter’s
15 personally. We disagree. In enacting RCW 11.96.140, the
16 Legislature obviously recognized that, in light of the almost
17 limitless set of factual circumstances that might arise in a probate
18 proceeding, no set standard for the award of attorney fees could
19 successfully be formulated. Rather, the Legislature wisely left the
20 determination of an award of fees to the trial court and directly
21 only that the award be made “as justice may require.” RCW
22 11.96.140. . . Here, both sides advanced reasonable and good faith
arguments in support of their respective position. The trial court
properly determined that costs and fees should be chargeable
against the estate, rather than against the parties personally, so that
all contesting parties would bear the costs of determining the
proper distribution of the estate.

21 The court in *Burmeister* then went on to distinguish *Niehenke* (117 Wn.2d 631) and
22 determined that it was appropriate to award fees against an estate even where the estate did not

1 “substantially benefit” from the litigation. The court distinguished *Niehenke* on the basis that
2 “here, however, all the beneficiaries are involved in the dispute and the award of fees against the
3 estate justly impose the costs of the litigation to ascertain their rights upon all those involved.”
4 (*At p. 540*).

5 Some cases deny attorneys’ fees against the estate or trust assets where the litigation
6 “could result in no substantial benefit to the estate.” *Estate of Moy*, 136 Wn. App. 823, 835, 151
7 P.3d 995 (2006), the court held “Generally we will not assess fees against an estate when the
8 litigation could result in no substantial benefit to the estate. *In re Estate of Niehenke*, 117 Wn.2d
9 631, 648, 818 P.2d 1328 (1991). Nelson’s attempt to take a larger share of the estate did not
10 benefit the estate, and so we decline to award him attorneys’ fees.” The court notes that the
11 statute gives the court “. . . discretion to award costs and attorneys’ fees as [the court] deem
12 equitable.” This case involved a claimed “omitted spouse” benefit under an estate. The claim
13 was rejected since the spouse received \$100,000 of estate assets pursuant to the Will.

14 Two recent cases discuss attorneys’ fees award in estate/trust situations but do not discuss
15 from what asset or party the award is to be paid: *Endicott v. Saul*, 142, Wn. App. 899, 929, 176
16 P.3d 560 (2008); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 501, 176 P.3d 510 (2008). The gist
17 of the cited cases is that fees and costs are rarely awarded against the personal assets of a party
18 absent compelling circumstances of inequitable conduct by that party. This case does not present
19 those compelling facts and fees and costs should be denied entirely or, alternatively, should only
20 be awarded against the estate.

1 VI. HOW TO DEFINE "EQUITABLE" IN ATTORNEYS' FEE CLAIMS?

2 The term "equitable" is used in RCW 11.96A.150(1) which reads in part:

3 The court may order the costs, including reasonable attorneys'
4 fees, to be paid in such amount and in such manner as the court
determines to be equitable.

5 is not otherwise defined. The decisions do not make an effort to define the term, presumably,
6 because it is a term that defies definition except based on the judicial response to specific facts
7 presented.² There is an interesting case involving ERISA, *Sikorski v. Sikorski*, 930 F. Supp. 804,
8 813, D.C. Ed. N.Y., 1996, that discusses the discretion of the court in awarding attorneys' fees
9 under that federal statutory system. In *Sikorski* the court relied on earlier decisions holding that
10 the discretion of the court "is guided by five factors;"

- 11 1. The degree of the offending party's culpability or bad faith;
- 12 2. The ability of the offending party to satisfy an award of attorneys' fees;
- 13 3. Whether an award of attorneys' fees would deter other persons from acting
14 similarly under like circumstances;
- 15 4. The relative merits of the parties' positions; and
- 16 5. Whether the action conferred a common benefit on a group of pension plan
17 participants.

18 In the *Sikorski* decision, the court declined to award attorneys' fees to any party because

19 . . . it is not possible to conclude that the plaintiff was acting in bad
20 faith in bringing this lawsuit. There is no indication that he is able
21 to satisfy an award of attorney's fees or that others who are
similarly situated would be deterred by such an award. With
respect to the relative merits of this lawsuit, the Court believes that

22 ² In this regard, one is reminded of Justice Potter Stewart's definition of "obscenity" as being a word that he cannot define, but he "knows it when he sees it."

1 the treasury regulations are difficult to navigate, and that the
2 arguments of both sides were plausible. Moreover, there is no
3 indication that this lawsuit conferred a common benefit on anyone.
4 Accordingly, the defendants' motion for attorneys' fees is denied.

5 While the ERISA law does not necessarily govern the probate statute at issue in this case,
6 the "guiding factors" identified may be of help. In the present case the same outcome as *Sikorski*
7 is justified here, since the factors do not suggest any basis for an award of attorneys' fees against
8 the individual Petitioners in favor of the successful Respondent who ended up obtaining the vast
9 bulk of the decedent's assets as a result of the beneficiary designation change by decedent within
10 three months of the date of her death. Given that Greg Harty has received a huge percentage of
11 his mother's estate already through the bank account beneficiary designation change shortly
12 before her death, requiring Greg to pay his own attorneys' fees and costs is no different than
13 requiring payment by his mother's probate and non-probate assets.

14 VII. COSTS IS A LIMITED STATUTORY TERM

15 RCW Ch. 4.84 defines "costs." Contrary to the statute, Greg Harty makes no effort to:

- 16 1. Pro-rate or apportion deposition fees based on RCW 4.84.010(7);
- 17 2. Limit "messenger fees" to "service of process" as required by RCW 4.84.010(2);
- 18 3. Limit photocopy charges to those required for "obtaining reports and records . . .
19 admitted into evidence" as required by RCW 4.84.010(5);
- 20 4. Identify any statutory authority for such things as "long distance telephone,"
21 "facsimile," "postage," "air, meals, lodging," none of which are provided for as recoverable costs
22 under the cost statute.

While the entry for "Lexis Research" may be justified under *Absher Construction v. Kent School District*, 79 Wn. App. 841, 849, 905 P.2d 1229 (1995), there is no identification of the

1 nature of the "Lexis Research" conducted and how it might have equated to actual attorney
2 research. The remainder of the costs challenged here are not specifically allowed by the cost
3 recovery statute. The law is clear that "absent a statute that expressly allows expanded cost
4 recovery, . . . plaintiffs are not entitled to such generous cost awards. . . ." *Hume v. American*
5 *Disposal*, 124 Wn.2d 656, 674, 880 P.2d 988 (1994).

6 Costs have historically been very narrowly defined, and RCW
7 4.84.010 limits cost recovery to a narrow range of expenses such
8 as filing fees, witness fees, and service of process expenses.

8 All of the costs objected to in the categories described herein should be disallowed by the
9 court.

10 **VIII. ANY AWARD OF FEES AGAINST THE ESTATE**
11 **RENDERS THE ESTATE INSOLVENT**

11 Any award of attorneys' fees in favor of Greg Harty against the estate of his mother
12 would render the estate insolvent (the estate now has about \$40,000 in it). In that situation, the
13 statute requires that claims in each class be paid "in proportion" to the claims made. Moreover,
14 no other creditors in a "lower class" are entitled to be paid until the senior claimants have been
15 paid in full. RCW 11.76.150.

16 At a minimum, any award of attorneys' fees to Greg Harty against the estate should be on
17 an equal footing with those fees incurred by the personal representative

18 **IX. CONCLUSION**

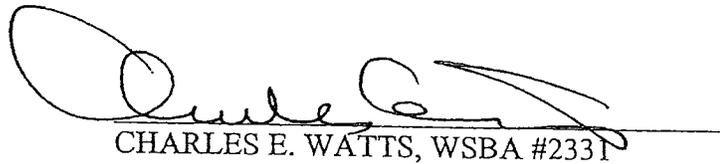
19 For the reasons stated herein, each party should pay and bear their own costs and
20 attorneys' fees. Alternatively, if Greg Harty is to receive an award of attorneys' fees and costs it
21 should be from the estate only. Costs should be determined to be those provided for by the cost
22

1 statute only. If an award of attorneys' fees renders the estate of Shirley A. Harty insolvent, both
2 Pat and Greg Harty should recover fees proportionately.

3 There is no basis in the case law or in equity for an award of attorneys' fees to be made in
4 favor of Greg against his brother and his nephews personally. The litigation was brought in good
5 faith, conducted efficiently, and the facts giving rise to the litigation are not such as to justify an
6 award of attorneys' fees *in personem* against the non-prevailing parties.

7 Dated this 6th day of April, 2009.

8 OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.

9 

10 CHARLES E. WATTS, WSBA #2331
11 Attorneys for Petitioners Pat and Christine Harty
12 and Jason and Ben Harty

APPENDIX E

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

IN RE

NO. 06-4-02161-1 SEA

ESTATE OF SHIRLEY A. HARTY

RESPONDENT'S RESPONSE TO
PETITIONERS' MOTION FOR
RECONSIDERATION

GREG HARTY hereby respectfully submits this Response to Petitioners' Motion for Reconsideration. In accordance with the Court's directive in its order of May 1, 2009, this response is confined to the question of the appropriate parties against whom the judgment for attorneys' fees and costs should be entered.

Pat Harty resorts to sophistry to persuade the Court that judgment should be entered in a way that it will be uncollectible and will remain unpaid. People typically argue that they are not liable for an obligation, or that someone else is also and equally liable. Here, Pat resorts to the rare argument that he alone is liable, and that no one else is anything but minimally liable. On the surface, this may appear to be a noble position to take. But this is not an argument that Pat needs to make. If he truly feels that this is his sole responsibility, he can limit everyone else's liability simply by paying or arranging to pay the debt himself. It is fairly obvious that Pat's is not a noble position. He is not "stepping up" to shoulder a

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1 burden and to protect others from being held responsible. Rather, this is part of a larger
2 effort wherein Pat and his family seek to avoid paying their legitimate liabilities.

3 The fairest outcome is to leave the members of Pat's family jointly and severally
4 liable and to let them sort out the division of the expenses amongst themselves. The Court
5 should reject the invitation to do injustice, and should deny the Motion for Reconsideration. *J*
6 *5*
7 *0*

7 I. ARGUMENT

8 1. This Civil Action Was Neither Commenced Nor Maintained
9 By Pat Harty As The Personal Representative To The Estate
10 Of Shirley Harty.

11 Pat Harty plainly misrepresents his status as a Petitioner in this action. The original
12 Petition was filed with the Court on March 22, 2006. Had Pat Harty chosen to sue his
13 brother Greg for fraud, conversion, replevin, or any other common law civil cause of action,
14 the caption would have read "J. Patrick Harty, *et al.*, Plaintiffs, v. Greg Harty, Defendant."
15 But, those common law causes of action do not carry with them any right to seek an award
16 of attorneys' fees if his effort was successful. And so, it was a matter of deliberate strategy
17 that Pat Harty styled this action under the Trusts and Estates Dispute Resolution Act
18 ("TEDRA"), RCW 11.96A. Unlike most common law civil causes of action, TEDRA
19 actions afford the trial court judge broad authority to decide whether or not to make a fee
20 award, to decide how much to award, and to enter a fee award as a judgment:

21 to any party: (a) from any party to the proceedings; (b) from the assets of the
22 estate or trust involved in the proceeding; or (c) from any non-probate asset that
23 is the subject of the proceeding.

1 RCW 11.96A.150. A petitioner need not be the personal representative to an estate to
2 commence a TEDRA suit. Pat Harty commenced his lawsuit against Greg Harty with the
3 deliberate and conscious aim (a) to prevail, and (b) to obtain an award of attorneys fees
4 against Greg. But just as Pat hoped to win, and hoped to obtain a fee award against Greg,
5 TEDRA gives the court the authority to do as it has done, and to award fees in favor of Greg
6 Harty, and against the other parties to the proceeding.

7 Who are the other "parties" to the proceeding?" The original Petition has a
8 verification page containing the signatures of J. Patrick Harty, Jason Harty and Benjamin
9 Harty, below a verification statement in which they certify that they are "the Petitioners."
10 Pat Harty's signature is not followed by the designation of any representative capacity. It
11 would have been quite impossible for Pat to have filed this action as the personal
12 representative of Shirley Harty's estate, because Shirley Harty's will had not yet been
13 admitted to probate when Pat first commenced his lawsuit against Greg. Plus, in the original
14 petition, besides asking that certain non-probate assets (the BECU accounts) be distributed a
15 certain way, Pat asked the Court to order Greg Harty to undertake his duties and obligations
16 as the personal representative. Pat could not have started this lawsuit as the personal
17 representative to a probate estate, asking the court to make Greg perform the duties of the
18 personal representative.

19 As previously mentioned, the original Petition was never served upon Greg Harty.
20 Pat let eighteen months pass before filing and serving an amended petition in September of
21 2007. The reason for amending the petition was because, in the intervening 18 months, Pat
22 had applied for and had been appointed as the personal representative to the Shirley Harty

1 probate estate. And so, the portions of the original petition, calling for the court to order Greg
2 to perform PR duties were removed, because Pat had assumed those responsibilities.¹ During
3 the intervening 18 months, Pat used the cause number in this lawsuit to subpoena records, and to
4 perform research into facts that would support his claims. When Pat applied for a citation
5 against Greg Harty in September of 2007, his supporting declaration makes no mention of his
6 role as the PR to the estate. He refers to himself merely as one of the petitioners. For Pat Harty
7 now to argue to the court that he was pursuing his claims purely as an agent of the probate estate
8 is legally frivolous.

9 **2. Pat Harty Commenced This Action In His Capacity As A**
10 **Concerned Parent.**

11 Pat Harty argues that his actions were undertaken in his capacity as the personal
12 representative to the Shirley Harty Estate. As the chronology set forth above shows, that
13 assertion is patently false. Pat Harty commenced this action in his own capacity. The court
14 should easily see that this was a family undertaking, from its inception. Pat Harty's motivation to
15 maintain this action against his brother Greg was his bitter animosity toward his brother Greg.
16 Immediately following Shirley Harty's death, Pat stated to Greg in a face-to-face confrontation,
17 "Doug may not have the money to sue you, but I do. I'll sue you just to f*** with you."

18 In numerous places in the record, Pat Harty has revealed that his primary goal in
19 maintaining this action was not to enrich himself. In the "Second Declaration of J. Patrick
20 Harty" dated December 5, 2007, Pat described his reasons for believing that Shirley Harty

21 ¹ Ironically, Pat has not actually done anything to administer the probate estate. His only
22 activity has been to petition the court for the right to have the estate pay his attorneys fees in this
23 lawsuit.

1 had identified Doug, Ben and Jason as her intended pay-on-death beneficiaries to her BECU
2 accounts. Pat testified:

3 Before she set up the accounts, she asked me what I wanted. I told her I
4 didn't want anything, and she should give my share to the boys, Ben and
5 Jason. That is why my name is not on any of the accounts in issue in this
6 matter. It was about this time that my mother had a conversation with
7 Sheryl Thole and that my mother made her will and set up the CD
8 accounts.

9 By December of 2008, as a result of this litigation, Pat Harty had substantially
10 exhausted his own anticipated entitlement to one-third of the net probate estate, and he had
11 (presumably with Doug's consent and authorization) substantially exhausted his brother
12 Doug's anticipated one-third share of net probate assets. Pat was subjectively willing to
13 spend his own inheritance and his brother Doug's inheritance, chasing the prize that he
14 believed his two sons were entitled to receive. Pat's sons, of course, are not beneficiaries to
15 the probate estate. Pat was willing to consume two-thirds of the probate estate (all of it,
16 even, if Greg had not objected) on a crusade to benefit people who were not beneficiaries to
17 the estate in the first place. These were not the actions of a personal representative, nor of a
18 man trying to enhance his own individual inheritance. These were the actions of a father
19 who believed - sincerely, though erroneously - that his sons were victims of an injustice. If
20 Pat was pursuing this action in the capacity as the personal representative of the Estate, he
21 had no reason even to include his sons' names on the petition.

22
23 In response to Greg Harty's Motion for an Award of Attorneys' Fees, Pat Harty
24 voluntarily disclosed the substantive terms of a settlement proposal that he made at

1 mediation, and then withdrew. That settlement offer would have required Greg to pay Doug
2 Harty a sum of \$75,000, and to disclaim Greg's distributive share of the net probate Estate.

3 Such a settlement would have benefited Doug substantially, and Pat to lesser extent,
4 but it would not have benefited Pat's sons, Ben and Jason, at all. And so, before the
5 24-hour period for Greg to accept the settlement offer had elapsed, Pat consulted with his
6 wife and two sons. Upon their input, Pat withdrew the settlement offer before Greg could
7 deliver formal notice of his acceptance of it. If Pat were acting as a personal representative
8 of the estate, he would not have withdrawn his settlement offer to pursue the claims of non-
9 beneficiaries. Pat Harty pursued this action in his capacity as a parent to Ben and Jason.

10
11 **3. Christine Harty Was A Knowing, Willing And Motivated Participant.**

12 Another reason to view Pat's involvement as a petitioner in this case as a parent who
13 is part of a marital community involvement of Christine Harty. Going back to the Motion
14 for Issuance of a citation in December of 2007, the Petitioners included in that Motion
15 mother of the petitioners, without reference to any personal representative capacity for Pat.
16 Most of the Declaration is spent describing how close Chris Harty's relationship was with
17 her in-laws, and how much time she had invested over the years assisting and caring for Ben
18 Harty Sr. and Shirley Harty during their lifetimes. In the last three lines of her Declaration,
19 Chris Harty testified:

20 I know Shirley Harty well enough to know that she would never
21 deliberately change the accounts that she had designated for Jason and
22 Ben. The only way they would have been changed is with Greg's doing
23 so in some fashion.

1 Nowhere in her Declaration does Chris Harty make any mention of Shirley Harty's
2 will, nor any of the issues surrounding the general administration of the probate Estate.
3 Chris Harty is unconcerned about marshalling estate assets and collecting estate personal
4 property, and otherwise attending to the smooth and efficient administration of the probate
5 Estate. Clearly, Chris Harty's sole and exclusive goal and objective was to see to it that her
6 sons would enjoy the inheritance to which she, like Pat, believed they were entitled.

7 The Court will probably remember vividly the anger and animosity that punctuated
8 Chris Harty's testimony at trial. Ms. Harty went on and on about how close her relationship
9 with her in-laws was, and how much time the grandparents spent with their two grandsons.
10 Ms. Harty's clear purpose and intention was to persuade the Court of her belief that Shirley
11 Harty's true, abiding intention was to bestow generosity upon Ben and Jason Harty. Chris
12 Harty offered almost no testimony concerning facts and events surrounding the July 29, 2005
13 transaction. Chris Harty's purpose at trial was to promote the interests of her sons to take
14 ownership of non-probate assets.

15 Because this prosecution was a "family project", with unknowable agreements
16 amongst the family members, it is easy to show that Chris played her part. Even relatively
17 unsophisticated clients know that, when they commence a lawsuit, they might not win, and
18 they still will have to pay their own lawyers. It bears mention that the legal expense incurred
19 *by the petitioners* in pursuit of this lawsuit exceeded the value of the probate estate. Liability
20 for the payment of the difference would obviously have to be paid by Pat and Chris's
21 community assets, because those are the only assets they have (Pat has testified that he has
22 no separate assets, and his sons Ben and Jason are young men without the financial

1 wherewithal to undertake a large bill for attorneys fees and costs). Accordingly, and
2 presumably with the blessing of family members, Pat's marital community was exposed to
3 the downside risk of funding an unsuccessful litigation effort. Because the members of the
4 marital community were motivated to fight for the perceived rights of their sons, and to risk
5 community assets to do so, liability to Greg properly rests with the marital community.

6 Further, the petitioners have chosen the wrong venue for answering this question.
7 This is not an issue for this court to decide, and it does not require the continued
8 involvement of Greg Harty. The assessment of individual blame and relative responsibility is
9 best decided by the petitioners' family alone, based on the information that only they
10 possess. To further involve this court and Greg Harty in debates amongst the members of the
11 Pat Harty family wastes the court's time and Greg Harty's money, while delaying and
12 diminishing satisfaction of the judgment. The petitioners are, and should be, jointly and
13 severally liable.

14 **4. Ben And Jason Harty Are Properly Characterized As Jointly And**
15 **Severally Liable For The Judgment For Fees and Costs.**

16 At all times during the pendency of this action, Petitioners Ben and Jason Harty
17 were, along with Pat Harty, co-Petitioners. No Petitioner had any formal position or status
18 that was above or beneath any other. It might be unusual for Pat Harty's sons to decline to
19 participate in their father's undertakings or projects, but they are adults, and they had the
20 right to decline to participate.

21 Pat advocates that Ben and Jason's liability be limited to a pro rata share of the total
22 obligation, in the proportion that their inheritance would bear to the total amount of Shirley

1 Harty's BECU accounts. The argument is pure artifice, aimed at reducing as much as
2 possible Ben and Jason Harty's financial exposure, upon no principle whatsoever. The
3 Petitioner's went into commencement of their lawsuit believing that Ben and Jason would
4 reap more than 90% of the recovery if they succeeded. Pat clung to that erroneous
5 understanding of the facts as late as his December, 2008 deposition - a mere month prior to
6 trial. What logic would compel a finding that Ben and Jason are only responsible for 10% of
7 the judgment in favor of Greg?

8 Second, this dispute could have, and, but for involvement by Ben, Jason and Chris
9 Harty **would** have, ended by voluntary settlement, and no liability to Greg for any fees. Pat
10 made an offer to settle, and Greg was prepared to accept it. But Christine, Ben and Jason
11 Harty conspired to persuade Pat to withdraw the offer, forcing Greg to endure many
12 thousands of additional dollars of expense. Now, Pat argues that Ben and Jason were just bit
13 players, along for the ride, who should be responsible for only a tiny fraction of the liability.

14 Only Pat's family can know the true extent of the conversations that occurred
15 amongst themselves (who supported the lawsuit and who did not; the agreements on the
16 division of revenues and expenses; the roles that each family member would play at trial).
17 But as outsiders, we know that Ben, Jason and Chris convinced Pat that he should withdraw
18 the settlement offer and proceed instead with trial. This is clear evidence that liability for
19 Greg's fees and costs bears no relationship to anyone Petitioner's potential economic gain.

20 Liability should not be based on what, in hindsight, the Petitioners stood to receive
21 financially if they had won, but rather, what they thought their overall benefit would be,
22 collectively. We will never know, as outsiders, the individual roles and motivations of the

1 family members. We can only examine the family's beliefs from the start of the process
2 (where they thought they would get everything for Ben and Jason) to the end of the process
3 where their only remaining motivation at the start of the trial was to punish their
4 brother/uncle. This accounts for the 'mean-spirited' testimony from each of them - designed
5 to punish Greg Harty rather than resolve a genuine dispute re Shirley Harty's intent. This
6 was a family project in which each of the members participated to the best of his or her
7 ability, regardless of any person's individual reward.

8 The case the Petitioners rely on to support an apportionment of liability for fees is not
9 on point. In *Boeing Company v. Sierracin Corp.*, 108 Wn.2d 38, 738 P.2d 665 (1987), the
10 court required apportionment of fees by the successful party between those claims upon
11 which a fee award could be based, and those claims that carried no right to a fee recovery.
12 The case does not even address, let alone require, apportionment of liability amongst the
13 unsuccessful parties on a claim for which an award of fees is appropriate (the situation in this
14 case).

15 16 II. CONCLUSION

17 It should be crystal clear that as a matter of simple chronology, Pat did not pursue
18 this action in his capacity as the personal representative of the probate estate. And because
19 he so adamantly put his own interests aside in favor of the interests of his sons, his choices
20 and behavior in this proceeding were, in some ways, contrary to the interests of the probate
21 estate and its beneficiaries. The court should have no difficulty concluding that Pat Harty
22 commenced this action in his personal capacity; not as a representative of the probate estate.

1 But as a parent, Pat Harty is also a member of a marital community. The financial
2 assistance that Pat and Chris Harty might offer to their two sons (in addition to all of the love,
3 affection, tutoring, mentoring and companionship they undoubtedly give their sons), could be
4 subsidized or eliminated if their two sons were to inherit a sum of money as large as Pat and
5 Chris Harty believed -- as recently as December of 2008 — they stood to inherit. Financial
6 assistance that Pat and Chris Harty might give to their sons could instead be used for their own
7 comfort and luxury if they knew that their two sons were provided for through inheritance, as
8 they sincerely, though erroneously, believed. After making a settlement offer in a pre-trial
9 mediation that would have ended this dispute, Pat Harty testified:

10 That evening, my family persuaded me that the offer was not fair and not
11 one that I should have extended without their approval. With that in mind, I
12 agreed to instruct the attorney the next morning to withdraw the offer,
13 which I did, and which I understand he did I came to my senses the next
14 morning after discussing the offer with my family and realized it never
15 should have been made in the first place and, therefore, withdrew it.

16 It is telling that Pat's "family" collectively persuaded him to withdraw the offer. The
17 strategy behind the Petitioners' Motion for Reconsideration is obvious. If Pat Harty can
18 convince the Court to enter judgment against only his "separate estate", Greg Harty will never
19 recover. Pat Harty has been married to Christine for more than 30 years. In his April 6, 2009
20 declaration, he testifies that he and Christine have no separate property. Pat's strategy is to get
21 the Court to restrict the judgment (or the large majority of it) to his separate estate, and then to
22 try to shield his community assets from enforcement. Although his tactic is different, this is
23 the same objective Pat had in his attempt to get the Court to make the fee award against the
24 probate Estate. If Pat can convince the Court to structure the judgment against a judgment

1 debtor that has nothing, it is as good as persuading the Court not to make a fee award in
2 Greg's favor at all.

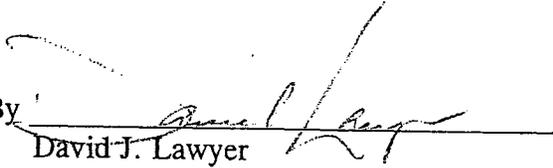
3 Given the mean-spirited nature of much of the testimony adduced trial and the
4 motivation to punish Greg Harty for receiving a disproportionate allocation of their mother's
5 financial estate, and recognizing that Christine Harty was an active participant in that effort
6 with a clear unison of purpose, the Court should reject the Motion for Reconsideration. This
7 process will yield no windfall to Greg. Greg did not initiate this lawsuit. Through the
8 process of the Motion for Reconsideration, Greg has incurred new and additional attorneys'
9 fees that are not subject to recovery under the judgment that has been entered. Most of the
10 expense that Greg is likely to incur in seeking to collect the judgment will be unrecoverable
11 under relevant statutes. Greg was made to travel from his home in Oregon to Washington at
12 his own expense on multiple occasions during the duration of this civil action, incurring still
13 more unrecoverable expense. In addition to all the economic expense associated with this
14 action that Greg Harty has no legal avenue for recovery, he will never be able to recover his
15 loss of time, and the enormous emotional pain he has suffered as his brothers, his sister-in-
16 law and his nephews have voiced their accusations and have recounted their unique
17 individual perceptions.

18 The court has entered a judgment that is the only sensible exercise of the court's
19 discretion: a joint and several judgment against the members of the J. Patrick Harty family,
20 who commenced this lawsuit, who risked their personal assets to fund this lawsuit; who
21 collectively declined to settle this lawsuit, and who decided amongst themselves how the
22 spoils of any victory in this lawsuit might be apportioned. It was a family effort, and so it is

1 fitting that the liability be a joint and several liability amongst the family members. The
2 Petitioners' Motion for Reconsideration should be denied.

3 DATED this 15th day of May, 2009.

4 INSLEE, BEST, DOEZIE & RYDER, P.S.

5
6 By 
7 David J. Lawyer
8 W.S.B.A. #16353
9 Attorneys for Respondent Greg Harty
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APPENDIX F

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

IN RE

No. 06-4-02161-1 SEA

ESTATE OF SHIRLEY A. HARTY

REPLY OF PETITIONERS J. PATRICK HARTY, BENJAMIN HARTY, AND JASON HARTY RE: ATTORNEYS' FEE RECONSIDERATION

GREG HARTY OFFERS NO LEGAL AUTHORITY/ONLY ARGUMENT

The most striking thing that can be said about the Response of Greg Harty to the Motion for Reconsideration is that it contains nothing but argument. The only case cited is a case cited by Petitioners in their Motion. The Court should disregard the entire Response of Greg Harty for the reason that it offers no legal authority in support of the arguments made.

THE LANGUAGE OF THE STATUTE AUTHORIZING AWARD OF ATTORNEYS' FEES CONTROL

The State of Washington follows the "American Rule" with regard to award of attorneys' fees in civil litigation. Attorneys' fees will be awarded to a prevailing party only where authorized by contract or statute or recognized ground of equity. Rettkowski v. Dept. of Ecology, 128 Wn.2d 508, 514, 910 P.2d 462 (1996). In the present case the Court properly

REPLY OF PETITIONERS J. PATRICK HARTY, BENJAMIN HARTY, AND JASON HARTY RE: ATTORNEYS' FEE RECONSIDERATION - 1
F:\RCB\Harty\reply to reconsid.doc 5/14/2009 (jg) #25469.001

OSERAN HAHN SPRING STRAIGHT & WATTS P.S.
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1 based its award of attorneys' fees only on the TEDRA statute, RCW 11.96A.150. Subsection 1
2 of the cited statute authorizes the court to award attorneys' fees only against "... any party to
3 the proceedings," assets of the estate or non-probate assets subject to the proceeding. The only
4 provision that would authorize award of fees in this case (except from estate assets) is subsection
5 (a) which limits the authority of the court to award fees to "any party to the proceedings." It is
6 clear from the pleadings that only J. Patrick Harty in his individual and separate capacity was a
7 party to the proceedings along with his two sons, Ben and Jason. Christine Harty and the marital
8 community of Pat and Christine were not parties to the proceeding, are not called out in any
9 pleading as parties to the proceeding, and until the attorneys' fee question arose, were never
10 claimed to be parties to the proceedings by Greg Harty or his attorney.

11 In Lejeune v. Clallam County, 64 Wn.App. 257, 267, 823 P.2d 1144 (1992) the court
12 defines the term "party" as follows:

13 A party is one who appears and participates in the proceeding.
14 Restatement (SECOND) of Judgments, §34, comment (a), at 348
15 (1982), or one "whose interests are properly placed before the
16 court."

17 Blacks Law Dictionary, 6th Ed. (1990) defines a "party" in this language:

18 A "party" to an action is a person whose name is designated on
19 record as plaintiff or defendant (*citing case*). Term, in general,
20 means one having right to control proceeding, to make defense, to
21 adduce and cross-examine witnesses, and to appeal from judgment.

22 "Party" is a technical word having a precise meaning in legal
parlance, it refers to those by or against whom a legal suit is
brought, whether in law or in equity, the party plaintiff or
defendant, whether composed of one or more individuals and
whether natural or legal persons; all others who may be affected by
the suit, indirectly or consequently, are persons interested but not
parties (*citing case*).

REPLY OF PETITIONERS J. PATRICK HARTY,
BENJAMIN HARTY, AND JASON HARTY RE:
ATTORNEYS' FEE RECONSIDERATION - 2

F:\RCBHarty\reply to reconsid.doc 5/14/2009 (jg) #25469.001

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1 Statutory language is to be given its reasonable and ordinary meaning. United States v.
2 Hoffman, 154 Wn.2d 730, 747, 116 P.3rd 999 (2005) (“where a term is undefined [in a statute] it
3 will be given its plain and ordinary meaning”). To expand the liability for attorneys’ fees created
4 by RCW 11.96A.150(1) beyond the definition of a “party” as used in the statute, would
5 constitute an abuse of discretion.

6 Neither Christine Harty individually nor the marital community of Christine and J.
7 Patrick Harty were parties to the TEDRA proceeding. The marital community would not have
8 benefited from the TEDRA proceeding as the Petition of J. Patrick Harty would simply have
9 confirmed his separate estate entitlement to this mother’s estate share (or the share of his
10 children which obviously would not have been a community benefit either). Property acquired
11 by inheritance is the separate property of the heir or devisee, hence the community of J. Patrick
12 and Christine Harty cannot be a “party” to a proceeding where only J. Patrick Harty seeks a share
13 of his mother’s estate for himself and his children.

14 **THERE ARE MANY CASES SUPPORTING THE REQUIREMENT**
15 **OF APPORTIONMENT BETWEEN CLAIMS IN AWARDING ATTORNEYS’ FEES**

16 The only case cited by Greg Harty in his Response is the case cited by J. Patrick Harty in
17 the Motion for Reconsideration, is Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 738 P.2d 665
18 (1987). The Boeing Co. case stands for the proposition that apportionment of liability for
19 attorneys’ fees as to claims must be made in accordance with the claims upon which success was
20 based and in this case, obviously the claims of Ben and Jason Harty are discreet from those
21 claims of J. Patrick Harty both as to entitlement and as to amount. Therefore, any award of
22 attorneys’ fees against Ben and Jason must take into account the extremely limited amount of
funds in the two accounts in which they were POD beneficiaries, as compared with the

1 substantial accounts claimed by J. Patrick Harty as PR and in his separate estate capacity in
2 which neither Ben nor Jason were claimed beneficiaries or from which they would have
3 benefited at all. Other cases standing for the proposition requiring apportionment include
4 Marassi v. Lau, 71 Wn.App. 912, 859 P.2d 605 (1993); Bloor v. Fritz, 143 Wn.App. 718, 180
5 P.3rd 805 (2008); Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 733 P.2d 208 (1987), (“this
6 court has followed Hensley and recognized that an award of attorney fees may be limited to fees
7 attributable to successful claims if the claims brought are unrelated and separable.”).

8 Should the Court award attorneys’ fees to Greg Harty in regard to the disputes centering
9 on the \$330,000 account in which Ben and Jason had no interest or claim at all, the award of fees
10 should be against J. Patrick Harty as his separate estate only (if at all). Similarly, J. Patrick Harty
11 should not be liable for attorneys’ fees with respect to Ben and Jason’s claims on the smaller
12 accounts of approximately \$20,000 each in which they were the only named POD beneficiaries
13 prior to Greg Harty obtaining the change by his very ill and soon-to-die mother to name himself
14 on those accounts and to delete his nephews. J. Patrick Harty was not named on those accounts,
15 only Ben and Jason. As a result, since the claims are truly discrete, attorneys’ fees should be
16 apportioned following the principles of the cases cited herein together with the Boeing v.
17 Sierracin in the Motion for Reconsideration.

18 **TEDRA IS THE CONTROLLING STATUTE ON CLAIMS**
19 **INVOLVING PROBATE DISPUTES**

20 By its very language, the provisions of the TEDRA statute are intended:

21 . . . to set forth generally applicable statutory provisions for the
22 resolution of disputes and other matters involving trusts and estates
 in a single chapter under Title 11 RCW. The provisions are
 intended to provide non-judicial methods for the resolution of
 matters, such as mediation, arbitration, and agreement. The [this]

1 chapter also provides for judicial resolution of disputes if other
2 methods are unsuccessful. RCW 11.96A.010.

3 Greg Harty, in his Response, complains that J. Patrick Harty and Jason and Ben had some
4 ulterior motive in suing under TEDRA in this action. Clearly the statute cited requires it and
5 equally clearly the only basis for an award of attorneys' fees is found under TEDRA in RCW
6 11.96A.150. Efforts to plead "equity" or "fairness" hopefully will fall on deaf ears. The statute
7 provides the basis for the court awarding attorneys' fees, the statute is very clear and is very
8 limiting. To go beyond the statute would clearly be an abuse of discretion. J. Patrick Harty and
9 Ben and Jason did not "choose" TEDRA as their method of challenging the actions of Greg
10 Harty, rather the Washington legislature has directed that that statute provide the basis for
11 resolution of trust and probate disputes such as this.

12 **TO AWARD FEES AGAINST NON-PARTIES OR WITHOUT APPROPRIATIONMENT
13 WOULD CONSTITUTE A "MANIFEST ABUSE OF DISCRETION"**

14 In Emmerson v. Weilep, 126 Wn.App. 930, 940, 110 P.3d 214 (2005) the court held that
15 review of a trial court's denial of attorney's fees is "for an abuse of discretion." Citing, Scott
16 Fetzer Co. v. Weeks, 122 Wn.2d 141, 148, 859 P.2d 1210 (1993). The Emmerson court
17 continued that:

18 A trial court abuses its discretion when it bases its denial on
19 untenable grounds or reasons. Citing, In Re Marriage of James, 79
20 Wn.App. 436, 440, 903 P.2d 470 (1995).

21 In Emmerson the court was asked to award attorneys' fees under a statute which did not
22 provide for an award of fees. The court concluded that it would have been an abuse of discretion
for it to do so on equitable grounds or by expansion of the statute beyond its language. That is
exactly the situation here in that Greg Harty claims that the Court should go beyond the specific

1 language of RCW 11.96A.150(1) in awarding attorneys' fees on "fairness" or "equitable"
2 grounds when the statute itself would not allow fees. Certainly, there cannot be an equitable
3 ground for awarding fees where a statute has "occupied the field."

4 **J. PATRICK HARTY SUED AS PERSONAL REPRESENTATIVE**
5 **OF THE ESTATE OF HIS MOTHER**

6 At pages 3-4 of the Response, Greg Harty concedes that the initial Petition by J. Patrick
7 Harty in his separate and individual capacity, was never served on Greg Harty. It was only after
8 J. Patrick Harty became the appointed PR of his mother's estate that the TEDRA action was
9 commenced by service of the Petition (as amended) to identify J. Patrick Harty as PR. From the
10 beginning of the TEDRA litigation following service on Greg Harty, J. Patrick Harty has always
11 been pursuing the litigation in his capacity as PR, not on behalf of the marital community of he
12 and Christine Harty. Whether in his capacity as PR, or in his capacity as a separate estate heir, it
13 is abundantly clear that the marital community of he and Christine and Christine Harty
14 individually, cannot and should not be "jointly and severally" liable for any award of attorneys'
15 fees against J. Patrick Harty in favor of Greg Harty in this case.

16 **GREG HARTY EMPHASIZES THE LAUDATORY GOALS OF HIS**
17 **BROTHER, PAT, IN PURSUING THE TEDRA CLAIMS**

18 Interestingly, throughout the Response, Greg Harty emphasizes the fact that Pat Harty
19 himself did not expect to personally benefit from the TEDRA claim. Pat Harty anticipated
20 helping his brother, Doug Harty, by seeing that Doug receive two-thirds of the estate share (his
21 and Pat's). Further, the summary of the settlement negotiations in mediation and the late
22 mediation offer under CR2A made by Pat and Ben and Jason would have benefited only Ben and
Jason and Doug Harty, and not benefited Pat at all.

1 By relying on these arguments, Greg Harty seems to be heavily discounting his claims of
2 malice and veniality on the part of his brother, Pat, in pursuing the matter. Rather, Pat had the
3 highest of motives, seeing that his two sons achieve their share of the estate, however modest,
4 and seeing that his brother, Doug, receive not only his share but the share to which Pat would be
5 entitled to had the TEDRA action been successful. These are not the actions of a greedy,
6 malicious brother.

7 **CHRISTINE HARTY DID NOT PARTICIPATE IN THE ACTION AS A PARTY**

8 Nowhere has Greg Harty pointed out any evidence of Christine Harty participating in the
9 action as a party. She testified at trial and she submitted Declarations, actions which are entirely
10 consistent with being a non-party, only a witness. Being a witness in a proceeding does not
11 render someone liable as a party for attorneys' fees. This cannot be disputed and is not disputed
12 by Greg Harty. That being the case, the fact that Christine Harty participated as a witness should
13 not impose liability on herself personally or the marital community of she and J. Patrick Harty
14 for any award of attorneys' fees that might be made.

15 The Declarations of Christine Harty do not suggest in any way that she was acting as a
16 party, rather they are descriptive of the relationship of herself and her mother-in-law and of facts
17 which she personally observed. It would be a manifest abuse of discretion to extend any liability
18 personally against Christine Harty or the marital community of she and J. Patrick Harty.

19 **THERE IS NO LEGAL BASIS FOR "JOINT AND SEVERAL"**
20 **LIABILITY OF THE PARTIES**

21 As much as Greg Harty would like it to be the case, there is no legal basis for establishing
22 joint and several liability on parties in a TEDRA proceeding. As noted above, the claims should
be apportioned under existing attorney fee case law in this state. Moreover, the statute itself,

**REPLY OF PETITIONERS J. PATRICK HARTY,
BENJAMIN HARTY, AND JASON HARTY RE:
ATTORNEYS' FEE RECONSIDERATION - 7**
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1 RCW 11.96A.150, limits the award of fees in an amount “ . . . as the court determines to be
2 equitable.” The statute is silent on imposing “joint and several” liability simply because more
3 than one person is a “party” to a TEDRA proceeding. Absent statutory authority to impose
4 liability on all parties jointly and severally, the equitable discretion of the court should be
5 exercised to impose liability only to the extent a party would have benefited from the proceeding.
6 This is the teaching of the recent amendment to the cited statute in 2007 which permits the court
7 to consider “ . . .all factors that it deems to be relevant and appropriate, which factors may, but
8 need not include whether the litigation benefits the estate or trust involved.” Ben and Jason
9 Harty would have “benefited” only to the extent they would have received the POD accounts that
10 Greg Harty changed into his name a few months before his mother died. J. Patrick Harty,
11 individually as his separate estate, would have benefited only to the extent that he would have
12 received one-third of the bank account in question with his brothers Greg and Doug.

13 On a “benefits’ analysis, joint and several liability simply is inappropriate and because it
14 is not authorized by statute, imposition of liability on that basis would be a manifest abuse of
15 discretion.

16 CONCLUSION/RELIEF SOUGHT

17 The fact that Greg Harty offers no authority for any of his arguments in the Response to
18 the Motion for Reconsideration, not only suggests, but compels, the conclusion that no such legal
19 authority exists. The reliance by Greg Harty on emotion and vitriol cannot replace sound legal
20 analysis and application of statutory and case law authority to the questions presented. Calumny
21 should not replace citation in a reasoned presentation.
22

1 J. Patrick Harty and Ben and Jason Harty ask the Court to reconsider its decision
2 awarding attorneys' fees in full against each of them, jointly and severally, together with the
3 community estate of J. Patrick Harty and Christine Harty and together with Christine Harty as
4 her separate property. The moving parties ask the Court to:

- 5 A. Deny attorneys' fees totally and require all parties to pay their own; or
6 B. Limit the award of attorneys' fees in favor of Greg Harty only to the currently
7 available assets of the Shirley A. Harty Estate; or
8 C. Award attorneys' fees against J. Patrick Harty as against his separate estate only
9 in the amount that represents his one-third share of the attorneys' fees expended
10 by Greg Harty in regard to the \$330,000 bank account; and
11 D. Limit the liability of Ben and Jason Harty to their proportionate prospect of
12 recovery on the two POD savings accounts totaling less than \$40,000 for both of
13 them.

14 Dated this 14th day of May, 2009.

15 OSERAN HAHN SPRING STRAIGHT & WATTS, P.S.

16 

17 CHARLES E. WATTS, WSBA #2331
18 Attorneys for Petitioner/Moving Party J. Patrick
19 Harty, Benjamin Harty and Jason Harty
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