

No. 68155-9-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION I**

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In Re the Estate of YOLANDA "LANI" SLOUGH,  
ROBERT SLOUGH, Appellant,

v.

CHRISTINE CALDERBANK, Respondent.

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**RESPONDENTS' OPENING BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. STATEMENT OF ISSUES.....	3
III. STATEMENT OF THE CASE.....	4
1. Background of the probate dispute.....	4
2. In 2010, the parties stipulated to contractual arbitration regarding the amount of rent due from Appellant to the Estate and whether any community lien existed or whether such lien would be barred by RCW 11.40.051.....	6
3. The parties next conducted the Contractual Arbitration regarding the amount of rent due.....	8
4. In 2011, Ms. Calderbank and Ms. Denike moved for an order granting Judge Lukens authority to determine attorneys' fees and costs due pursuant to a TEDRA Arbitration.....	9
5. Ms. Calderbank and Ms. Denike moved for summary judgment and dismissal at the trial <i>de novo</i> .....	11
IV. ARGUMENT.....	13
1. Standard of Review.....	13
2. The trial court properly determined that it lacked subject matter jurisdiction to retry the entire Contractual Arbitration.....	14
3. The trial court properly determined that the award of fees and costs of \$55,167.80 to	

	Christine Calderbank and Carolynne Denike pursuant to the TEDRA Arbitration was fair and reasonable.....	16
4.	If the Court were to conduct a <i>de novo</i> review of the amount of rent Mr. Slough owed the Estate for living in the House, it should affirm the decision of the trial court.....	19
	a. The lower court properly applied prejudgment interest.....	21
5.	Mr. Slough’s appeal should be dismissed because it is moot.....	23
	a. RCW 11.40.051 bars Mr. Slough’s putative claims.....	24
6.	Christine Calderbank and Carolynne Denike should be awarded their attorneys’ fees and costs as prevailing parties to this appeal.....	32
V.	CONCLUSION.....	34

## TABLE OF AUTHORITIES

### Washington Supreme Court Decisions

<i>Bellevue School Dist. No. 405 v. Brazier Const. Co.</i> , 103 Wn.2d 111, 691 P.2d 178 (1984).....	26
<i>City of Sequim v. Malkasian</i> , 157 Wn.2d 251, 138 P.3d 943 (2006).....	23
<i>Davis v. Dep't of Labor &amp; Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980).....	19, 22
<i>Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.</i> , 131 Wn.2d 345, 932 P.2d 158 (1997).....	23
<i>Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	3, 11, 19, 20
<i>Gunnier v. Yakima Heart Ctr., Inc.</i> , 134 Wn.2d 854, 953 P.2d 1162 (1998).....	13
<i>Hansen v. Rothaus</i> , 107 Wn.2d 468, 730 P.2d 662 (1986).....	21
<i>In re Estate of Boston</i> , 80 Wn.2d 70, 491 P.2d 1033 (1971)...	19, 20
<i>In re Estate of Hickman</i> , 41 Wn.2d 519, 250 P.2d 524 (1952)...	3, 19
<i>Klickitat County Citizens Against Imported Waste v. Klickitat County</i> , 122 Wn.2d 619, 860 P.2d 390, 866 P.2d 1256 (1994)....	23
<i>Labriola v. Pollard Grp., Inc.</i> , 152 Wn.2d 828, 100 P.3d 791 (2004).....	33
<i>Lane v. Department of Labor and Indus.</i> , 21 Wn.2d 420, 151 P.2d 440 (1944).....	25, 26
<i>Mt. Hood Beverage Co. v. Constellation Brands, Inc.</i> , 149 Wn.2d 98, 63 P.3d 779 (2003).....	33, 34
<i>Prier v. Refrigeration Eng'g Co.</i> , 74 Wn.2d 25, 442 P.2d 621 (1968).....	21

<i>Ruff v. County of King</i> , 125 Wn.2d 697, 887 P.2d 886 (1995)....	13
<i>Ruth v. Dight</i> , 75 Wn.2d 660, 453 P.2d 631 (1969).....	27
<i>Stenberg v. Pacific Power &amp; Light Co.</i> , 104 Wn.2d 710, 709 P.2d 793 (1985).....	25
<i>Wash. State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	17
<b>Washington Court of Appeals Decisions</b>	
<i>Aker Verdal A/S v. Neil F. Lampson, Inc.</i> , 65 Wn. App. 177, 828 P.2d 610 (1992).....	22
<i>Egerer v. CSR West, LLC</i> , 116 Wn. App. 645, 67 P.3d 1128 (2003).....	22
<i>Gottwig v. Blaine</i> , 59 Wn. App. 99, 795 P.2d 1196 (1990).....	29, 30, 31
<i>Jordan v. Bergsma</i> , 63 Wn. App. 825, 822 P.2d 319 (1992).....	26
<i>Kaintz v. PLG, Inc.</i> , 147 Wn. App. 782, 197 P.3d 710 (2008).....	33, 34
<i>O'Steen v. Wineberg's Estate</i> , 30 Wn. App. 923, 640 P.2d 28 (1982).....	29, 30
<i>Palermo at Lakeland, LLC v. City of Bonney Lake</i> , 147 Wn. App. 64, 193 P.3d 168 (2008).....	21
<i>Redding v. Virginia Mason Med. Ctr.</i> , 75 Wn. App. 424, 878 P.2d 483 (1994).....	13
<i>Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n</i> , 94 Wn. App. 744, 972 P.2d 1282 (1999).....	13
<i>Teeter v. Lawson</i> , 25 Wn. App. 560, 610 P.2d 925 (1980).....	27

*Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502 (2013)..... 26

*Witt v. Young*, 168 Wn. App. 211, 275 P.3d 1218 (2012)..... 27, 28

**Statutes**

RCW 4.56.110..... 21

RCW 11.40.051..... 24, 25, 29, 31

RCW 11.96A, *et seq.*..... 5, 34

RCW 11.96A.150..... 17

RCW 11.96A.150(1)..... 32

RCW 11.96A.310..... 2, 3, 6, 7, 8, 9, 10, 11, 14, 15, 16, 34

RCW 11.96A.310(1)(d)..... 14

RCW 11.96A.310(6)..... 17

RCW 11.96A.310(9)..... 15

RCW 11.96A.310(10)..... 33

RCW 19.52.020..... 21

**Regulations and Rules**

CR 56(c)..... 13

CR 12(h)(3)..... 14

RAP 18.1(a)..... 32

RAP 18.1(b)..... 32

MAR 7.1..... 9, 16

**Other Authorities**

Washington State Bar Ass'n, Community Property Deskbook §  
4.14, at 4-48 (3d ed. 2003)..... 17

## I. Introduction

Appellant Robert Slough lived in a house Yolanda (“Lani”) Slough bequeathed to her daughters, respondents Christine Calderbank and Carolynne Denike. During that time, he refused to move out and he refused to pay rent to Lani’s estate, despite the fact that he was the personal representative. Finally, after five years of Mr. Slough’s repeated delays and avoidance, the King County Superior Court ordered him to deed the house to Ms. Calderbank and Ms. Denike. Later, on a summary judgment motion Ms. Calderbank and Ms. Denike brought in the trial *de novo* that Mr. Slough himself requested, the court ordered him to pay Lani’s estate the back due fair market rent he owed, and to pay Ms. Calderbank and Ms. Denike’s attorneys’ fees and costs. That is the order he now appeals.

Mr. Slough misapprehends that summary judgment order (“Order”). The Order included three separate dispositive rulings. First, it awarded the Estate of Yolanda Slough (the “Estate”) past due rent. Second, it awarded attorneys’ fees to Ms. Calderbank and Ms. Denike as prevailing parties in two separate arbitrations – one contractual (the “Contractual Arbitration”), and a later one conducted pursuant to the Trust and Estate Disputes Resolution Act (the “TEDRA Arbitration”) - and in the trial *de novo*. Third, it dismissed for lack of jurisdiction any other

issues in a trial *de novo* pursuant to RCW 11.96A.310 because the Contractual Arbitration was not subject to that statute.

Mr. Slough assigns error only to the portion of the Order dismissing his claims for lack of jurisdiction. He does not assign error to the King County Superior Court's finding that he owed the estate back rent, nor does he assign error to the attorneys' fees award against him, both of which were the basis of the judgments entered against him. Those were the only issues determined in the arbitrations, and Mr. Slough does not assign error to them. This Court should affirm them without further review.

If it were to review the lower court's determinations, it should come to the same conclusion. First, Mr. Slough's request for trial *de novo* was untimely because the initial arbitration was not conducted pursuant to RCW 11.96A.310. His request for trial *de novo* under that chapter was unavailing and untimely. Second, the lower court's other rulings were correct as a matter of law and are factually unchallenged. The lower court properly awarded Ms. Calderbank and Ms. Denike their reasonable attorneys' fees and costs of \$55,167.80 because it determined that they were the prevailing parties – an unchallenged finding – and that those fees were reasonable. The lower court did not abuse its discretion in making that award and it should be upheld. If a personal representative “chooses

to use the house for his own benefit he must pay rent.” *Estate of Jones*, 152 Wn.2d 1, 14, 93 P.3d 147 (2004) (citing *In re Estate of Hickman*, 41 Wn.2d 519, 526-27, 250 P2d 524 (1952)). The lower court ordered Mr. Slough to pay rent in accordance with well-established law. It would be clear error to reverse that order.

Finally, Mr. Slough’s appeal should be dismissed because it is moot. Although it is somewhat difficult to ascertain what relief he seeks, it appears he asks for a determination he had some undefined community property interest in the house Lani owned. That house was long since determined, in unchallenged and unappealed dispositive orders, to be Lani’s separate property and in 2010 the King County Superior Court ordered it distributed to Ms. Calderbank and Ms. Denike. They sold the house to unrelated third parties nearly two years ago.

## **II. STATEMENT OF ISSUES**

1. Whether the trial court properly determined that it lacked subject matter jurisdiction to retry the entire Contractual Arbitration pursuant to RCW 11.96A.310 because the Contractual Arbitration.
2. Whether the trial court properly determined that the award of fees and costs of \$55,167.80 to Christine Calderbank and Carolynne Denike pursuant to the TEDRA Arbitration was fair and reasonable.

3. Whether the trial court properly awarded rent to the Estate from Mr. Slough based on his own determination of fair market monthly rental value.

4. Whether Mr. Slough's appeal should be dismissed because it is moot.

### **III. STATEMENT OF THE CASE**

#### **1. Background of the probate dispute**

Yolanda ("Lani") Slough died on October 27, 2005. In her will, she gave her daughters, respondents Christine Calderbank and Carolynne Denike, everything she had, including her house in the Laurelhurst neighborhood of Seattle (the "House"). CP 163.<sup>1</sup> The House was Ms. Calderbank and Ms. Denike's childhood home; Lani bought it 12 years before her marriage to Mr. Slough and owned it as her separate property throughout her life. CP 149-151. In her will, she named her grandson as her executor. CP 163.

On March 12, 2009, Mr. Slough had himself appointed personal representative of Lani's estate. CP 167.<sup>2</sup> Since that time, he insisted that he was entitled to live in the House rent-free. He later started claiming

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<sup>1</sup> Respondents are designating this and two other docket entries as clerk's papers with the filing of this brief. The clerk's papers citations are based on Respondents' attorney's best estimate of the numerical designation the King County Superior Court Clerk will provide. If those designations turn out to be inaccurate, Respondents will file a corrected brief accordingly.

<sup>2</sup> See footnote 1.

that a portion of the House was community property. To resolve the issues and expedite closure of the Estate, Ms. Calderbank and Ms. Denike brought a Trust and Dispute Resolution Act (“TEDRA”) petition pursuant to RCW 11.96A *et seq.* on March 3, 2010. CP 148-159. They sought a determination that the House was Lani’s separate property, that any claims Mr. Slough may have had – though as a matter of law and fact there were none - with respect to the House were long since time-barred by the creditor’s claim statute, RCW 11.40.051, and that Mr. Slough owed the Estate back rent for living in the House. CP 148-159.

The King County Superior Court rejected Mr. Slough’s contention that he somehow had a community property interest in the House and ruled “that the [House] is the separate property of Yolanda Slough.” CP 32. Mr. Slough did not appeal that determination and does not contest it here. However, during oral argument, Mr. Slough raised a case that he had not briefed and argued that it was relevant to the creditor’s claim issue. Commissioner Watness, not having had time to analyze that case, ordered the parties to TEDRA mediation on two distinct issues: one, the amount of “rent due from Mr. Slough to the estate” and two, “whether there is any lien in favor of the community or whether such lien would be

barred by RCW 11.40.051.” CP 32.<sup>3</sup>

2. **In 2010, the parties stipulated to contractual arbitration regarding the amount of rent due from Appellant to the Estate and whether any community lien existed or whether such lien would be barred by RCW 11.40.051.**

Having determined mediation would be unproductive, on June 25, 2010, Ms. Calderbank and Ms. Denike stipulated with Mr. Slough to arbitrate before Judge Terry Lukens (Ret.) the two issues upon which Commissioner Watness had ordered mediation. CP 34-35. They agreed to bifurcate the arbitration and to conduct it in two separate proceedings, with the issue of Mr. Slough’s claim of community lien being heard first. Those arbitration proceedings (the “Contractual Arbitrations”) were not conducted pursuant to TEDRA, RCW 11.96A.310.

The initial phase of the Contractual Arbitration concluded with Judge Lukens’ summary judgment order dismissing Mr. Slough’s putative claim to a community lien in the House because any lien, if it could exist, was barred by the creditor’s claim statute, RCW 11.40.051. CP 93-95.<sup>4</sup> Ms. Calderbank and Ms. Denike then moved the lower court for an order

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<sup>3</sup> Mr. Slough erroneously represents that “the petition filed by [Ms. Calderbank and Ms. Denike] asks for TEDRA mediation.” *See* Appellant’s Opening Brief, p.8. They did no such thing in their petition; the order for mediation arose because of Mr. Slough’s untimely presentation of additional unavailing authority at the hearing on that petition.

<sup>4</sup> Mr. Slough submitted the arbitrator’s order on that matter to the lower court and designated it in his clerk’s papers in this appeal.

distributing the House to them. CP 171-174.<sup>5</sup> On October 18, 2010, the King County Superior Court ordered Mr. Slough to deed the House to his stepdaughters. CP 37-38. That court later issued an order further clarifying that “the house shall not be returned to the Estate” and that Ms. Calderbank and Ms. Denike “own the house free and clear and may do with it what they wish.” CP 40-42. Mr. Slough never appealed the dismissal order in the first Contractual Arbitration regarding his creditors claim of an equitable interest in the House or the lower court’s orders regarding distribution and ownership. Mr. Slough does not contest them here and those awards and orders are final and conclusive.

In the first Contractual Arbitration, Judge Lukens took briefing on the issue of his authority under RCW 11.96A.310 to award attorneys’ fees and costs. Mr. Slough strenuously argued he did not have such authority and that the issues in the Contractual Arbitrations were strictly circumscribed by the parties’ stipulation. On October 21, 2010, Judge Lukens ordered that while “under TEDRA, the arbitrator has the authority to award attorney’s fees and costs,” the issue before him was “is this proceeding a TEDRA arbitration or a contractual arbitration.” CP 91-92.<sup>6</sup> He found that the “answer is contained within the [June 25, 2010]

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<sup>5</sup> See footnote 1.

<sup>6</sup> Again, Mr. Slough submitted that decision for the lower court’s consideration and has designated it in this matter, too.

Stipulation.” *Id.* He held that the parties “contractually agreed to an arbitration, enumerating the issues to be resolved” and that the stipulation “did not expand on the arbitrated issues nor did it make the proceeding a TEDRA arbitration.” *Id.* (emphasis added). Judge Lukens therefore held that the Contractual Arbitration was not subject to RCW 11.96A.310.

**3. The parties next conducted the Contractual Arbitration regarding the amount of rent due.**

After conclusion of the first Contractual Arbitration, the parties conducted the second Contractual Arbitration to determine the amount of rent Mr. Slough owed the Estate. On May 17, 2010 Ms. Calderbank and Ms. Denike propounded discovery requests on Mr. Slough, asking what he “contend[s] is the fair market rental value of the House.” Answering that interrogatory, Mr. Slough produced a letter dated July 15, 2010 from his expert, Ewing & Clark real estate brokers, stating that they “have determined that the rental value of the home is \$2,000 per month.” CP 57.

Mr. Slough lived in the House without paying rent from the date of Lani’s death on October 27, 2005. He had himself appointed personal representative on March 12, 2009. CP 167. He deeded the House to Beneficiaries on November 2, 2010. CP 59-61. Therefore, he lived in the House, refusing to pay rent at the fair market monthly rental rate of \$2,000 for 5 years and 8 days. He was the personal representative of Lani’s estate

for 19 months and 20 days of that time.

On February 16, 2011, Judge Lukens issued a final award relating solely to the issue of the rent due the Estate, awarding the Estate \$37,400 in principal and \$4,612 in prejudgment interest. CP 100 – 101.<sup>7</sup> 28 days later, on March 15, 2011, Mr. Slough filed a document titled “Notice of Appeal of Final Decision of Arbitrator,” purporting to appeal the February 16 award. CP 48.

RCW 11.96A.310 allows 30 days for a request for a trial *de novo* of an arbitration award. MAR 7.1 only allows 20 days for such a request. If an arbitration was not a TEDRA arbitration, it could not be appealed under that statute. For reasons of his own, despite the fact that he himself argued strenuously the Contractual Arbitration was not subject to TEDRA, Mr. Slough decided not to make request for trial *de novo* within the MAR timeline. When he discovered his error, he began for the first time to argue that TEDRA now applied.

**4. In 2011, Ms. Calderbank and Ms. Denike moved for an order granting Judge Lukens authority to determine attorneys’ fees and costs due pursuant to a TEDRA Arbitration.**

There were two issues to be decided in the Contractual Arbitration: whether any putative community lien was barred by RCW 11.40.051 and

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<sup>7</sup> Mr. Slough relied on this award as one of his exhibits in his opposition to Ms. Calderbank and Ms. Denike’s summary judgment motion in the trial *de novo*. CP 86-106.

how much rent Mr. Slough owed the Estate. Ms. Calderbank and Ms. Denike were the prevailing parties on both issues. RCW 11.96A.310 allows an arbitrator to award attorneys' fees and costs to the prevailing party in a dispute. Ms. Calderbank and Ms. Denike incurred \$3,839.27 in costs and \$34,449 in attorneys' fees in arbitrating the issues the parties stipulated to arbitrate. CP 22-24; 63-78.

Because Judge Lukens determined – at Mr. Slough's own urging – that he lacked jurisdiction to award fees and costs because the Contractual Arbitrations were not subject to TEDRA, on March 3, 2011, Ms. Calderbank and Ms. Denike moved to compel arbitration pursuant to RCW 11.96A.310 to determine attorneys' fees and costs due. On April 19, 2011, the lower court ordered a separate arbitration pursuant to RCW 11.96A.310 (the "TEDRA Arbitration"). CP 50.<sup>8</sup> The parties then engaged in the court-ordered TEDRA Arbitration. Mr. Slough later sought a trial *de novo* of that award from the King County Superior Court. CP 162.

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<sup>8</sup> Notably, Mr. Slough misstates the content of this order in his Opening Brief, erroneously claiming the order provides "the matter is still proceeding as a TEDRA arbitration." See Appellant's Opening Brief, p.8.

**5. Ms. Calderbank and Ms. Denike moved for summary judgment and dismissal at the trial *de novo*.**

Personal representatives owe a duty to pay rent to an estate if they live in the estate's property. *Estate of Jones*, 152 Wn.2d at 14. No issue of material fact existed regarding the amount of rent Mr. Slough owed the Estate. That amount was based on Mr. Slough's own determination of the fair market monthly rental value and the undisputed time he lived in the House as personal representative without paying rent. Likewise, there was no issue of material fact regarding the amount of attorneys' fees and costs Ms. Calderbank and Ms. Denike had incurred, nor that they were prevailing parties in the Contractual Arbitrations and TEDRA Arbitration. Accordingly, they moved for summary judgment on November 4, 2011. CP 3-20. They also sought a determination that Mr. Slough's request for a trial *de novo* under RCW 11.96A.310 of whatever other issues he may have felt he hoped to argue in the Contractual Arbitrations should be dismissed for lack of jurisdiction because the Contractual Arbitrations were not conducted subject to RCW 11.96A.310.

The King County Superior Court took briefing, (CP 3-20; CP 21-83; CP 107-112; CP 86-106; CP 113-118) and heard oral argument. Notably, in his opposition, Mr. Slough did not contest either the amount of rent due to the Estate or the reasonableness of Ms. Calderbank and Ms. Denike's fee request. *See* CP 107-112. Instead, he argued that he had a

claim to offset against those amounts based on an equitable right to a creditors claim. He also argued that his request for trial *de novo* was in fact timely. The court rejected Mr. Slough's arguments that the amount of rent due should be reduced by any offset. It entered an order awarding the Estate past due rent plus prejudgment interest. CP 122. It also determined it lacked subject matter jurisdiction to try any other issues determined in the Contractual. *Id.* Further, as it did have jurisdiction to conduct a trial *de novo* of the TEDRA Arbitration involving the award of attorneys' fees and costs, it did so and awarded Ms. Calderbank and Ms. Denike \$38,288.27 in reasonable and necessary attorneys' fees and costs. *Id.* In addition, it awarded them fees and costs incurred as prevailing parties in the trial *de novo*. CP 123.

On December 22, 2011, Judge Heller entered a judgment of \$55,167.80 against Mr. Slough in favor of Ms. Calderbank and Ms. Denike for the attorneys' fees and costs award. Mr. Slough appealed the summary judgment order on December 30, 2011. CP 142-145. On January 12, 2012, Judge Heller entered a second judgment of \$46,213.12 against Mr. Slough in favor of the Estate for past due rent.

#### IV. ARGUMENT

##### 1. Standard of Review

Appellate courts review summary judgment orders *de novo*, engaging in the same inquiry as the trial court. *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wn.2d 854, 858, 953 P.2d 1162 (1998). Summary judgment is appropriate if the record before the court shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ruff v. County of King*, 125 Wn.2d 697, 887 P.2d 886 (1995). An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994). The orders of the trial court dismissing Mr. Slough's request for trial *de novo* as untimely and awarding the Estate past due rent may be reviewed *de novo*.

Attorneys' fees awards are reviewed for abuse of discretion. Absent a manifest abuse of discretion, appellate courts will not disturb an award of attorney fees. *Seattle-First Nat'l Bank v. Wash. Ins. Guar. Ass'n*, 94 Wn. App. 744, 761-62, 972 P.2d 1282 (1999). Here, the trial court did not abuse its discretion in awarding Ms. Calderbank and Ms. Denike \$55,167.80 in attorneys' fees and costs as prevailing parties in both the arbitrations and the trial *de novo*.

**2. The trial court properly determined that it lacked subject matter jurisdiction to retry the entire Contractual Arbitration.**

CR 12(h)(3) provides that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” Mr. Slough’s asserted jurisdictional basis for a trial *de novo* was RCW 11.96A.310. But the Contractual Arbitration was not conducted pursuant to RCW 11.96A.310.

To bring an arbitration action within the ambit of RCW 11.96A.310, the parties and the Court must take several procedural steps. RCW 11.96A.310(1)(d) provides that “[a]rbitration under RCW 11.96A.260 through 11.96A.320 is available . . . if . . . [t]he court has ordered that the matter must be submitted to arbitration.” It further provides that:

Arbitration must be commenced as follows:

- (a) If the matter is not settled through mediation under RCW 11.96A.300, or the court orders that mediation is not required, a party may commence arbitration by serving written notice of arbitration on all other parties or the parties’ virtual representatives. The notice must be served no later than twenty days after the later of the conclusion of the mediation procedure, if any, or twenty days after entry of the order providing that mediation is not required. If arbitration is ordered by the court under RCW 11.96A.300(3), arbitration must proceed in accordance with the order.
- (b) If the parties or the parties’ virtual representatives agree that mediation does not apply and have not agreed to another procedure for resolving the matter, a party may commence arbitration without leave of the court by serving written notice of arbitration on all other parties

or the parties' virtual representatives at any time before or at the initial judicial hearing on the matter. After the initial judicial hearing on the matter, the written notice required in subsection (1) of this section may only be served with leave of the court.

RCW 11.96A.310. The statute goes on to provide the required form that must be provided to give notice of and to initiate TEDRA arbitration. The parties and the court did not commence TEDRA arbitration by following the dictates of RCW 11.96A.310 in the Contractual Arbitrations. The parties and the court did commence TEDRA arbitration following those steps in the TEDRA Arbitration regarding attorneys' fees and costs. Judge Lukens – at Mr. Slough's insistence - expressly determined that the Contractual Arbitration was not a TEDRA arbitration and not subject to the provisions of RCW 11.96A.310. CP 91. The appeal provision of RCW 11.96A.310, granting a right to a trial *de novo*, applies only to arbitrations conducted under that chapter.

RCW 11.96A.310(9) provides that “[t]he final decision of the arbitrator may be appealed by filing a notice of appeal with the superior court requesting a trial *de novo* on all issues of law and fact. The notice of appeal must be filed within thirty days after the date on which the decision was served on the party filing the notice of appeal.” The Contractual Arbitrations were not conducted under RCW 11.96A.310, so the 30-day

limit for filing a notice of appeal did not apply. Arguably, no right to trial *de novo* existed at all with respect to the Contractual Arbitrations.

Mr. Slough does not cite any authority – in either his opposition to the motion for summary judgment or in his Opening Brief - that provides a request for trial *de novo* may be filed within 30 days of the issuance of an arbitration award or even that he had a right to trial *de novo*. To the contrary, Mandatory Arbitration Rule 7.1 provides that a party to an arbitration conducted under those rules “may serve and file with the clerk a written request for a trial *de novo* in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial *de novo* may not be extended.” Emphasis added. Mr. Slough certainly did not request a trial *de novo* within 20 days of the issuance of the award. His notice of appeal was untimely, was made under an inapplicable statute and the lower court properly rejected it.

**3. The trial court properly determined that the award of fees and costs of \$55,167.80 to Christine Calderbank and Carolynne Denike pursuant to the TEDRA Arbitration was fair and reasonable.**

On April 19, 2011, the court ordered arbitration pursuant to RCW 11.96A.310 to determine the amount of attorneys’ fees and costs Mr. Slough owed Ms. Calderbank and Ms. Denike. CP 50. An arbitrator has

authority to award attorneys' fees and costs under RCW 11.96A.310(6), which provides that "[t]he arbitrator may order costs, including reasonable attorneys' fees and expert witness fees, to be paid by any party to the proceedings as justice may require." In addition, RCW 11.96A.150 provides for the award of attorney fees in an action brought under the Trust and Estates Dispute Resolution Act (TEDRA). The statute provides:

(1) Either the Superior Court or ... any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) from any party to the proceedings; or (b) from the assets of the estate or trust involved in the proceedings; or (c) from any non-probate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorney's fees, to be paid in such amount and in such manner as the court determines to be equitable.

Washington courts use the lodestar method in determining the reasonableness of attorney fees. *See, e.g., Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 334, 858 P.2d 1054 (1993). Under this method, the fee is calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred.

In awarding fees and costs, the King County Superior Court considered the Declaration of Jonah Harrison. CP 21-83. That declaration provided Mr. Harrison's educational background and professional practice history. CP 22-23. It provided contemporaneous billing records of all

work performed and costs incurred for which Ms. Calderbank and Ms. Denike sought an award. CP 23-24, 63-78.

Ms. Calderbank and Ms. Denike spent a total of \$55,167.80 in contemporaneously-documented fees and costs in prevailing in the Contractual Arbitrations, the TEDRA Arbitration and the trial *de novo*. CP 62-78, 128-135. Mr. Slough has and had no good faith argument that a personal representative is not required to pay rent at the fair market value for living in the estate's house. Nor did he have any argument that the fair market rental value of the House was not \$2,000, as that was the number he himself provided in response to discovery requests. He also failed in his argument that he was entitled to an interest in the House, as the Court's order distributing the House to Ms. Calderbank and Ms. Denike and later clarification that they own it "free and clear" amply demonstrates. CP 37-42.

Ms. Calderbank and Ms. Denike were the prevailing parties in the Contractual Arbitration, the TEDRA Arbitration regarding fees and costs and the trial *de novo*. The lower court reviewed all briefing and argument submitted by the parties and properly exercised its discretion in determining their attorneys' fees were reasonable under the lodestar method employed by courts of this state. CP 63-78; 122-123; 128-139.

Unchallenged factual findings are verities on appeal. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980). Mr. Slough did not challenge the award of attorneys' fees, did not challenge their reasonableness and certainly did not challenge the finding that Ms. Calderbank and Ms. Denike were the prevailing parties entitled to fees. Even upon a *de novo* review of the facts and law before the King County Superior Court, this Court should uphold the award of \$55,167.80. But here, as noted above, the applicable standard of review should be abuse of discretion. The court did not abuse its discretion in its award and it should be affirmed.

**4. If the Court were to conduct a *de novo* review of the amount of rent Mr. Slough owed the Estate for living in the House, it should affirm the decision of the trial court.**

It is axiomatic that one who lives in estate property must pay rent to the estate. If a personal representative “chooses to use the house for his own benefit he must pay rent.” *Estate of Jones*, 152 Wn.2d at 14 (citing *In re Estate of Hickman*, 41 Wn.2d 519, 526-27 (1952)). In addition to paying rent, the personal representative has a fiduciary duty to pay “utilities, property taxes, and insurance while residing in the house.” *Id.* at 12. A personal representative “is accountable for his use of the deceased's real property.” *Id.* at 14 (citing *In re Estate of Boston*, 80 Wn.2d 70, 72, 491 P.2d 1033 (1971)). “Where there are reasonable alternatives open,

particularly alternatives which could produce rents and profits from the property, an executor has no right to remain on and to use the property.” *In re Estate of Boston*, 80 Wn.2d at 72. “For such continued use [the executor], as an individual, should be charged a reasonable rent.” *Id.* (citing *In re Estate of Hickman*, 41 Wn.2d 519 (1952)).

In *Jones*, the personal representative of a nonintervention estate breached his fiduciary duty to other beneficiaries by holding the decedent's house after her death and using the house for his own benefit before the estate was closed. Just as Mr. Slough did here, he lived in the house (his mother's) for years prior to her death and continued to do so after she passed away. During the entire time he lived there, he failed to pay rent, utilities, property taxes, and insurance. *Estate of Jones*, 152 Wn.2d at 12. Accordingly, the court ordered him to pay rent at fair market value from the date of his mother's death. *Id.* at 14-15.

Mr. Slough's expert determined the monthly fair market rental value of the House was \$2,000. CP 57. For the purposes of summary judgment and to facilitate resolution of this matter, Ms. Calderbank and Ms. Denike conceded that value, though they believed the actual value to be higher. CP 14.

As in *Jones*, Mr. Slough lived in the House since Lani's death and outright refused to pay rent to the Estate, even while he was personal

representative. The Estate was deprived of income and Mr. Slough had a duty to pay rent at \$2,000 per month for the time he lived in the Home since his appointment as personal representative until the time he executed a personal representative's deed as ordered by the Court. The lower court found he owed the Estate \$46,213.12 in past due rent, including prejudgment interest, for that period. CP 146.

**a. The lower court properly applied prejudgment interest.**

“Prejudgment interest is allowed in civil litigation at the statutory judgment interest rate, RCW 4.56.110, RCW 19.52.020, when a party to the litigation retains funds rightfully belonging to another and the amount of the funds at issue is liquidated, that is, the amount at issue can be calculated with precision and without reliance on opinion or discretion.” *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 87, 193 P.3d 168 (2008) (citing *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 33, 442 P.2d 621 (1968)). “The touchstone for an award of prejudgment interest is that a party must have the ‘use value’ of the money improperly. In effect, an award of prejudgment interest compels a party that wrongfully holds money to disgorge the benefit.” *Id.* (citing *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986)). The statutory interest rate is 12 percent. RCW 19.52.020.

The claim for rent due is liquidated, because it is a claim for past due rent based upon fair market value. “The fact that a claim is disputed does not render the claim unliquidated, so long as it may be determined by reference to an objective source such as fair market value.” *Egerer v. CSR West, LLC*, 116 Wn. App. 645, 653, 67 P.3d 1128 (2003) (citing *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 190, 828 P.2d 610 (1992)) (emphasis added). Here, that amount was not only undisputed, but was the fair market value that Mr. Slough himself propounded. Moreover, equity demands an award of prejudgment interest because Mr. Slough had the “use value” of the rent of the House that he refused to pay the Estate, nearly \$120,340, while he lived in the House for the more than five years since Lani’s death. CP 82-83.

Mr. Slough’s failure to pay the Estate rent for living in the Home deprived the Estate of at least \$2,000 per month for five years. The \$2,000 monthly fair market rental rate Mr. Slough’s own expert determined is an objective figure that can be computed with exactness from the evidence. As such, the claim is liquidated. An award of prejudgment interest at 12 percent was appropriate. Again, as noted above, the above findings regarding the amount of rent and prejudgment interest due are unchallenged here and must be taken as verities. *Davis*, 94 Wn.2d at 123.

**5. Mr. Slough's appeal should be dismissed because it is moot.**

An appeal is moot where it presents purely academic issues and where it is not possible for the court to provide effective relief. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 258-59 138 P.3d 943 (2006); see also *Dioxin/Organochlorine Ctr. v. Pollution Control Hearings Bd.*, 131 Wn.2d 345 350, 932 P.2d 158 (1997) (a matter is technically moot if the court cannot provide the basic relief sought). When an appeal is moot, it should be dismissed. *Klickitat County Citizens Against Imported Waste v. Klickitat County*, 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1994).

This appeal should be dismissed because it presents purely academic issues but gives no avenue for relief to Mr. Slough. He asks only that the Court determine that the Contractual Arbitration was conducted pursuant to TEDRA and that he therefore made a "timely request for a trial de novo at which [Mr. Slough] can assert his equitable ownership interest in the family home and contest the arbiter's [*sic*] awards against him." Appellant's Opening Brief, p. 8.

First, asserting an equitable ownership interest in Lani's separate property will not provide him with any relief. On March 30, 2010, the superior court determined that house was Lani's separate property. CP 32. Mr. Slough never contested or appealed that determination. One year

later, on March 30, 2011, the court also expressly ordered that “the house shall not be returned to the Estate” and that Beneficiaries “own the house free and clear and may do with it what they wish.” CP 40. Likewise, Mr. Slough did not contest or appeal that determination – in fact, his attorney signed the order. CP 42. The House has since been sold to an unrelated third party so that Ms. Calderbank and Ms. Denike could pay the costs associated with the extensive litigation Mr. Slough has caused. Even if Mr. Slough were to have a trial *de novo*, there is no longer any house in which he could assert an “equitable ownership interest.”

Likewise, contesting “the arbiter’s [*sic*] awards against him” will not provide Mr. Slough with any relief. The judgments that he apparently contests were not based upon the arbitrator’s awards. They were express determinations made by the King County Superior Court on summary judgment that Mr. Slough owed the Estate rent in the amount he himself determined was appropriate and that Ms. Calderbank and Ms. Denike were entitled to an award of attorneys’ fees and costs. Finally, any claim Mr. Slough may have had is barred by RCW 11.40.051.

**a. RCW 11.40.051 bars Mr. Slough’s putative claims.**

It is undisputed that Mr. Slough never made a creditor’s claim against the Estate. RCW 11.40.051 provides that any “person having a

claim against the decedent is forever barred from making a claim or commencing an action against the decedent . . . unless the creditor presents the claim . . . within twenty-four months after the decedent's date of death.” RCW 11.40.051 (emphasis added). “This bar is effective as to claims against both the decedent's probate and nonprobate assets.” *Id.*

In his summary judgment briefing, Mr. Slough unsuccessfully argued RCW 11.40.051 did not bar his claim of an ownership interest in the House. CP 109-110. He cited cases that discuss offsets in situations where a statute of limitation bars a claim. CP 110. Those cases are inapposite. RCW 11.40.051 is not a statute of limitation. Rather, it is a nonclaim statute that forever extinguishes and bars probate claims if they are not made within the prescribed time period.

Nonclaim statutes differ from statutes of limitation. In regard to a true statute of limitations, “although a remedy may become barred thereunder, the right or obligation is not extinguished.” *Lane v. Department of Labor and Indus.*, 21 Wn.2d 420, 426, 151 P.2d 440 (1944) (emphasis added). “A statute of limitation, in effect, deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim.” *Stenberg v. Pacific Power & Light Co.*, 104 Wn.2d 710, 714, 709 P.2d 793 (1985) (emphasis added). However, because the

right itself is not extinguished, a right of offset based on that extant right may still exist.

A nonclaim statute is wholly different. When the prescribed time period in a nonclaim statute runs, the once-extant right ceases to exist. In *Lane*, “the court contrasted statutes of limitations with statutes of nonclaim,” noting that “[w]hen the period of a statute of nonclaim expires the right or obligation is extinguished.” *Jordan v. Bergsma*, 63 Wn.App. 825, 828 (1992)(emphasis added) (citing *Lane*, 21 Wn.2d at 425). “The policy of the probate nonclaim statute is to limit *in rem* claims against the decedent's estate, expedite the settling of estates, and facilitate the distribution of decedent's property to the heirs and devisees.” *Bellevue School Dist. No. 405 v. Brazier Const. Co.*, 103 Wn.2d 111, 119-120, 691 P.2d 178 (1984) (internal citations omitted).<sup>9</sup> The Washington Supreme Court “has recognized that no good reason exists to allow . . . *in rem* claims against estates long after the nonclaim limitation period has expired.” *Id.* That court noted that “[c]learly this would frustrate the policy of settling estates and distributing a decedent's property to designated heirs.” *Id.*

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<sup>9</sup> Inapposite portion superseded by statute as stated in *Wash. State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 513 (2013)

“Claims between spouses are treated like any other claim. Included are claims asserting rights of reimbursement and equitable liens.” Washington State Bar Ass’n, Community Property Deskbook § 4.14, at 4-48 (3d ed. 2003) (emphasis added). “The surviving spouse, even though acting as personal representative, must comply with the nonclaim statute in order to preserve his or her own claims, as against competing claimants, taxing authorities, devisees, legatees and heirs.” *Id.* “The nonclaim statute is mandatory and not subject to enlargement by interpretation; and it cannot be waived.” *Ruth v. Dight*, 75 Wn.2d 660, 669, 453 P.2d 631 (1969) other portions superseded by statute as stated in *Teeter v. Lawson*, 25 Wn. App. 560, 610 P.2d 925 (1980).

In direct contravention of the above, Mr. Slough relies on the inapposite Division II case of *Witt v. Young*, 168 Wn. App. 211, 275 P.3d 1218 (2012), decided months after the lower court entered judgment against Mr. Slough, for the proposition that he did not need to make a creditor’s claim. *Witt* says nothing of the sort. In *Witt*, “at a point when neither had any real property or significant personal property, Danny Merle Young and Julie Witt met, started a relationship, and began living together.” *Id.* at 213 (emphasis added). However, “during their relationship, they acquired and maintained a home” and various other property. *Id.* When Young died intestate, Witt filed a creditor’s claim,

which the executor rejected. *Id.* at 214. Witt then filed a suit against the estate seeking partition of all real and personal property because Witt had a “‘vested interest’ in ‘one-half’ of the property the Estate claimed based on her ‘marital-like relationship’ . . . , which created a ‘quasi community property estate’.” *Id.* at 215. However, she failed to file that suit within 30 days of the estate’s rejection of her claim. The court found that Young’s suit was not barred because her claim was not a claim against Witt’s property but “rather than an attempt to protect *her* preexisting property interests in property she co-owned with Young.” *Id.* at 221 (emphasis included in original).

Here, none of the facts in *Witt* exist; in fact, this matter involves an opposite set of facts. Lani acquired the House 12 years before her marriage to Mr. Slough. In earlier unchallenged and unappealed proceedings, the King County Superior Court ordered, on March 30, 2010, that the House was her separate property, not community property. CP 32. It later ordered the House distributed to Ms. Calderbank and Ms. Denike and ordered that it was theirs “free and clear and [they] may do with it what they wish.” CP 37 38, 40. None of these orders were appealed or challenged.

Even Mr. Slough does not contend he was a co-owner of the House, as was the appellee in *Witt*. Ms. Witt simply sought a

determination that she could still sue the estate for rejecting her claim to her own property that she actually acquired together with Witt during their life together. Mr. Slough seeks to upend the nonclaim statute on the grounds that a claim to interest in property in which he was explicitly found to have no ownership interest and did not acquire during his marriage with Lani, yet which he contends he impressed with debt during her lifetime, can somehow survive forever as an “equitable interest.”

He further cites, without explanation, the other cases he has continuously cited throughout this litigation and which the courts and arbitrators have consistently found unavailing, specifically *Gottwig v. Blaine*, 59 Wn. App. 99, 795 P.2d 1196 (1990) and *O’Steen v. Wineberg’s Estate*, 30 Wn. App. 923, 795 P.2d 28 (1982).

In *O’Steen*, the issue was “whether an action against a trustee is barred by the non-claim statute, RCW 11.40.051, when the trust property is inventoried as community property in the estate of the trustee’s spouse and the beneficiary makes no claim in the estate.” *O’Steen*, 30 Wn.App. at 925. It turned out that Mr. Wineberg’s wife had died 13 years earlier and that he had inventoried the stocks he held for plaintiffs as community property in her estate. He claimed that because plaintiffs never made a claim in *her* estate, 13 years earlier, they were barred from making a claim against his estate.

The court held that the nonclaim statute did not bar the action because it was a claim for specific property (*i.e.* shares of stock) and because Mr. Wineberg held the stock as trustee for plaintiffs and his marital community therefore acquired no interest in it (and presumably was not properly part of the deceased wife's estate). *Id.* at 934. Here, Mr. Slough's claim is against the general assets of the estate. He does not appear to claim he is entitled to the House itself, but an undisclosed sum of money reflecting the supposed increase in value of the House. And in stark contrast to *O'Steen*, Mr. Slough's claim is entirely premised on the notion that the marital community *did* have an interest and that his claim arises from that interest. *O'Steen* is irrelevant and inapplicable.

Similarly, *Gottwig* is both legally and factually distinct. There, two women, Reynolds and Blaine, owned property as joint tenants with right of survivorship. *Gottwig*, 59 Wn.App. at 100. Reynolds named Blaine as personal representative in her will. *Id.* Shortly before Reynolds' death, Gottwig influenced Reynolds, who then was suffering from Alzheimer's, to convey her one-half interest in the property to Gottwig by quit claim deed and to change her will and name Gottwig, rather than Blaine, personal representative. *Id.* at 100-101. Gottwig kept the will a secret from Blaine and did not record the deeds until two days before Reynold's death. *Id.* at 101. Blaine sued to quiet title in herself, claiming

Reynold's lack of capacity invalidated the deed. Gottwig asserted that RCW 11.40.051 barred her action.

The trial court held and the court of appeals affirmed that the deed was invalid due to lack of capacity and undue influence. *Id.* at 100. It held that because the deed was invalid, Blaine remained a joint tenant. RCW 11.40.051 was therefore inapplicable because Blaine's interest was based on her status as a joint tenant, not a creditor, and the interest of a joint tenant does not pass under their will. *Id.* at 104. In stark contrast, here there are no issues of undue influence, Mr. Slough is not claiming an interest as a joint tenant and the court herein has already conclusively held that the Home was Lani's separate property. *Gottwig* has no bearing on this case.

As the order on motion for summary judgment included in the declaration Mr. Slough filed with his response noted:

The public policy reflected in RCW 11.40.051 is to provide finality of claims against an estate and expedite its closing. Here, with nearly five years elapsing since the date of death, with still no distribution or formal claim by [Mr. Slough], that policy has been frustrated. There is no legal basis to carve out liens that are purely equitable in nature from the application of RCW 11.40.051.

CP 95. Whatever the source of his putative claim, RCW 11.40.051 forever extinguished any right of offset or other claim Mr. Slough may have. Mr. Slough's claims are continued efforts to relitigate the issue in

this nearly eight-year-long probate frustrates this state's policy of expeditiously and finally settling estates. Affirming the lower court's determination that the Contractual Arbitration was not conducted pursuant to TEDRA and that Mr. Slough's request for trial *de novo* of that issue was untimely will fully and finally put this matter to rest.

**6. Christine Calderbank and Carolynne Denike should be awarded their attorneys' fees and costs as prevailing parties to this appeal.**

RAP 18.1(a) provides:

If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

RAP 18.1(b) provides that a party seeking an award of attorneys' fees on appeal "must devote a section of its opening brief to the request for the fees or expenses."

RCW 11.96A.150(1) provides;

Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable.

Further, RCW 11.96A.310(10) provides for an award of attorneys' fees and costs to the prevailing party in an appeal:

Costs on appeal of arbitration decision. The prevailing party in any such de novo superior court decision after an arbitration result must be awarded costs, including expert witness fees and attorneys' fees, in connection with the judicial resolution of the matter. Such costs shall be charged against the nonprevailing parties in such amount and in such manner as the court determines to be equitable. The provisions of this subsection take precedence over the provisions of RCW 11.96A.150 or any other similar provision.

“In Washington, attorney fees may be awarded only when authorized by a private agreement, a statute, or a recognized ground of equity.” *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). One such “well recognized principle of equity” is the principle of mutuality of remedy. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 789, 197 P.3d 710 (2008) (quoting *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003)). Pursuant to this principle, where a party has successfully argued that a statute is invalid (thus rendering the statute's attorney fee provision without force), that party is nevertheless entitled to an award of attorney fees if such fees would have been awarded to the opposing party had the statute

been deemed valid. *Kaintz*, 147 Wn. App. at 789 (citing *Mt. Hood Beverage Co.*, 149 Wn.2d at 121-22).

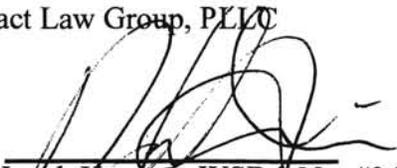
Mr. Slough's appeal is based on the argument that TEDRA applies to the entire proceedings, including the Contractual Arbitration. The TEDRA Arbitration was unquestionably conducted pursuant to RCW 11.96A.310 and Ms. Calderbank and Ms. Denike should be awarded their fees on this appeal on that basis alone. Because Mr. Slough asserts that TEDRA also applies to the Contractual Arbitration, even though it does not, the principle of mutuality of remedy dictates that RCW 11.96A, *et seq.*, provides for an award of reasonable attorneys' fees and costs to Ms. Calderbank and Ms. Denike should they prevail. They respectfully request this Court award them such fees and costs.

#### **V. CONCLUSION**

For the foregoing reasons, Ms. Calderbank and Ms. Denike respectfully request that this Court reject appellant Robert Slough's appeal and award them their reasonable attorneys' fees and costs as the prevailing parties.

DATED this 21<sup>st</sup> day of March, 2013.

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