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No. 73537-3-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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In the Matter of the Estate of SADIE M. RIVAS,  
Deceased,

EDWARD NICHOLAS RIVAS,  
Appellant,

v.

LEONARD E. RIVAS and JOSEPH RANDY RIVAS,  
Respondents.

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**BRIEF OF RESPONDENTS**

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A handwritten signature in black ink is written over a faint circular stamp. The signature is stylized and appears to be the initials 'JL'. The stamp is partially obscured by the signature and is mostly illegible.

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## I. INTRODUCTION

After having been granted multiple extensions of the deadline to file his Brief of Appellant in compliance with the Rules of Appellate Procedure, Appellant Edward Nicholas “Nick” Rivas has filed a brief consisting of exactly one page of incoherent “ARGUMENT,” which fails to articulate the error of which he is complaining or to set forth any basis for reversal of the trial court’s decision to dismiss his petition filed under the Trust and Estate Dispute Resolution Act, chapter 11.96A RCW.

Nick Rivas’ “Assignments of Error,” to the extent they are intelligible, are unrelated to the “ARGUMENT” he asserts, and they appear to focus on the trial court’s plenary power over probate proceedings. The Assignments do not identify any error, nor do they articulate an argument for reversal. To the extent that the Assignments can be interpreted as presenting issues for review, these issues were not raised below and cannot be argued for the first time on appeal pursuant to RAP 2.5(a).

Significantly, the instant appeal is but the latest in a series of maneuvers by Nick Rivas to use the court system and legal process to harass the Co-Personal Representatives and to cause the Estate of the parties’ late mother, Sadie M. Rivas, and the Co-PRs, personally, to spend significant amounts of time and money defending his frivolous claims.

The Sadie Rivas Estate is still in open probate, after more than **nine years**, due in large part to the disputes and delays that Nick Rivas has caused.

At this point in the litigation, after having both an ex parte commissioner and a superior court judge find that his allegations against the Estate were not cognizable, were frivolous, and were sanctionable, Nick Rivas still reiterates the same arguments. The only “new” arguments he asserts are not preserved for appeal because he failed to raise them below. Nick Rivas filed this appeal solely to continue harassing the Co-PRs and to cause the Estate to incur additional unnecessary fees and costs.

The trial court’s rulings dismissing Nick Rivas’ claims should be affirmed, and because this appeal is frivolous, Nick Rivas should be required to pay all fees and costs that the Estate has been forced to incur in defending the appeal pursuant to RCW 11.96A.150, RCW 4.84.185, RAP 18.1, and RAP 18.9(a).

## **II. STATEMENT OF THE CASE**

### **A. Factual Background**

This appeal arose from an estate dispute between siblings: Appellant Edward “Nick” Rivas and Respondents Leonard E. Rivas and Joseph Randy Rivas. Respondents are the Co-Personal Representatives of the Estate of the siblings’ late mother, Sadie M. Rivas (the “Decedent”). Clerk’s Papers (“CP”) 309-10. The Decedent died testate on June 23,

2007. CP 309. Her Last Will and Testament (“Will”) named her five sons (including Appellant Nick Rivas and the Respondent Co-Personal Representatives) and her granddaughter as beneficiaries. *Id.*

**B. Procedural History**

Nick Rivas filed a petition with the trial court to remove the Co-Personal Representatives and to force the sale of real property that was an asset of the Estate. CP 315. On February 11, 2011, the trial court denied the motion. *Id.* The parties thereafter attempted to negotiate the sale of the real property to Nick Rivas; the property was sold to Nick Rivas and title was conveyed to him. CP 316.

On June 1, 2012, Nick Rivas filed a petition under the Trust and Estate Dispute Resolution Act (“TEDRA”), chapter 11.96A RCW, for removal of the Co-Personal Representatives, an early disbursement from the Estate, damages from the Co-Personal Representatives for breach of fiduciary duty, and an accounting. CP 316. On June 15, 2012, the trial court ordered an accounting of the Estate, permitted the parties to engage in discovery, and entered an order of mediation. CP 317. The parties mediated on August 20, 2012, but failed to reach a settlement. *Id.* Following mediation, Nick Rivas took no further action on his TEDRA Petition and made no further discovery efforts. *Id.*

In November 2014, after retaining counsel, the Co-Personal Representatives filed a petition to approve an additional accounting, to dismiss Nick Rivas' TEDRA Petition, and to sanction Nick Rivas and his counsel under Civil Rule 11 for filing a frivolous petition. CP 317. At a preliminary hearing before Commissioner Carlos Velategui, Nick Rivas asserted allegations that Commissioner Velategui found to be non-cognizable. CP 385. The case was then set for trial.

The Honorable Monica Benton granted the Co-Personal Representatives' petition by Order, dated February 5, 2015. CP 459-63. In the February 5, 2015 Order, the trial court found that Nick Rivas: (1) engaged in litigation "designed for an improper purpose, including, without limitation, delay, harassment and to run up fees inordinately"; (2) "engaged in litigation that was unsubstantiated in fact and/or unwarranted in law"; and (3) asserted claims, through his attorney, "which were frivolous, not legally cognizable and not based on a plausible view of the law[.]" CP 461.

The trial court also made the following "conclusions of law": (1) "[Nick] Rivas abused the judicial process," *id.*; (2) "[Nick] Rivas' claims were not grounded in fact or law; they were frivolous; there was no debatable issue on which reasonable minds might differ and they were totally devoid of merit such that there is no reasonable possibility of

reversal”; (3) Nick Rivas’ attorney “failed to make a reasonable inquiry into the facts and/or law”; (4) Nick Rivas’ “pleadings were filed for improper purposes of delay, harassment, to run up fees, [and] to derail settlement”; (5) “[s]anctions are justified under CR 11”; and (6) attorneys’ “fees and costs proportionate to the effort incurred by the improper conduct are justified under RCW 11.96A.150.” CP 462.

Based on the foregoing findings and conclusions, the trial court dismissed Nick Rivas’ claims with prejudice and ordered attorneys’ fees and costs to be paid out of Nick Rivas’ share of the Estate. *Id.* 462-63. On May 8, 2015, the trial court granted the Co-Personal Representatives’ request for approval of their activities, accounting, final report, and distribution of Estate funds. CP 465-67.

On June 1, 2015, the trial court denied Nick Rivas’ claim for attorneys’ fees, entered final judgment, struck the trial date, authorized the payment of the Co-Personal Representatives’ attorneys’ fees from Nick Rivas’ Estate distribution, authorized the Co-Personal Representatives to make final distributions to the Estate beneficiaries, ordered the Co-Personal Representatives to be discharged, and ordered the Estate to be closed. CP 468-70.

Nick Rivas filed three notices of appeal with this Court, seeking review of the trial court’s orders, the first of which he filed on June 9,

2015. CP 433, 445, 457. On September 25, 2015, undersigned counsel received a Notice of Intent to Withdraw from counsel for Nick Rivas. Counsel's withdrawal became effective on October 9, 2015.

Pursuant to RAP 10.2, Nick Rivas, now proceeding *pro se* with his frivolous appeal, was required to file his Opening Brief within 45 days of the date that the Verbatim Report of Proceedings was filed with this Court, *i.e.*, by October 19, 2015. The deadline came and went with no filing or other communication from Nick Rivas.

The Co-Personal Representatives filed a Motion to Dismiss for want of prosecution and for filing frivolous appeal and requested attorneys' fees under RAP 18.1, RAP 18.9, RAP 10.4, RAP 9.2, RCW 11.96A.101, and RCW 4.84.185. The Commissioner of this Court allowed Nick Rivas additional time to submit his opening brief because he was proceeding *pro se*. Nick Rivas submitted his brief, but did not comply with the Rules of Appellate Procedure, omitting, among other things, assignments of error. This Court ordered Nick Rivas to resubmit a rule-compliant version of his brief by January 15, 2016. Nick Rivas filed his revised Brief of Appellant on that date.

### III. ARGUMENT

#### A. Nick Rivas Fails to Articulate a Basis for Reversal of the Trial Court's Decision

Although Nick Rivas' Brief of Appellant includes four Assignments of Error, none of these Assignments identifies an error by the trial court or presents grounds for reversal. Brief of Appellant ("Br. of App.") 5. Even when given the benefit of a liberal reading, the Assignments of Error fail to articulate an error made in the court below. Instead, they state only that (1) Nick Rivas' "issues were ruled frivolous," (2) he was "[d]enied due process and full discovery was not allowed," (3) "the logical progression through the TEDRA process" should have been allowed, and (4) "Respondent's [sic] were awarded attorney fees[.]" Br. of App. at 5. He is wrong.

Nick Rivas does not assign error to any specific finding of fact or conclusion of law made by the trial court. Appellate courts generally treat unchallenged findings of fact as verities on appeal, not subject to review. *Casterline v. Roberts*, 168 Wn. App. 376, 381, 284 P.3d 743 (2012). Thus, as a threshold matter, because Nick Rivas fails to challenge any specific finding of fact in his briefing, the trial court's findings are treated as verities on appeal and are not subject to review. *In re Estate of Barnes*, 2016 WL 348057, at \*2 (Wash. Jan. 28, 2016) (Slip Opinion) (noting that

the reviewing court defers to the trial court's determinations of the weight and credibility of the evidence in an estate dispute, and that unchallenged findings are verities on appeal).

Furthermore, with respect to the first Assignment of Error, which comes the closest to challenging a finding by the trial court, Nick Rivas provides no argument as to why the trial court's "frivolous" finding was erroneous. Where, as here, the trial court has weighed the evidence, the appellate court reviews factual matters to determine whether the trial court's factual findings are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law and determination of the case. *Frank Coluccio Constr. Co. v. King Cty.*, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007). Substantial evidence is that sufficient to persuade a fair-minded person of the truth of the declared premise. *Id.* There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that finding of fact at issue is not supported by substantial evidence. *Id.*

Here, even if Nick Rivas were to make the argument that the trial court's findings are not supported by substantial evidence—which he does not—such an assertion would not comport with the record on appeal, which provides ample evidence to support the trial court's findings of fact and conclusions of law. For instance, Judge Benton specifically found

that Nick Rivas (1) engaged in litigation “designed for an improper purpose, including, without limitation, delay, harassment and to run up fees inordinately”; (2) “engaged in litigation that was unsubstantiated in fact and/or unwarranted in law”; (3) asserted claims through his attorney “which were frivolous, not legally cognizable and not based on a plausible view of the law and which furthered baseless allegations” aimed at causing “delay” and “harassment” and “to run up fees inordinately.” CP 461. Judge Benton also found that “[Nick] Rivas’ claims, even with the help of counsel, were not grounded in fact or law,” that “there was no debatable issue on which reasonable minds might differ,” and that Nick Rivas’ claims “were totally devoid of merit such that there is no reasonable possibility of reversal.” CP 462. On these findings, substantial evidence unquestionably supports the trial court’s conclusion that Nick Rivas’ allegations were frivolous. To the extent that Nick Rivas articulates an argument to the contrary, it is unsupported by the record and should be rejected.

Nick Rivas’ second Assignment of Error states that he was “[d]enied due process and full discovery was not allowed,” but there is no further argument or explanation of this Assignment in his briefing. Br. of App. at 5. Nor is it true. With respect to the single reference to “due process,” no argument whatsoever appears in the briefing. *See Ainsworth*

*v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 81, 322 P.3d 6 (2014).

Indeed, the “ARGUMENT” section of Nick Rivas’ Brief of Appellant contains no argument at all, and instead discusses the trial court’s “plenary power over estates”—an issue unrelated to any of the Assignments that Nick Rivas attempts to assert. Nick Rivas’ “ARGUMENT” provides no citation to the record or to any applicable legal authority. The three cases he cites in his briefing are unpublished and otherwise inapt to the Assignments of Error he attempts to raise. *See* Br. of App. at 3, 9,

With respect to discovery, review of the record on appeal demonstrates that the trial court provided an opportunity for the parties to engage in discovery, but that no action was taken by Nick Rivas to propound discovery requests or to engage in discovery through other means. Perhaps most importantly, Nick Rivas raised no issue concerning discovery with the trial court.

It is well settled that the appellate court will “not review an issue, theory, argument, or claim of error not presented at the trial court level.” *Ainsworth*, 180 Wn. App. at 81 (citation omitted). Because Nick Rivas failed to raise this claim below, it is not preserved for appeal. Moreover, the record contradicts Nick Rivas’ Assignment of Error on this point, demonstrating that discovery was permitted, but that he made no effort to

engage in it. Thus, to the extent he articulates an Assignment of Error concerning discovery, it should be rejected.

Nick Rivas' third Assignment of Error asserts that "[t]he parties should be allowed to follow the logical progression through the TEDRA process." Br. of App. at 5. This Assignment is not explained further. Because Nick Rivas fails to present argument or to provide any explanation for this Assignment, it should also be rejected out of hand. Giving him the benefit of the doubt, it may be that he believes the case should have proceeded to a full trial. However, TEDRA is clear that it "is the intent of the legislature that the courts shall have full and ample power and authority under this title to administer and settle: (a) All matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this title; and . . . (2) If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section, the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, *all to the end that the matters be expeditiously administered and settled by the*

*court.* RCW 11.96A.020. In estate matters, courts are encouraged by the legislature to “expeditiously” administer and settle disputes. *Id.*

Finally, Nick Rivas appears to challenge the award of attorneys’ fees in Assignment of Error No. 4. Br. of App. at 5. Although he does not actually make an argument on this point, the Assignment references the award of attorneys’ fees granted to the Estate below. Again, to the extent that an argument is even articulated, it must be rejected as untenable because Nick Rivas fails to show error or abuse of discretion by the trial court, and the record on appeal supports the trial court’s award of attorneys’ fees to the Estate.

“Under the American rule compensation for attorneys’ fees and costs may be awarded only if authorized by contract, statute, or a recognized ground in equity.” *In re Washington Builders Benefit Trust*, 173 Wash. App. 34, 82-83, 293 P.3d 1206 (citation omitted), *review denied*, 177 Wn.2d 1018 (2013). Appellate courts apply a two-part standard of review to a trial court’s award or denial of attorneys’ fees: (1) *de novo* review of whether there is a legal basis for awarding attorneys’ fees by statute, under contract, or in equity and (2) review under the abuse of discretion standard of the reasonableness of the fee award. *Id.* Nick Rivas does not cite to the applicable standard of review, but applying this standard to the record on review demonstrates no error or

abuse of discretion by the trial court. To the contrary, the record on review demonstrates that the trial court properly awarded fees to the Estate pursuant to TEDRA's attorney-fee provision.

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[.]" (emphasis added). Here, the record on review demonstrates that the trial court cited this portion of the statute in its order awarding fees, CP 462, and that the trial court's findings of fact and conclusions of law support an award of attorneys' fees *to the Estate* because Nick Rivas' claims were frivolous.

The record on review also demonstrates that the amount of fees was reasonable. The trial court awarded \$5,361.14 to the Estate to be taken out of Nick Rivas' portion of Estate funds. CP 463. The trial court ordered that the remainder of Nick Rivas' share of the Estate funds (\$18,443.89) be deposited into the court registry so that it can be used to satisfy the \$8,000 attorney fee lien filed by his former attorney. Nick Rivas does not assert that this order or the amount of fees awarded is unreasonable, nor does he otherwise articulate why an award of fees would be improper on the facts of this case. Accordingly, to the extent he can be deemed to challenge the trial court's award of fees to the Estate, Nick Rivas cannot show error or abuse of discretion by the trial court.

**B. Nick Rivas's Appeal is Frivolous**

Under RAP 18.1, a party may request fees on appeal if the request is based on applicable law and the party devotes a section of its opening brief to the request for fees or expenses. Here, the Co-Personal Representatives request an award of the attorneys' fees and costs incurred on appeal pursuant to statute RCW 11.96A.150, which provides “[e]ither the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorney fees, to be awarded to any party” from any party in the proceedings. (emphasis added). The Co-Personal Representatives also request fees based on RAP 18.9(a), which permits this Court, in its discretion, to order a party who has failed to comply with the RAPs or who has used them for the purpose of delay to pay terms or compensatory damages to any party who has been harmed by the delay or failure to comply. The Rule also allows this Court to impose sanctions if it finds that the appeal is frivolous. RAP 18.9(a); *see Stiles v. Kearney*, 168 Wn. App. 250, 267-68, 277 P.3d 9, *review denied*, 175 Wn.2d 1016 (2012) (concluding that Stiles' appeal was frivolous under RAP 18.9(a) because “all of her arguments could not possibly have resulted in a reversal.”); *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (concluding that the appellants' essentially factual appeal was “totally

devoid of merit” and imposing terms and sanctions against them under RAP 18.9(a), *review denied*, 94 Wn.2d 1014 (1980).

As this Court noted in *Shutt v. Moore*, 26 Wn. App. 450, 456-57, 613 P.2d 1188 (1980), “[a] lawsuit is not a game.” The rules of appellate procedure “are not designed to place unjustified burdens, financial and otherwise, upon opposing parties nor are they designed to provide recreational activity for litigants.” *Rich v. Starczewski*, 29 Wn. App. 244, 250, 628 P.2d 831 (awarding attorneys’ fees and costs on appeal under RAP 18.9(a)), *review denied*, 96 Wn.2d 1002 (1981).

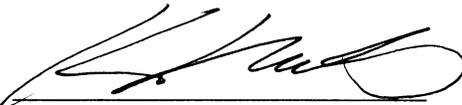
Here, Nick Rivas has used the appellate process solely to cause additional harassment and to force the Co-Personal Representatives to expend even more time and attorneys’ fees defending against his frivolous and improperly briefed appeal. Nick Rivas engaged in this conduct after having been sanctioned by the trial court for filing frivolous claims intended to harass, to cause delay, and to increase attorneys’ fees unnecessarily. Rather than curbing this improper conduct in the trial court, Nick Rivas perpetuates it on appeal by filing a meritless appeal that fails even to present a cognizable argument for review.

By proceeding in this litigation the way he has, Nick Rivas has abused the legal process, both in the trial court and on appeal. For these reasons, the Co-Personal Representatives should be awarded reasonable

attorneys' fees and costs on appeal under RCW 11.96A.150, RAP 18.1, and RAP 18.9 for the expense that they have been forced to incur since Nick Rivas filed his first Notice of Appeal on June 9, 2015.

#### IV. CONCLUSION

The trial court's orders dismissing Nick Rivas' TEDRA petition and awarding fees and costs to the Co-Personal Representatives under RCW 11.96A.150 should be affirmed, and the Co-Personal Representatives should be awarded reasonable attorneys' fees and costs on appeal under RCW 11.96A.150, RAP 18.1, and RAP 18.9.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 16th day of February, 2016, I caused a true and correct copy of the foregoing document, "Brief of Respondents," to be delivered by messenger to the following counsel of record:

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Dated this 16th day of February, 2016, at Seattle, Washington.



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