

No. 39067-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re:

Estate of CORRINE D. WEGNER
Deceased

BRIEF OF APPELLANT MAXINE ELAINE TESCHE

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I. ASSIGNMENTS OF ERROR:

1. The Commissioner erred in applying 11.42.085.
2. The Commissioner erred if the Order was based on RCW 11.18.200.
 - a. No action by P.R. to Administer or transfer the non-probate asset.
 - b. The Fees and Costs were not reasonably incurred.
3. The Commissioner erred in not ruling on Appellant's Motion for citation (Breach of Duties).
4. The Commissioner erred in not ruling on Appellant's Motion for Removal based on Insolvency of the Estate.
5. The Commissioner erred in not awarding costs and fees below.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 11.42.085 does not apply to an estate being administered in the Superior Court (Assignment of Error 1)
2. Whether the Commissioner was erroneous in:
 - (a) awarding attorney fees and costs when the P.R. took no action to administer or transfer the non-probate asset? (Assignment of Error 2(a))
 - (b) awarding attorney fees and costs when the fees and costs weren't reasonably incurred in administration? (Assignment of Error 2(b))

3. Whether the Commissioner should have issued a citation to the P.R. because he breached his fiduciary duties? (Assignment of Error 3)
4. Whether the Commissioner should have issued a citation to the P.R. or declined to approve his Final Report because the estate was insolvent? (Assignment of Error 4)
5. Whether the Commissioner should have ordered the P.R. and his attorney to pay costs and fees incurred below by the Appellant? (Assignment of Error 5)

II. STATEMENT OF THE CASE

1. Joint Tenancy Interest in Realty.

On December 6, 1994 Corrine Wegner ["Wegner"] and Maxine Tesche ["Tesche"] bought two rental houses in Enumclaw, Washington, taking title as Joint Tenants with Right of Survivorship [JTWROS]. **CP 93, CP 220.** Ms. Tesche made her residence in Nevada. **RP 26, lines 4-5.** Corrine Wegner lived at one of the rental houses until her intestate death on February 20, 2006. **CP 168.** At Ms. Wegner's death the Enumclaw real estate was still held by her and Tesche as Joint Tenants with Right of Survivorship. **CP 412, lines 20-22.**

2. Estate of Corrine Wegner. On March 3, 2006 Kenneth Wegner applied to be named

administrator of his sister's estate. He was granted letters of administration authorizing him to probate the estate without intervention and without posting a bond, based upon the entry of an Order of Solvency. **CP 6, lines 13-19.**

Mr. Wegner's petition asserted that his sister's personal property was worth \$5,000.00. **CP 2, line 22.** Kenneth Wegner also asserted the Estate held title to the JTWROS real estate in Enumclaw valued at \$350,000. **CP 2, line 21.**

Kenneth Wegner later asserted in the estate's inventory that the estate contained real property valued at \$400,000.00, noting by an asterisk (*) that "a lawsuit was pending between the estate and Maxine Tesche over title to that real estate." **CP 16, line 10.**

3. P.R.'s Possession of JTWROS Property.

For thirteen months after the probate action was commenced Mr. Wegner refused to put Tesche into possession of the JTWROS real estate; **CP 86, line 27 and CP 87, lines 15-18;** during which time P.R. Wegner did not rent either of the rental residences at the JTWROS realty, **CP 87, line 22;** did not make payments on the mortgages encumbering

the JTWROS property, **CP 84, lines 7-10**; permitted a lien for \$4,521.76 in unpaid utility bills to encumber the property; **CP 136, line 6, CP 140, line 3**. Mr. Wegner left volumes of trash at the JTWROS realty when in April of 2007 he returned the realty to Tesche's possession. **CP 87, lines 18-21 and Photographic Exhibits, CP 95-102**).

4. Quiet Title Litigation against Tesche.

In May of 2006 Administrator Wegner filed a quiet title action against Maxine Tesche, Pierce County civil Cause No. 06-2-06866-7. **CP 82, lines 10-23**. That proceeding was later consolidated with the Wegner probate proceeding. **CP 23-24, RP 19, line 21**. In a pleading he titled "Petition for Adjudication of Title to Real Property," Mr. Wegner alleged three substantive theories of recovery. Count One asserted that Tesche's interest in the real estate was for "the sole purpose . . . of placing Maxine Tesche's name on the property . . . to secure the initial loan made by Maxine Tesche to Corrine Wegner. . ." **CP 11, lines 17-20**. Mr. Wegner alleged in what he termed 'Cause of Action No. Two' that the court should

"find under its equity powers that the parties held the property as tenants in common and not as joint tenancy (sic) with right of survivorship".

CP 12, lines 2-3. The P.R.'s Third Cause of Action asserted that "the Estate of decedent is entitled to an accounting as to the date of death for contributions from the respondent for her pro rata share of expenses to have been paid on the real property from the date of acquisition to the date of decedent's death". **CP 12, lines 6-10.**

Mr. Wegner's fourth (and last) cause of action against Tesche asserted a procedural theory of recovery:

"... should the court conclude that the property is to pass to Maxine Tesche under a joint tenancy with right of survivorship, then the estate is entitled to receive such sum as it shall prove, either from the respondent for from the sale of the real property, to recover the real property's fair share of administrative expenses and creditors claims, pursuant to RCW 11.42.085".

CP 12, lines 13-17.

As noted in section III (B) below, Mr. Wegner's attorney appears to have cited the wrong section of the probate code in making this fourth request for relief. Appellant presumes that the

section of the code relied upon in the fourth cause of action was actually RCW 11.18.200. See Section III (B) below, Pages 11-13.

5. Dismissal of Quiet Title Litigation.

On August 14, 2008 P.R. Wegner filed a Motion for Partial Dismissal of the Estate's action against Maxine Tesche. Mr. Wegner asked that his three substantive causes of action against Ms. Tesche be dismissed, but that the Court leave pending his fourth cause of action, "which relates to Tesche paying estate expenses pursuant to RCW 11.42.085, et seq." **CP 292, lines 1-2.** [*See Note in the last paragraph of the section above*]

On August 29, 2008 Judge Gary Steiner entered an Order of Partial Dismissal granting Mr. Wegner's Motion to dismiss the estate's first three causes of action. **CP 25-26.**

6. Inventory of Estate of Corrine Wegner.

The P.R.'s inventory and appraisement reveals the Estate contained the following assets:

"	1.	Real Property	\$	*
		* pending lawsuit to establish interest of estate ... value not set forth herein ... *		
	2.	Stocks and Bonds	\$	0.00

3.	Mortgages, etc.	\$1,612.08
4.	Bank Accounts, etc.	\$ 108.00
5.	Furniture, etc.	\$1,200.00
6.	Other Personal Property	<u>\$7,000.00</u>

TOTAL FAIR NET VALUE **\$9,920.08"**

See, CP 15, lines 7-15

7. Liabilities of Estate of Corrine Wegner.

In his Final Report Kenneth Wegner revealed that the estate owed \$8,007.42 in four allowed Creditor's Claims, CP 45, lines 13-18; \$24,335.15 in legal fees, \$845.60 in court costs, and \$7,500.00 in P.R.'s fees. CP 45, lines 19-21.

8. Proceedings to Close Estate.

On November 26, 2008 Kenneth Wegner filed what was termed 'Final Report to Close Estate, Granting Judgment Lien against Non-probate Asset & Requiring Sale of Real Property.' CP 30-46.

Maxine Tesche filed an objection to the P.R.'s Final Report. CP 57, lines 22-26. She also filed two motions associated with her objection. The first motion requested that the court issue a Citation to Wegner pursuant to RCW 11.68.070 (Recreant to Trust); CP 55, line 17-23.

Tesche's second motion was made pursuant to the provisions of RCW 11.68.080 (Vacation of nonintervention powers following insolvency).

CP 55, line 18, CP 328.

These Motions were briefed by Ms. Tesche's counsel, **CP 57-80**; and supported by the Certified Declarations of Maxine Tesche, **CP 81-102**; her attorney, **CP 103-104**; as well as from probate attorney David Moe. **CP 114-117**. The P.R. did not respond to Ms. Tesche legal Brief, did not reply to her objections to his 'Final Report' nor did Wegner respond to the allegations made in the three opposing Declarations. **RP 29, lines 17-25.**

Ms. Tesche's Memorandum of Authorities discussed issues relating to Tesche's two motions in the following pages:

[i] P.R.'s duties relating to insolvent estates. **CP 77-80.**

[ii] Malfeasance of a P.R. **CP 73-77.**

Appellant requested and award for the for damages the P.R. did to the JTWROS realty. **CP 30, lines 18-20** and **CP 56, line 13**. Maxine Tesche also requested the court award her reasonable

attorney's fees pursuant to CR 11. **CP 80, lines 22-23, CP 92, lines 2-8.**

The matter was heard before Pro Tem Court Commissioner Joe Quaintance on December 22, 2008.

9. Court Commissioner's Ruling.

On December 22, 2008 Commissioner Quaintance entered an Order Approving Final Report; **CP 118-126.** The Commissioner found that the Estate owed \$5,640.30 in unpaid creditor's claims, \$24,335.15 in legal fees, \$845.60 in court costs and a \$2,367.12 for advancements Mr. Wegner made to the estate. **CP 122, lines 15-26.** These figures were set for in the Order and totaled \$33,188.17.

P.R. Wegner's request for \$7,500.00 in Administrator's Fees was denied. **CP 122, line 25.**

The Commissioner concluded that Ms. Tesche and the non-probate real estate were liable to account to the Estate, "as its fair share of expenses attributable to that real property asset", the sum of \$16,212.58. **CP 123, line 10.** This figure roughly equals one half of the estate's creditor's claims, fees and costs.

Commissioner Quaintance also ruled that Maxine Tesche should "either pay the estate the amount of \$16,212.58 or in the alternative that the court require that the real property be sold." **CP 123, lines 19-20.**

10. Ruling on Revision Motions and Appeal.

Maxine Tesche requested revision of the Court Commissioner's ruling. **CP 127.** Kenneth Wegner also moved for revision. **CP 405.** On February 27, 2009 The Hon. John A. McCarthy denied both revision motions and ruled that the Commissioner's Order would remain in full force and effect. **CP 130, lines 3-5.** Both Ms. Tesche and the P.R. Wegner have appealed Judge McCarthy's Order. **CP 132-133 and CP 146-147.**

IV. ARGUMENT

A. Standard of Review.

1. De Novo Review of Commissioner Rulings.

Court Commissioner rulings are subject to revision by the Superior Court, RCW 2.24.050. In a motion to revise a commissioner's order, the Superior Court reviews the Commissioner's findings of fact and conclusions of law *de novo*, based upon the

evidence and issues presented below¹. Because the Superior Court did not revise the Commissioner's ruling, the Commissioner's decision stands as the decision of the Superior Court that is before the Court of Appeals for review.

2. De Novo Review - Statutory Interpretations

A lower court's interpretation of a statute is reviewed by the Court of Appeals *de novo*.² Because the commissioner's ruling was based upon RCW 11.42.085 and 11.18.200, this Court's review and interpretation of those statutes is *de novo*.³

B. RCW 11.42.085 was Misapplied

Count four of Kenneth Wegner's Petition for Adjudication of Title to the JTWROS Real Property was based upon his request for an award charging the JTWROS real property with costs and attorney fees pursuant to RCW 11.42.085. **CP 13, lines 7-9.** The P.R's reliance upon this section of the probate code is misguided because Chapter 11.42 is part of the probate code which regulating

¹ *In Re Estate of Wright*, 147 Wn. App. 674, 196 P.3d 1075 (2008) and *Marriage of Freeman*, 146 Wn. App. 250, 255, ___ P.3d ___ (2008)
² *Rettkovskv. Dept of Ecology*, 128 Wn.2d 508, 515, 910 P.2d 462 (1996)
³ *Dimension Funding v. D.K. Associates*, 146 Wn. App. 653, ___ P.3d ___ (2008), *State v. Sloan*, 149 Wn. App. 736, 742, ___ P.3d ___ (2009)

'Settlement of Creditor Claims for Estates Passing without Probate.' (See Heading of RCW Title 11, Sect. 42). (Emphasis added)

RCW 11.42.085 applies only in circumstances when "No personal representative has been appointed."⁴ In this case Mr. Wegner was the acting Administrator of the Wegner Estate. Because Mr. Wegner's was the appointed P.R., then on its face and by its terms RCW 11.42 can not apply.

Furthermore, the largest part of the Commissioner's award below was for \$24,335.15 in legal fees to the firm of Campbell, Dillie, Barnett, Smith and Wiley; **CP 413, line 24**, plus an award to acquire a grave marker. **CP 413, line 23**. Neither of those awards were for 'creditor's claims.'

The only items addressed in the Court's order that qualify as a 'claim of a creditor' are the following: The \$676.94 claim of Multi-care Medical Group, the claim of \$441.60 of Valley Radiologists; and the City of Enumclaw's claim for \$4,521.76.

See, **CP 94**.

⁴

RCW 11.42.010(1) provides: 'Subject to the conditions stated in this chapter, and if no personal representative has been appointed in this state, . . . (Emphasis Added)

Even if the court below ignored the fact that Mr. Wegner had been appointed P.R., and relied on Chapter 11.42.085 in charging the JTWROS property with the claims of Ms. Wegner's creditors, the ruling below was erroneous because subpart (2) of RCW 11.42.085 deals with claims 'allowed by' the "notice agent."⁵

There is no evidence below that Mr. Wegner was either a notice agent or that he had 'approved' the claims referenced in the Commissioner's order.

C. The Commissioner Erred if the Order was based upon RCW 11.18.200.

Although P.R. Wegner's Fourth Cause of Action in his Petition cited *RCW 11.42.085* as the basis for the Estate's request to charge the JTWROS property with the estate's attorney's fees, costs and creditor's claims, the Estate's Final report also mentioned *RCW 11.18.200(1)* as a basis for the relief the P.R. requested. **CP 311, lines 20-26.**

As noted above, Wegner asked the Commissioner to charge the JTWROS real estate to satisfy all \$8,007.42 of the Estate's creditor's claims as well

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RCW 11.42.085(2) The notice agent may pay a claim allowed by the notice agent or . . . or a claim first prosecuted against a notice agent only out of assets received as a result of the death of the decedent (Emphasis Added)

as \$31,835.15 of the Estate's administration fees.

CP 315, lines 13-22.

Because RCW 11.18.200 was cited by the P.R. in his Final Report and because Ms. Tesche argued to the Commissioner that it would be an error to apply that statute in this case, (See Tesche's Memorandum in Opposition to the P.R.'s Final Report; **CP, Pages 340-345**); and because RCW 11.18.200 could have been the basis for the Commissioner's ruling of December 22, 2008, (See Conclusion of Law No. 2, **CP 446, lines 7-12**); this brief will next argue that it was erroneous for the Commissioner to rely on RCW 11.18.200 as authority to charge the JTWR0S property with any of the attorney fees or expenses incurred in estate administration.

[1] The PR. did not administer or transfer the non-probate (JTWR0S) asset.

There exists precious little Washington case law interpreting RCW 11.18. When no Washington case addresses a point of law, the issues presented become one of first impression.⁶

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Angelo v. Angelo, 142 Wn. App. 622, 175 P.3d 1096 (2008)

Pertinent parts of RCW 11.18.200 are:

"A(1)... a beneficiary of a non-probate asset... takes the asset subject to liabilities, claims, estate taxes, and the fair share of expenses of administration reasonably incurred by the P.R. in the transfer of or administration upon the asset"
(Emphasis Added)

P.R. Wegner has failed to point to any *expense* incurred during the administration of the Estate of Corrine Wegner which related to the 'transfer of' or 'administration upon' the JTWROS real estate in Enumclaw. In fact, most of the fees claimed by the Estate's attorney relate to the commencement, continuation and abandonment of the quiet title litigation against Maxine Tesche. **CP 51-54.**

Thorough review of Mr. Wegner's Final Report reveals that the only mention of the JTWROS real estate, other than in the context of the abandoned litigation, appears in **CP 37, lines 7-8:**

"At this time the Estate has consented to the property passing to Defendant Tesche subject to payment of the remaining Estate administrative expenses and creditor's claims from decedent's one half interest in the property."

P.R. Wegner has failed to point to any provision of the probate code that obligates Ms. Tesche to obtain the consent of the Estate of a deceased joint tenant to accomplish the transfer of joint tenancy property to her.

In point of law, Chapter 64.28 RCW authorizes the creation of properties in the form of 'joint tenancy' and confirms the manner of when and how joint tenancy property is transferred upon the death of one of the joint tenants. That statute provides, in pertinent part, as follows:

RCW 64.28.010

'Whereas joint tenancy with right of survivorship permits property to pass to the survivor without the cost or delay of probate proceedings, there shall be a form of co-ownership of property, real and personal, known as joint tenancy. A joint tenancy shall have the incidents of survivorship . . . ' (Emphasis Added)

Upon the creation of a joint tenancy, each tenant takes a complete, undivided interest in the whole. No new title vests in the survivor at the moment of death, In re Estate of Peterson, 182

Wash. 29, 36, 45 P.2d 45 (1935), In re Estate of Politoff, 36 Wn. App. 424, 674 P. 2d 687 (1984).

Under Washington law a joint tenancy is created by a written instrument, which instrument shall expressly declare the interest created to be a joint tenancy. RCW 64.28.010⁷ (emphasis added)

The warranty deed granted by Patricia Streeter to Ms. Wegner and Maxine Tesche fulfilled this requirement. **CP 93**. Wegner's and Tesche's creation of a Joint Tenancy with Rights of Survivorship was a deliberate act. The parties's signatures appear in their deed directly below the following language:

**"THE UNDERSIGNED HEREBY ACKNOWLEDGE
THAT THEY ARE ACCEPTING THE PROPERTY
AS JOINT TENANTS WITH RIGHT OF
SURVIVORSHIP**

/s/ Corrina Wegner
/s/ Maxine Elaine Tesche " CP 93

This case is analogous to facts in In re Estate of Phillips vs. Nyhus, 87 Wn.2d 855, 557 P.2d 302 (1976) where the Supreme Court reviewed a Clallam County Superior Court's decision denying revision of a Commissioner's order that granted summary judgment in favor of a surviving of Joint Tenant.

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See Also, In re Estate of Olson, 87 Wn.2d 855, 557 P.2d 302 (1976)

In Phillips, as in this case, the deed to the grantees created a joint tenancy with right of survivorship. Phillips Pg 859.

In Phillips, as in this case, the intent of the parties was clearly expressed in a deed. Here, as in Phillips, there is no evidence in the record indicating that Corrine Wegner or Maxine Tesche ever intended to sever the joint tenancy. The Supreme Court in Phillips affirmed the decision of the Superior Court denying revision of the commissioner's ruling of summary judgment in favor of the surviving Joint Tenant. The Phillips case defines Washington law regarding the devolution of Joint Tenancy Realty.

P.R. Wegner asserted no counter Washington authority to support his assertion that the Joint Tenancy between his sister and Maxine Tesche was ever severed. Rather, and contrary to clear and unambiguous Washington authorities,⁸ Kenneth Wegner litigated title to the JTWROS real property for over two years. His claims were not based upon any competent evidence but rather based on unsubstantiated rumor, the speculation of parties interested

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In re Estate of Phillips v. Nyhus, 124 Wn.2d 80, 85, 874 P.2d 154 (1994)

in inheriting Corrine Wegner's estate *and* the declaration of one additional witness, Kenneth Wegner's Aunt Turli.

Mr. Wegner states in his Final Report:

". . .At the time the property was purchased in 1994 decedent and Tesche were friends, but that relationship changed and the friendship had terminated prior to the decedent's death.

The decedent told her close family members that she was the sole owner of the home. She also told her aunt that she had borrowed money from a friend to purchase the property in 1994. Prior to decedent's death she advised her aunt that she was having difficulty with the person that loaned her the money on the house and was trying to straighten it out. (See Declaration of Arlene W. Turli). After the decedent's death it was learned "the Friend" was Maxine Tesche and that she was shown on the title as joint tenant with right of survivorship."

CP 31, Lines 15-26.

"During the discovery process the Personal Representative was asked to go through numerous boxes of old records and documents kept by the decedent to determine if there were any writings that would shed light the true relationship of the title to the property to substantiate the verbal statements of the Decedent. This took substantial searching and time of the Personal Representative, but after all of the searching no writings were uncovered that related to this issue. ...

Although the matter could have proceeded to trial based upon the oral statements to the aunt and the general circumstances of the

relationship between the parties, as Tesche's motion for summary judgment was denied, a decision was made by the Personal Rep. and heirs of the estate not to pursue the legal claims which contested Maxine Tesche's right to the entire property based upon the joint tenancy with right of survivorship title."

CP 32, Lines 13-23

Kenneth Wegner's claims against Maxine Tesche were not based upon any legal authority which the P.R.'s attorney could assert to Judge McCarthy at the Revision hearing. Pages **25-27** of the **Report of Proceedings** contains the dialogue between Judge McCarthy and Mr. Wegner's counsel:

THE COURT: Can I interrupt you just a second?
MR. BARNETT: Yes.
THE COURT: I didn't want to just jump forward to a question. I just want to make sure you don't miss it. Let's assume, for the sake of argument, that you had sufficient facts to raise the specter that the estate had or may have some right to the property, even though there was a deed that was joint tenancy with right of survivorship. What case law, what cases have said, or are there any cases -- let me finish. What cases say that even with those sufficient probable cause, if you will, or sufficient basis or sufficient information to get you beyond the CR 11 sanction situation, that if you then prove a suit and don't prove it, that you are entitled to your fees for the suit, in essence, or the administration fees from the person you lost [to]?

MR. BARNETT: I understand your question. If I can go through this, that would be my wrap-up. I understand that question.

THE COURT: Okay

MR. BARNETT: Let's see. I believe it was 10:25. I believe I should have 7 more minutes.

THE COURT: That's correct.

MR BARNETT: Tesche lived in Nevada the whole time. She never lived at the property. Nobody knew that she had any interest in the property. Wegner lived in the home, collected the rents, paid the bills, took care of it, did everything in reference to the home, itself.

Three months before her death, she told her Aunt Turi - and this is what got me. I felt we just had to do something. She told her Aunt Turi that the lady that she said she borrowed money from earlier, and Aunt Turi told me, quote "played a dirty trick on her" and that she thought she could straighten it out and pay the loan off. She called it a dirty trick. She didn't tell her exactly what happened, but she said it was a dirty trick.

So with that, then we had equity in the property of \$113,000. That was the major asset of this poor lady that died. She had about three -- a few thousand bucks and \$133,000 in equity. That was her entire estate.

Her heirs at law are her brothers and sisters. She has got a brother here, her sisters. She disliked Tesche. They did not get along. So we have a person - the entire estate going to a person the deceased disliked.

And there was an issue regarding how this title came on the property that she verbalized to her friends. So if you look at the whole picture here, the person that should be real upset is the brother, and his sisters get nothing, and a person this lady

dislikes gets \$133,000 of the net equity subject to what she has to pay for the estate.

Now, if we look at the real legal issue here and what should be paid, he has not challenged the law. I have filed a brief, Your Honor. I think it's number three, but as far as a mortgage is treated --a loan treated as a equitable mortgage--

THE COURT:

Yes.

MR. BARNETT:

-- That sets out the cases that support our position that even a deed where you have a deed outright to somebody, if you can prove that it was done for a loan, then it's an equitable mortgage, and they get to get their loan amounts, but they don't get title to the property. So we have plenty of legal authority in that brief to support this with the facts given." **RP 25-27.**

Mr. Wegner's attorney's reliance, without citation, on the doctrine of 'Equitable Conversion' of Joint Tenancy property is not supported by any authority. Our Supreme Court rejected the doctrine.⁹

Without any supporting authority Mr. Wegner's attorney urged Judge McCarthy to reverse the Supreme Court's well established and long standing precedent which disavowed the theory of equitable conversion by asserting the existence of a legal fiction invented by Mr. Wegner or his attorney, that an 'equitable

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Cascade Security Bank v. Butler, 88 Wn. 2d 777, 567 P.2d 631m 634 (1977), *Reed v. Eller*, 33 Wn. App. 820, 664 P.2d 515, 518, Div. II (1983). The court in Cascade recognized that adoption of this doctrine would create uncertainty and confusion in title to realty. *Cascade* at 783-84

conversion' of JTWROS realty had taken place based upon an alleged 'loan' given by Tesche to Ms. Wegner at some time in the distant past. Other than the attorney's attempt to orally define his theory, the facts of this case do not support quiet title claim.

The primary characteristic of joint tenancy, which distinguishes it from tenancy in common, is the right of survivorship.¹⁰ How Wegner and his attorney could have justified the attack they made against the surviving joint tenant of JTWROS real property is difficult to comprehend. It is possible that greed and/or an effort to avoid the unambiguous Washington law regarding the devolution of Joint Tenancies were at play in the decisions made by Mr. Wegner and his counsel to maintain the quiet title litigation.

Washington joint tenancy law did not require Maxine Tesche to obtain the consent of the P.R. to acquire the JTWROS realty, nor was it necessary for her to engage in any proceeding in order to gain title to the JTWROS real property free of the interest of the deceased joint tenant.

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Harry M. Cross, *Joint Tenancy for Washington?*, 35 Wash. L.Rev. 292 (1960), See also, Lyon v. Lyon, 100 Wn. 2d 409, 670 P.2d 272 (1983), Merrick v. Peterson, 24 Wn. App. 248, 606 P. 2d 700 (1980), 1 *Wash. State Bar Ass'n, Real Property Deskbook* ss 6.7 (1986)

Rather, Wegner's interest in the JTWROS property was deemed to have been transferred at her death.¹¹

Mr. Wegner's decision to commence litigation against the surviving joint tenant cannot be equated with any valid or legitimate effort to transfer or administer the non-probate asset, particularly given the facts of this case. Here the P.R. simply filed a Quiet Title action against Ms. Tesche, kept that litigation pending between May of 2006 and August of 2008; finally electing, sua sponte, to dismiss the Estate's case in chief. In his argument before Judge McCarthy on the P.R.'s Cross Motion to Revise the Commissioner's ruling, Hollis Barnett described the reason Mr. Wegner elected to abandon the quiet title litigation as follows:

"Mr. BARNETT:

Now with those facts, the law is, it has to be proved by clear and convincing evidence. When I sat down with my client, I said go through oh, there were 300 boxes that she said had real estate stuff in. I said you've got to go through everything to see if we can find any notes that she had that sheds light on this relationship with Tesche. And he went through all of those boxes. We could find nothing in writing backing up the verbal comments she made.

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2 Real Property 198 (3d ed. 1939), See also In re Estate of Oney, 31 Wn. App. 325, 641 P.2d 725, rev. denied, 97 Wn. 2d 1023 (1982)

Now, those verbal comments are sufficient to go forward on trial. But I felt it was a weak case if you didn't have something to corroborate the verbal statements. And in light of the cost and the size of this estate, it would have wiped it out entirely. I said, you know, it just doesn't make sense to pursue this .."

RP Page 28, lines 1-18

Mr. Wegner's Final Report further summarizes the Estate's decision to dismiss the quiet title litigation. That Report indicates:

"After conducting substantial discovery and after hearings before Judge Steiner on cross motions for Summary Judgment, a decision was made by the P.R. after consulting with the heirs and Mr. Barnett that the litigation with Ms. Tesche relating to the first 3 causes of action should be dismissed. The P.R. was unable to locate any written documentation made by his sister which related to the status of the title to the real property between she an Defendant Tesche other than the Deed itself.

...

It was necessary for the estate to investigate and proceed to the point where the claims were dropped as the circumstances of the JTWR0S were unusual, and given the decedent's verbal statements there were no reason to support a reason why Tesche should inherit decedent's interest in the realty. After dropping the claims against Tesche she is still unwilling to accommodate the estate's legal request that the remaining administrative and legal expenses be paid from the decedent's portion of the real property." **CP 38, lines 9-26:**

These narratives reveal the Estate's theory against Maxine Tesche was that the P.R. of an estate

who commences quiet title litigation against a surviving joint tenant may, after the litigation has been abandoned, require former adversary to bear all fees and costs incurred in that litigation.

The record below does not support that Mr. Wegner performed any action in "administration upon" or the "transfer of" the non-probate real property. Title 7 of the Revised Code of Washington would not have allowed a prevailing party to recover reasonable attorney's fees even after having won in the action. Recovery by a prevailing party in a quiet title action is limited to an award of statutory attorney's fees.¹² Mr. Wegner's attempt to recover from the JTWR0S real property that which could not have been recovered if the P.R. prevailed in the abandoned quiet title litigation is a bald attempt to recover costs and fees in the utter absence of statutory authority or case-law precedent.

[2] The P.R.'s fees and costs weren't reasonably incurred. Non-probate assets ought not be charged the costs or fees incurred in the Probate Proceeding.

RCW 11.28.200 contains two preconditions in

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R.C.W. 7.28.010, Magart v. Fierce, 35 Wn. App.264, 666 P.2d 386 (1983)

addition to those discussed in IV C [1] above which must exist before the beneficiary of a non-probate asset may be charged with decedent's liabilities, claims of creditors, estate taxes, or the expenses of administration of the deceased joint tenant's estate.

One of those conditions is that the beneficiary of a non-probate asset should bear only a "fair share" of probate expenses. Then, the expense must have been "reasonably incurred" during administration upon or transfer of the asset.¹³

As noted above, Commissioner Quaintance did not enter a finding that the \$24,335.15 in legal expenses Mr. Barnett claimed were connected to '*transfer of*' or '*administration upon*' the Joint Tenancy property.

Even had the Commissioner adopted an affirmative finding in that regard, the cost or fee would have to have been '*reasonably incurred*' before the surviving Joint Tenant and the JTWROS property could have been charged with the costs and fees requested by the P.R.

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RCW 11.18.200 (1) "... a beneficiary of a non-probate asset ... takes the asset subject to liabilities, claims, estate taxes, and the fair share of expenses of administration reasonably incurred ..." [Emphasis Added]

Under RCW 11.18.200 "liabilities, claims and estate taxes" are treated differently than are "expenses of administration." While expenses of administration must be "reasonably incurred" before non-probate property can be charged; the beneficiary of a non-probate asset takes 'subject to' all of the liabilities, claims and estate taxes of the decedent.

Maxine Tesche has never asserted [nor does she assert in this appeal] that the Enumclaw real estate is free of the claim of \$4,521.76 filed by the City of Enumclaw or the Multi-care Medical claim or Valley Radiologist's claim. Under RCW 11.18.200 those are the only obligations the estate can pass on to the surviving joint tenant absent a finding in the court below that a fee or administrative expense was "reasonably incurred." Even then the statute provides that the non-probate asset bear only a "fair share" of such costs and expenses.

When RCW 11.18.200 is applied to the facts of this case, this court, in its *de novo* review, should find that while the three creditor's claims totaling \$5,640.30 should be charged to the Enumclaw real property; none of the administration expenses or

legal fees requested by Kenneth Wegner and his attorney should be charged against the non-probate realty because none of the expenses of administration were "reasonably incurred."

If P.R. Wegner in his reply brief can point to any expense incurred by his counsel in "*administration-upon*" or in the "*transfer-of*" the non-probate asset, this court should follow RCW 11.18.200 and determine if any expense was "reasonably incurred." Only then should the Court assess what 'fair share' of that expense should be charged against the non-probate asset. In simply "*halving*" the fees and costs claimed by the P.R. and in similarly evenly dividing the 3 creditor's claims between the estate & the non-probate asset (**RP 22, lines 16-17**), the Commissioner failed to address the questions the statute required the court below to answer before charging the a non-probate asset with claims or expenses of administration.

D. The Commissioner Erred in not ruling on Appellant's Motion for Removal of the P.R. per RCW 11.68.070

[Re: Breach of a P.R.'s Fiduciary Duties]

On December 17, 2008 Maxine Tesche filed a Motion for Removal of Kenneth Wegner and for damages. **CP 55-**

56. That motion was based, in part, upon the provisions of RCW 11.68.070.¹⁴ Tesche's motion was supported by a twelve page Declaration, four of which addressed the P.R.'s breach of his fiduciary duty to the Court and to the estate he administered. **CP 73-77.**

Eight pages of photographs were included in Appellant's motion. **CP 95-102.** Ms. Tesche's counsel devoted five pages of his Memorandum to Support the Removal of the P.R. **CP 73-77.** Appellant's Declaration, the exhibits attached to her declaration as well as her counsel's memorandum amply supported Ms. Tesche's Motion for the issuance of a Citation to the P.R. directing him to address the possibility of restriction of his Non-Intervention powers; his removal as estate P.R.; Tesche's entitlement of the costs of the citation proceeding; and the attorney fees she incurred in bringing Wegner's malfeasance to the court's attention.

Despite the volume of evidence supporting Ms. Tesche's motion and despite the arguments presented to

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RCW 11.68.070 provides, in pertinent part, as follows:

If any personal representative who has been granted nonintervention powers fails to execute his trust faithfully . . . Upon petition of any heir, devisee, or legatee, such petition being supported by an affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said P.R. has not faithfully discharged said trust . . . Then, in the discretion of the court the powers of the P.R. may be restricted or the P.R. may be removed and a successor appointed. and in all such cases the cost of the citation, hearing and reasonable attorney's fees may be awarded as the court determines.

Commissioner Quaintance; neither the Commissioner's Order nor Judge McCarthy's Order on Revision made any reference to Ms. Tesche's Motions.

Because this court reviews the proceedings below *de novo*,¹⁵ it is appropriate that its opinion address Ms. Tesche's motion for the removal of P.R. Wegner, based upon his breach of fiduciary duty in conducting the estate proceeding as well as his malfeasance while possessing [and damaging] the non-probate asset, an asset in which the P.R. asserted an interest between 2006 and 2008.

Maxine Tesche's arguments supporting the removal of P.R. Wegner for breach of his fiduciary duties are best reviewed in an examination of the Declarations and Photographic Exhibits submitted to the Court on Dec. 17, 2008, as well as the cases cited in the Memorandum of Authorities Appellant filed along with her Motions and Declarations. **CP 73-77**. Those materials and cases will not be repeated further in this Brief.

¹⁵ State v. Ramer, 151 Wn.2d 106, 113, 86 P.3d 132 (2004), Marriage of Freeman, 146 Wn. App. 250, 255, __ P.3d __ (2008), In re Interest of Mowery, 141 Wn. App. 263, 169 P.3d 835 (2007)

E. The Commissioner Erred in not ruling on Appellant's Motion for Removal based on RCW 11.68.080
[Insolvency of Estate]

Appellant Tesche filed a companion Motion for the issuance of a Citation to Mr. Wegner. **CP lines 16-24.** A citation would have required the PR to appear in court at a date in the future to respond to Tesche's request that the Court either reaffirm, rescind or restrict the nonintervention powers Wegner obtained in 2006. Her motion was based upon the insolvency of the Estate and the provisions of RCW 11.68.080, which provides, in pertinent part, as follows:

- (1)
- (2) Within ten days after an estate becomes insolvent, the personal representative shall petition under chapter 11.96 RCW for a determination of whether the court should reaffirm, rescind, or restrict in whole or in part any prior grant of nonintervention powers. Notice of the hearing shall be given in accordance with RCW 11.96.100 and 11.96.110.
- (3) If, on a petition under chapter 11.96 RCW the court determines that the decedent's estate is insolvent, the court shall reaffirm, rescind, or restrict in whole or in part any prior grant of nonintervention powers to the extent necessary to protect the best interests of the creditors of the estate.

Commissioner Quaintance failed to rule on Ms. Tesche's Motion for a Citation despite the fact that the Final Report filed by P.R. Wegner revealed that the Estate of Corrine Wegner consisted of only **\$4,820.08** in assets but **\$9,247.40** in liabilities.

In his Final Report, the P.R. listed the following assets, liabilities and expenses:

Estate Assets

a. Bank One Account [Rent]:	\$1,720.08	16
b. Washington Mutual Acct.:	\$ 108.00	17
c. Personal Property Assets:		
Firewood, 1980 GMC, 1990		
Ford Fiesta, an Econoline		
Van, 1999 Dodge [All Sold]	<u>\$3,100.00</u>	18
	\$4,820.08	

Estate Liabilities

a. City Utility Lien	[\$4,521.76]	19
b. "Loans" by Wegner:	[\$6,523.28]	20
Less Estate 'Repayment':	\$2,900.00	21
c. Powers Funeral Home:	[\$4,446.12]	22
d. Misc. Expenses:	<u>[\$1,178.00]</u>	23
	[\$9,247.40]	

These submissions revealed that in December of 2008 the Wegner Estate was insolvent by more than Four Thousand Dollars. Such had been the case since August,

16 * See CP 37, lines 16-25
 17 ** See CP 37, line 20
 18 CP 36, lines 21-26 and CP 37, lines 1-2
 19 CP 45, line 14
 20 CP 37, line 19
 21 CP 37, line 24
 22 CP 37, line 22
 23 CP 37, line 23

2008 when the P.R. dismissed the estate's quiet title litigation against Maxine Tesche because by dismissing that action, the P.R. conceded that Maxine Tesche had acquired the JTWROS property by virtue of having survived Corrine Wegner.

The accounting submitted by the P.R. revealed the estate was insolvent to the tune of \$4,427.32 when the P.R.'s Final Report was filed. Had the court below factored the \$7,500.00 fee P.R. Wegner was requesting and the \$24,335.15 in legal fees Mr. Barnett then sought; the Estate of Corrine Wegner had a negative 'Net Worth' of **\$36,262.47** on the day the Final Report was filed.

Despite clear evidence of insolvency, the P.R. did not comply with the duties imposed upon him. Rather, the P.R.'s Final Report and Petition for Distribution were apparently filed with the assumption that Mr. Wegner could continue serving with non-intervention powers. RCW 11.68.080 negated that assumption and obligated the P.R. to appropriately report the insolvency to the Court.

Neither Mr. Wegner nor his attorney initiated the proceeding called for under chapter 11.68 as soon as the Estate of Corrine Wegner was obviously insolvent.

Maxine Tesche brought the issue squarely before the court below. **CP 55-56**. In Tesche's supporting declaration she did the calculations set forth above which clear showed the Wegner Estate to be totally insolvent. **CP 63** and **CP 77-79**.

Appellant's counsel made clear to Commissioner Quaintance that the P.R. had no authority to exercise non-intervention powers until the court held a hearing 'for a determination of whether the court should reaffirm, rescind, or restrict ... any prior grant of nonintervention powers.'²⁴

Without non-intervention powers, the P.R. should not have made application to Close the Estate or to take any other administrative action which required existence of non-intervention powers. In essence, at that stage of the proceedings, the P.R. should have been able to administer and close the estate only

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RCW 11.68.080(2)

after posting the sort of fiduciary bond required of intestate estates requiring court supervision pursuant to RCW 11.28.185 and 11.68.041(2) and (3).

The unreported case of In Re estate of Wollen, 88 Wash. App. 1008, Not Reported in P.2d (1997), involves a fact pattern similar to the one presented in this appeal. In Wollen, Division II of the Court of Appeals reviewed the finding of a Thurston County Judge that the Wollen Estate had not been solvent from the outset of the proceedings, the Estate's debts had exceeded its assets and its cash flow was insufficient to pay its obligations as they arose. The Court faulted the P.R. for having neglected to bring to the court's attention the insolvency of the estate he was administering, finding such a failure to have been a breach of his fiduciary duty to administer the estate in a way as would protect the estate's creditors.

The Court found the P.R.'s election to contest a creditor's claim without merit constituted a breach of the P.R.'s fiduciary duties. The Court awarded the wronged creditor "substantial attorney fees which

would not have been incurred ... except for the PR's breach of his fiduciary duty."

Citing Estate of Mathwig, 68 Wn. App. 472, 843 P.2d 1112, review denied, 121 Wn.2d 1020 (1993) Judge Madsen of Division I reasoned that in the interest of justice the Superior Court had discretion to hold the personal representative personally responsible for the attorney's fees an aggrieved litigant had experienced. While it is true that Judge Madsen, in Mathwig was discussing the protection of an estate's beneficiaries from excessive Executor's fees Tesche notes that the P.R. himself chose to classify her as a 'Beneficiary' in her status as the surviving Joint Tenant in JTWR0S real property, RCW 11.18.200.

Similarly, in In Re Clawson's Estate, 3 Wn.2d 509, 101 P.2d 969 (1940) a P.R. holding *non-intervention* powers was sanctioned and removed because he promoted unnecessary and costly litigation, revealing that his personal interests interfered with his fiduciary duties to such a degree as to prevent him from acting in a disinterested way.

In this case, the administrator allowed his personal interest in Enumclaw realty to cloud his judgment. Mr. Wegner kept possession of the rental units on the property for over one year for reasons only he knows. The mortgage upon the JTWROS property was not paid during the P.R.'s possession. Then, when Mr. Wegner became aware that the Wegner estate was insolvent; no report was given to the Superior Court. Each of those actions are evidence of the administrator's failure to faithfully execute the trust the Superior Court placed in him. Worse yet, he (like the P.R. in the Clawson Estate, supra,) promoted and remained involved in unnecessary and costly quiet title litigation for dubious reasons for over two years between 2006 and 2008.

Mr. Wegner's failure to prosecute the quiet title action should raise 'red flags' regarding his motivations and the legal strategy he adopted in seeking to acquire an interest in the JTWROS real property. P.R. Wegner's failure to comply with RCW 11.68.080 allowed him to bypass the sort of review appropriate when estates become insolvent, including

posting of a Fiduciary Bond. It was a reversible error for the Commissioner to have entered the Order on December 22, 2008 before the solvency inquiry mandated by RCW 11.68.080 was conducted.

F. **Ms. Tesche is Entitled to all Fees and Costs incurred below pursuant to RCW 11.96A.150, RCW 4.84.185 and CR 11**

RCW 4.84.185 authorizes a court to require a non-prevailing party to "pay the prevailing party the reasonable expenses, including fees incurred in opposing . . . an action that is found to be frivolous and advanced without reasonable cause." Here the P.R. commenced a quiet title action against Maxine Tesche without reasonable cause, deciding to dismiss the substantive portions of the estate's action only *after*:

"The P.R. was unable to locate any written documentation made by his sister which related to the status of the title to the real property between she and Defendant Tesche other than the Deed itself."

[P.R.'s Final Report, CP 38, lines 12-14]

Then, after dismissing all substantive parts of the quiet title action, the P.R. sought \$24,335.15 in fees for his attorney and \$7,500.00 for himself under

a statute that has never been cited as authority for the proposition that following the dismissal of unsuccessful litigation against the beneficiary of a non-probate asset the P.R. may recover all costs and legal fees incurred in the abandoned litigation.

The signature of an attorney on a pleading constitutes a certificate that, among other things, the pleading "is not interposed for any improper purpose, such as to cause unnecessary delay or needless increase in the cost of litigation." CR 11(a). For a pleading to become the proper subject of Rule 11 sanctions it must lack a factual or legal basis. Even then, the court cannot impose Rule 11 sanctions unless it also finds that the attorney who signed and filed the pleading failed to conduct reasonable inquiry into the factual and legal basis of the claim. IBF, LLC v. Heuft, 141 Wn. App. 624, 174 P.3d 95 (2007).

Pleadings which are grounded in fact & warranted by existing law or a good faith argument for extension, modification, or reversal of existing law are not baseless claims and therefore are not the proper

subject of Rule 11 sanctions, since the purpose behind Court Rule 11 is to deter baseless filings, not filings which may have merit. The reasonableness of an attorney's inquiry before filing suit is evaluated by an objective standard. Id

A case decided in 1966 is the only Washington decision Tesche can locate which addresses a theory as novel as the one advanced by Mr. Wegner in the Court below. That case, In re Baxter's Estate, 68 Wn. 2d 294, 412 P.2d 777 (1966) hardly supports Wegner's proposition. In Baxter, a case also involving an insolvent estate, a judgment creditor sought to satisfy his judgment against property claimed as exempt by a decedent's widow because the widow, who was P.R. of Mr. Baxter's estate, filed an inventory listing as an estate asset a bank account then held as Joint Tenants. The Superior Court found:

"That said cash in bank (sic) is owned by the surviving joint owner and is not an asset of the estate available for the payment of creditors claims in this estate."

The creditor appealed and filed a brief asserting that his judgment should have been paid out of the bank account formerly held in Joint Tenancy.

The Supreme Court noted: 'The court has not been favored with a brief in behalf of the surviving spouse, and somewhat understandably so considering the size of this small estate in terms of the amount of money involved.'

The Court's decision was not based upon the joint tenancy nature of the bank account but rather upon the protection the Judge found flowing from the widow's homestead allowance. At page 296 the Court noted:

" . . . the legislative policy implicit in the homestead-in-lieu award and set aside provisions of RCW 11.52.010 should be accorded priority, was controlling and dispositive of the controversy involved. The appellant's theory is an ingenious one. But we have no hesitation in agreeing with the reasoning of the trial court and his disposition of the matter."

Like the creditor in the Baxter estate, Mr. Wegner advanced at the Superior Court level an ingenious theory both seeking to include JTWROS real estate in his sister's estate and attempting to avoid the favor the legislature has decided to extend to Joint Tenancies:

'Whereas joint tenancy with right of survivorship permits property to pass to

the survivor without **the cost or delay of probate proceedings**, there shall be a form of co-ownership of property, real and personal, known as joint tenancy . . .

(RCW 64.28.210) (Emphasis Added)

Mr. Wegner's litigation below involved extensive costs and delay, all borne by Maxine Tesche as the joint tenant surviving in the joint tenancy realty. The P.R. should have honored the intention expressed by the legislature in RCW 64.28.210 rather than engaging in frivolous litigation for dubious purposes. Appellant questions the sort of investigation Wegner and his attorney conducted before electing to initiate the quiet title litigation.

Further, Tesche asks Mr. Wegner or his counsel to show the existing law upon which they relied and where was their good faith argument for the extension, modification, or reversal of existing law.

Appellant urges this court to give the same deference to the legislative intent as was given in Baxter, supra and in so doing find that P.R. Wegner had no factual or legal basis to justify tying up the JTWROS real property in litigation for two years.

Appellant has shown in Section D above that a prima facie case was made to the Court on December 22, 2008 that Kenneth Wegner had failed to faithfully execute his trust. Mr. Wegner failed to reply to Maxine Tesche's pleadings. The Commissioner erred in not having issued a citation directing the P.R. to appear at a future date to affirmatively show the Court that he had faithfully fulfilled his duties. At such a hearing the Court would have had discretion to award costs of the citation including the reasonable attorney's fees incurred by the moving party.²⁵

P.R. Wegner's theory of recovery of P.R. and attorney fees in this case is worse than ingenious, more than novel, it was frivolous and advanced without reasonable cause. Maxine Tesche is therefore entitled to recover her fees and costs at the trial court level under RCW 4.84.185 and CR 11 as well as pursuant to RCW 11.96A.150.²⁶

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RCW 11.68.070 provides, in pertinent part: "If any P.R. who has been granted non-intervention powers fails to execute his trust faithfully . . . upon petition . . . being supported by affidavit which makes a prima facie showing of cause for removal . . . the court shall cite such P.R. to appear before it, . . . and in all such cases the cost of the citation, hearing and reasonable attorney's fees may be awarded . . ."

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RCW.11.96A.150 provides, in pertinent part: "(1) Either the superior court or any court on appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party:(a) From any party to the proceeding . . . 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. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, . . . (2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving . . . decedent's estates . . ."

Ms. Tesche made a fee request in the motions she filed below. **CP 56, line 1, CP 80, lines 21-23.** Because neither the Commissioner nor Judge McCarthy ruled on her attorney cost and fee request, Appellant asks that this Court either make an award of attorney's fees and costs incurred below or remand this matter to the Superior Court for determination of the costs and fees she has incurred in the estate proceeding as well as for damages done by the P.R. to the JTWROS real property while he possessed it.

G. **Tesche is Entitled to Fees and Costs on Appeal pursuant to RCW 11.96A.150 and RAP 18.9(a)**

Streater v. White and Bonded Escrow, 26 Wn. App. 430, 613 P.2d 187 (1980) gives the following instructions to an appellate court considering whether attorney's fees and costs should be awarded on appeal.

"RAP 18.9(a) provides:

'[t]he appellate court on its own initiative or on motion of a party . . . may order a party or counsel who . . . files a frivolous appeal to pay terms or compensatory damages to any other party who has been harmed . . .'

In determining whether an appeal is brought for delay (or is frivolous) under this

rule, our primary concern is whether, in considering the record as a whole the appeal is frivolous, i.e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal."

[Citations Omitted]

In determining whether an appeal is frivolous ... justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal."²⁷

For the same reasons set forth in Section IV

(D) [i] above, and in accordance with the analysis set forth in Streater, supra, Maxine Tesche submits that she is clearly entitled to all reasonable attorney fees and costs incurred on this appeal under RCW 11.68.070, CR 11 and RAP 18.9.

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See Jordan, Imposition of Terms and Compensatory Damages in Frivolous Appeals, Washington State Bar News, May 1980 at page 46.

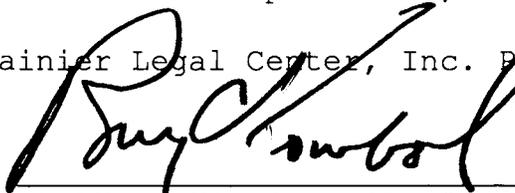
IV. CONCLUSION

Maxine Tesche respectfully requests that the Court find that both the Superior Court Commissioner and reviewing Judge erred as set forth above.

Appellant asks this Court, in its *de novo* review, find that Kenneth Wegner violated his fiduciary duties, failed to bring the insolvency of the Wegner Estate properly to the attention of the Court below, that Appellant was damaged as a consequence of Mr. Wegner's malfeasance and that it Vacate the Order issued by the Commissioner on December 22, 2008; remand this matter to the Superior Court for further proceedings; order that Wegner pay all attorney's fees and costs on this appeal and instruct the Superior Court to sanction both Kenneth Wegner and his attorney Hollis Barnett with CR 11 attorney's fees and costs incurred by Maxine Tesche in defense of the proceedings below.

Respectfully Submitted on September 4, 2009

Rainier Legal Center, Inc. P.S.



BARRY C. KOMBOL, WSBA 8145
Attorney for Appellant

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STATE OF WASHINGTON
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No. 39067-1-II

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

MAXINE ELAINE TESCHE,

Appellant,

v.

KENNETH WEGNER,
Administrator of Estate of
CORRINE D. WEGNER,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I served the **BRIEF OF APPELLANT**
MAXINE TESCHE, as indicated below, upon the following counsel
of record:

Mr. Hollis Barnett
Attorney at Law
317 So. Meridian
Puyallup, WA 98371-0164

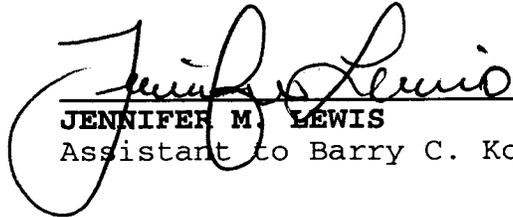
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Shannon R. Jones
Campbell, Dille, Barnett
Smith and Wiley
P.O. Box 488
Puyallup, WA 98371-0164

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1 I declare under penalty of perjury under the laws of the
2 State of Washington that the above is true and correct.

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4 Executed at Black Diamond, Washington this 4th day of
5 September 2009.
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9 **JENNIFER M. LEWIS**
10 Assistant to Barry C. Kombol
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