

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON  
Case No. 39067-1-II

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**In re: Estate of Corrine D. Wegner, Deceased  
and Kenneth Wegner, Personal Representative,**  
Respondent and Cross-Appellant,

**and**

**Maxine Elaine Tesche,**  
Appellant and Cross-Respondent.

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**REPLY BRIEF OF RESPONDENT/CROSS APPELLANT,  
ESTATE OF CORRINE D. WEGNER, DECEASED AND  
KENNETH WEGNER, PERSONAL REPRESENTATIVE**

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Case No. **39067-1-II**

Reply Brief of Respondent/  
Cross Appellant,  
Estate of Corrine D.  
Wegner, deceased and  
Kenneth Wegner, PR

**REPLY**

Respondent/Cross Appellant, the Estate of Corrine D. Wegner and its  
Administrator, Kenneth Wegner, submit the following reply brief pursuant  
to RAP 10.3(c):

**Issue 1: Where the issue on appeal is the reasonableness of the Court  
Commissioner's award of attorney fees in a probate  
proceeding, the standard of review is not *de novo*.**

**A. Standard of Review.**

The Appellant contends that In re Parentage of Hillborn, 114 Wn.App.  
275, 58 P.3d 905 (2002), together with In re Marriage of Balcom and  
Fritchle, 101 Wn.App. 56, 1 P.3d 1174 (2002), mandate that the standard of  
review in this case be *de novo*, but those cases are inapplicable. The

Appellant ignores ample authority providing the standard of review is abuse of discretion for appeal of an attorney fee award in a probate case.

Generally, fee decisions are entrusted to the discretion of the trial court. Mahler v. Szucs, 135 Wash.2d 398, 957 P.2d 632 (1998), citing Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 65, 738 P.2d 665 (1987). The appeals court exercises a supervisory role to ensure that discretion is exercised on articulable grounds. Id. In probate matters specifically, the appeals court will not will not interfere with the trial court's decision to allow fees unless there are facts and circumstances clearly showing an abuse of the trial court's discretion. In re Estate of Larson, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985).

Appellant's cited authorities, In re Marriage of Balcom & Fritchie and In re Parentage of Hillborn, supra, are readily distinguishable from this action.

In re Marriage of Balcom does not even address the standard of review on appeal of a court commissioner's decision. The Court in Balcom considered only the standard for a *superior court judge's* review of a court commissioner's decision on a motion for revision (which is *de novo*, if no live testimony was considered by the commissioner).

The Hillborn case is likewise distinguishable. In Hillborn, a court

commissioner denied a petition to establish paternity and compel support after an 18-year delay, based on the doctrine of laches. The decision was upheld on revision. The Court of Appeals, Division 3, reviewed the court commissioner's findings and conclusions *de novo* because the decision was (1) based entirely on documentary evidence, (2) material facts were undisputed, and (3) the sole issue was whether those facts were legally adequate to establish the defense of laches. Hillborn at 278.

Hillborn's standard of review analysis was later cited by Washington's Supreme Court:

“[Where the] parties do not dispute the underlying facts but only the conclusions drawn from the facts, the correct standard is *de novo* since the trial court commissioner relied solely on documentary evidence and credibility is not an issue.” In re Marriage of Langham, 153 Wn.2d 553, 106 P.3d 212 (2005).

In Langham, *supra*, Washington's Supreme Court reviewed *de novo* undisputed documentary evidence which had been analyzed by the lower court to determine when certain stock options were wrongfully converted by one party to the detriment of another. The court noted the appellate court's application of an abuse of discretion standard, but declined to apply that standard based on the factors set forth in the citation above.

Neither Hillborn nor Langham, *supra*, are probate proceedings and

neither case concerns a discretionary award of attorney fees by a court commissioner, upheld on revision by a superior court judge. Moreover, both cases involve application of the law to the substantive, undisputed facts of a case; whereas, the instant appeal concerns the facts underlying the estate's claims against the Appellant in only a circumstantial way.

Applying the factors cited in Langham, this matter is not appropriately reviewed *de novo*. The findings at issue here relate to the application of RCW 11.18.200, which statute is unambiguous and which statute all parties agree applies to this case. Whether or not the fees incurred by the estate were reasonable, and what portion of those fees are properly assessed against the non-probate asset under the applicable statute, was within the trial court's discretion to decide. Whether there was proper exercise of that discretion is reviewed only for manifest abuse. See In re Estate of Black, 116 Wn.App. 476, 489, 66 P.2d 670 (2003). The amount of fees awarded is reviewed for substantial evidence. In re Estate of Larson, 26 Wn.App. 196, 200-01, 674 P.2d 669 (1983).

**B. This case involves only the application of an unambiguous statute, RCW 11.18.200, and the reasonableness of attorney fees awarded below.**

The Appellant claims that the Respondent is "not correct in asserting

RCW 11.18.200 is ambiguous ‘as applied to these facts’.” Appellant’s Reply Brief at p. 6. But the Appellant fails to identify any portion of the statute as ambiguous. Indeed, whether or not a statute is ambiguous has nothing to do with the facts of a case.

A statute is ambiguous only if it is susceptible to two or more reasonable interpretations, not merely because different interpretations are conceivable. Cerrillo v. Esparza, 158 Wash.2d 194, 142 P.3d 155 (2006), citing AgriLink Foods v. State Dept of Revenue, 153 Wash.2d at 396, 103 P.3d 1226 (2005). When a statute is not ambiguous, only a plain language analysis of the statute is appropriate; the court will not construe the statute, but simply apply it. Cerrillo, supra; see also, Rettowski v. Dept of Ecology, 128 Wn.2d 508, 515, 910 P.2d 462 (1996), citation omitted.

RCW 11.18.200's plain language requires the Appellant, as beneficiary of a non-probate asset, take the asset subject to “liabilities, claims, estate taxes, and the **fair share** of expenses of administration **reasonably incurred** by the personal representative in the transfer of or administration upon the asset . . .” Emphasis added. Furthermore, the statute requires the Appellant be liable to account “**to the extent necessary** to satisfy liabilities, claims, the asset’s fair share of expenses of administration, and

the asset's share of estate taxes . . ." Emphasis added. The statute does not require construction. The court need only apply the statute's plain language standards (highlighted in bold-face type) to the facts of the case.

While the Appellant denies conceding that RCW 11.28.200 allows the court to charge the non-probate asset with expenses of administration (p. 8, Appellant's Reply Brief), Appellant then admits the statute does obligate the non-probate asset to bear expenses of administration subject to analysis of the "fair share" and "reasonably incurred" statutory language. Appellant's Reply Brief, p. 9. Thus, there is truly no dispute that RCW 11.28.200 does requires the non-probate asset be charged with administrative expenses. Importantly, the Appellant wholly ignores the statute's additional requirement that the non-probate asset bear administrative expenses "to the extent necessary," but aside from this omission, the Appellant and the Respondent otherwise agree that, under RCW 11.18.200, the Court properly charged the real property with liability for expenses of administration under RCW 11.18.200.

Appellant again argues that RCW 11.42.085 may have been relied upon by the Court Commissioner below, but there is nothing in the record to support this argument. Appellant's Reply Brief at p. 9. The TEDRA

action consolidated with the probate was resolved by way of the Estate's Final Report and Petition to Close the Estate. CP 300-316. That Final Report and Petition relied specifically on **RCW 11.18.200** in support of the request for payment of administrative expenses from the decedent's share of the non-probate asset. CP 302. In fact, the full text of RCW 11.18.200 was set forth in the Final Report. CP 311-312.

**Issue 2: All remaining unpaid expenses, claims and fees are properly charged to the non-probate property under RCW 11.18.200.**

**A. Consideration of hypothetical examples is appropriate.**

There is no case law interpreting RCW 11.18.200. For this reason, the Respondent provided hypothetical examples to assist the court in its analysis of the statute's requirements ("fair share," "reasonably incurred," and "to the extent necessary"). Hypothetical examples are appropriately presented to illustrate application of a particular statute or rule, particularly where there is no case law. See Vaughn v Chung, 119 Wn.2d 273, 280, 830 P.2d 668 (1992), "[T]here is a hypothetical example that the Court of Appeals found persuasive."

The Appellant cites Barth v Allstate, 95 Wn.App. 552 and an unpublished case (State v McCarty, 111 Wn.App. 1051) to dissuade the

court from considering the Respondent's hypothetical examples. Neither case is similar to this action, and neither case offers any authority to prohibit consideration of hypothetical examples.

**B. Policy considerations support charging the non-probate asset with all administrative expenses reasonably incurred.**

The Appellant's policy arguments concerning joint tenancy property, including her allegation that the non-probate real estate was not an "asset" of the Estate, are likewise unsupported by law.

Under RCW 11.96A.030, a non-probate asset has "the same meaning given in RCW 11.02.005." Non-probate assets under RCW 11.02.005 are defined to include "a right or interest passing under a joint tenancy with right of survivorship." RCW 11.02.005(15). RCW 64.28.010, in turn, allows for the passing of real property as a non-probate asset, but the transfer cannot "derogate," or distract, from the rights of creditors:

"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 and severability as at common law, including the unilateral right of each tenant to sever the joint tenancy. Joint tenancy shall be created only by written instrument, which instrument shall expressly declare the interest created to be a joint tenancy. It may be created by a single agreement, transfer, deed, will, or other instrument of conveyance, or

by agreement, transfer, deed or other instrument from a sole owner to himself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from husband and wife, when holding title as community property, or otherwise, to themselves or to themselves and others, or to one of them and to another or others, or when granted or devised to executors or trustees as joint tenants:

**PROVIDED, that such transfer shall not derogate from the rights of creditors.”** Emphasis added.

Under RCW 11.68.011(2), determination of an Estate’s solvency takes into account probate and *non-probate* assets and, under RCW 11.18.200, the beneficiary of a non-probate asset takes the asset subject to liabilities, claims, estate taxes, and the fair share of administrative expenses.

Per the statutes set forth above, disposing of property by joint tenancy with right of survivorship does not insulate the property from the deceased co-owner’s debts, including administrative expenses of their estate. The property, even though a non-probate asset, is subject to its fair share of administrative expenses, reasonably incurred, and to the extent necessary. RCW 11.18.200. The property is an asset of the estate – a non-probate asset.

In this case, the court below determined that all of the attorney fees incurred in the administration of the estate were reasonably incurred and the estate had a duty to investigate and file its suit against the Appellant.

CP 398. There being no other asset from which to collect these expenses, reasonably incurred, the non-probate realty is properly charged with all such expenses, because that is “the extent necessary.”

**C. The majority of fees incurred in administering the estate were incurred in pursuit and investigation of the real property claims.**

The Appellant concedes that the bulk of the estate’s attorney fees and costs relate to “substantial legal work expended in litigating title to the Joint Tenancy property.” Appellant’s Reply Brief, p. 15. The Appellant did not object to any portion of the fee declaration submitted below. CP 319-324. Yet, the Appellant inexplicably claims that these fees were not incurred in “transferring” or “administering upon” the non-probate real property.

To “administer” means to direct or manage, or to manage or dispose of (an estate or trust) as executor, administrator, or trustee. *Webster’s Universal College Dictionary* 835 (2001). The Appellant offers no alternative definition. Administration upon (ie. directing, managing, and disposing of, as administrator of the estate), the non-probate real property is exactly what the estate attorney and administrator were doing in pursuing the legitimate claims against the Appellant related to the asset.

Were the claims not thoroughly investigated, there could have been allegations of breach of fiduciary duty.

**Issue 3: The lower court properly found there were reasonable grounds for the Estate's suit against Appellant.**

The Appellant asks the court on appeal to “question the motivation” of the Administrator, and argues the Administrator was “likely motivated either by substituted anger . . . or personal greed” in pursuing the Estate’s claims concerning the real property. Appellant’s Reply Brief, p. 18. This argument is unsupported by any portion of the record below and is completely without merit.

The lower court found:

“There were reasonable grounds for the estate to bring its initial lawsuit against [the Appellant], and the legal actions, including discovery, briefings, court appearances and orders entered, were all reasonably [*sic*] incurred expenses in administration of the estate.” CP 398, lines 16-19.

This finding was amply supported by the record, which included sworn testimony from the Administrator, the decedent’s aunt (to whom she had confided about the “dirty trick” the Appellant had played with the real property deed), and the estate attorney’s fee affidavit. The Appellant moved for summary judgment dismissal of the Estate’s claims against her, and that motion was denied. CP 287-288. The Appellant never filed an

answer to the Estate's claims, and did not object when the Estate moved for a voluntary non-suit, nor request any fees against the Estate. The Estate's claim for equitable mortgage was supported in fact and law and the Appellant has offered neither citation to law, or actual evidence, to suggest the contrary.

**Issue 4: The Administrator's affidavit is properly considered in support of his fee request.**

The Appellant argues it would be error for the court on appeal to consider the Administrator's sworn time and expense affidavit.

Appellant's Reply Brief, p. 21. But the Administrator should not be unfairly penalized because the lower court did not allow him to testify, in person, at the final hearing, to the facts set forth in the affidavit. RCW 11.27.050 expressly permits taking of live testimony at the hearing on the final probate report. Because the Administrator here was denied that opportunity due to court congestion, he submitted his sworn statement. It is proper that the statement be considered under these circumstances.

The Administrator owed a fiduciary duty to pursue the real property claims for the heirs. See In re Estate of Vance, 11 Wash.App. 375, 381, 522 P.2d 1172 (1974), referring to personal representatives and RCW 11.68.070. The Estate's heirs did not object to the Administrator's fees

and costs. Although the Appellant objected, she is not an heir and the Administrator owes her no fiduciary duty. The Administrator spent 150-200 hours performing work necessary to fulfill his fiduciary duties to the heirs. It is proper he be awarded his reasonable administrator fee award of \$7,500.00.

**Issue 5: The Appellant is required to comply with the Superior Court Civil Rules.**

**A. The Appellant's failure to comply with CR 7 and PCLR 7(a) is fatal to her appeal of motions never properly noted for hearing.**

The Appellant argues that her failure to note hearings on her motions for removal of the Administrator and for CR 11 sanctions is not dispositive or fatal to her appeal of those requests for relief. Appellant's Reply Brief, p. 22. In support of this argument, the Appellant claims there is "no case or court rule preventing a party from filing responsive motions and pleadings in connection with pending or ongoing trials and hearings." The Appellant's argument dodges the issue. While there may be no rule to *prevent* filing of the Appellant's motions, that does not mean the motions are properly considered on appeal when they were never noted for hearing. Also, the Appellant's CR 11 motion *was never even filed with the court*, a fact which the Appellant fails to address at all.

Superior Court Civil Rule 7 requires applications to the court for orders be made “by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.” Superior Court Civil Rule 6(d) requires motions, other than those which may be heard ex-parte, **and the notice of hearing**, be served not later than 5 days before the time specified for hearing.

Pierce County Superior Court Local Civil Rules specifically prohibit hearing motions unless there is proof of service of sufficient notice of the hearing on the opposing party, which notice is required to be served by the 6th court day prior to the hearing date. PCLR 7(a)(2), (3) and (4).

The Appellant must comply with these court rules. The consequence of non-compliance depends upon the rule violated. Here, the consequence of the Appellant’s failure to note her motions is that they not be heard, or considered on appeal. For example, in Rudolph v Empirical Research Systems, Inc., 107 Wn.App. 861, 28 P.3d 813 (2001), the appeals court interpreted CR 26(i), which states that the court “will not” entertain a motion or objection with respect to civil rules 26 through 27 unless counsel have conferred with respect to the motion and the motion “shall”

include counsel's certification that the conference requirement was met. As analyzed by the Court of Appeals, Division 2, under the plain language of the rule, the quoted words are mandatory; thus, the rule precluded the trial court from hearing the discovery motion when the conference requirement was not met. Id. at 866, 867.

The rule at issue here (CR 7 and its counterpart, PCLR 7) require the Appellant's motions be noted with sufficient notice to the Respondent: "No motion **will be heard** unless there is on file proof of service of sufficient notice of the hearing . . ." PCLR 7(a)(3). The trial court was precluded from hearing the motions because the rule's language is mandatory and the Appellant did not comply with the requirement that her motions be properly noted, and noted by the 6th court day prior to the date set for hearing.

**B. The Appellant is required to comply with PCLR 7(g).**

The Appellant claims she may not be bound by PCLR 7(g), which requires in her motion for revision that she specify which portions of the court commissioner's order she sought to revise. PCLR 7(g)(3) provides that "any portion [of the court commissioner's order] not so specified is binding as if no revision motion was made." The Appellant argues that the

rule may conflict with RCW 2.24.050. There is no conflict, however.

RCW 2.24.050 provides that motions for revision be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner. Nothing in PCLR 7(g) suggests that motions for revisions be upon records any different than those specified in RCW 2.24.050. PCLR 7(g) imposes requirements for the form of a revision motion, without restricting the evidence that will be reviewed.

The Appellant is bound by PCLR 7(g)(3), and that rule provides that her motion for revision “**shall state** with specificity any portion of the commissioner’s order or judgment sought to be revised.” The language is mandatory. Having failed to comply with the rule, the superior court judge and all parties were bound by the commissioner’s findings: “Any portion not so specified **shall be binding** as if no revision motion has been made.” Again, the rule’s language is mandatory and, consistent with the analysis set forth in Rudolph, supra, must be followed.

### CONCLUSION

The Estate reiterates its requests for relief set forth in its earlier Respondent / Cross-Appellant’s Brief, including that the Court uphold the lower court’s application of the plain language of RCW 11.18.200,

requiring the Appellant take the non-probate real property subject to the claims of the estate, including all costs and expenses of administration. RCW 11.18.200 requires the “fair share” of these expenses “to the extent necessary” be charged to the non-probate asset, and where there are no other assets to satisfy fees reasonably incurred, that share necessarily be 100% of the fees determined to be reasonable, in addition to the Administrator’s reasonable fee for services necessarily rendered to fulfill his fiduciary duty to the heirs.

Respectfully submitted this 28 day of January, 2010.

  
\_\_\_\_\_  
Hollis H. Barnett, WSBA #2858  
Shannon R. Jones, WSBA #28300

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON  
FILED  
BY: [Signature]

**COURT OF APPEALS, DIVISION II  
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Respondent and Cross  
Appellant,

and

Maxine Elaine Tesche,

Appellant and Cross  
Respondent

No. 39067-1-II

**AFFIDAVIT OF  
SERVICE**

MELINDA L. LEACH, being first duly sworn on oath, deposes and says:

That on the 28th day of January, 2010, I caused to be delivered by ABC Legal Messengers the original Reply Brief of Respondent/Cross Appellant, Estate of Corrine D. Wegner, deceased and Kenneth Wegner, PR, to the Court of Appeals, Division II for filing, along with this Affidavit and two additional copies, and also a true and correct copy to the attorney for Appellant/Cross Respondent at the addresses set forth below:

Court of Appeals  
Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

Barry C. Kombol  
Rainier Legal Center, Inc.  
31615 Third Ave.  
Black Diamond, WA 98010

Further, that on the 28th day of January, 2010, I caused to be faxed to Barry C. Kombol, a true and correct copy of the Reply Brief of Respondent/Cross Appellant, Estate of Corrine D. Wegner, deceased and Kenneth Wegner, PR, to 360-886-2124.

  
MELINDA L. LEACH

SUBSCRIBED AND SWORN to before me this 28<sup>th</sup> day of January, 2010.



  
Printed Name: M. Y. Lewandowski  
NOTARY PUBLIC in and for the State of Washington residing at Smallup  
My commission expires: 10-15-12

Affidavit of Mailing