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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY   
DEPUTY

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**In re: Estate of Etsuko F. Toland,**

**Respondent**

**and**

**Peter Paul Toland, Jr.,**

**Appellant**

**Case No. 41388-4-II**

**Surreply of Respondent  
Estate of Etsuko F. Toland,  
deceased**

Pursuant to Court of Appeals Commissioner Schmidt's notation ruling of June 24, 2011, the Respondent submits the following brief in surreply to Appellant's Amended Reply Brief. Respondent replies, in particular, to Appellant having supplemented the record on appeal to include pleadings from a separate Pierce County Superior Court action and a ruling in that separate action issued on March 25, 2011, and Appellant's arguments related thereto.

The ruling of Pierce County Superior Court Judge Culpepper in a separate legal action is irrelevant to the instant appeal because (1) the

ruling was made 6 months **after** the summary judgment dismissal of the Appellant's TEDRA petition; (2) the ruling is pending appeal in this Court; and (3) the Appellant remains a major creditor of the Respondent Estate.

- 1. This Court should only consider the evidence and issues called to the attention of the trial court, not a ruling made by another judge in a separate action 6 months later.**

RAP 9.12 provides a special rule on appellate review of an order on summary judgment:

“On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.” RAP 9.12.

This appeal concerns the Respondent Estate's summary judgment motion to dismiss the Appellant's TEDRA Petition (CP 493-510) and the trial court's granting of that motion on October 8, 2010. CP 1-21, CP 628-631; RP 17-18. As reflected in the summary judgment order, the trial court considered only three documents in granting the summary judgment motion – the Respondent Estate's Motion and Memorandum for Summary Judgment with exhibits, the Declaration of Peter Paul Toland, Jr. in Response to Motion for Summary Judgment and Mediation, and the

Estate's Reply to Response to Summary Judgment. CP 628-631.

The Appellant has supplemented the record on appeal to include the ruling of Pierce County Superior Court Judge Culpepper in a separate cause of action on March 25, 2011. CP 653-654. This ruling was not of course considered by Judge Hogan in her ruling on the Respondent Estate's summary judgment motion on October of 2010 -- Judge Culpepper's ruling was not issued until six (6) months later. Under RAP 9.12, this appeals court should not consider Judge Culpepper's ruling to determine whether Judge Hogan appropriately dismissed the Appellant's TEDRA petition.

**2. Judge Culpepper's ruling is pending appeal.**

The Appellant has supplemented this appeals record to include three rulings of Judge Culpepper in the Estate's separate action to enforce judgments issued the decedent in the Japanese divorce decree. Judge Culpepper denied the Estate the right to collect the judgments based on the doctrine of comity, even denying the Estate the right to collect the judgment for past due child support. CP 653-654; CP 655-656. The Respondent Estate has appealed that ruling under Court of Appeals, Division II, Case No. 42187-9-II.

Notably, Judge Culpepper had earlier ruled that he could not find anything facially wrong with the Japanese decree because it addressed support, property division, and other matters. CP 648. Judge Culpepper further recognized the Appellant's participation, with assistance of counsel, in the Japanese divorce. CP 648. Nonetheless, Judge Culpepper ruled that the Estate had to establish Appellant received notice of a guardianship proceeding, which proceeding was instituted several years after the Japanese divorce decree. CP 649. The Respondent Estate argues that the doctrine of comity under Washington law requires examination of various issues relative *to the judgment sought to be enforced*, and a legal proceeding which takes place years later (here, a guardianship filed after the divorced spouse dies) has no relevance to whether comity should be granted to the previously entered judgments. As these issues are pending appeal, it is premature and inappropriate that this court consider Judge Culpepper's rulings at this juncture.

**3. The Appellant remains the major creditor of this estate.**

As the Respondent Estate has previously argued, the primary issue on the summary motion to dismiss Appellant's TEDRA petition was whether the Appellant should be the custodian of the funds of the Estate that will

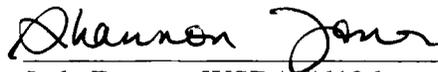
ultimately be paid to the minor heir as sole beneficiary of the Estate. CP 88-89. The Estate resists the Appellant being appointed because he comes before the Court with unclean hands. The Appellant has failed and refuses to pay the Judgment based on the Court of Appeals Mandate, claiming he will pay it, but not to the Estate even though it is a valid Judgment owing to the Estate. CP 221-234.

The Appellant persists in his refusal to pay this appeals court judgment (see Appellant's Amended Reply Brief at p. 8), even though Judge Culpepper's rulings have no bearing on the validity of this judgment. The balance owed on the Court of Appeals judgment, with interest through July 8, 2011, is \$12,289.62. CP 178-179.

Appellant concedes that Judge Culpepper's ruling does not render this appeal moot (see Appellant's Amended Reply Brief at p. 7, footnote 2), yet argues that the Estate should be barred from arguing unclean hands on the basis of collateral estoppel (see Appellant's Amended Reply Brief at p. 7-8). Appellant's position is untenable. Appellant refuses to pay a judgment based on mandate of this appeals court issued nearly four (4) years ago. The Appellant is a major creditor of this Estate and should not be permitted control of an Estate to which he owes over \$12,000.00.

In conclusion, the Estate reiterates its request that this appeal be denied, that the summary order of Judge Hogan be upheld, and requests an award of its attorney fees in this matter.

Respectfully submitted this 14 day of July, 2011.



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Judy Dugger, WSBA #6136  
Shannon R. Jones, WSBA #28300  
Attorneys for Respondent

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STATE OF WASHINGTON

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DEPUTY

In Re:

Estate of Etsuko Toland

No. **41388-4-II**

**DECLARATION OF  
SERVICE**

Melinda Leach, being first duly sworn on oath, deposes and says:

That on the 14th day of July, 2011, she caused to be delivered by legal messenger service the Surreply of Respondent Estate of Etsuko F. Toland, deceased, and this Declaration of Service, to the following attorney(s) at their addresses below:

Douglas N. Kiger  
**Blado Kiger Bolan, P.S.**  
4717 S. 19<sup>th</sup> St., Ste 109  
Tacoma, WA 98405

Michael Smith  
**Comfort, Davies & Smith, P.S.**  
1901 65<sup>th</sup> Avenue West, Suite 200  
Fircrest, Washington 98466

That also on the 14th day of July, 2011, she caused to be delivered by facsimile and first class mail the Surreply of Respondent Estate of Etsuko F. Toland, deceased, and this Declaration of Service, to the

**Declaration of Service**

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following attorney(s) at their addresses

Kimberly Quach  
1 SW Columbia, Ste 1800  
Portland, OR 97214-2327  
FAX: **503-224-0092**

I hereby declare under penalty of perjury under the laws of the  
State of Washington that the foregoing is true and correct.

DATED at Puyallup, Washington this 14th day of July, 2011.

  
Melinda Leach

**Declaration of Service**

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