

FILED
COURT OF APPEALS
DIVISION II

2012 JUN 22 PM 3:37

STATE OF WASHINGTON

BY 
DEPUTY

No. 42789-3-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

Barry C. Kombol, WSBA 8145
Rainier Legal Center, Inc. P.S.
31615 - 3rd Avenue
Black Diamond, WA. 98010
(360)886-2868

Attorney for Appellant
Maxine Elaine Tesche

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR.....	3
Assignments of Error	3, 4
Issues Pertaining to Assignments of Error.....	4
C. STATEMENT OF THE CASE	4
D. SUMMARY OF ARGUMENT	18
E. ARGUMENT	21
1. The Standard of Review	21
2. The Trial Court Abused its Discretion in granting the Estate a Fee Award in the sum of \$3,010.00 for fees incurred in seeking the appointment of a custodial receiver	22
3. The Trial Court Abused its Discretion in granting a Fee Award in when Ms. Tesche prevailed on the procedural and substantive grounds she raised below	27
4. The Trial Court Abused its Discretion in granting the Fee Award in when it did not find it 'Necessary' for the Estate to Petition to Appoint a Referee.....	38
5. The Court on Appeal Should Award Fees Award Based upon the Estate's Conduct Below	42
F. CONCLUSION	48

TABLE OF AUTHORITIES

A. TABLE OF WASHINGTON CASES

Estate of Larson, 103 Wn. 2d 51721

Estate of Wegner v. Tesche, 157 Wn. App.
554 5, 16, 43

IBF, LLC v. Heuft, 141 Wn.App, 624..... 46

Mahler v. Szucs, 135 Wn.2d 398 21

Rettkowski v. Dep't of Ecology, 128 Wn.2d 508 ... 21

B. STATUTES

RCW 4.84.185 42

RCW 6.13 28

RCW 6.13.070(2) 28, 29

RCW 7.52 10, 19, 28

RCW 7.60 10, 19, 28

RCW 7.60.023(d)..... 6

RCW 7.60.025 23

RCW 7.60.025(d) 1, 22

RCW 7.60.025(2) 26

RCW 7.60.025(3) 6, 23

RCW 7.60.025(5) 25

RCW 7.60.045 6, 10, 24

RCW Title 11 9

RCW 11.96A 10, 19, 28

C.1 COURT RULES

CR 11 46, 47, 48
CR 11(a) 46, 49
RAP 18.1(a) and (b)..... 49

C.2 COURT ORDERS and RULINGS

ORDER OF DECEMBER 22, 2008 ... 1,4,15,17,18,19,25,48
ORDER OF FEBRUARY 27, 2009 1,5,15,17,18,19,25
ORDER OF OCTOBER 14, 2011 1, 3, 4, 15, 49

A. **INTRODUCTION**

Maxine Tesche (Tesche) appeals a judgment of \$8,617.50 for attorneys fees awarded against her by Judge Garold Johnson on October 14, 2011. The attorney fee award was in favor of the estate of Corrine Wegner (Estate).

The Estate argued below that it was entitled to attorneys fees based upon a Commissioner's court order entered on December 22, 2008 which was later confirmed by the Superior Court on February 27, 2009. That order authorized the estate *"to bring a motion to the court for the appointment of a referee . . ."*

The order concluded: *"Should it be necessary for the estate to file a petition for appointment of the referee, then the estate shall be entitled to all reasonable attorneys fees incurred after the date of entry . . ."*

On April 26, 2011 the Estate filed a petition to appoint a custodial receiver and evict Ms. Tesche from her residence, purportedly under the authority of RCW 7.60.025(d). Ms. Tesche was not served with that petition, nor was it posted at her residence

and no bond was posting by the Estate prior to making its request. The only notice given to Ms. Tesche was to her counsel who had made request for special notice of proceedings in the probate case.

On May 13, 2011 Judge Johnson declined to rule on the Estate's petition to appoint a "Custodial Receiver." The Estate then amended its petition to request the appointment of a receiver or a referee to take possession of and sell Tesche's home.

A hearing was then held on May 27, 2011 on the Estate's amended petition. Again the Court denied both of the Estate's requests; but specifically reserved ruling on "*Petitioner's right to request, per the prior court orders, reasonable attorney's fees*".

On October 4, 2011 the estate filed a motion for an award of \$8,132.50 in attorney's fees, including a request for \$3,010.00 in fees incurred in connection with the Estate's request to appoint the custodial receiver; \$4,370.00 in fees incurred between May 13, 2011 and May 27, 2011 when the Estate's amended petition was heard; and 752.50 for debt collection

efforts and miscellaneous Estate work done between May 27 and August 29, 2011.

On October 14, 2011, the Court awarded the Estate the \$8,132.50 of in attorney fees and added \$485.00 in additional fees in connection with the preparation and attendance at the hearing on its fee requests.

The attorney fee judgment was entered in favor of the Estate and against Tesche despite the fact that Tesche had prevailed in all objections to the appointment of a custodial receiver or a referee.

The Court failed to enter findings of fact or conclusions of law in connection with the fees it awarded. The Court likewise failed to explain its rationale for awarding fees that weren't consistent with prior court orders or making an awarding against the party who prevailed in contesting the petitions.

The Court abused its discretion by obligating Tesche to bear the estate's legal fees despite having prevailed in resisting the estate's petitions.

B. ASSIGNMENTS OF ERROR:

(1) **Assignment of Error**

The court erred in awarding the estate \$8,617.50 in attorney fees on October 14, 2011.

(2) **Issues Pertaining to Assignment of Error**

- a. Did the trial court err in entering the \$8,617.50 judgment against Tesche for fees incurred in seeking the appointment of a custodial receiver rather than a referee?
- b. Did the trial court err in entering the judgment for attorney fees after adopting Tesche's arguments in opposition to all of the relief the Estate requested and denying all requests made by the Estate?
- c. Did the court err in entering judgment against Tesche for attorney fees for requests the Court didn't find 'necessary'?

C. **STATEMENT OF THE CASE:**

(1) **Proceedings in 2008-2009**

In December of 2008 Court Commissioner Pro Tem Joe Quaintance entered an Order Approving Final Report which granted the Estate a award of attorney fees against Tesche, concluding "The estate is entitled to a Judgment Lien against the real property in the sum of [see below] \$16,212.59 with interest at 12% per annum from date of the entry of the decree." [Conclusion of Law 6]. **CP 6 and CP 26.**

That Order provided in part, as follows:

“Should the judgment lien not be paid by Respondent Maxine Elaine Tesche within one hundred eighty (180) days of date of entry of this Order, then the estate has the right to bring a motion to the court for appointment of a referee who shall have authority to sell the real property on terms and conditions the court will order. Should it be necessary for the estate to file a petition for appointment of the referee, then the estate shall be entitled to all reasonable attorney fees incurred . . .”

[Emphasis Added]

Judge McCarthy affirmed that ruling at a revision hearing on February 27, 2009.

(2) **Appeal of Commissioner's Award Below**

Ms. Tesche and the Estate of Corrine Wegner filed cross appeals of the December 22, 2008 and February 27, 2009 to Division II of the Court of Appeals. This Court issued an opinion in August of 2010 affirming the Orders of the Commissioner and Judge McCarthy. See Estate of Wegner v. Tesche, 157 Wn. App 554 (2010).

(3) **Actions of the Estate in 2011**

The Judgment lien against real property formerly held by Corrine Wegner and Maxine Tesche as Joint Tenants remained unpaid in the Spring of 2011.

On April 26, 2011, the Wegner Estate filed a "Petition to Appoint a Custodial Receiver" under the authority of RCW 7.60.023(d). **CP 10-15**

Tesche resisted the Estate's petition, arguing, among other things, that she had not been personally served with the Petition [**CP 32, lines 1-4**] and that the Estate had failed to obtain a bond as required by RCW 7.60.045 and .025(3). **CP 31, lines 17-18**

A hearing on the Estate's Petition was held on May 13, 2011. The following dialog transpired between Judge Johnson and the Estate's attorney:
[Verbatim Transcript of Proceedings of May 13, 2011, Page 32, Line 19 to Page 38 Line 5]

MR. BARNETT: Question, Your Honor?

THE COURT: I do have a question for you when you get up here. Why are we doing a receivership as apposed to a referee?

MR. BARNETT: The referee is a special statute for tenants in common when there's disputes. And I had kind of initially looked at the referee thing. The referee is a sale on the courthouse steps; it could be done. I think it's more equitable for his client to try to get the most out of the property and have a negotiated sale at a price

that gives her the maximum, and that's - I was doing it for their benefit, not for mine.

THE COURT: And why I hesitate on that is what the court actually ordered, if we're going to be technical.

MR. BARNETT: Is a referee.

THE COURT: Is a referee.

MR. BARNETT: And we can do that. 752, we can do that, and then there is no bond required in that.

THE COURT: But you didn't move for that today.

MR. BARNETT: I'll move for it today, and we'll do it under 752 and make a change. That is what you would like, Mr. Kombol?

THE COURT: Well, I mean, it's not his decision, it's mine. Because the technical argument's going to be raised by Mr. Kombol. And frankly, - let me just speak for a second.

MR. BARNETT: Yeah.

THE COURT: Frankly, this is catching me at one heck of a disadvantage. I mean, 2:50 yesterday to provide me -- I still don't know the statute. You haven't cited the statute to me yet. I'm sitting here saying now, wait a minute the court's not able to make a really well-reasoned decision unless I have a chance to look at the law and the cases behind them. An I haven't had that opportunity.

And I'm very reluctant to sign an order for appointment of a receiver when the judge ordered referee, Judge McCarthy did that in the first place. Unless there's some special way around that I think we need to follow the

order of the prior court. I'm not --
MR. BARNETT: Your honor, I'm not sure, did you get -- what I sent to Mr. Kombol was the working copies I sent to the court and maybe you didn't get my working copies

THE COURT: I did not.

MR. BARNETT: You didn't?

THE COURT: I did not.
MR. BARNETT: Because I've the statutes laid out.
THE COURT: Okay.
MR. BARNETT: The statutes are laid out, and the other things were the published opinion of the Court of Appeals, the orders, everything that's in the record, there was nothing new other than that. And I had a couple of attorneys suggested, one of them was George Kelly, for --

THE COURT: I read that. I did see that.
MR. BARNETT: But if the court would feel comfortable taking a little time to go back and look and perhaps fashion something.

THE COURT: Well, the working copies aren't filed with the court -- yours aren't either -- with the court either. I mean, whatever you sent me that was not filed on the 26th is not in LINX.

MR. BARNETT: It isn't?
THE COURT: No. Hand that back. I'm not going to consider that.

MR. BARNETT: I'm wondering if they went somewhere else. She gave me what she sent to the -- working copies that went out, and this is the court's working copies right here.

THE COURT: Mr. Barnett, I think the thing to do today is maybe set this over. And I'm not going to tell you what kind of motions to file. I can tell you that Mr. Kombol has raised some pretty good issues I think on the receivership issue without -- I've read the statute. I haven't read it today, so I'm not sure how that would apply on this situation.

But it seems to me what we need to do is set this over -- well, let you re-note it. It won't be set over -- to file a motion that you think is appropriate in this case consistent with the prior order.

MR. BARNETT: Well, the court would --

THE COURT: I'm not going to tell you how to practice law.

MR. BARNETT: No, no. The court does have inherent authority, because the court didn't set the statute.

THE COURT: That's right.

MR. BARNETT: And we don't have to refer to either statute. The court can appoint a person under a court's order to do this without running through the statute. It's just the -- it's just that on the receiver statute there's a specific statute that says enforcement of a court order, so that enforcement of a court order kind of falls under this and the court can still tailor it because you have equitable rights to tailor it. So it isn't strictly fully under the statute.

THE COURT: And I don't mean to take issue. My concern is we're not doing what Judge McCarthy ordered. That is what is in the court order; that's what was appealed from. That becomes the law of the case, is my understanding of this. If we do something else, then what we're ending up doing is setting up another potential appeal for one thing, and a decent argument that -- that was not -- I understand your argument; I have the equitable powers under Title 11.

MR. BARNETT: Under TEDRA.

THE COURT: Under TEDRA, right, thank you, to do certain things, but that would be an appealable decision; where a prior order is the law of the case. And I don't know why -- I mean, it's up to you what you want to move for, but it's a question I would have. I'm reluctant to do something not previously ordered.

MR. BARNETT: I'm comfortable designating this as a referee and doing it under 752. I'm very comfortable doing it that way. I think Mr. Kombol wouldn't be, but I'm comfortable with it.

THE COURT: It's up to him. If you want to move on that, then maybe that's what you should do -- if you wish. That's not my call. But let's set this over, or you can re-note it for that purpose.

MR. BARNETT: Well, could we do this, Your Honor. Could we reschedule this for next week, for any further briefing on this to be filed by next Wednesday.

THE COURT: You know, I'm reluctant to do that because your timing on your motion for appointment of referee would be incorrect appointment of referee --

MR. BARNETT: Well, let's maybe set it over three weeks or two weeks.

THE COURT: Whatever is comfortable for you. You do have to re-note it though.

MR. BARNETT: I'll re-note it. . . . "

The Estate next filed an 'Amended Petition to Appoint Receiver or Referee.' **CP 48** In that amended petition, **CP 48, lines 16-19**, the Estate alleged:

"**COMES NOW** the Petitioner, Kenneth Lee Wegner, Personal Representative of the Estate of Corrine Diane Wegner, by and through its attorney, Hollis H. Barnett, and moves to amend the Petition dated April 26, 2011 for appointment of a receiver in the following respects:

That the Court, using its ***inherent, equitable authority*** under TEDRA, RCW 11.96A, appoint either a receiver under RCW 7.60, (sic) a referee under RCW 7.52."

(Emphasis Added)

One Again the Estate failed to post a bond as required by RCW 7.60.045 and also failed to

personally serve Ms. Tesche with the amended petition
CP 94, lines 4-7.

The hearing on the Estate's Petition was held on May 27, 2011. The Court's decision included the following dialog between the Judge and the Estate's counsel: [From the Verbatim Transcript of Proceedings of May 27, 2011, Page 31, Line 2 -to- Page 38 Line 5]

"THE COURT: My concern here is -- let me just finish that thought for a moment -- is this is basically, look it was an issue of whether or not who really owned the property under is it equitable mortgage, or is it a joint right -- right of survivorship -- right of ownership with right of survivorship; which one is it, and ultimately determined by -- by stipulation to be joint ownership with right of survivorship.

As I understand the statute, immediately upon death the title vests in the person receiving -- let me finish this thought -- and what happens is that in this particular case, the court said yes, we're going to do that, but its going to be subject to a judgment lien, and the judgment lien being roughly \$16,000. Which if I understand this correctly, is both a lien against the property and a personal judgment against the -- also in personum judgment, if I read that correctly. I may have misread that, but I think that's right.

So what we've got is basically your judgment. And then what we have is the court ordering clear back -- and to say there's not notice would seem to be less than credible -- but

clear back in May 27, 2009 the court ordered -- just to be sure I read this correctly -should the judgment lien not be paid by the respondent, Maxine

Elaine Tesche, within 180 days from the date of this order, then the estate has the right to bring a motion for the appointment of a referee who shall have the authority to sell the property on terms and conditions the court will order.

The puzzling language here is, it's not an order that says the court shall appoint a referee who shall have authority to appoint, but instead, it's the right to bring a motion for appointment of a referee. Which is a curious choice of words, because it puts me in the position of saying -- it's odd, because parties can bring a motion for darned near anything. And certainly, there's a focus on appointment of referee here. But it doesn't say a referee shall be appointed. It says a motion for appointment of a referee.

MR. BARNETT: But it does say who -- the referee, who shall have authority to sell the real property on terms and conditions the court will order.

THE COURT: Right, but again -- I don't mean to be entering in your argument here. But again, I looked at it, and it says bring a motion for the appointment -- for if the appointment for the referee happens, then -- to read the sentence carefully -- that referee would then have authority to sell the property on terms & conditions the court orders.

So the first question is should the motion, itself, be approved, and the second question is, what would

those -- if you appoint, then they would have authority to appoint on the condition of the court order. So it's kind of a two-stage process.

So the first stage is what Mr. Kombol is arguing, I think, and that is that the motion should not be granted, which was left open for a future judge to look at or for that judge or commissioner to look at by later date.

MR. BARNETT: But if we look at the earlier language there's a judgment lien, a judgment lien to protect the administrative costs that were required to be paid.

THE COURT: I understand.

MR. BARNETT: The only way to enforce that is through an equitable court order. It didn't say we'd go by execution. It said the court would order -- that a referee would order, I'm sorry.

THE COURT: Well, I think I've expressed what I'm reading here. And it's not that. It's that a motion can be brought. So that leaves the discretion up to the future judge to decide whether or not to grant that motion. That's the way I read that. And I think it's a fair reading of those documents.

If the court had wanted to say that if she doesn't pay within 180 days the court shall appoint a referee, that could have been done, but it wasn't. It was for a motion to consider appointing a referee. And that's where we're at today.

And here is where I come down-- this looks to me like a judgment pretty much like any other monetary judgment. The great equities of the situation here, the fairness and so forth, we see virtually in every judgment how unfair it can be. I'm looking at this one saying, I think this judgment lien -- I don't want to go here because I don't

know this part of the law and I haven't searched it, but I think the judgment lien is effective the day it was entered if it was recorded in King County particularly.

The judgment lien is there. Even though it was 180 days delay in foreclosing on that lien, the judgment lien was there. If Homestead interest attaches later, I'm not sure how that works; it looked to me like the Homestead attachment was very recent, at least in the form you would file it. So I don't know how it affects your ability to enforce that judgment.

So, I see this as being really not much more than look, it costs to administer the estate. You're entitled to a judgment for those costs. You have got the judgment. It included the judgment lien, but the ultimate decision here is how do you execute on that remedy. And the court here said you could bring a motion but it didn't say shall be a referee. And I look at it and I think, I don't see there's any particular reason that this judgment -- and I've been around a long time, too -- would be any different than any other judgment that come enforced."

After the Court made its oral ruling, the attorneys prepared, and the Court signed an order, which provided, in pertinent parts:

CP 102, lines 1-12

"The Court finds that under the circumstances it has considered in this matter, the Court declines to appoint a receiver or referee at this time; and the petitioner is free to conduct execution

proceedings in any manner authorized by law; Now, **THEREFORE**, it is hereby

CP 103, lines 10-17

ORDERED: That the Petition of the Estate for the appointment of a receiver is Denied; and the Petition of the Estate for the appointment [sic] is denied; and with respect to other matters coming before the court this day, and argued by counsel for the parties, it is hereby:

ORDERED:

.....
.....

Petitioner's right to request [per the prior court order] reasonable attorney's fees is reserved, without prejudice for the submission of a future request, and ruling on the issue of attorney's fees is reserved. [The prior February 27, 2009 (sic), adopting the December 22, 2008 order concerning award of attorney fee and costs remains in full force and affect (sic).]"

(4) **Award of Attorney Fees to the Estate**

On October 14, 2011 the Court heard the Estate's motion for an award of attorney's fees. Shannon Jones appeared for the estate and Barry Kombol presented Ms. Tesche's arguments in opposition to the fee requests. The Court's oral ruling, in pertinent part, was: [From the Verbatim Transcript of Proceedings, Page 19, Line 2 to Page 21 Line 4]

"THE COURT: Thank you, counsel, both of you. I have, as Mr. Kombol pointed out, I have read carefully the appellate case

in this decision, which is at 157 Wn. App. 554. I did note that the Court of Appeals for that decision did not award attorney fees for that decision. They did uphold a prior award of attorney's fees but not in that decision itself. And apparently they were applying somewhat of a frivolous standard (sic), as you look at the unpublished portion of that decision.

But that's not the issue before this court. That is not the issue before this court. What's before this court is upholding and complying with and enforcing the order of the pro tem commissioner that was once again affirmed by Judge McCarthy of the Superior Ct and not appealed from. It remains the order in this case, and I will enforce that order.

And I tried to make that very clear last time the parties were before me. That's what the sentence was added for was to make sure everybody understood that continued to be in full force and effect, and I did intend to enforce it.

I have reviewed the request for attorney's fees line by line. And I realize these line by lines are kind of difficult. Obviously, I did a number of them over the years myself. Sometimes its not a complete story of what's being done. It's pretty hard to get in gee, the attorney's fees requested would be books long if you had to include everything that's being done, but the notations are sufficient for me to conclude that there's nothing unreasonable about any one of these particular line items that are

shown on the exhibit, the declaration of Hollis Barnett.

.....
.....

THE COURT: What I'm looking for is the justification for the \$600.00 that you are talking about today. How much time do you have in it today?

MS. JONES: That was one hour of Mr. Barnett's time for the rebuttal at \$250.00 plus 1.5 hours for my review and attendance today at \$235.

THE COURT: Without doing the calculation, that seems a little bit less than \$600. Am I doing it wrong here?

MS. JONES: Well, I did it without a calculator and while I was standing here, so that's entirely possible.

THE COURT: Well, I find that \$485 in reasonable additional fees between you and Mr. Barnett to prepare and proceed today. I just want to get the math right here. If I've got the math right, that would leave a total of \$8,617.50
.....
....."

The Court's "Order Re: Attorney Fees" reiterated that the attorney fee award was based upon the Order December 22, 2008 Order of Court Commissioner Quaintance and confirmed by Superior Court McCarthy on February 27, 2009. The order, **CP 141-142** provides:

"This matter, having come regularly before the Court on the Motion of the estate of Corrine Diane Wegner, by and through its attorney, Hollis H. Barnett, of

Campbell, Dille, Barnett & Smith, PLLC, Maxine Elaine Tesche appearing by and through her attorney, Barry Kombol, the Court having considered the Motion of the estate for an award of attorney fees, and the following documents Respondent's Memorandum of Authorities in Opposition to the Motion for Award of Attorney's Fees and Estate's rebuttal the Court in all things being advised, now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that the estate of Corrine Diane Wegner be, and hereby is, awarded judgment against Maxine Elaine Tesche for reasonable attorney fees incurred by Campbell, Dille, Barnett and Smith, PLLC in the amount of \$8,617.50 pursuant to the earlier court order authorizing an award of reasonable attorney fees entered December 22, 2008, as confirmed the superior Court order entered February 27, 2009."

(5) **Appeal of Order for Attorney Fees**

Maxine Tesche filed a Notice of Appeal of the attorney fees awarded to the Estate on Nov. 10, 2011.

D. **SUMMARY OF ARGUMENT**

The record presented to this Court on the trial court's award of attorney fees to the Estate clearly establishes that the Court committed reversible error in granting the estate a fee award in connection with relief it requested [the appointment of a custodial receiver] not authorized in the 2008 and 2009 Court Orders upon which the Court based its award of fees.

Judge Johnson declined to grant any of the substantive requests made by the Estate. Initially, as regards to the Estate's request to evict Ms. Tesche from her home and appoint a custodial receiver to sell it, the Court indicated in its dialog with Mr. Barnett that Ms. Tesche's counsel had '*raised some pretty good issues on the receivership issue*', declined to rule on the Estate's petition, and allowed the Estate to amend and re-note its request.

When the Estate returned two weeks later requesting appointment of a custodial receiver or a custodial referee it based its requests upon: "the Court, using its inherent equitable authority under TEDRA, RCW 11.96A, appoint a receiver under RCW 7.60, or a referee under RCW 7.52 ... " **CP 48.**

By asserting what the Estate's petition termed "the Court's inherent authority under RCW 11.96A" and RCW 7.60 and RCW 7.52, the Estate invoked those statutes without even bothering to incorporate into its petition either the December 22, 2008 or the February 27, 2009 earlier Court Orders.

However, the Estate also failed to comply with various important procedural requirements of the receivership act and the act relating to receivers.

At the second hearing on the Estate's petitions, held May 27, 2011, the Court accepted Ms. Tesche's arguments that it would be improper on both procedural and substantive grounds to appoint either a receiver or a referee to evict Tesche from her home and sell it to satisfy the Estate's judgment lien.

It cannot be argued that Tesche did not prevail against the Estate on all substantive requests the Estate had made. Despite prevailing against the Estate on its statutory requests for equitable relief, the Court reserved ruling an award of attorney fees on the basis of earlier Court Orders which the Estate had not relied upon in seeking relief in its petitions. Nor had the Estate complied with numerous procedural requirements in statutes regulating the appointment of Receivers and Referees.

The Court's fee award failed to differentiate between the fees incurred in connection with its request for the appointment of a receiver [which the Estate had no basis in prior Court Orders to request]

from the fees incurred for petitioning for the appointment of a referee.

E. **ARGUMENT**

1. **The Standard of Review**

Abuse of discretion is the standard of review of awards of attorney's fees by a trial court. Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998), Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 519, 910 P. 2d 462 (1996). Mahler and Rettkowski point out that it is important for trial courts to exercise their discretion on articulable grounds, making an adequate record so the appellate court can adequately review fee awards on an objective basis.

In probate matters, an appeal court will not interfere with a trial court's discretion in making fee awards 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 (1983).

There doesn't appear to be a reported Washington decision discussing the standard of review of an award of attorney fees *against* a party who prevails.

on all substantive parts of the petitions considered by a Court.

2. The Trial Court Abused its Discretion in granting the Estate a Fee Award in the sum of \$3,010.00 for fees incurred in seeking the appointment of a custodial receiver

Counsel for the Estate made application for the appointment of a receiver pursuant to R.C.W. 7.60.025(d) without having first personally served Ms. Tesche or posing a bond. Further, no Court Order existed in proceedings in the Wegner Estate which permitted the Estate to seek relief under the receivership statute for appointment of a receiver.

The receivership statute contains clear and specific provisions to ensure due process and to limit its application to certain circumstances. As is noted above, the statute also contains provisions to ensure due process and other procedural protections against misuse or mischief; such as a requirement that the petitioner and the receiver post bonds before a receiver is appointed and accepts its responsibilities and commences its duties.

7.60.025 provides:

“(1) A receiver may be appointed by the superior court of this state in the following instances, but except in any case ... in which a receiver’s appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate.”
[Emphasis Added]

The Estate failed to include in its petition any allegation or argument that the appointment of a receiver was necessary or that no other remedies were available or were inadequate to foreclose its lien. By this omission, the Court was deprived of an essential issue the receivership statute requires it to consider.

The Receivership statute also requires a Petitioner to give actual notice to the owner of property to be subject to the application, See RCW

7.60.025(3):

“(3) At least seven days’ notice of any application for the appointment of a receiver shall be given to the owner of property sought to be subject thereto . . .”

The Estate filed its petition and scheduled a hearing asking the Court to appoint a 'Custodial Receiver' to evict Ms. Tesche from her residence, assume possession of and sell her home without having served Ms. Tesche with its petition or even posting notice at the premises. One wonders whether counsel for the Estate had bothered to read the receivership statute before filing the Estate's petition.

The Petition also asked the trial court to ease the difficulties and expenses connected with gaining the relief it had requested by asking the trial court to 'waive' the necessity of posting Bond both on its application and by the receiver before the receiver commenced its duties.

Nothing in the Estate's pleadings revealed to the court of the mandatory provisions of the Receivership statute.

RCW 7.60.045 provides:

"Except as otherwise provided for by statute or court rule, before entering upon duties of receiver, a receiver **shall** execute a bond with one or more sureties approved by the court ...

[Emphasis Added]

The Estate not only requested that which the 2008 and 2009 court orders did not authorize; but then, without any basis or justification, asked the trial court to 'waive' that which the Receivership statute clearly mandates.

The Estate also failed to inform the Court of another important due process provision of the receivership statute authorizing the Court, under certain circumstances, to require a petitioner who requests the appointment of a receiver itself to post an additional Bond before a petition would be granted.

RCW 7.60.025(5) provides:

"The Court may condition the appointment of a receiver upon the granting of security by the person seeking the receiver's appointment"

It's important to mention [as Ms. Tesche did to the trial court] that the Wegner Estate was virtually insolvent and illiquid. Perhaps the reason the Estate neglected to reveal the bonding requirements to the trial court had to do with its significant financial difficulties. Those difficulties should

have been all the more reason to ensure that an individual such as Ms. Tesche could have an assured source of recovery if the receivership application (or the actions of the receiver) were found to be unjustified or improper.

The Estate seemed to have considered that proper service of process or posting of notice of its petition (or the filing of the sort of bonds required by the receivership statute) either unimportant or too trivial to mention when it argued to the Court that it was entitled to be granted its petition for the appointment of a receiver.

Interestingly, as Ms. Tesche argued to the Court, at **CP 38, lines 12-16**, that the receivership statute even contains a provision setting that venue for such proceedings in the county where the property is located. RCW 7.60.025(2) provides, in relevant part:

" . . . The venue of [a receiver-ship] proceeding may be any county in which the person resides or maintains any office, or any county in which any property over which the receiver is to be appointed is located..."

Still in all, the Court below made a \$3,010.00 fee award to the Estate for legal fees incurred exclusively in connection with the Estate's first petition filed on April 26, 2011 (and argued on May 13, 2011) for the appointment of a 'Custodial Receiver' despite the numerous procedural errors the Estate had committed in seeking to appoint a receiver to sell Tesche's property. It was an obvious abuse of discretion for the trial court to make a fee award to the Estate after Tesche pointed out the existence of those deficiencies.

3. **The Trial Court Abused its Discretion in granting a Fee Award in when Ms. Tesche prevailed on the procedural and substantive grounds she raised below.**

Ms. Tesche argued that she had never received service of either the petition for appointment of a custodial receiver or of the amended petition for appointment of either a receiver or a referee to take possession of and sell her residence.

Ms. Tesche pointed out that the residence was her homestead and that the Estate had an adequate remedy at law (the execution statute) which made it unnecessary to resort to the court's "inherent,

equitable authority under TEDRA, RCW 11.96A" or to appoint either a receiver under RCW 7.60 or a referee under RCW 7.52." See Tesche's Memorandum of Authorities, **CP 38-39**, where her counsel wrote:

"Maxine Tesche resides at the property in Enumclaw. She has an 'Automatic Homestead' in her residential property, which she asserts. The Petitioner knows she resides there and is presumed to be aware of the provisions of Washington law creating an 'Automatic Homestead' in residential property, as provided in RCW 6.13.

The Exemptions statute reasonably provides that the Homestead created by statute is presumed to be valid and that any contest over the validity of which must be adjudicated in King County, see RCW 6.13.070(2):

(2) Every homestead created under this chapter is presumed to be valid to the extent of all the property claimed exempt until the validity thereof is contested in a court of general jurisdiction in the county ... where the homestead is situate.

Tesche also argued below that any dispute over the validity of a Claim of Homestead or any effort to execute against the real estate had to be done in King County, because the property was located in that county. Ms. Tesche filed proof that she had asserted a Claim of Homestead, **CP 99-100** and that she had not abandoned her Homestead. **CP 97-98**

Appellant argued to the trial court that the Exemptions statute provided that the Homestead created by statute is presumed to be valid and that any contest over its validity must be adjudicated in the county where the property is located. **CP 39**

See RCW 6.13.070(2):

"Every homestead created under this chapter is presumed to be valid to the extent of all the property claimed exempt until the validity thereof is contested in a court of general jurisdiction in the county . . . where the homestead is situate."

(Emphasis Added)

Tesche filed a lengthy Memorandum of Authorities outlining all of these arguments in advance of the hearing on May 27, 2011. Tesche's counsel's oral arguments to the Court included the assertion of the principal that if a party has an adequate remedy at law, resorting to equitable relief is not appropriate. This argument appears in the Verbatim Report of Proceedings, May 27, 2011, Page 21, line 19 to Page

26, line 15:

THE COURT: . . . What would be the terms and conditions that the trial court should impose or should I impose here on the

sale if there's an appointment of a referee?

MR. KOMBOL

Well, we should look at what the referee statute says, and the referee statute, there is none. It's a partition statute. As so I think there's a bind here. I think there's a bind that if you look at that statute, it's not permitted.

Next, why shouldn't a referee be appointed under the equitable powers? Well, I don't think under equitable powers, first of all, we should look at what the legislature would suggest is possible. And the Legislature in the appointment of a receiver especially a custodial receiver, which is the request being made, requires notice to the party who is sought to be bound. And the notice isn't three years ago, the notice isn't to me. The notice is service [of process]. And you know, I know the execution statute. If this were simply an execution of a judgment, there would be mailings, service, posting. My client says-- and it's uncontroverted

-
that she has not -- she's gotten none of those things.

And so, if the court is going to fashion, as what's being requested an equitable remedy that doesn't exist in statute, then what would you look to? What would you look towards?

What counsel for the petitioner would like, just to have it done? Or would the court say, well, I guess I'll think of my own procedure, and I'll adopt a procedure about how this should start from beginning to end and that's a lot of work for the court.

So I don't think that right now this case comes any way equitably to allow the court simply to say, well,

I'm going to appoint a receiver -- I mean, I'm going to appoint a referee without notice, without service, without instructions.

And I guess I'll ask counsel; is the request for a referee, a custodial referee?

MR. BARNETT: I'll address the court.

THE COURT: Address yourself to the court.

MR. KOMBOL: Well, I didn't know. The pleadings have changed.

THE COURT: You've raised that there's a question. We heard your question.

MR. KOMBOL: I'm just saying -- and so if it were an equitable remedy, I think we'd have to look at some equitable manner of doing it -- so if you want me to argue the third issue, first receiver, I've argued that.

THE COURT: Yes.

MR. KOMBOL: I mean, I want the court -- because we're going to try to structure this in a little bit different way -- partition -- I mean referee, I've next argued that. TEDRA law, I think that's the third argument. Am I correct?

THE COURT: Well, it's up to you to argue it anyway you wish.

MR. KOMBOL: I mean, I think that that was the third argument that I heard, and TEDRA law indicates to me that the Legislature wants courts want these things to be administered and settled without undue litigation.

The TEDRA law is called Trust and Estate Dispute Resolution, and the Legislature has furnished us with lots of instructions here under this new statute and has indicated that the statute is for resolution of disputes and other matters involving trusts and estates intended to provide a non-judicial method for resolution of matters such as mediation, arbitra-

tion and agreement. That's the purpose of TEDRA.

So counsel argues TEDRA. And then counsel wants to go beyond the purpose of TEDRA and suggest that TEDRA allows the court to just kind of ignore the purpose and go ahead and fashion its own remedy, and just do it here with instructions from the court. Well, that's not permitted under TEDRA.

There are so -- this is so unusual, and the remedy is so -- I've been here for 34 years and I've never heard anything like this, to kind of grasp into the air and find Common-law powers and equitable powers, and ignore the court order, and ignore the TEDRA law and ignore the receivership law, and come up with a new remedy and suggest this court should adopt it without notice to my client.

I just -- and I guess I could argue, and if you want me to argue how I could resolve this if it were me, if I had gotten myself in this sort of box. I mean, there is a problem. The petitioner wants something. Number one, the court order could be amended. To remedy the order that is being relied upon, that could be amended. Come back before you because you've taken over this case and amend it, and get an instruction under that order.

Or we have a judgment. We have an execution statute. The sheriff of King County could -- this court could issue a statutory procedure if there's a judgment, collect your judgment. Now that's statutory, and I don't know why that's not something.

And so if you have an adequate remedy at law, and we know that's the law of equity, what on earth are we coming here asking the court to fashion and function as some kind of a

-- in an unfair capacity for this court, really to come up with a method to rewrite -- to supplement statutes equitably.

And if you would like, I'll then go to the equitable argument, just pure equitable terms. And I don't know if the court has thought that I have addressed the issues of statutorily or equitably. If you want me now to address the equities, I could, your Honor.

THE COURT:

MR. KOMBOL:

It's up to you. It's your nickle. There is un-refuted evidence here, Your Honor, that in this case from the beginning there has been, at best, very unusual actions and un-equitable actions, ones that I've never seen before. I don't think this court has ever seen. When a party who is the co-owner by -- deed is asked to come into -- in a counsel's office and then is badgered and argued with, and challenged while unrepresented. I don't think arguing with unrepresented people in one's office is equitable. I don't think it's pursuant to any ethical rule. In fact, I think it's wrong. I've never done it. I've never seen anybody do it, but it was done. Counsel, I'm going to cut you just a little bit, because I think what you're doing -- if you'll just curtail your arguments to where we are today. Because I think those arguments that might very well have going to the appropriateness of the \$16,000.00 judgment that was entered in this case. But I don't think they go to what we do to enforce a prior court order. That's something way beyond this.

THE COURT:

You're actually talking about what happened prior to the entry of the order. Those issues, if they

weren't addressed, should have been. If not, I don't know. I don't mean to criticize you.

MR. KOMBOL: I'm not accepting any criticism. I think in that case, Ms. Tesche was served that way. Ms. Tesche did have to respond. Ms. Tesche was treated un-equitably. So in terms of this order and equities here, I'll just point out that --

THE COURT: I'm going to cut you off on equities before the entry of this order. Let's talk about after the entry of this order. I don't want to have to re-argue the whole darn case again, Mr. Kombol. That's already been argued, gone to the Court of Appeals and back. Let's stay with the issues of how to carry out the Court's order.

MR. KOMBOL: All right, Your Honor. I'm sorry that I have to go here, but the court order -- the court order includes debts that were incurred while this estate was in possession of the property that it didn't pay. It's uncontroverted at this point that the estate didn't pay the underlying mortgage; that it allowed the property to fall into foreclosure, and these are parts of the judgment.

THE COURT: But they're not before me today. The question is there a judgment out there for roughly \$16,000 plus interest and attorney's fees, that's yet to be argued, but that's where we are at today.

MR. KOMBOL: There is a judgment. And the equities -- all right. I'll just go on the equities after judgment.

THE COURT: On enforcement of judgment. How to enforce it.

MR. KOMBOL: No service, no service. You've heard that.

THE COURT: I heard it

MR. KOMBOL: No notice.

THE COURT: I heard that.

MR. KOMBOL: Objection by my client to lack of service, lack of notice. Objection from my client with regard to the process, the very process that's being sought to be done. And the objection is based upon the underlying facts, the underlying facts of possession of property, misuse of power, that's a fact. It is regarding enforcement of this judgment.

I don't know if this court, I certainly have never heard of anyone taking possession of property when there's another remedy available. That doesn't seem equitable to me, post judgment.

I think those are my arguments with regard to equity. Well, I've already said, You Honor, that when there's an adequate remedy at law, we really don't look toward equity, because we would look to statute.

THE COURT: Thank you.

Tesche's Counsel was attempting to argue to the Court issues that had been discussed in a Declaration Ms. Tesche had filed prior to the hearing, **CP 88-96** (with a Declaration of Service appended **CP 98-96**) revealing that the case against her had commenced when she was asked to meet with Mr. Barnett at his firm's law office in Puyallup, Washington in April of 2006.

At that meeting Mr. Barnett interrogated Tesche about the nature of her ownership of the real estate

she had purchased with Corrine Wegner as Joint Tenants. Ms. Tesche described that Mr. Barnett and she argued over the issues he was raising over the ownership of the real estate. Mr. Barnett then asked Ms. Tesche to wait in his office. **CP 90, lines 18-21**

Ms. Tesche described waiting for some time in Mr. Barnett's office until a member of his staff appeared and served her with a Summons and Petition which commenced the quiet title litigation. The Declaration of Service shows service of process was at the law offices of Campbell, Dille, Barnett, Smith and Wiley.

Judge Johnson ruled in favor of Tesche in her objection to the appointment of a Receiver or a Referee. Judge Johnson's oral ruling indicated that the Estate did have an adequate remedy at law, under the Execution of Judgments statute, thereby adopting the arguments made by the Appellant. See Verbatim Report of Proceedings of May 27, 2011, page 35, lines 1-8.

Despite adopting Tesche's arguments and issuing a ruling denying the Estate's petitions, the Court

reserved: "Petitioner's right to request, per the prior court orders, reasonable attorney's fees."

An obvious question arises. What basis could exist in the prior court order which would allow the Estate to assert attorney fee requests when the petitions had not been made with reference to the earlier court orders, but rather on statutory bases, and the petitions were found wanting - and were denied.

Again the Court abused its discretion and clearly erred in denying the relief the Estate had requested by also adopting the appellant's arguments and then granting the Estate all attorney fees it had requested, including fees incurred in presenting its October, 2011 motion for the award of fees.

No reported Washington opinion can be found which stands for the proposition that an Estate (or any party who requesting equitable relief from a Court) can not prevail on all substantive issues relating to those requests and still recover all legal fees incurred in asserting its defective and failed requests for relief.

Unless there exists some authority for the proposition that a party or an Estate can [a] request relief; [b] have that relief denied on procedural and substantive grounds; and then [c] be given an award of legal fees for the effort, the trial court must be found to have abused its discretion.

4. The Trial Court Abused its Discretion in granting the Fee Award in when it did not find it 'Necessary' for the Estate to Petition to Appoint a Referee.

The 2008 Court Order, kept intact by Judge McCarthy, contains language that Judge Johnson struggled to understand and apply to the facts and circumstances presented to him by the Estate. The language with which he struggled was:

"Should it be necessary for the estate to file a petition for appointment of the referee, then the estate shall be entitled to all reasonable attorney fees incurred..."

The trial court's difficulty in applying the facts and the Court Order to the Estate's petition is revealed in the Verbatim Transcript of Proceedings, between Pages 32 and 35.

THE COURT:

The puzzling language here is it's not an order that says the court shall appoint a referee who shall have authority to appoint; but instead; it's the right to bring a motion for appointment of a referee. Which is a curious choice of words, because it puts me in the position of saying -- it's odd, because parties can bring a

motion for darned near anything. And certainly, there's a focus on appointment of a referee here. But it doesn't say a referee shall be appointed. It says a motion for appointment of referee.

MR. BARNETT: But it does say who -- the referee, who shall have authority to sell the real property on terms and conditions the court will order.

THE COURT: Right, but again -- I don't mean to be entering into your argument here. But again, I looked at it, and it says bring a motion for the appointment -- for if the appointment of the referee happens, then -- to read the sentence carefully -- that referee would then have authority to sell the property on terms and conditions the court orders.

So the first question is, should the motion, itself, be approved; and the second question is, what would those -- if you do appoint, then they would have authority to appoint on the conditions of the court order. So it's kind of a two-step process.

So the first stage is what Mr. Kombol is arguing, I think, and that is that the motion should not be granted, which was left open for a future judge to look at or for that judge or commissioner to look at by later date.

MR. BARNETT: But if we look at the earlier language, there's a judgment lien, a judgment lien to protect the administrative costs that were required to be paid.

THE COURT: I understand.

MR. BARNETT: The only way to enforce that is through an equitable court order. It didn't say we'd go by execution. It said the court would order -- that a referee would order, I'm sorry.

THE COURT: Well, I think I've expressed what I'm reading here. And it's not that. It's that a motion can be brought. So that

leaves the discretion up to the future judge to decide whether or not to grant that motion. That's the way I read that. And I think that's a fair reading of these documents.

If the court had wanted to say that if she doesn't pay within 100 days the court shall appoint a referee, that could have been done and it wasn't. It was for a motion to consider appointing a referee. That's where we're at today.

And here is where I come down -- I know you're not going to be happy, but here's where I come down -- this looks to me like a judgment pretty much like any other monetary judgment. The great equities of the situation here, the fairness and so forth, we see virtually in every judgment how unfair it can be. I'm looking at this and saying, I think this judgment lien -- I don't want to go here because I don't know this part of the law and I haven't searched it, I think the judgment lien is effective the day it was entered, if it was recorded in King County particularly.

The judgment lien is there. Even though it was 180 days delay in foreclosing on that lien, the judgment lien was there. If a Homestead interest attaches later, I'm not sure how that works; it looked to me like the Homestead attachment was very recent, at least in the form you would file it. So I don't know how it affects your ability to enforce that judgment.

But I look at this as being really not much more than look, it cost to administer the estate. You're entitled to a judgment for those costs. You have got the judgment. It includes the judgment lien, but the ultimate decision here is how do you execute on that remedy. And the court said you could bring a motion but didn't say it shall be a referee. And I look at it and I think, I don't see there's any

particular reasons that this judgment -- and I've been around a long time, too -- would be any different than any other judgment that comes to be enforced.

The trial court's fee award to the Estate is an abuse of discretion, because the Court found that it was unnecessary for the Estate to petition the Court for the appointment of a referee, because the Estate already had a 'Judgment' as well as a 'Judgment Lien' against Maxine Tesche's property, which furnished it with adequate remedies at law.

As a consequence of having that lien, the Court concluded that the estate had the ability to enforce its lien claim the same way judgments are normally enforced. See Verbatim Report of Proceedings of May 27, 2011, page 40, lines 4-10:

"So those are my decisions in this case. But let me make it clear. The initial, the key case that you're looking at, and that is - is the court going to fashion an equitable remedy to enforce the remedy in this case, or an equitable way to enforce the remedy in this case beyond the normal enforcement of the judgment and I'm sorry to say, no."

Logic dictates that it can't go both ways. It was illogical and an abuse of its discretion for the trial court to have essentially ruled that because the Estate had an adequate remedy at law, it was not

necessary for the Estate to bring a petition to appoint a referee (because the estate already had a lien against Ms. Tesche's real estate) and thereafter to grant the Estate's its request for attorney fees, apparently concluding that it was *sufficiently* necessary for the Estate to file its petition to appoint of a receiver so as to make the Estate's attorney fee request reasonable.

Either the petition was necessary and the fee request reasonable or the petition was not necessary thus rendering unreasonable any fee request. That type of illogic is an abuse of the trial court's discretion

5. **The Court on Appeal Should Award Fees Award Based upon the Estate's Conduct Below.**

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."

Once again the Personal Representative of the Wegner Estate commenced a proceeding against Maxine Tesche, initially in the form of a Receivership Petition, without its counsel appearing to have read

the receivership statute or even ensured that fundamental procedural requirements were in place before noting a hearing its Petition. Then the Estate failed to apprise the Court of important procedures mandated by the Receivership Statute.

Once again (as in an earlier proceeding in this same case) after having failed to prevail on any of the Estate's requests, the Estate's counsel sought to recover a sizable attorney fee award in connection with the Estate's fruitless endeavors.

This Court's earlier ruling in the dispute between the Estate and Maxine Tesche, In Re: Estate of Wegner v. Tesche, 157 Wn. App. 554 (2010) is surely not authority for the proposition that fee awards in probate matters can be based simply on filing pleadings on dubious grounds, and then after it's requests have been denied entirely because it is unable to convince the Court that it could [or should] issue orders that are not warranted under the law of the case or the receivership statute or the law governing the appointment of a referee or any purported 'Inherent, Equitable Authority' of a Court. To quote Macbeth, Act 5, Scene 5:

*"Life is but a walking shadow, a poor player
That struts and frets his hour on the stage
And then is heard no more: it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing."*

When no consideration has been given to serving an opposing party with process; no effort has been made to ensure that bonds have been acquired and filed with the court; then requesting [contrary to statutory mandate] that the Court waive the requirement for posting a bond; all with the objective of dispossessing a person of her residence and, if successful in the enterprise, gaining the appointment of a receiver or referee to sell the property, mischief and unfair advantage and undue compulsion can result.

Were this the first time that such conduct was observed by the Estate and its counsel, it might be attributed to simple error or inattention. When such practices continue, at considerable cost to an adversary, the question of adequate redress arises.

This court, in its opinion with regard to fee awards when the Estate of Corrine Wegner and Maxine Tesche were before it in 2010, addressed the somewhat issue obliquely. In the "**AWARD of FEES**" portion of the decision, the Court opinion states:

"Here, the expenses sought [by the estate] were incurred during an unsuccessful lawsuit against Tesche, the beneficiary of the non-probate asset. Thus we can easily conclude that it would be unfair to require her [Tesche] to pay all of the expenses incurred in that litigation."

So far, so good. However, what about a situation when a person such as Maxine Tesche must, for a second time, be forced to incur substantial legal fees and court costs in defending against an action which she has only heard about from her counsel, when she was traveling out of state, which action is found defective in various respects and is denied in its entirety.

What is Maxine Tesche's remedy for being forced to defend against a Petition for the Appointment of a Custodial Receiver to evict her from her home?

What is Maxine Tesche's remedy for having to defend again against a request for thousands of dollars in legal fees incurred by an adversary who initiated proceedings that were found flawed and unwarranted?

What can protect a lady such as Maxine Tesche from being legally abused and put-upon for what seem to be dubious grounds if not dubious purposes?

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). Before a pleading can be the proper subject of CR 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 v. Heuft, 141 Wn. App. 624, 174 P.3d 95 (2007)

Pleadings which are grounded in fact and 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*

What inquiry did Mr. Barnett make before filing the Estate's petition for appointment of a custodial receiver with authority to evict Ms. Tesche

from her residence and then sell it? Why was no service of process attempted against this woman? Why was there no posting of a Notice of Hearing upon her residence? Why would an attorney for an estate seek to avoid the requirement of posting a bond before requesting the appointment of a custodial receiver with the type of power over another's property that was sought by the Estate?

Ms. Tesche argued in her Memorandum of Authorities, **CP 39-40** and **CP 42, lines 21-23** that she was entitled to CR 11 sanctions against the Estate and its counsel because she was forced to defend against petitions and requests for relief that were without foundation.

Tesche's memorandum to the Court argued:

"Petitioner's request is so unjustified, so erroneous and so contrary to Washington law and statutory authorities as to cause this writer [and should cause this court] to question why Mr. Barnett would make such a request. Mr. Barnett has stated to this writer that unless Maxine Tesche pays the Judgment Lien in this case, the Estate of Corrine Wegner and his firm are willing to run up litigation costs, presumably as a penalty or even worse as a 'lever' to force the Respondent to pay the Judgment [which consists primarily of legal fees Mr. Barnett and his firm seek to recover].

The litigation and pressure tactics are unwarranted and unjustified. CR 11 prohibits the use of legal proceedings in the manner Mr. Barnett and his client are using. Mr. Barnett appears not even to have read the Receivership statute before filing the petition now before the court. CR 11 bars the filing of pleadings which are not warranted by existing law or an argument for the extension of existing law. The 'law' in this matter includes not only the relevant receivership statute, but the Court Order Mr. Barnett obtained back in 2008 [the Order that allowed the appointment of a 'Referee'. Mr. Barnett and his client should be sanctioned for the misconduct under CR 11 that is so egregious."

The questions posed by Ms. Tesche beg for answers. The opportunity for mischief, compulsion and abuse is great when there is an absence of any check on unbridled use of authority, statutory or otherwise.

To the extent that the Estate and its counsel are unable to answer the questions appellant has posed, request is respectfully made for this court to consider an award of legal fees and costs in favor of Maxine Tesche pursuant to the authorities cited above.

F. CONCLUSION

The Trial Court abused its discretion in awarding the Estate of Corrine Wegner attorney fees on its unwarranted and improper attempt to use the Receivership statute to seize and sell Maxine Tesche's home.

The Trial Court abused its discretion in making an award of attorney fees to the Estate of Corrine Wegner after having denied the Estate's requests for the appointment of a receiver or the appointment of a referee on substantive and procedural grounds.

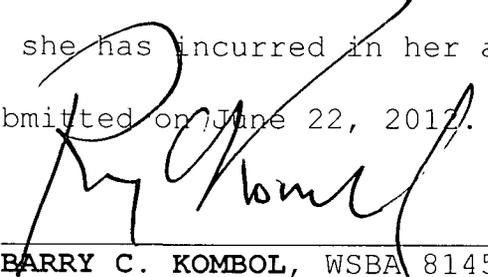
The Court of Appeals should, on the record now before it, reverse the Court's fee award of October 14, 2011 because on the grounds pointed out and argued in this brief as well as before the Court below, it is an abuse of discretion to award attorney fees against a prevailing party when it was that party's whose legal arguments were adopted by the Court in denying the requests made by its adversary.

In the event there is any question or confusion about Judge Johnson's reasoning below, this Court could remand the case to the Superior Court with instructions as to the issues that should be considered and resolved in making a ruling on the Estate's fee requests.

For the reasons set forth in Paragraph 4 of Maxine Tesche's argument to this Court, appellant respectfully asks the Court, pursuant to CR 11(a) and under the authority of RAP 18.1(a)and(b) award her all legal fees she incurred in connection with defending against the

Estate's petitions in the Superior Court as well as all
legal fees and costs she has incurred in her appeal.

Respectfully Submitted on June 22, 2012.



BARRY C. KOMBOL, WSBA 8145
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II

2012 JUN 22 PM 3:37

STATE OF WASHINGTON

BY 
DEPUTY

DIVISION TWO, COURT OF APPEALS OF STATE OF WASHINGTON

MAXINE ELAINE TESCHE,

Appellant

vs.

In Re: Estate of Corrine
Wegner, Deceased and Kenneth
Wegner, P.R.,

Respondent.

No. 42789-3-II

CERTIFICATE OF SERVICE

I certify that the following statement is true and correct,
under penalty of perjury, laws of the State of Washington:

I am now and at all times herein mentioned a citizen of
the United States and resident of the State of Washington, over
the age of twenty-one years, not a party to the above entitled
action and competent to be a witness therein:

That on the 22th day of June, 2012, I delivered two
original **Appellant's Opening Brief** to the Court of Appeals,
Division II. I further certify on the same day, I placed
in the U.S. Mails, First Class, Return Receipt Requested an
envelope to the attention of **SHANNON JONES** containing
Appellant's Opening Brief, consisting of Fifty Pages along

1 with a Cover Sheet and Table of Contents to the following
2 named attorney at the following address, to wit:

3 **Ms. Shannon Jones**
4 Attorney at Law
5 317 South Meridian
6 Puyallup, WA. 98371

7 **DATED** this 22nd day of June, 2012 at Black Diamond,
8 King County, Washington.

9 

10 **NICOLE EICHELBERGER**
11 c/o Rainier Legal Center
12 31615 Third Avenue
13 Black Diamond, WA. 98010

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DIVISION TWO, COURT OF APPEALS OF STATE OF WASHINGTON

In Re: Maxine Elaine Tesche,)	
)	No. 42789-3-II
Appellant)	
vs.)	
)	AFFIDAVIT OF MAILING
Estate of Corrine Wegner,)	DRAFT BRIEF OF APPELLANT
Deceased and Kenneth Wegner,)	MAXINE ELAINE TESCHE
P.R.,)	
Respondent.)	

STATE OF WASHINGTON)
) ss.
 COUNTY of King)

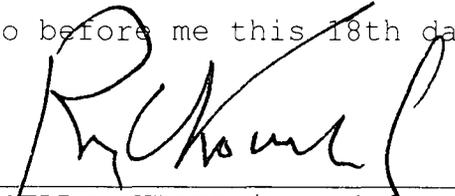
SUSAN BURNETT, being first duly sworn upon oath, deposes and says:

1. That on the 18th day of June, 2012 I deposited in the United States Mail, via First Class, postage prepaid, a copy of the "Draft" Brief of Appellant Maxine Elaine Tesche and the same document was sent via facsimile to (253)845-4941 to the following named individual to wit:

Shannon R. Jones
 Campbell, Dille, Barnett & Smith PLC
 Post Office Box 488
 Puyallup, WA. 98371-0164

Susan Burnett
 SUSAN BURNETT

1 **SUBSCRIBED** and **SWORN** to before me this 18th day of
2 June, 2012.


3
4 **NOTARY PUBLIC** in and for the
5 State of Washington residing
6 at Black Diamond Wa
7 My commission expires: 5/1/14

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28