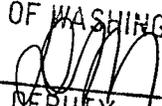


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY 
DEPUTY

**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
Case No. 42789-3-II**

**IN RE: ESTATE OF CORRINE D. WEGNER, DECEASED and
KENNETH WEGNER, P.R.**

Respondent

v.

**MAXINE ELAINE TESCHE,
*Appellant.***

Brief of Respondent

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

**In re: Estate of Corrine D. Wegner,
deceased and Kenneth Wegner, P.R.,**

Case No. 42789-3-II

Respondent

Brief of Respondent

and

Estate of Corrine D. Wegner

Maxine Elaine Tesche,

Appellant

I. RESTATEMENT OF THE ISSUES

Issue No 1: The trial court did not err in awarding the estate attorney fees because the fee award was required by a prior order which was final, affirmed on appeal, and the “law of the case.”

Issue No. 2: The trial court did not err in awarding the estate attorney fees because those fees were necessarily incurred when the appellant failed and refused to pay a valid judgment, affirmed on appeal.

Issue No. 3: The trial court conducted sufficient review of the estate attorney fee records and made findings sufficient to support the award of attorney fees to the estate.

Issue No. 4: The estate is entitled to reasonable attorney fees on appeal.

II. COUNTER STATEMENT OF THE CASE

A. Summary of Facts: Pre-2010 Appeal.

The underlying facts of this case are fully summarized in this Court's ruling in Estate of Wegner v. Tesche, 157 Wn.App. 554, 237 P.3d 387 (2010). CP 154-168. Corrine Wegner died intestate on February 20, 2006 and her principal asset was real property owned with the Appellant, Maxine Tesche, in joint tenancy with right of survivorship. CP 155. There was a dispute as to whether Tesche had only an equitable mortgage on the property, not survivorship rights, and a suit was filed by Corrine's personal representative in an attempt to recover the property.¹ Id. The lawsuit claims were dismissed, but the estate preserved its right to charge a fair share of administrative expenses and creditor claims to Corrine's interest in the real property under RCW 11.42.085. CP 156.

On December 22, 2008, Commissioner Pro Tem Joe Quaintance signed an order closing the probate estate, provided Tesche pay \$16,212.58 of the estate obligations (creditor claims and a portion of estate attorney fees). CP 1-9. The Court concluded that the \$16,212.58 was a judgment lien against the real property. CP 6. If Tesche did not pay the

¹ For clarity, the decedent will be referred to by first name and the appellant by last name, which is consistent with this court's opinion on the prior appeal.

\$16,212.58 within 180 days, the order provided:

“...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 after the date of entry of the decree herein until receipt of the judgment lien payment in full...**” CP 8. Emphasis added.

The judgment lien bears interest at the rate of 12% per annum from the date of entry of the decree. CP 6.

Tesche moved for revision of the commissioner’s order without specifying which portion of the order she was challenging. The estate then filed its own motion for revision. Both motions were denied by Judge John A. McCarthy on February 22, 2009, and the original order of the Court Commissioner was affirmed. CP 158.

On March 25, 2009, Tesche appealed Judge McCarthy’s ruling. On October 8, 2010, this appellate court filed its mandate with part published opinion. CP 152-168. This court found no reversible error, Judge McCarthy’s decision (and thus, the court commissioner’s order) was upheld, and the case mandated back to the Pierce County Superior Court for further proceedings. Id.

B. Summary of Facts: Post-2010 Appeal.

Following the mandate, the estate attorney, Hollis Barnett, corresponded with Tesche's attorney, Barry Kombol, on October 11, 2010, and again on February 14, 2011, requesting the judgment lien plus interest be paid. CP 68-69 and 66-67. The balance then owing was \$19,719.72. In both letters, Tesche was reminded of the December 22, 2008 Order which allowed the estate to petition for sale of the real property to satisfy the debt. Id. In addition, Hollis Barnett spoke to Barry Kombol on the telephone, requesting payment. CP 12. Neither Tesche nor her attorney took any action to pay the monies owed, and the estate therefore filed a Petition to Appoint Custodial Receiver on April 26, 2011. CP 10-15.

Tesche's counsel received the estate's Petition to Appoint Custodial Receiver on May 2, 2011, but admittedly failed to file a timely response. VRP, May 13, 2011, p. 25, lines 17-20, and p. 26, lines 10-16. At the initial hearing on the Petition, Judge Garold Johnson therefore refused to consider anything but oral argument from Tesche's counsel. Id. Judge Johnson commented that he had no opportunity to make a well-reasoned decision because he had no chance to look at the law and the cases. VRP, May 13, 2011, p. 34, lines 1-4. Judge Johnson made no ruling at the initial

hearing and instructed the estate attorney to re-note the hearing. VRP, May 13, 2011, p. 35, lines 16-24.

The estate filed an Amended Petition to Appoint Receiver or Referee and scheduled the Petition for hearing on May 27, 2011. CP 48. The estate necessarily responded to Tesche's prior pleadings (untimely for the initial hearing) by filing a legal memorandum responding to Tesche's claim of a homestead in the real property (CP 51-53), a legal memorandum regarding the court's authority to appoint a receiver or referee (CP 54-62), and a declaration to support striking false statements made by Tesche's counsel in a previously filed affidavit (CP 63-69).

In response to the Amended Petition, Tesche's counsel filed a "Reply" which was actually in the form of an answer, admitting or denying the allegations of the estate's Amended Petition, as opposed to a legal memorandum (CP 75-77), his personal declaration alleging the impropriety of prior communications between counsel (CP 78-81), Tesche's declaration for "credits" toward the outstanding judgment (CP 82-87), Tesche's declaration for sanctions against estate counsel (CP 88-96), and yet another Tesche declaration for "non-abandonment of homestead" (CP 97-100). Tesche's counsel also requested that the hearing

on the Amended Petition be continued and that the request for a continuance be heard on shortened time. Id. Estate counsel filed a declaration to rebut the false statements of Tesche's pleadings and a hearing on all of these pleadings occurred on May 27, 2011. CP 107-121.

At the hearing on the Amended Petition, Judge Johnson referred specifically to the number of motions made by Tesche's counsel including the request for credits against the judgment, the request to strike pleadings, the request for a more definite statement, and the request for CR 11 sanctions. VRP, May 27, 2011, p. 38-39. Judge Johnson found that the motions were not properly noted and also specifically found that the motions "clog the case and distract [...] from analyzing the proper motion [...]" Id. Judge Johnson did not consider the homestead issue. VRP, May 27, 2011, p. 42, lines 17-20.

Judge Johnson declined to appoint a receiver or a referee as of May 27, 2011, and his Order contains the following finding:

"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 [estate] is free to conduct execution proceedings in any manner authorized by law..." CP 102, lines 1-5.

Judge Johnson's May 27, 2011 Order denied Tesche's motions for an order shortening time and for a continuance as untimely, and denied all

other motions filed by Tesche for which no Note of Issue was filed. CP 102. Judge Johnson found Tesche's request for CR 11 sanctions was without basis and the request was denied. CP 103. Finally, Judge Johnson specifically reserved the estate's right to request reasonable attorney fees pursuant to the December 22, 2008 Order. CP 103, lines 10-18.

With respect to the estate's right to attorney fees, in his oral ruling Judge Johnson stated as follows:

“One thing I want to add to this order when we get to it; and that is [the estate's] right to attorney's fees and costs. I'm fully aware that the court ordered – that's not an option. That is a right for reasonable attorney's fees and costs were to be considered at some future date, and because we're not at the point right now, execution yet on this judgment, full execution, I think it's not appropriate to do that today.

But I want to be sure the record is clear and the order is clear that [the estate's] right to attorney fees and costs are preserved for whatever court – and the reason I say that is whatever court is I know we have property in King County. We may have an issue on exactly where you execute this judgment. I am fully aware of that. So I just want to be sure the record is clear that [the estate's] right to attorney's fees and costs are not being determined today. They are being preserved.” VRP, May 27, 2011, p. 43, lines 8-24.

On October 4, 2011, the estate filed its motion for an award of attorney fees pursuant to the December 22, 2008 Order, upheld by Judge McCarthy on February 27, 2009 and by this appeals court by mandate dated October 8, 2010. CP 122-124. The motion noted that the estate had a few days

prior received a notice from a lending company which Tesche had contacted for a refinance, requesting a payoff figure on the judgment. CP 124. The estate attorney submitted a declaration with a detailed list of attorney fees incurred from October 11, 2010 (post-mandate) through August 28, 2011, which totaled \$8,132.50. CP 125-129. Tesche opposed the motion because the court had declined to appoint a receiver or a referee; therefore, Tesche argued that the estate had not “prevailed.” CP 130-140. Tesche made no specific objection to the reasonableness of the estate fees (time expended or hourly rate charged). Id.

Judge Johnson granted the estate’s attorney fee motion on October 14, 2011. CP 141-142. In his oral ruling, Judge Johnson noted the absolute significance of the December 22, 2008 Order:

“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 Court and not appealed from. It remains the order in this case, and I will, indeed, 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.”

Judge Johnson followed the December 22, 2008 Order and awarded the estate all of its fees incurred subsequent to the mandate -- \$8,617.50 in

estate attorney fees. Tesche's only assignment of error on appeal is that Judge Johnson erred in awarding the estate \$8,617.50 in attorney fees on October 14, 2011. See Appellant's Brief at pp. 3-4.

III. ARGUMENT

Tesche argues that the issue on appeal is reviewed only for abuse of discretion. In re Estate of Larson, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). This is correct. As noted in the previous appeal in this same case, the record before the appeals court is the same as the record before the superior court, thereby putting the appeals court in the same position as the superior court in determining the reasonableness of fees. Larson, Id. at 521-522. Abuse of discretion occurs only if the exercise of discretion is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Moreman v. Butcher, 126 Wn.2d. 36, 40, 891 P.2d 725 (1995).

Issue 1: The estate attorney fee award was required by the prior and final court order, which was affirmed on appeal and is "the law of the case."

A. The December 22, 2008 Order requires the fee award.

A final order from which no appeal is taken becomes the law of the case. State v. Sponburgh, 84 Wn.2d 203, 208, 525 P.2d 238 (1974). The

law of the case binds the court and the parties. Id. In addition, collateral estoppel applies where a prior court order has decided an issue, the order is final, the party who will be estopped is a party to the prior order, and application of the doctrine does not work an injustice. Lenzi v. Redland Ins. Co., 140 Wn.2d 267, 279, 996 P.2d 603 (2000).

Here, the lower court's award of estate attorney fees was based on the express language of Commissioner Pro Tem Joe Quaintance's December 22, 2008 Order, namely:

"It is further ORDERED, ADJUDGED AND DECREED that Respondent Maxine Elaine Tesche takes title to the below described real property as the surviving joint tenant with the right of survivorship subject to the above entitled judgment lien. Maxine Elaine Tesche is hereby required to pay the judgment lien together with interest thereon to the Personal Representative of the above entitled estate, who, upon receipt of the full payment of the judgment lien and interest, shall enter a satisfaction of judgment herein. 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 after the date of entry of the decree herein until receipt of the judgment lien payment in full...**" CP 7-8. Emphasis added.

The December 22, 2008 Order was the final probate order, affirmed on revision by Judge McCarthy. While the December 22, 2008 Order was

appealed, the Order was upheld by this appeals court. Estate of Wegner v. Tesche, 157 Wn.App. 554, 237 P.3d 387 (2010). Notably, there was never any appeal of the December 22, 2008 ruling which entitled the estate to all reasonable attorney fees if the filing of a petition for referee was necessary. In fact, at the October 14, 2011 attorney fee hearing, Tesche's counsel claimed that the above-cited provision "slipped [his] attention" and admitted it "was not appealed by [him]." VRP, October 14, 2011, p. 8, lines 9-12. Counsel's inattention does not render that portion of the order ineffective, nor is Tesche allowed to challenge the order nearly 4 years later.

Judge Johnson properly recognized that the December 22, 2008 Order was the law of the case at each of the three hearings which culminated in the award of estate fees. VRP, May 13, 2011, p. 36, lines 19-23; VRP, May 27, 2011, p. 20, lines 24-25, p. 21, lines 1-3; VRP, October 14, 2011, p. 19, lines 12-23.

The December 22, 2008 Order plainly required that Tesche pay the \$16,212.58 judgment. She was given ample opportunity to pay the judgment – 180 days per the court order and, due to her appeal, almost another year and one-half until the mandate issued. Her incentive to pay

was expressed in no uncertain terms – if she failed to pay and a petition for a referee was filed, then she would have to pay the estate all of its fees incurred after entry of the final decree. There can be no other interpretation of the order except that the estate is entitled to all of its fees incurred subsequent to the mandate, which is what the estate sought to recover and was awarded by the lower court on October 14, 2011. Judge Johnson correctly interpreted and implemented the provisions of the December 22, 2008 Order.

B. The court’s order on the estate’s Amended Petition for Appointment of a Receiver or Referee has no effect on the estate’s right to attorney fees.

Tesche devotes a substantial portion of her appellate brief to analysis of the receivership statute (RCW 7.60.025), claiming the statute was not properly followed, that she “prevailed” in her arguments against the estate’s Amended Petition for Appointment of Receiver or Referee, and that the estate is not therefore entitled to any fees. Tesche arguments are not on point.

First, there has been no appeal of the “Order on Motion to Appoint Receiver/Referee and Other Matters.” CP 101-103. Neither Tesche nor the estate appealed that Order. The receivership statute and all arguments

related to that statute are therefore irrelevant.

Second, Tesche did not “prevail” on “procedural and substantive grounds” in the court below, as she incorrectly claims in her Brief of Appellant at p.27. As is set forth in the Order on Motion to Appoint Receiver/Referee and Other Matters, Judge Johnson found only that, under the circumstances considered, he declined to appoint a receiver or referee “at this time” and expressly allowed the estate to conduct other execution proceedings in any manner authorized by law. CP 102. In this same Order, Judge Johnson denied ALL of Tesche’s requests for relief including her Motion for Order Shortening Time, Motion for Continuance, request for credits against the judgment, request to strike pleadings, request for a more definite statement, and request for CR 11 sanctions. CP 102-103. Judge Johnson made no ruling at all on Tesche’s arguments concerning a homestead. CP 102. In fact, Judge Johnson criticized Tesche for motions not properly noted (habitual behavior for Tesche in this case) and also specifically found her motions “clog the case and distract [...] from analyzing the proper motion [...]”VRP, May 27, 2011, p. 38-39. Judge Johnson never indicated that he adopted any of Tesche’s arguments in reaching his ultimate ruling.

Third, the lower court's award of attorney fees to the estate was not premised on whether or not, or to what extent, the estate "prevailed" on anything. The estate prevailed in obtaining a judgment against Tesche for \$16,212.58. Tesche was personally responsible to pay this judgment, with interest, and it is also a lien on the real property she received by joint tenancy with survivorship. The December 22, 2008 Order expressly entitled the estate to "all reasonable attorney fees" incurred if it should be necessary for the estate to file a petition for referee. The necessity of filing the petition is discussed below, but the fact is the petition was filed and nothing in the December 22, 2008 Order conditions payment of the estate fees on the outcome of a hearing on the petition. CP 8.

Issue 2: The estate attorney fees were necessary only because Tesche refused (and still refuses) to pay a valid judgment issued against her and her property interest.

Tesche claims that Judge Johnson found the estate's petition for a referee or receiver was "unnecessary" and therefore abused his discretion in granting the estate attorney fees related to the petition. See Brief of Appellant at pp. 41-42. Judge Johnson made no such finding. Furthermore, the estate attorney fees were necessary only because Tesche refused (and still refuses) to pay the valid judgment against her.

In his May 27, 2011 Order on Motion to Appoint Receiver/Referee, Judge Johnson declined to appoint a receiver or referee “at this time.” CP 102. He made no finding that the estate’s Petition for Appointment of a Receiver or Referee was “unnecessary.” That word is not used by Judge Johnson at all in his oral ruling. VRP, May 27, 2011. Judge Johnson instead recognized that the estate’s motion was authorized by the December 22, 2008 Order. VRP, May 27, 2011, p. 33, lines 19-14. Judge Johnson found that the actual appointment of a referee was discretionary, and he chose not to exercise his discretion to appoint a referee (at this time). *Id.* and CP 102. Judge Johnson’s order on the petition for appointment is not the subject of this appeal. Nevertheless, it is wholly inaccurate to allege that he found the estate’s petition “unnecessary.”

Tesche has had nearly four years to pay the \$16,212.58 judgment. A portion of the judgment was collected through a garnishment, a portion was paid by Tesche (directly to estate creditors), and a portion of the judgment remains unpaid. CP 124. After this appeals’ court mandate, the estate incurred fees to collect the judgment, yet the judgment still has not been fully paid. This is exactly the circumstance contemplated by the December 22, 2008 order. If Tesche did not pay the judgment within 180

days, the estate had the right to petition for appointment of a referee to sell the property. If the petition becomes necessary (ie. the judgment is not paid in the 180 days), the estate shall be entitled to all reasonable fees incurred after entry of the final order. The estate only sought to collect reasonable fees incurred post-mandate, and this is entirely within the estate's rights as set forth in the December 22, 2008 Order.

Tesche was afforded ample opportunity to avoid the filing of the estate's petition for a receiver/referee and, thus, to avoid the award of attorney fees to the estate under the December 22, 2008 Order. Estate counsel corresponded with Tesche's counsel on October 11, 2010 and then on February 11, 2011, requesting the judgment be paid to avoid the necessity of filing a petition and to avoid additional attorney fees. CP 66-69. Tesche did not respond. Indeed, Tesche did nothing until after the petition was filed, at which time her counsel filed multiple motions without properly noting them, to which the estate was forced to respond.

Tesche's arguments assume the court gave no consideration to the fact that the estate fees were incurred only because she failed and refused to pay the judgment. Tesche also assumes that the court gave no consideration to the fact that she filed multiple motions in response to the

estate's petition which were not properly noted, and which were denied. Tesche's assumptions are inconsistent with the record. Judge Johnson repeatedly warned that he would enforce the estate's rights to seek fees. CP 103, lines 10-18 VRP, May 27, 2011, p. 43, lines 8-24. That Tesche ignored those warnings and persisted with improper court filings to which estate counsel and the court had to respond, is not the fault of the estate, nor should the estate be penalized for Tesche's conduct. The estate is entitled to recover those fees which would not have been incurred at all had it not been for Tesche's refusal to pay the valid judgment, consistent with the precise language in the December 22, 2008 Order.

Issue 3: The estate fees were fair and reasonable.

Tesche claims that the trial court failed to enter sufficient findings or to explain "its rational [*sic*]" for its award of estate attorney fees. See Brief of Appellant at p. 2. Tesche's claims are without merit.

In his oral ruling granting the estate attorney fees, Judge Johnson stated:

"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 it's not the complete story of what's being done. It's pretty hard to get in [*sic*], 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.” VRP, October 14, 2011, p. 19, lines 24-25, p. 20, lines 1-9.

Also in his oral ruling, Judge Johnson described his *rationale* (basis) for the award of fees, the December 22, 2008 Order:

“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 Court and not appealed from. It remains the order in this case, and I will, indeed, enforce that order.”

Tesche did not object to any of the line items, time expended, or the hourly rate charged by estate counsel. The Declaration of Hollis Barnett contains sufficiently detailed records of time expended and legal services performed. CP 125-129. The award of estate fees was based upon a portion of the December 22, 2008 Order which Tesche never appealed. Judge Johnson carefully reviewed the estate attorney time records and found the fees incurred to be reasonable. There is no basis to find that his award of \$8,617.50 was an abuse of discretion.

Issue 4: The Estate is entitled to its attorney fees on appeal.

The estate is entitled to its attorney fees on appeal under the plain language of the December 22, 2008 Order, allowing the estate to recover “all reasonable attorney fees” incurred after the date of the final probate

order. CP 8. The award of fees to the estate is entirely consistent with the December 22, 2008 Order, which is the law of this case.

The estate is also entitled to attorney fees on appeal under RCW 11.96A.150, which provides that either the superior court or the court on appeal may, in its discretion, order costs, including reasonable attorney fees, in TEDRA matters.

Tesche has also requested fees, both those incurred on appeal and those she incurred relative to the proceedings below. Tesche's request should be denied.

Tesche requests fees under RCW 4.84.185 and CR 11, but Tesche did not properly note a motion for any fees below and her request on appeal for these fees must therefore be denied.

Tesche unnecessarily increased the cost of collecting the valid judgment against her by repeatedly arguing issues that have nothing to do with the validity of the judgment, clogging the case with baseless, untimely filed motions, and motions which she did not even properly note for hearing. The estate should not bear the cost of litigating the same issues over and over, and responding to motions Tesche fails to properly note. The estate should not bear the cost to pursue collection of a judgment

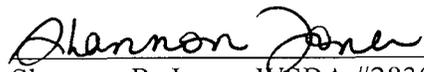
which Tesche was ordered to pay by **June 2009**. It is over three years later and Tesche has yet to fully pay the judgment.

Because Tesche has not cited any law or facts which require the trial court's decision be overturned, her appeal could be considered frivolous and in violation of CR 11. This is another basis for this court to award the estate its fees on appeal.

IV. CONCLUSION

The estate requests this appeal be denied, the trial court order be upheld, and for an award of attorney's fees on appeal.

Respectfully submitted this 24 day of August, 2012.

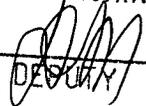


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STATE OF WASHINGTON

BY  DEPUTY

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

**In re: Estate of Corrine D. Wegner,
deceased and Kenneth Wegner, P.R.,**

Respondent

and

Maxine Elaine Tesche,

Appellant

No. 42789-3-II

**DECLARATION OF
SERVICE**

THE UNDERSIGNED, hereby declares as follows:

That I am now and at all times herein mentioned a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to the above entitled action and competent to be a witness therein. That on the 27th day of August, 2012, she caused a copy of the following documents:

- (1) Brief of Respondent

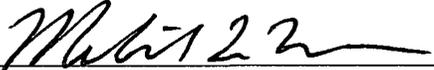
to be served on the parties listed below by the method(s) indicated:

Barry C. Kombol
LAW OFFICES OF
RAINIER LEGAL CENTER INC, P.S.
31615 Maple Valley Highway
P.O. Box 100
Black Diamond, WA 98010

- regular first class U.S. mail
- facsimile - (360) 886-2124
- Fed-Express/overnight delivery
- personal delivery via ABC Legal Messengers
- via electronically to

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Signed at Puyallup, Pierce County, Washington this 27th day of August, 2012.



Melinda L. Leach