

STATE OF WASHINGTON  
COURT OF APPEALS, DIVISION II  
MARIE J. REESE, DECEASED  
BY \_\_\_\_\_  
COURT CLERK

No. 45405-0-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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IN RE:

ESTATE OF MARIE J. REESE,

DECEASED.

BEVERLY JO. GESSEL,

APPELLANT,

VS.

MARILYN SANGER IN HER CAPACITY AS PERSONAL  
REPRESENTATIVE,

RESPONDENT.

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BRIEF OF APPELLANT

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WSBA 13787

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## STATEMENT OF THE CASE

Marie J. Reese, (Marie) died testate on 23 June 2012. (CP 52, line 17). At the time of her death, she was survived by three daughters: Marilyn Franz (Marilyn), Beverly Gessel (Beverly), the Appellant in this case, and Janice Sanger (Janice) (CP 54, lines 17-22, CP 55, lines 1-3). Her Estate included Real property with a residence and a 1/3 interest in a Testamentary Trust established by the Decedent's mother, Jennie Rowe, the corpus of which was comprised of recreational property located on the Hood Canal. (CP 61)

Marie executed her will on December 28, 2010 (CP 1-7) in duplicate and left one of the originals with her attorney, Greg Norbut and the other original with Beverly. The Will contained the following language regarding disposition of her estate:

5.2 I give, devise and bequeath one-third of my estate consisting of the real property, cabin and storage building identified as Kitsap County Assessor Tax Parcel number 232701-2 -019-2002 and the adjoining undeveloped lot identified as Kitsap County Assessor Tax Parcel number 232701-2-046-2009 to my daughter, JANICE MARIE SANGER , subject to one- half interest in the Well reserved for my residence , and subject further to an access easement along the north margin of the property devise to Janice Marie Sanger along the existing access road .

5.3 I give, devise and bequeath the real property, and primary residence identified as Kitsap County Assessor Tax Parcel number 222701 - 1-002 2004 to my daughter, MARILYN ANN FRANZ.

5.4 I give, devise and bequeath my total share of the Jennie H. Rowe Property Trust pursuant to my power of appointment set forth in my deceased Mother's Last Will and Testament (Jennie H. Rowe) dated March 30, 1980, and described under Kitsap County Property Tax Account numbers 232701 - 1-001-2005 , 232701-2-014-2007, and 232701-2-015-2006 to my daughter, BEVERLY JO GESSEL.

The total combined value of my bequest and/or devise to both Beverly Jo Gessel and Marilyn Ann Franz shall be divided by two and that amount shall be subtracted from the total value of Marilyn's interest in my estate, which amount shall be a lien in favor of Beverly Jo Gessel against my former primary residence with no interest, payable in full within six (6) months of my demise.

\* \* \*

5.6 I bequeath the remainder of my liquid funds to my daughter, BEVERLY JO GESSEL.

In order to comply with the requirements of RCW 11.20.010, Beverly filed the original in her possession on 13 Jul 2012 with the Kitsap County Superior Court (CP 1-7).

On July 26, 2012, the Personal Representative, Marilyn Sanger, filed a Petition for and obtained orders determining that the decedent died testate, the estate was solvent, requesting that she be appointed Personal Representative of the Estate and that letters testamentary be issued with a waiver of the bonding

requirement and the granting of non-intervention powers. (CP 8 through CP 19). Notice of pendency of probate proceedings were mailed to Beverly on 27 Jul 2012 (CP 20). On 31 Jul 2012, mailed for filing and for service on the Personal Representative through her attorney of record a request for special notice. Included in the request for special notice was the demand that notice be given of the filing of the inventory and the intent to pay personal representative's or attorneys' fees. (CP 21-22).

The inventory for the estate was due on or about 27 Oct 2012. The inventory was ultimately transmitted by the Personal Representative to Beverly on 7 Dec 2012. Concerned with the appraisal and the methods used to appraise both the Real Property devised to Marilyn and the Personal Property bequeathed to Beverly under Article 5.4 of the Will, Beverly requested a copy of the appraisal. The Personal Representative turned down that request noting that her attorney had advised her against providing a hard copy of the appraisal to Beverly (CP 105-107)

On or about 26 Jul 2013, the Personal Representative elected, pursuant to RCW 11.68.100 to initiate the procedure

for closing the estate as set forth in RCW 11.76.050 and filed her final report and petition for distribution. (CP 52-63) The Personal Representative, however, mailed Beverly's notice to her neighbor's address and a prior address for her attorney and not the address listed on the request for special notice. (CP 51), (CP 22) (RP pages 7-10). Beverly filed and served, the day before the hearing, her objection to the Petition and Final Report along and a request to set the matter for a date certain for an evidentiary hearing. (CP 77-109) In her objection, Beverly objected to the notice provided, objected to the Personal Representative's decrease in the value of the real estate devised to the Personal Representative by cutting off the property's access to the only good well providing water to it (CP 88 lines 9-16), improper valuation methods in valuing the Personal Property Trust interest bequeathed by the Decedent to Beverly (CP 78, lines 4 – 16) and the failure to provide proper notice of payments to the personal representative and attorney for the estate. (CP 79, lines 5 – 20). Despite the fact that counsel noted that there is no time limit to contest the Personal Representative's inventory and appraisal and that the timing of the Appellant's objection and request for testimony

was proper (RP page 23, lines 5-12), the court entered orders granting the Personal Representative's Petition, approved the attorneys' fees and personal representatives' fees and denied Beverly's request for a hearing in which evidence and testimony would be presented regarding the manner in which assets were valued. (RP Page 23 – 25). Appellant also noted that it was the duty of the Personal Representative to properly value property and the Personal Representative established that she had not properly valued the Trust Interest by her own admission that she hired a Real Estate Appraiser to value the Trust. (RP Page 16, lines 21-25, Page 17, Lines 1-9). The court denied Beverly Gessel's request that an evidentiary hearing be set for the purpose of taking testimony with respect to the valuation issues, reasoning that there had been sufficient time for providing contravening valuations and that no expert was offered by Ms. Gessel that day (CP 24, 25). The Court interpreted the Testatrix's intent under the will to require the including of the net liquid assets to be included in the computation to determine the equalization lien (RP page 59). The court also rejected arguments made by Ms. Gessel that attorneys' fees paid without prior notification should be

disgorged. (RP 39). It is from these three rulings that Ms. Gessel appeals.

## ARGUMENT

### I. THE COURT ERRED IN HOLDING A HEARING ON THE PERSONAL REPRESENTATIVE'S FINAL REPORT AND PETITION FOR DISTRIBUTION

A. STANDARD FOR REVIEW. The issue regarding whether proper notice has been given of a hearing on the Personal Representative's final report and petition for distribution is governed by RCW 11.76.040. Consequently, the determination of whether notice has properly been provided requires the court to interpret a statutory provision. The Construction and interpretation of a statute is a question of law. The standard for review of an error of law is *de novo*. *State of Washington vs. Lewis*, 141 Wn. App. 367, 381 (Wn. App. Div 2 2007). Consequently, the standard for review of the court's decision that notice was proper is *de novo*.

### B. A PERSONAL REPRESENTATIVE WHO SEEKS A PETITION FOR DISTRIBUTION MUST PROVIDE PROPER NOTICE TO ALL HEIRS OF THE HEARING.

A Personal Representative who has non-intervention powers, has the right to Petition the court for a decree of distribution pursuant to RCW 11.76.050. RCW 11.76.040 requires that notice be properly mailed to each heir. Where a request for special notice is provided for one of the

heirs, the proper address is the notice set forth in the request for special notice. See RCW 11.28.240.

Here, the Personal Representative's notice did not go to the heir at Appellant's proper address (CP 74, CP 75-76), nor did it go to the Appellant's attorney's proper address in the request for special notice as requested by her attorney. (CP 74, CP 75-76, RP page 7, lines 4-25, RP lines 1-25, Page 9, lines 1-4). While the Personal Representative argued that mail had gone to the address it claimed was on Beverly Gessel's counsel's letterhead, it was clear that Counsel did not maintain an office at that address and he had provided a proper address for the mailing.

The court, however, ruled that the service on that address was reasonable despite the clear mandate of RCW 11.76.040 and RCW 11.28.240. Consequently the notice was improper.

By allowing the Personal Representative to proceed with defective service, the court then went on to penalize the Ms. Gessel for being unable present valuation on notice even shorter than the 20 day notice for finalizing an estate. Even if notice had been properly provided, if Ms. Gessel was to be expected to provide testimony in opposition to the Personal Representative's valuation it would take her more than 20 days to provide that testimony. The court had within its power, as argued below,

and should have provided not only additional time for Beverly to present any expert testimony she might have but the Personal Representative to present her valuation testimony so that the court could determine that proper methods had been used to value the property and that the Personal Representative did not give into the personal temptation to distort the value of the personal property being distributed to Beverly Gessel high and the value of the real property being distributed to the Personal Representative low.

The court should hold that the Probate Court erred in determining that the Estate was ready to be settled pursuant to RCW 11.76.050 when proper notice had not been given particularly here, where the court believed that it was incumbent upon the Ms. Gessel to provide testimony to refute the Personal Representative's unsupported contention that the Estate was ready to be settled. The court should reverse the lower court's order approving the Personal Representative's final report and the lower's court's decree of distribution and remand the matter for additional proceedings at which the court should order that testimony be provided regarding proper estate valuation.

**II. THE COURT ERRED IN FAILING TO REQUIRE TESTIMONY SUPPORTING THE VALUATION OF ESTATE ASSETS FROM BOTH THE PERSONAL REPRESENTATIVE AND THE OBJECTING CREDITOR.**

**A. STANDARD OF REVIEW.** The statute governing the final report and petition for distribution is RCW 11.76.050. The lower court determined that it was within her discretion to determine whether to hold an additional hearing to take testimony and whether Beverly Gessel should be allowed additional time to obtain testimony and then concluded, because of the amount of time that the probate had been pending, that no additional time should be allowed and that no additional testimony would be allowed. Essentially the court made a determination that RCW 11.76.050 gave the court discretion whether to allow such additional time for testimony. (See RP pages 18-25). The court's interpretation of the statute along with statutes regarding the challenge of the Personal Representative's Inventory and Appraisal (See RCW 11.44.035) are, as noted above, reviewable *de novo*. With respect to any determination that would be in the discretion of the court, such as a question of whether a continuance should be granted, the standard is *abuse of discretion*.

**B. RCW. 11.76.050 REQUIRES THE COURT CONSIDER OBJECTIONS FILED UP TO THE TIME OF THE HEARING IN DETERMINING WHETHER TO REQUIRE TESTIMONY WHICH IS NOT LIMITED TO TESTIMONY OFFERED BY AN OBJECTING PARTY BUT INCLUDES TESTIMONY THAT MAY SUPPORT THE PERSONAL REPRESENTATIVE'S VALUATION AND ISSUES**

REGARDING POSSIBLE SELF-DEALING BY A PERSONAL REPRESENTATIVE

RCW 11.76.050 serves as the basis for approving a Personal Representative's final report and granting a Petition by the Personal Representative for distribution. That section provides, in part, as follows:

Upon the date fixed for the hearing of such final report and petition for distribution, or either thereof, or any day to which such hearing may have been adjourned by the court, if the court be satisfied that the notice of the time and place of hearing has been given as provided herein, it may proceed to the hearing aforesaid. **Any person interested may file objections to the said report and petition for distribution, or may appear at the time and place fixed for the hearing thereof and present his or her objections thereto.** The court may take such testimony **as to it appears proper or necessary to determine whether the estate is ready to be settled, and whether the transactions of the personal representative should be approved,** and to determine who are the legatees or heirs or persons entitled to have the property distributed to them, and the court shall, if it approves such report, and finds the estate ready to be closed, cause to be entered a decree approving such report, find and adjudge the persons entitled to the remainder of the estate, and that all debts have been paid, and by such decree shall distribute the real and personal property to those entitled to the same. Upon the production of receipts from the beneficiaries or distributees for their portions of the estate, the court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the personal representative.

court shall, if satisfied with the correctness thereof, adjudge the estate closed and discharge the personal representative.

RCW 11.76 050 (emphasis added with underscoring and bold). An appellate court reviews the Court's order of distribution to determine

whether it complies with the Testatrix's intent and the applicable law. *In re Estate of Wegley*, 65 Wn.2d 689, 695 (1965) [Court set aside a decree of distribution and ordered the lower court to enter a new decree in accord with Court of Appeals outlined mode of distribution].

**Time for Objecting to final report and Accounting.** The Personal Representative claimed that the time for objecting was governed by local rules requiring a response (RP page 3, line 25, page 4, lines 1-8). The time for objecting to a final report and proposed distribution is governed by statute. To the extent that a local rule conflicts with a statute on such a matter, the statute governs. See *In Re Marriage of Lemon*, 118 Wn. 2d 422, 423 (1990) [statutory right granted to a party cannot be abridged by local rule]. In the present case, the objection was both filed (CP 77 – 109) and served prior to the hearing and presented during the court hearing on 30 Aug 2013. As such, the objections were timely and proper.

**The Probate Court should have required testimony and should have continued the proceedings.** As set forth in RCW 11.76.050, at the hearing on the Report and Distribution, the court is required to make a determination that notice has been properly given. While the court made a finding that the mailing to Appellant's attorney at the address was

“reasonable” (RP 8, lines 24-25), the court did not determine that the notice was reasonable.

Additionally, the court is also required to take such testimony “as appears proper and necessary” to determine whether the estate is ready to be settled. RCW 11.76.050. This provision, by its language, not only allows parties to offer testimony, but requires, on the court’s part, a determination of whether a party should be required to produce a witness. The present case illustrates why a probate court would necessarily want to require a Personal Representative to produce such testimony.

The Personal Representative in this case was granted non-intervention powers. (CP 15-16). When a Personal Representative is granted non-intervention powers, the Probate Court loses jurisdiction. *In re Estate of Ardell*, 96 Wn.App. 708, 716 (Wn.App. Div III 1999). Consequently, the Personal Representative is vested with authority, without court oversight to conduct whatever matters are necessary to administer an estate. Consequently, short of finding grounds to have letters testamentary revoked, RCW 11.28.250, a court has virtually no oversight of a Personal Representative’s actions while performing her duties. Nevertheless, a Personal Representative has a fiduciary duty to the heirs of an estate. *Estate of Winslow*, 30 Wn. App. 575, 577 (Wn. App. Div III

1981) and must do what will serve the best interests entrusted to her.

*Stewart vs. Baldwin* 86 Wn. 63, 68 (1915).

Because the court has no jurisdiction, unlike a civil matter, an heir cannot demand discovery where it questions a Personal Representative's valuation. Where an heir has not been allowed to examine the Personal Representative's valuation, it is difficult, and sometimes impossible where the Personal Representative has exclusive control of an asset such as real and personal property being distributed, to value such an asset. That is why the statute not only grants a party in interest to object all the way to the time of the hearing, but gives the court broad discretion to take testimony. The statute does not limit the testimony that may be available when the matter is noted for hearing by the Personal Representative but allows the court to determine what testimony it will take and when it will take that testimony.

The Court's usual opportunity, then to review the Personal Representative's responsibilities will come in the form of an objection at the closing of an estate such as in this case, where a Personal Representative petitions the court pursuant to RCW 11.76.010 et. seq. for approval of the final report and a decree of distribution. Consequently, a Probate Court should be willing to not only consider the objection filed by

an heir, but also to insist upon the testimony of witnesses to determine whether the Estate is truly ready to be settled and in the manner proposed by the Personal Representative.

In this case, the value of property being distributed was of importance to the Appellant and Marilyn Sanger in her individual capacity because of the equalizing lien which the Decedent was requiring in her will. The Personal Representative, as was her right, refused to provide copies of the appraisals to the appellant in the real property that was being distributed to the Personal Representative and personal property trust interest that was being distributed to the Appellant. The Personal Representative had disconnected a well to her property which would then call into question whether the Appraisal that she had performed had taken that into consideration and valued the property before or after the disconnection of the well. CP 88, lines 17-24. Additionally, The Personal Representative made it clear that she had used a Real Estate appraiser to value the Trust interest calling into serious question whether she had provided a proper valuation of the trust interest. (RP 16-17)

There were serious valuation issues raised by the Appellant's objections. Those serious valuation questions should have prompted the Probate Court to require the hearing to be continued to a later date and not

only allow testimony to be offered by the Appellant, but also to require the Personal Representative to produce testimony to support the valuation of the real property being distributed to her and the personal property being distributed to the Appellant. The only time for the court to consider whether the estate was ready to be settled was the hearing on the final report and petition for distribution RCW 11.76.050. Before the court could possibly determine, in this case, whether the estate was ready to be settled, based upon the very serious objections raised by Beverly Gessel, the court needed to be provided with the testimony of the Appraiser utilized by the Personal Representative to determine whether he had the background to perform a valuation of a 1/3 interest in a trust and whether the Personal Representative had decreased the value of the Real Property being distributed to her by disconnecting the only good well providing water to that property. The court could not possibly make a determination as to whether the estate was ready to be settled without considering the Personal Representative's valuation testimony as well as any valuation testimony to be presented by Beverly Gessel. The court misinterpreted the statute in determining that it would only take testimony if Beverly Gessel had an expert to testify at the time of the hearing and abused her discretion by deciding that the estate was ready to be settled when it was obvious that the objections of Beverly Gessel, coupled with the admission as to

improper valuation of the personal property by the Personal Representative left serious doubt of the validity of the Valuation of Estate property.

### **III. THE PROBATE COURT'S INTERPRETATION OF THE EQUALIZATION LIEN IS NOT CONSISTENT WITH THE DECEDENT'S INTENT**

**A. Standard of Review.** The interpretation of a Will is a question of law. Questions of law are reviewed *de novo*. Therefore, the interpretation of the Marie J. Reese Will provisions are to be reviewed by the Court of Appeals *de novo*.

**B. The court's job in interpreting and construing a will is to determine the Testatrix's intent.**

It was the Decedent's intent to only equalize the distribution of the 1/3 interest in the Jennie Rowe trust to Beverly Gessel and residential real property distributed to Marilyn Sanger and to not include the distribution of the liquid assets under 5.6 of the Will in that equalization. The court erred in its interpretation of the Will.

"The primary duty of a court called upon to interpret a will is to ascertain the intent of the [testatrix]." *Matter of Estate of EJ Mell*, 105 Wn. 2d 518, 524, 716 P.2d 836 (1986) citing *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985), *In Re Estate of Riemcke*, 80 Wn. 2d

722, 728, 497 P.2d 1319 (1979). Where possible, testamentary intent is to be determined from the four corners of the Will and the Will must be considered in its entirety. *Matter of Estate of EJ, Mell, supra* citing *Estate of Bergau, supra* at 435 and *In re Estate of Douglas*, 65 Wn. 2d 495, 499, 398 P.2d 7 (1965). In construing a will, a court seeks for and gives effect to the intent, scheme or plan of the Testatrix if it is lawful. *Matter of the Estate of Johnson*, 46 Wn.2d 308, 312, 280 P.2d 1034 (1955).

Here the Decedent's intent and scheme is clear by the manner in which she organized her will. Article 5.4 of the Testatrix's Will deals directly with the Real Property the Decedent devised to the Personal Representative and her one-third interest in the Jennie Rowe Trust which held an interest in recreational real property. It was in that same Article 5.4 that she granted the equalization lien:

5.4 I give, devise and bequeath my total share of the Jennie H. Rowe Property Trust pursuant to my power of appointment set forth in my deceased Mother's Last Will and Testament (Jennie H. Rowe) dated March 30, 1980, and described under Kitsap County Property Tax Account numbers 232701 - 1-001-2005, 232701-2-014-2007, and 232701-2-015-2006 to my daughter, BEVERLY JO GESSEL.

The total combined value of my bequest and/or devise to both Beverly Jo Gessel and Marilyn Ann Franz shall be divided by two and that amount shall be subtracted from the total value of Marilyn's interest in my estate, which amount shall be a lien in favor of Beverly Jo Gessel against my former primary residence with no interest, payable in full within six (6) months of my demise.

(CP 4) The language of 5.4 makes it very clear that the provisions of 5.4 only deal with the distributions being made in Article 5.4 of the Will and do not concern other distributions provided for in the Will to Beverly Gessel. In 5.4 the Decedent speaks of the combined value of the bequest and/or devise being divided by two and the amount be subtracted from “the total value of Marilyn’s interest” in the Decedent’s estate. It does not talk about “entire” bequests when it talks about Beverly’s interest, which clearly indicates that this provision only deals with the distribution to Beverly of the interest in the Trust. It should also be noted that the Will includes a provision 5.5 where the Testatrix expresses her interest that all real property interests stay in the family. (CP 5)

Additional evidence of the Decedent’s intent that the liquid distribution not play a part in the equalization is found in the fact that Article 5.6 makes no reference to Article 5.4 and Article 5.4 makes no reference to Article 5.6. (CP 5).

It is also clear from the Will that the Decedent was not attempting an even division of her direct or indirect real property interests between her three daughters. Her will is absolutely silent as to any attempt to equalize real property assets with Janice even though Article 5.3 distributes real property to her. Additionally, the Decedent does evenly

distribute the residual of the estate between the three daughters making it clear that the equalization provided for in Article 5.4 was limited to the assets being distributed in article 5.4.

The court should reverse the Probate Court's ruling and direct it to calculate the value of the equalization lien without inclusion of the liquid assets.

IV. THE COURT ERRED IN FAILING TO REQUIRE THE PERSONAL REPRESENTATIVE AND ESTATE ATTORNEY TO DISGORGE FEES PAID IN VIOLATION OF THE APPELLANT'S REQUEST FOR SPECIAL NOTICE AND SPR 98.12W

A. Standard of Review. Here the court is called upon to review rules and statutes. As set forth above, the review is *de novo*.

**B. The State Courts and Legislature intend that Prior Notification be provided to heirs of an estate prior to the payment of Estate Attorneys' Fees.**

SPR 98.12W provides as follows:

**Before compensation shall be allowed to any personal representative, guardian, or attorney in connection with any probate matter or proceeding, or to any receiver or an attorney for a receiver, and before any agreement therefor shall be approved, the amount of compensation claimed shall be definitely and clearly set forth in the application therefor, and all parties interested in the matter shall be given notice of the amount claimed in such manner as shall be fixed by statute, or, in the**

absence of statute, as shall be directed by the court; **unless such application be filed with or made a part of a report or final account of such personal representative, guardian, receiver, or attorney.**

RCW 11.48.210 provides, in part, as follows:

. . . An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. **Such compensation may be allowed at the final account; but at any time during administration a personal representative or his or her attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees.** If the court finds that the personal representative has failed to discharge his or her duties as such in any respect, it may deny him or her any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

RCW 11.28.240 provides that a party in interest may file a request for special notice and that one of the items of which she must be notified are attorneys' fees.

According to the Petitioner's final report, a total of \$12,074.14 was paid in blatant disregard of Appellant's request for special notice, SPR 98.12, and RCW 11.48.210. The fact that two statutes and one court rule cover the issue of advance notice of payment of fees indicates the significance that the legislature and the courts place on the need for prior disclosure. Implicit in each of these rules is the principal that payment of fees in derogation of these provisions should result in a disallowance of such fees.

**C. THE REASON FOR REQUIRING PRIOR NOTICE OF PAYMENT OF ATTORNEYS' FEES IS THAT THE PERSONAL REPRESENTATIVE AND ATTORNEY FOR THE ESTATE ARE FIDUCIARIES TO THE PARTIES IN INTEREST OF THE ESTATE**

A Personal Representative is a fiduciary of the Estate. *Estate of Little*, 127 Wn. App. 915, 925 (Wn. App. Div. I 2005). Because the fiduciary has control of all of the estate assets and holds those assets for the benefit of the heirs, it makes sense that before fees are paid to either the Personal Representative or the Attorney for the Estate from funds that would ultimately be distributed to the estate after the payment of administrative expenses, it necessarily stands to reason that the requirement of notice prior to using those trust funds to self-pay a Personal Representative or the Personal Representative's attorney would be a requirement in that fiduciary capacity.

Consequently, the clear intent of the statutes cited and the rules is that while acting in their fiduciary capacities, the Personal Representative and the attorney for the estate would be required to give such a notice.

**D. THE APPROPRIATE REMEDY FOR BREACH OF THE FIDUCIARY DUTY OF PRIOR NOTIFICATION IS DISGORGEMENT**

The statute provides no remedy where the statutes and rules requiring prior notification are violated. That may have been why the Personal Representative and her attorney felt free to violate them with

impunity. While one might argue that where the fees are reasonable and later approved, there is no harm to the estate. However, the funds are removed from the estate without advance notice to beneficiaries and in the case at bar the beneficiary that would be the recipient of the net liquid estate. It places the burden on the objecting party then, to wait until the money is out of the bank to then attempt to have the money put back if it is determined that the fees were excessive. Fiduciaries should never be allowed such a luxury, nor do the statutes intend that they be afforded such a luxury. If the court's fail to impose a severe enough penalty, fiduciaries will continue to ignore statutes that are in place to prevent beneficiaries from abuses by fiduciaries.

An appropriate penalty then is the same penalty that is imposed any time a fiduciary breaches a fiduciary duty, to-wit: disgorgement. There are a number of cases that require disgorgement where an attorney has breached his fiduciary duty to his client. *See Cotton vs. Kronenberg*, 111 Wn. App. 258, 262 (Wn. App. Div. I 2002). Cases were the fiduciary duty to give notice prior to self-payment of a personal representative or attorney should carry this same penalty regardless of whether a court later finds that the fees were reasonable or Personal Representatives will continue to be influenced to pay their Attorneys' fees without prior notice

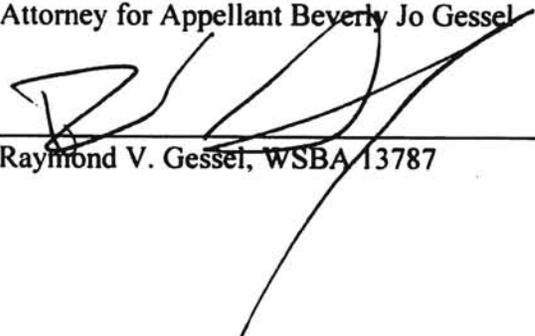
to beneficiaries who are left without any information about the dissipation of estate assets until it is too late to do anything about it.

### CONCLUSION

Where a Personal Representative is granted non-intervention powers, the heirs to that estate's only chance to prevent improper settlement of the estate and obtain information necessary to do so comes during a 20 day period to either object or, in this case, appear at a hearing on the final report and petition for distribution. The court should find that the Probate Court erred in failing to require testimony in favor and opposition of the closing of the estate based upon the objections raised by Beverly Gessel and should vacate the order approving the final settlement and order of distribution and remand the proceedings for a new trial. The Court should also disapprove the fees paid in violation of court rule and statute which requires prior notice and require those fees to be disgorged.

Respectfully Submitted 26 March 2014.

RAYMOND V. GESSEL  
Attorney for Appellant Beverly Jo Gessel



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Raymond V. Gessel, WSBA 13787

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COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

IN RE:

ESTATE OF MARIE J. REESE,

Appellate Case No. 45405-0-II  
CERTIFICATE OF SERVICE OF APPELLANT'S  
BRIEF

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that he deposited the APPELLANT'S BRIEF in the US Mail, first class mail, postage prepaid to Personal Representative's/Respondent's' counsel, GREGORY P. NORBUT, Attorneys for Estate of Marie Reese, at 18890 8<sup>th</sup> Avenue NE, Poulsbo WA 98370-8770 and Janice Sanger, Pro Se, 209 North Nevada Avenue, East Wenatchee, WA 98802 on 26 MAR 2014

Signed at Kent, WA on 26 MAR 2014.

By:   
Raymond V. Gessel, WSBA 13787

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COURT OF APPEALS  
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