

**FILED**

JUL 03 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 306861

Superior Court No. 10-401154-6

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

IN THE MATTER OF THE ESTATE OF  
GARTH BENJAMIN PETERSON, Deceased.

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APPELLANTS' OPENING BRIEF

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## **INTRODUCTION**

This appeal involves two heirs, Rena and Lyndra Peterson regarding the Estate of their father, Garth Petersen. The Heirs allege that the Personal Representative, Thomas Milby Smith, appointed by the Court, breached his fiduciary obligations to the beneficiaries, failed to properly probate the estate, and give proper notices, and failed to disclose to the Court at the time of his appointment his antagonism toward the heirs of the Estate due to a previous Washington State Bar Complaint. He failed to honor the heirs' First Right of Refusal to allow them to buy the Estate property, and unnecessarily incurred excessive attorney's fees and costs, due to his antagonistic position to the heirs.

### **III. ASSIGNMENTS OF ERROR**

#### **Assignment of Error No. 1.**

The Court erred in entering the Order dated September 3, 2010, appointing Thomas Milby Smith as Administrator of the Estate.

#### **Assignment of Error No. 2**

The Court erred in approving the Personal Representative's Creditor's Claim under the Order dated February 4, 2011.

**Assignment of Error No. 3**

The Court erred in entering Order Judgment Nunc Pro Tunc on the same Personal Representative's Creditor's Claim on January 17, 2012.

**Assignment of Error No. 4**

The Court erred in entering the Order of July 14, 2011 and July 22, 2011, for sale of Property without providing in the Order a First Right of Refusal to the heirs and without proper advance notice to the heirs.

**Assignment of Error No. 5**

The Court erred in entering the order of April 1, 2011 and in failing to grant the heirs' Motion to have the Court recuse itself.

**Assignment of Error No. 6**

The Court erred in failing to appoint Rena Peterson and Lyndra Peterson as Successor Personal Representatives in the above-entitled estate following Resignation by Personal Representative.

**Assignment of Error No. 7**

The Court erred in entering Order dated January 17, 2012, in favor of the Personal Representative, consisting of:

- (1) Approving Administration of Estate and Final Account;
- (2) Payment of Creditor's Claim;
- (3) For disbursements of Estate monies;
- (4) Accepting resignation of Administrator;
- (5) Orders on motions.

**Assignment of Error No. 8**

The Court erred in entering the Order dated February 3, 2012, approving final discharge and resignation of Administrator.

**Assignment of Error No. 9**

The Court erred in entering the Order Denying and in failing to grant the Motion for Reconsideration entered February 17, 2012.

**IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**Issue No. 1.**

Did the Personal Representative comply with all notice requirements in the probate proceeding?

**Issue No. 2**

Was Thomas Milby Smith qualified to be appointed as the Personal Representative of the Estate of Garth Benjamin Peterson and did he properly carry out his duties?

**Issue No. 3**

Should the Judgment entered on the Personal Representative's Creditor's Claim be reversed?

**Issue No. 4**

Were the heirs deprived of their right of first refusal to purchase the property of the Estate?

**Issue No. 5**

Should the Court have accepted the resignation of the Personal Representative and appointed Lyndra Peterson and Rena Peterson as Successor Personal Representatives?

**Issue No. 6**

Did the Court properly deny the heirs' motion for the Court's recusal?

**Issue No. 7**

Were the Personal Representative's attorney's fees and costs incurred excessive and unnecessary?

**Issue No. 8**

Did the Personal Representative act in a fiduciary relationship with the heirs?

**Issue No. 9**

Did the Personal Representative properly inventory, protect and sell the property of the estate?

**V. STATEMENT OF THE CASE**

This is an appeal by two heirs of the Estate who claim that the Personal Representative appointed by the Court breached his fiduciary obligations to the beneficiaries. He failed to properly probate the estate. He failed to disclose to the Court at the time of his appointment a prior Bar Complaint filed by the deceased. He failed to honor the heirs' First Right of Refusal to buy the Estate property, and unnecessarily incurred attorney's fees and costs (CP 1037-1050).

## VI. STATEMENT OF THE FACTS

Garth Benjamin Peterson died a resident of Spokane, Spokane County, State of Washington, on May 11, 2010, leaving two parcels of real property, consisting of two residences and several antique cars and antique car parts (CP 1-13).

Garth Peterson was survived by four adult children whose names and addresses are (CP 35-36):

Rena L. Peterson  
P.O. Box 10864  
Spokane, WA 99209

Lyndra E. Peterson  
420 S. Carnahan Road  
Spokane Valley, WA 99212

David G. Peterson  
743 N. River Bend Road  
Otis, Oregon 97627

Leighann Yocom  
513 W. 12th Ave.  
Ellensburg, WA 98926

Thomas M. Smith, Inc. P.S. was a creditor of the Estate, having performed legal services for the deceased approximately 19 years before his death (CP 17-18). Thomas M. Smith on September 3, 2010, based upon his petition as principal creditor of the Estate, obtained an Order appointing Thomas M. Smith, individually, as the Administrator of the Estate (CP 14-16). The bond was fixed in the amount of \$10,000.00 (Supp. CP 1382-1384). Letters of Administration were issued to Thomas M. Smith on September 30, 2010 (CP 10). Even though Thomas M.

Smith, Inc. P.S. was a creditor of the estate, the Court appointed Thomas M. Smith individually as the Administrator (CP 15). Letters of Administration were issued to Thomas Milby Smith individually, however due to an Order Non Pro Tunc the Letters of Administration were changed to Thomas Milby Smith P.S. (CP 1268-1271). The bond, however, only covered Smith individually (Supp. CP 1382-1384). Personal Representative, Thomas Milby Smith, will hereinafter be known as Smith.

Smith was appointed by Court Order on September 3, 2010 (CP 14-16). Smith did not give notice of his appointment until October 7, 2010 (CP 31). At that time, he gave notice of his appointment only to heir Rena Peterson (CP 31). The remaining heirs were not provided Notice of Appointment until December 27, 2010 (CP 39-41). Rena Peterson's Notice of Appointment was given within 20 days from the Personal Representative's posting of his bond, but not within 20 days of Smith's appointment (CP 31). RCW 11.28.237 requires giving notice of appointment 20 days after entry of the Order of Appointment. Smith failed to use reasonable diligence, as required by statute, to notify the heirs within 20 days after entry of the Order of Appointment. After appointment Smith left the area for 20 days (CP 26). Smith had the following information available to ascertain the names and addresses of the other heirs:

1. Cremation letter and cremation investigation (CP 584 & 776);
2. Pretrial discovery methods of ascertaining the names of the heirs, which the Personal Representative failed to exercise (CP 680);
3. Basic internet searches verifying the addresses of the various heirs;
4. Telephone directories;
5. Prior contact in 1992 with Rena Peterson and Lyndra Peterson (CP 927).

Smith failed to disclose to the Court, at the time of his appointment as Administrator, his previous relationship with the deceased (CP 1-4). Due to a former Washington State Bar Complaint made by the deceased, Garth Peterson, against Smith approximately 19 years before Garth Peterson's death, the heirs and Smith maintained a strained relationship (CP 881-884). The Washington State Bar Complaint resulted in animosity between Smith and the heirs of the deceased. Had Smith made such a disclosure to the Court at the time he petitioned for his appointment, the Court, in all probability, would not have appointed him as Personal Representative, as he was unable to carry out his duties in a fiduciary relationship to all the heirs. The antagonism and lack of cooperation between Smith and the heirs precipitated the fees and additional work on

the part of the Personal Representative. This relationship dissipated the Estate assets (CP 881-884).

It is not disputed that Smith and the heirs did not get along. It is not disputed that Smith and Rena Peterson had a contentious relationship. It is disputed whether Smith should have been serving in a fiduciary capacity because of the contentious relationship with the heirs and deceased. It is disputed whether the trial judge should have recused itself because while he was in private practice, he was the arbitrator that granted the creditor's claim that is at the heart of this case (CP 881-884).

The Personal Representative appointed by the Court was Thomas M. Smith who was not a Creditor. The Creditor was Thomas Milby Smith, Inc., P.S. Smith had the Court approve his Creditor's Claim when he failed to comply with RCW 11.40.140, which requires his claim to be approved pursuant to TEDRA as per RCW 11.96A.070 (CP 1-13). When this was brought to Smith's attention by the heirs, near the conclusion of the probate, the Court entered an Order Nunc Pro Tunc (CP 870-871).

Smith failed to timely file a complete inventory (CP 379-383). He failed to release a full inventory upon written request (CP 664). He had filed a partial inventory several months late and beyond the statutory period, but did not complete a full inventory prior to his discharge (CP 379-383). Smith thereafter failed to honor the first right of refusal the

Court granted to the heirs (RP 233-236). The heirs contend that the personal property that was sold by Smith was worth substantially more than the sale price (CP 1309-1310).

The heirs also contend that the Personal Representative's fees were improper and exorbitant (CP 1302-1303). The Personal Representative claimed fees due of \$65,228.00 and costs incurred of \$10,913.04, making a total of \$76,141.04 (CP 1302-1303). These fees are excessive, duplicative and unnecessary (CP 939). The normal fee for the entire probate should not exceed \$5,000.00 (CP 934-940).

On September 15, 2011 Smith filed with the Court his Notice of Intent to Resign and petitioned for Final Accounting, Approval of Administration and Distribution of Monies. He set the hearing on September 30, 2011 (CP 627-642). At the same time all four heirs of the Estate signed a Petition to substitute Rena L. Peterson and Lyndra E. Peterson as Co-Personal Representatives of the Estate (CP 651-654). At the hearing on September 30, 2011, because the heirs would not release Smith of any and all liability in handling the Estate (CP 702-711) the Court allowed Smith to continue as Personal Representative. The heirs were denied their Petition for the appointment of Rena L. Peterson and Lyndra E. Peterson, as Co-Personal Representatives (RP 194 CP 997-998). Smith did not resign until 3½ months later on January 17, 2012. He

incurred an additional \$25,478.78 of fees and costs that could have been avoided during this time (CP 1293-1295). Charles Cleveland, an attorney who specializes in probates, filed an Affidavit indicating that the fees and costs were unreasonable for the size of the estate (CP 932-939).

In conclusion of Smith's final account, the Court granted judgment on his Creditor's Claim on January 17, 2012, against the Estate in the amount of \$57,989.90 (CP 1272-1288). The Administrator's fees and costs totaled \$72,868.04 (CP 1283). Findings 19 on page 11 of 17 of the Order entered January 17, 2012, recites that the estate bank account was in the amount of \$64,104.06 (CP 1272-1288). The only other claim that remained unpaid was for \$858.00 to a person Smith hired to assist in the probate. That left a net cash amount of \$63,246.06. Deduct the Creditor's Claim to Smith and the Estate is left with \$5,256.16. This amount of money, \$5,256.16, has been retained by the Personal Representative, Smith, and should be credited on the judgment of \$72,868.04 (CP 1272-1288).

The Conclusions of Law on Page 15 of 17 of the Order entered January 17, 2012, at Line 17, recite that Thomas Milby Smith, Inc., P.S. have judgment over and against the Estate for the sum of \$5,258.16, representing the unpaid balance due Thomas Milby Smith, Inc., P.S. for

said costs of administration. This is an obvious error, as Mr. Smith took judgment for \$72,868.04 (CP 1272-1288).

## VII. STANDARD OF REVIEW

“In general, the standard of review is de novo in probate proceedings for decisions based on declarations, affidavits, and written documents.” *In re Estate of Bowers*, 132 Wash. App. 334, 339–40, 131 P.3d 916 (2006). In the current case the record is based upon declarations, affidavits, and written documents. Washington case law dictates that this appeal be reviewed de novo.

RCW 11.96A.150 gives the court discretionary authority to award attorney fees from estate assets. The Court will not interfere with the decision to allow attorney fees in a probate matter, absent a manifest abuse of discretion. *In re Estate of Marks*, 91 Wash. App. 325, 337, 957 P.2d 235 (1998); *In re Estate of Larson*, 103 Wash.2d 517, 521, 694 P.2d 1051 (1985). Discretion is abused when it is exercised in a manner that is manifestly unreasonable, on untenable grounds, or for untenable reasons. *In re Estate of Niehenke*, 117 Wash.2d 631, 647, 818 P.2d 1324 (1991). *In re Estate of Black*, 116 Wash. App. 476, 489, 66 P.3d 670, 677 (2003). The Court in this proceeding held the estate liable to pay the Court Appointed Administrator \$72,868.04 in attorneys’ fees. This is not including the Creditor’s Claim judgment of \$57,989.90 that the Court

allowed him as the Court Appointed Administrator. Smith estimated the estate to be worth \$209,000, he took \$130,857.94. Smith also happened to be the decedent's former attorney until a Bar Complaint was filed against Smith 19 years prior (CP 886-889). The sum of \$72,868.04 in attorneys' fees and costs allowed by the Court is completely unreasonable considering the size of the estate and should be reviewed de novo.

### VIII. ARGUMENT

**Issue No. 1. Did the Personal Representative comply with all notice requirements in the probate proceeding?**

This issue involves Assignment of Errors Nos. 1, 2, 3, 7, 8 and in part 9.

The notice requirements that Smith failed to comply with are as follows:

(a) Smith failed to give proper notice of his appointment to all four heirs;

RCW 11.28.237(1) provides:

Within 20 days after appointment, the Personal Representative of the Estate of a decedent shall cause written notice of his or her appointment and the pendency of said probate proceedings, to be served personally or by mail to each heir...

When a Personal Representative fails to give notice to the heirs of an estate as required under RCW 11.28.237, a "jurisdictional defect" is created as to the heirs, rendering any subsequent decree of distribution void. *Hesthagen v. Harby*, 78 Wn.2d 934, 942, 481 P.2d 438 (1971).

A jurisdictional defect means that the court does not have either personal jurisdiction or subject matter jurisdiction, exposing any judgment made to collateral attack. *Id.* at 945 (citing *France v. Freeze*, 4 Wn.2d 120, 102 P.2d 687 (1940)).

If a court nonetheless acts when a jurisdictional defect is present, any orders and judgments disseminated are considered null and void. *Id.* at 945 (citing *France v. Freeze*, 4 Wn.2d 120, 102 P.2d 687 (1940)). A void judgment "may be impeached in collateral proceedings by any one with whose rights or interests it conflicts." *Id.*

In *Hesthagen*, a family friend of the decedent was appointed administrator of the estate. 78 Wn.2d at 936. The administrator briefly inquired about other possible heirs and was told that the decedent's sister and a brother were the remaining heirs. *Id.* at 937. In fact, there were children of a deceased brother who were never notified. *Id.* After the court awarded the estate to the sister and brother, the children of the deceased brother brought an action against the brother and sister and the administrator for failure to inform the probate court and to notify them.

*Id.* at 938. The Washington Supreme Court determined that the failure of the administrator to 'exercise due diligence in ascertaining the names and addresses of other heirs' denied the heirs of due process and was a jurisdictional defect not subject to statutes of limitations. *Id.* at 941.

Three years later, *In re Estate of Walker*, two sons of a decedent brought an action after discovering that notices of probate had not been sent to 16 unrelated legatees. *In re Estate of Walker*, 10 Wn.App. 925, 926 521 P.2d 43 (Div. II, 1974). The administrator of the estate had declined to notify the legatees because the liquid assets of the estate were insufficient to cover the bequests. *Id.* at 927. The trial court order approved the final accounting although notice had not been given. *Id.* The Court of Appeals reversed, holding that the insufficiency of the estate to cover the bequests did not justify overlooking the failure to notify the 16 legatees. *Id.* at 930. The rationale underlying the reversal was because there would be "a perpetual cloud on the property inherited." *Id.*

To avoid redoing two entire years of administration, the Court of Appeals suggested that lack of notice made the decree voidable rather than void, *Id.* at 930.

In the present action, the Court entered an Order appointing the Personal Representative on September 3, 2010. Letters of Administration were granted subject to filing a bond and oath, this was completed on

September 30, 2010. (CP 14-16). The September 30, 2010 bond, as required by the Court, was in the sum of \$10,000.00 (Supp CP 1382-1384). Certificate of Mailing was sent to Rena L. Peterson, giving notice of the appointment on October 7, 2010 (CP 31). Lyndra E. Peterson, Leighann Yocum and David G. Peterson were not given notice of the appointment until December 2010 (CP 25-38).

Smith knew, or should have known, that there were four heirs, and that all four heirs were entitled to Notice of Appointment of the Personal Representative within 20 days of appointment pursuant to RCW 11.28.237. Smith should have known because he had previously represented the deceased Garth Petersen and in the 1990 action Smith communicated with both Rena Peterson and Lyndra Peterson concerning the lawsuit (CP 927). Additionally, Smith had the cremation documentation available to him as evidenced by the fact that he included on his billing statement to the Estate (CP 584). The cremation documentation listed all four heirs. Smith also had available to him pretrial discovery methods of ascertaining the names of the heirs. Simply stated, Mr. Smith failed to exercise reasonable diligence of a prudent individual in ascertaining the names of all the heirs as required under RCW 11.28.237. Failure to use reasonable diligence as required by statute to notify the heirs constitutes misfeasance. *Hesthagen*, 78 Wn.2d at 943.

Smith's failure to use reasonable diligence to ascertain who the heirs of the estate were, and his failure to give notice to all four heirs pursuant to RCW 11.28.237, rendered the Court's jurisdiction defective and therefore any judgment and order are defective and voidable. *Id* at 942.

Smith will argue waiver as the two heirs, Rena Peterson and Lyndra Peterson appeared in the Court proceedings.

RCW 11.96A.140 provides:

"Notwithstanding any other provision of this title, notice of a hearing does not need to be given to a legally competent person who has waived in writing notice of the hearing in person or by attorney, or who has appeared at the hearing without objecting to the lack of proper notice or personal jurisdiction."

It is not disputed that Rena and Lyndra appeared in court thus waiving notice but only as it applied to Rena and Lyndra and only for the preliminary hearing. *In re Walker's Estate*, 10 Wash App. 925, 521 P.2d 43 (1974) the court held that by appearing and submitting to the jurisdiction of the court, any orders or decrees entered are valid only with respect to those who appeared or waived notice. With respect to those interested parties or heirs not given notice, all orders or decrees are jurisdictionally deficient and upon challenge are voidable.

Smith neglected to give proper notice to the heirs of his appointment as Personal Representative as described herein thus rendering the jurisdiction of the Court deficient and any decrees or orders therefrom voidable.

(b) Smith failed to comply with heirs' request for notice of proceedings dated April 30, 2011 and June 2, 2011(CP 264-265 & 355).

Heir Rena Peterson filed two Requests for Special Notice of Proceedings with the Court and Smith (CP 264-265 & 355). The first request was filed on March 31, 2011, by Ms. Peterson's attorney Eric Byrd. The second request was filed on June 2, 2011, by Ms. Peterson Pro Se (CP 264-265 & 355). Both documents request that Smith give notice to the heirs of any proceedings regarding the administration of the Estate. Inclusive in these requests were that written notice be given to the heirs, specifically Rena Peterson, regarding the sale of any property (CP 355). Pursuant to RCW 11.28.240, this statute requires at least 10 days before hearing of the Petition or personal service upon the heirs not less than five days before the hearing. RCW 11.76.030 requires a Personal Representative in the Final Report and Petition for Distribution to give at least 20 days notice.

Pursuant to the Request for Special Notice of Proceedings filed on March 31, 2011 and June 2, 2011 Smith was required to give notice to

Rena Peterson prior to the sale of property (CP 264-265 & 355). Smith did not give notice to any heir prior to the sale of the antique cars or car parts (RP 123). Smith failed to give notice thus breaching his fiduciary duty to the heirs of the estate and the Request for Special Notice of Proceedings.

(c) Smith failed to give notice of first right of refusal to the heirs having agreed to do so in open court (RP 68 & 353) ;

In open court on May 19, 2011, Smith agreed to give Rena Peterson the option of First Right of Refusal (RP 68). The Order for the First Right of Refusal was entered and signed by Judge Leveque on May 19, 2011 (CP 353). The Order is handwritten and the First Right of Refusal is located on the bottom near the signature line (CP 353). Smith further admitted that the heirs had a First Right of Refusal in his pleadings (CP 366). Smith later recanted the First Right of Refusal in subsequent pleadings further confusing the matter and continuing to frustrate the probate (CP 512). In later deposition testimony by Michael Waller, one of the personal property purchasers recounted the fact that in open court a First Right of Refusal was granted to the heirs (CP 809 pg 29 ln 4). The evidence is clear that a First Right of Refusal was granted to the heirs and Smith did not abide by this order. In fact, he sold the property without notice and without complying with the first right of refusal. He also sold

the property far below fair market value thus breaching his fiduciary duty as the Personal Representative of the Estate. A reasonable Personal Representative satisfying his fiduciary duty to the Estate, would not sell property at less than one-third of its market value.

Mike Waller who purchased the antique vehicles for \$34,800.00 later offered to sell the vehicles to the heirs for \$130,000 (CP 812 pg 39 & 42). This price did not include the two cars that the heirs repurchased from Waller for \$7,500 (CP 812- pg 39).

(d) Smith failed to give proper notice on the final account hearing;

RCW 11.76.040 requires at least a 20 day notice and the Personal Representative is required by statute to give not less than 20 days notice before the hearing. The "Supplemental Report and Supplemental Accounting to Notice of Intent to Resign, Request for Approval of Administration and Approval of Final Accounting and Distribution of Estate Funds" was filed January 13, 2012 (CP 1103-1110). The Certificate of Mailing indicated that the document was mailed January 13, 2012 (CP 1111). On January 17, 2012, the Court, over the objection of the heirs' attorney, entered an Order "Amending Letters of Administration, Order Denying Motions Petitions to Succeed as Administrator and Revoke Letters of Administration, Order Denying Motion Re: Jurisdiction, Order

on Hearing and Approving Final Account and Approved Final Account" (CP 1163). The Court did indicate that the heirs could file their objections at a later date (RP 154-155). The heirs also objected in writing to the inadequate notice of administrator's final account (CP 1301). In the heirs' objection Rena Peterson contended that the notice did not comply with the Request for Special Notice of Proceedings in Probate pursuant to RCW 11.28.240 or RCW 11.76.040.

Here the heirs appeared and did object, as indicated above, and consequently, did not waive the right to notice. *In re Walker's Estate*, 10 Wn.App. 925, 521 P.2d 43 (1974). The heirs also filed an objection to the Final Account (CP 1014-1020). The failure to give the heirs proper notice prejudiced the heirs in that they did not have adequate time to view the accounting and file objections thereto.

The final settlement of the Personal Representative's Final Account can be made only upon due publication of notice to the heirs and all persons interested pursuant to RCW 11.76.040. *In re Krueger's Estate*, 11 Wn.2d 329, 119 P.2d 312 (1941).

The most recent case is *Pitzer v. Union Bank of California*, which was reversed in 141 Wash. 2d 539, 9 P.3d 805 (2000). The *Pitzer* Court denied reopening the Estate because the claimants were illegitimate children. The Court in *Pitzer* held that the parties challenging the probate

were not legally entitled heirs of the probate, and hence there was no need to reopen the estate.

It is important to note here that Smith was discharged at the final account hearing without having legally closed the estate and without legally procuring a Decree of Distribution or final settlement. RCW 11.76.030. Failure of the Personal Representative to give notice to the heirs as required by RCW 11.76.040 results in jurisdictional defect as to such heirs and renders a Decree of Distribution void. *Hesthagen v. Harby*, 78 Wash.2d 934, 481 P.2d 438 (1971). Here the two heirs, Rena Peterson and Lyndra Peterson, objected to the notice as being inadequate. They consequently did not waive the timeliness of the notice. There are numerous other failures to give proper and timely notice. These deficiencies indicate the lack of competency and breach of fiduciary duty to the heirs. The failure to give the proper and required notice resulted in loss of jurisdiction.

**Issue No. 2. Was Thomas Milby Smith qualified to be appointed as the Personal Representative of the Estate of Garth Benjamin Peterson and did he properly carry out his duties?**

Issue No. 2 involves Assignment of Error No. 1, No. 4, and in part, Nos. 7 and 8.

The heirs contend that Smith was not qualified to be appointed Personal Representative, nor did he properly carry out his duties as the Personal Representative. The heirs' contention is based upon the following:

A. Smith had no standing because the Creditor was the corporation and not Smith individually (CP 1015). The Petition for his appointment was to have Smith individually appointed and not the corporation creditor appointed as Personal Representative (CP 2). Because the corporation was the creditor, and not Smith individually, Smith was not eligible to be appointed (CP 19-21).

B. The probate was completed by Smith and not the corporation. Neither Smith nor the corporation should have been appointed because the prior judgment and relationship precluded either from carrying out their fiduciary duty to the heirs.

C. Smith was not qualified because of the antagonism that existed between he and the heirs (CP 682). The heirs were also reluctant to cooperate with Smith (CP 682 & 886 & 889). This antagonism originated in 1992, when the judge in the current proceedings, Judge Leveque, was in private practice and acted as the Arbitrator. He granted a judgment to Smith's personal service corporation, which was the subject matter of the Creditor's Claim (CP 894-898). Leveque, as the Arbitrator,

denied deceased Peterson his request for a continuance due to illness. As a result of Peterson's denial for a continuance and thus not being able to appear, Leveque granted judgment to Smith's corporation, which is now the subject matter of these proceedings (CP 912).

D. Smith could not act in a fiduciary capacity because of his antagonism originating in 1992, when the deceased made a Washington State Bar Association ethics Complaint against Smith (CP 886). Smith should have disclosed this antagonism at the time of his appointment to the Court (CP 1-4).

E. A Professional Service Corporation can act as a Personal Representative under RCW 11.36.010, however Smith and the Professional Service Corporation were not qualified because of their antagonism (CP 1-4).

F. Smith was guilty of waste and mismanagement of the estate as follows:

(1) The Personal Representative did not give notice of his appointment to the heirs in a timely manner as required by the statute. RCW 11.28.237 (CP 674).

(2) Upon Smith's appointment, he gave notice of his unavailability from the date of September 3, 2010 to September 23, 2010, and from October 15, 2010 to November 4, 2010 (CP 26).

(3) Smith was appointed on September 3, 2010, and did not take any action to preserve the assets of the estate until he issued a Show Cause Order for hearing on February 25, 2012, directed to Rena Peterson some 5½ months later (CP 14-16 & 115-119).

(4) Smith never made a complete inventory of the auto parts, the Rockwell residence, nor the Conklin residence. Smith never inventoried the furniture and fixtures in either residence or other personal property (CP 1308). The partial inventory that he filed was inadequate because it lacked the same detail that Smith devoted to his billings (CP 381).

(5) Smith sold the estate property, consisting of antique vehicles and parts, for under market value (CP 1309-1310). He sold over 30 antique cars for \$34,800.00 (CP 754-756). Soon after the sale the purchaser offered to sell the cars back to the heirs for \$130,000.00 (CP 812 pg 39). The same purchaser had also previously offered the deceased over \$100,000.00 for the same cars, which Smith sold for \$34,800.00 (CP 1309-1310).

(6) The heirs were interested in purchasing all of the parts and all the vehicles owned by the estate (CP 1304). Smith failed to honor the heirs' first right of refusal on the sale of the estate property (CP 164 &

1044)(RP 233). As a result, the heirs repurchased two vehicles and paid \$7,500.00 (CP 921).

(7) The Estate was not compensated for several antique car parts that were stored in the vehicles and transferred to the buyer (CP 754-756). The heirs attempted to repurchase the parts and issued a check to the parts purchaser for the sum paid but the purchaser would not sell (CP 921).

(8) Smith failed to properly protect the estate property. There were five different and separate burglaries at the Rockwell residence (CP 1031-1034). There were three different and separate burglaries at the Conklin residence (CP 1031-1034). Smith charged the estate \$1,133.00 from December 20, 2011 to January 2012, pertaining to these burglaries (CP 1151-1155).

(9) Smith's antagonism to the heirs resulted in extra legal fees and expenses (CP 932-939). The Affidavit of Charles Cleveland, an attorney specializing in probates, stated that a fee of \$5,000.00 would have been adequate and fair (CP 932-939). Smith obtained a judgment for fees and costs for \$72,868 (CP 1356-1373).

(10) Smith did not get approval from the Court on his Creditor's Claim, as required by TEDRA, until late in the probate when the heirs called it to the Court's attention and then Smith obtained an Order Nunc

Pro Tunc. (CP 941-942 & 1268-1270). The heirs contend the Order Nunc Pro Tunc was invalid because it dealt with substantive law (CP 1268-1270).

"[A motion nunc pro tunc] may be used to make the record speak the truth, but not to make it speak what it did not speak but ought to have spoken. If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy these errors or omissions by ordering the entry nunc pro tunc of a proper judgment" *State v. Ryan, supra* 146 Wash. at 117, 261 P. 775 (1927); *Osborne v. Osborne*, 60 Wash.2d *supra* at 167, 372 P.2d 538 (1962) *Pratt v. Pratt*, 99 Wash. 2d 905, 911, 665 P.2d 400, 404 (1983).

(12) Smith failed to comply with the Request for Special Notice of Proceedings filed by Rena Peterson on March 31, 2011, and on June 2, 2011, as required under RCW 11.28.240 (CP 264-265 & 355-358). This issue is supported by earlier argument herein.

(13) Smith gave notice to resign in September 2011, thereafter he refused to resign when the heirs declined to release Smith of all liability after he demanded that they sign an indemnity and release agreement consisting of 14 pages. (CP 692) (RP 155).

For the foregoing reasons Smith was not qualified to act as Personal Representative and is guilty of waste and mismanagement and not properly carrying out his duties to the Estate.

**Issue No. 3. Should the judgment entered on the Personal Representative's Creditor's Claim be reversed?**

This involves Assignment of Error No. 2, 6, and 8.

The Personal Representative was not a creditor. The professional corporation was the creditor of the estate. The bond issued covered only Smith individually and not the creditor, which was the professional corporation (Supp CP 1382-1384). The Creditor's claim filed was invalid, due to the fact that the creditor was a professional corporation, and not the individual, Smith (CP17-18). Secondly, the Creditor's Claim, as originally submitted individually by Smith, was not properly submitted nor approved by the Court. The Creditor's Claim should have been rejected for the reason that the corporation was the creditor and not Smith. The further reason that the Creditor's Claim should have been rejected was that the Court's approval was not obtained as required by RCW 11.40.070 and RCW 11.96A.080 and as specified in RCW 11.40.140. TEDRA procedures were not followed by Smith. When the heirs called this to the attention of the Court the Personal Representative sought to cure the error (CP 798-799). The Personal Representative attempted to cure the error by entering a judgment Nunc Pro Tunc (CP 1268-1270).

The Creditor's Claim Statute, RCW 11.40, is strictly construed. *Villegas v. McBride*, 112 Wn.App. 689, 50 P.3d 678 (2002). In *Villegas* the Court of Appeals held that the Plaintiff's Creditor's Claim was

inadequate and invalid because she failed to provide certain information required by statute. A judgment for which Smith seeks to be paid on his Creditor's Claim was filed and entered 19 years earlier in favor of his professional corporation. The Creditor's Claim was made and filed by Smith and not the corporation.

Thereafter the Court sought to accommodate the Personal Representative by entering an Order Nunc Pro Tunc on January 17, 2012. (CP 1268-1270). A judgment Nunc Pro Tunc may not be granted when the conduct of the person seeking judgment renders its entry improperly, or if a third person's interest is affected. Here, the heirs' interest is affected. A judgment Nunc Pro Tunc was entered in the case of *Pasco v. Napier*, 109 Wn.2d 769, 755 P.2d 170 (1988), which involved a disability retirement of a law enforcement officer. The *Pasco* Court quoted the rule:

It is well established that nunc pro tunc orders are not a proper vehicle for changes of substance in the prior orders or judgments. A judgment or decree nunc pro tunc corrects procedural mistakes, but not matters of substance. It cannot be used to change the terms of, or remedy omissions in, the prior judgment or decree.

Here, since the Creditor's Claim Statute is strictly construed, the change entered by the Court Order Nunc Pro Tunc dated January 17, 2012, was a change of substance and does not fall within the principals set out

herein as a procedural mistake (CP 1268-1270). The Creditor's Claim was filed by the professional corporation (CP 17-25). The Creditor's Claim should have been disallowed because the professional corporation was not the appointed personal representative, RCW 11.28.120.

The Creditor's Claim should also be disallowed because Smith did not disclose his conflict of interest in his original Petition for Appointment of Personal Representative. A Personal Representative is under a duty to the beneficiary to administer the trust solely in the interest of such beneficiary, undivided loyalty is required, *In re Johnson's Estate*, 187 Wash. 552, 554, 60 P.2d 271, 272 (1936). He failed to disclose to the Court his past antagonistic relationship with the deceased, causing him to breach his fiduciary duties to the beneficiaries of the estate. *Id.* *In re Jones Estate*, 152 Wn.2d 1, 93 P.3rd 147 (2004).

In conclusion the Creditor's Claim should be disallowed for the following reasons; (a) Smith was not the creditor, (b) the bond covered Smith individually and not the creditor, (c) the Creditor's Claim was improperly submitted and approved by the court, (d) the Judgment Non Pro Tunc did not cure the deficiencies and, (e) the Creditors Claim Statute is strictly construed.

**Issue No. 4. Were the heirs deprived of their right of first refusal to purchase the assets of the Estate?**

This involved Assignment of Error Nos. 7 and 8.

Rena L. Peterson and the other heirs were granted a First Right of Refusal by the Court, which was agreed to by the Personal Representative on May 19, 2011, as evidenced in the Court's transcript (RP 68), and also as evidenced on the Order of Continuance entered May 19, 2011 (CP 352-354). Subsequent to the May 19, 2011 representation, the Personal Representative took the position that the heirs had to come forward and seek court approval prior to any sale and seek affirmatively the Right of First Refusal (RP 42-47). The heirs dispute this fact and contend that Mr. Smith was obligated to give each heir notice of disposal of any asset's selling price by the estate so that the heirs had a reasonable time prior to the actual sale to determine whether or not one of the heirs wished to purchase the asset. In the alternative it would be impossible for the heirs to present written offers of intent to purchase assets if the Personal Representative neglected to notify the heirs of any bids.

The Personal Representative had a fiduciary duty to submit the First Right of Refusal to the heirs before selling any assets pursuant to court orders. The Personal Representative violated his duty by not giving Notice of First Right of Refusal to each heir. This failure shows his breach of fiduciary duty and antagonism.

The Personal Representative sold all 24 vehicles in the estate for \$34,800.00, (CP 440-442), which vehicles were antiques and classics and had a value of over \$100,000.00 (CP 879 & 1018 & 805-813). After the sale of the vehicles for \$34,800.00, the heirs contacted the purchaser on August 8th or 12th, 2011, and sought to repurchase the vehicles for the price of \$34,800.00, being the same price that the purchaser paid, plus any and all purchaser's expenses (CP 812). The heirs, Rena L. Peterson and Lyndra Peterson, did repurchase two of the vehicles for a price of \$7,500.00 (CP 811-812). The Purchaser was approached by the heirs requesting to repurchase the remaining vehicles and the purchaser requested \$130,000.00 for the 22 remaining vehicles (CP 812 pg 39). Smith also sold all inventory of parts, some of which were new, or practically new, for \$15,000.00 (CP 947). The parts had a value far in excess of \$15,000.00, as many parts had been collected over several years, inventoried and logged into a log book (CP 921). Rena L. Peterson sent a cashier's check to the Purchaser of the parts for \$15,001.00 to repurchase the parts. Rena L. Peterson even offered to pick the parts up. The Purchaser refused to sell the parts to Rena Peterson for \$15,000.00, or any sum of money (CP 519-520). Rena L. Peterson would have exercised her right of first refusal on all 24 vehicles and also on the purchase of the

inventory of parts, had she been given notice of the intended sale price by the Personal Representative (CP 691).

The actions of the Court and Smith deprived the heirs of their Right of First Refusal and thus financially damaged the Estate and its beneficiaries.

**Issue No. 5. Should the Court have appointed Lyndra Peterson and Rena Peterson as Successor Personal Representatives and accepted the resignation of Smith?**

This involves Assignment of Error Nos. 5, 6 and 8, failing to appointed Rena Peterson and Lyndra Peterson as Successor Personal Representatives (CP 1064-1069).

The first part of September 2011, Rena L. Peterson and Lyndra Peterson, with the consent of all four heirs, petitioned the Court to be appointed as Co-Personal Representatives of the Estate to replace Smith as he gave notice of resignation (CP 651-655). The Personal Representative had filed a Notice to Resign at that time (CP 627-643). Because the heirs declined to sign a Release of All Claims against the Personal Representative, the Personal Representative in open Court refused to resign (CP 702-710) (RP 155). He subsequently incurred more than \$25,000.00 additional attorney's fees and costs to the date of the final account (CP 1144-1156). On January 17, 2012, Rena L. Peterson and

Lyndra Peterson again asked the Court to be appointed Co-Personal Representatives of the aforesaid estate to replace Smith. (CP 1345). The Court again rejected the request for appointment of Rena L. Peterson and Lyndra E. Peterson as the replacement Personal Representatives (CP 1265-1267).

The Court has complete discretion on the appointment. *In re St. Martin's Estate*, 175 Wash. 285, 27 P.2d 326 (1933). The heirs contend that the Court abused its discretion in not appointing them as Co-Personal Representatives. Presently the estate does not have a Personal Representative. During the period that the Personal Representative offered to resign from September 2011 until he resigned in January 2012, the Personal Representative incurred additional fees in the amount of \$23,728.50 for what he claims was 709.8 hours of time and also incurred additional costs of \$1,750.28, making combined additional fees and costs totaling \$25,478.78, which the heirs contend could have been avoided by their appointment as Co-Personal Representatives (CP 997). The order denying appointment was entered December 9, 2011 (CP 997).

RCW 11.28.120 favors the appointment of the next of kin. "While the request or suggestion, by the next of kin, of a fit and suitable person for appointment as administrator, is entitled to serious consideration and has a persuasive force and weight, it is not controlling upon the court's

discretionary power and ultimate decision.” *In re St. Martin's Estate*, 175 Wash. 285, 289, 27 P.2d 326, 327 (1933). Rena Peterson and Lyndra Peterson should be appointed as the court has not appointed anyone to replace Smith. The court abused its discretion in failing to appoint the two heirs as Personal Representatives.

**Issue No. 6. Did the Court properly deny the heirs’ motion for the Court’s recusal?**

This involves Assignment of Errors No. 4 and No. 8.

On May 19, 2011, Rena L Peterson, acting *Pro Se*, requested the Court to recuse itself from hearing the probate matter (CP 352-353) (RP 56). The basis of her motion to disqualify was Canon 3 of the Code of Judicial Conduct. At the May 19, 2011 at a hearing, Rena L. Peterson stated.

**Ms. Peterson:** If I may, your Honor, I don’t know the procedures proper, I don’t mean to be rude, but I need to ask you to recuse yourself in the matter before you, because you were the original determining party that rendered the Arbitration Award that granted this judgment that has given him (Thomas Milby Smith) power to his actions as a Personal Representative. You were the gentleman that decided on this case, rendered the Arbitration award. He took the award, went to Court and got a judgment on it. I didn’t think you knew that probably. . . .

**The Court:** I don’t see how that relates. I don’t have any memory of that at all.

**Ms. Peterson:** I am sure you don’t, your Honor, and I personally think that you are way in the dark about it. But

Mr. Smith and I both know that it was only your decision that has got us before you today, and it was because of your decision and how he presented it to you. Dad didn't show, nothing, he did it de novo, or something like that. . . .

**The Court:** . . . I recognize your concern and it's a matter of record so you have it for appeal if you need it (RP 56).

The Court denied Rena L. Peterson's motion to be disqualified.

Rena L. Peterson and Lyndra Peterson perceived at all times that they could not have a fair and impartial trial or hearing on the probate matters before The Honorable Jerome J. Leveque (CP 923). While Leveque was in private practice he was the arbitrator that awarded Smith his fees on the disputed claim against Peterson in 1992 (CP 894-898).

On August 5, 2011, Rena L. Peterson again filed a handwritten motion requesting the Court to reconsider the sale of the deceased's property and also recusal request, both of which were previously denied (CP 466). At the same time, Rena Peterson filed a typewritten motion to allow the heirs to be heard before the Court and to consider the Affidavit of Prejudice. (CP 469-470). The Court Order entered on August 11, 2011 denied all motions. (CP 474). Canon 3 is a broad rule dealing with conflicts. Rule 3.9 states:

Service as Arbitrator Mediator. A Judge shall not act as an Arbitrator or a Mediator, or perform other judicial functions in a private capacity unless authorized by law.

Judge Leveque, as a private lawyer, arbitrated the dispute which is the subject matter of Smith's Creditor's Claim. The comment under the Code of Judicial Conduct, Canon 3, (1995-2010) states:

Comment (D) Disqualifications.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including, but not limited to, instances in which . . . (b) the judge previously served as a lawyer, or was a material witness in a matter in controversy. . . .

Rena L. Peterson and Lyndra Peterson at all times perceived that Judge Leveque's prior act as Arbitrator while he was a lawyer resulted in his being unfair and partial to the administrator in the present proceedings (CP 352-353 & 466).

The Code of Judicial Conduct (2011) under Rule 2.11 "Disqualification" provides:

RULE 2.11

Disqualification

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding. . . .

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was

associated with a lawyer who participated substantially as a lawyer or a material witness in the matter during such association; . . .

*Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), involved an appeal where the Trial Judge erred in denying a party's Motion for Recusal, which was based upon the allegation that the Judge had initiated improper ex parte communication. In *Sherman*, as in the present case, the Judge did not believe that he had violated the Code of Judicial Conduct. The Court said at Page 205:

CJC Cannon 3(A)(4) cmt. (1994)  
(emphasis added).

We conclude that the Judge violated the unambiguous dictates of this rule when he directed his extern to contact the physician's charge with monitoring Dr. Sherman's chemical dependency for information about the monitoring process. See *State v. Romano*, 34 Wn.App. 567, 569, 662 P.2d 406 (1983); *State v. Cash*, 867 S.W. 2d 741, 749 (Tenn. Crim. App. 1993).

The *Sherman* case went on to state at Page 206 that the test for determining whether the Judge's impartiality might reasonably be questioned is an objective test. The Personal Representative here misled the judge and stated that the matter was unrelated. The Court did not

recuse itself from hearing the probate proceedings. The Judgment entered for fees and costs should be reversed and vacated.

**Issue No. 7. Were the Personal Representative's fees and costs excessive and unnecessary?**

This involves Assignment of Error Nos. 6, 7 and 8.

The Administrator's fees and costs total \$72,868.04 (CP 1162). The Court in the Order Approving Administration of the Estate and Resignation of Administrator, Administrator's Final Account and Order for Disbursement of Estate Monies entered January 17, 2012, ordered the Creditor's Claim of Thomas Milby Smith, Inc., P.S. be paid by the Estate in the sum of \$57,989.90 (CP 1272-1288). This claim was paid by the Personal Representative, Smith, from the estate funds. The Court at Page 16 of 17 also ordered judgment against the Estate for the sum of \$72,868.04, for fees and costs (CP 1287). This amount remained unpaid. The Estate's checking balance at the time of the Final Account and before payment of Smith's Creditor's Claim, was \$63,210.09 (CP 1284). The Estate ended with cash on hand of \$5,258.16 after the payment of the Creditor's Claim (CP 1286). The excessive judgment for fees and costs of \$72,864.04 remains unpaid and should be disgorged (CP 1287).

In *Meryhew v. Gillingham*, 77 Wash. App. 752, 755, 893 P.2d 692, 694 (1995) a claim for disgorgement of the attorney fees collected from the estate was alleged because the Personal Representative breached his

ethical duty. A claim for disgorgement is available to a party who is damaged by an attorney's violation of ethical duty. *Eriks v. Denver*, 118 Wash.2d at 462, 824 P.2d 1207 (1992). In *Eriks* the court held that “the general principle that a breach of ethical duties may result in denial or disgorgement of fees is well recognized.” *In re Price's Estate*, 53 Wash. 2d 393, 398, 333 P.2d 929, 932 (1959) the Court held that because the administrator of the estate acted with self interest and did not conduct the administration of the estate ‘according to law’ then the fees and costs are forfeited.

Charles Cleveland, who is a specialist in probate and handles exclusively probate matters, filed an Affidavit indicating that a reasonable fee for this Estate would have been \$5,000.00 (CP 932-940). It is true that the heirs did not cooperate with Smith, however, because of the past relationship; the heirs had reason not to cooperate. At the outset Smith should have disclosed to the Court his past relationship as a condition to his appointment as Personal Representative. He should be required to forfeit his fees and costs for not acting in an ethical and fiduciary manner in being appointed as the Personal Representative.

Members of the Washington State Bar Association are expected to maintain their high ethical standards. Smith had a personal conflict with the heirs and was unfit to act in a fiduciary capacity to the heirs (CP 933-

937). Washington courts have held that when a Personal Representative acts unethically or in breach of his fiduciary obligation to the Estate, fees and costs can be disgorged. In the alternative, where a Court has found that attorneys fees or administrators fees are excessive, the administrator is ultimately liable to the estate for the full reimbursement *In re Peterson's Estate*, 12 Wash. 2d 686, 732, 123 P.2d 733, 754 (1942).

Smith should be deprived of all attorneys' fees and costs (CP 1267). The judgment for fees and costs should be reversed and vacated.

**Issue No. 8. Did the Personal Representative act in a fiduciary relationship with the heirs?**

This issue involves Assignment of Errors Nos. 1, 2, 3, 6, 7 and 8.

RCW 11.48 provides for the general powers and duties of a Personal Representative, however in this case the Court appointed a Personal Representative whose personal interest and bias prevented him from acting in a disinterested manner; he was not qualified to act. *In re Clawson's Estate*, 3 Wn.2d 509, 101 P.2d 968 (1940) (CP 936).

In Washington, the Personal Representative stands in a fiduciary relationship and is bound to what will best serve the interests entrusted to him. He is to exercise diligence in the administration of the Estate in the best interests of the heirs. *Estate of Larson*, 103 Wn.2d 517, 694 P.2d

1051 (1985); *Hesthagen v. Harby*, 78 Wn.2d 934, 942; 481 P.2d 438

(1971). Hesthagen stated in part:

"The administrator of a decedent's estate is an officer of the court and stands in a fiduciary relationship to those beneficially interested in the estate. In the performance of this fiduciary duty he is obligated to exercise the utmost good faith and to utilize the skill, judgment, and diligence which would be employed by the ordinarily cautious and prudent person in the management of his own trust affairs. *Stewart v. Baldwin*, 86 Wn. 63, 149 P. 662 (1915); *In re Estate of Maher*, 195 Wash. 126, 121, 79 P.2d 984, 986 (1938), *supra*. For breach of his responsibilities which causes loss to another, he stands liable."

Lyndra Peterson and Rena Peterson stated that the Personal Representative was not qualified because of the litigation against the deceased by the Personal Representative and the Washington State Bar Complaint (CP 1014-1016) (CP 881-884). Charles Cleveland, an experienced probate attorney, testified that the Personal Representative had a conflict of interest with the deceased (CP 932-940). This conflict was the result of Smith previously representing the deceased in a different action that ended in Smith suing the deceased over disputed attorneys fees, garnishing the deceased wages, obtaining a bench warrant for the deceased's arrest, and the deceased filing a Bar Complaint against Smith (CP 881-884). These actions clearly present a hostile and contentious relationship between Smith and the deceased ultimately leading to a conflict of interest with the heirs (CP 932-940)(CP 881-884). If Smith

wanted his Creditor's Claim paid he should have simply filed a claim once a Personal Representative was appointed. Smith acting in this Estate as Personal Representative under the undisputed facts is a clear conflict of interest.

The Personal Representative is an officer of the Court and standing in a fiduciary relationship to those beneficially interested in the Estate. He is obligated to exercise the utmost good faith and to utilize, skill, judgment, and diligence as that of an ordinarily cautious and prudent person would employ in the management of his own affairs. He stands liable for any breach of his responsibilities which causes loss to another. *Wilson's Estate v. Livingston*, 8 Wn.App. 519, 507 P.2d 902 (1973). The fact that the Personal Representative sold all the antique vehicles for approximately \$34,800.00, when they had a value in excess of \$100,000.00, constitutes a breach of the Personal Representative's fiduciary duty (CP 1018). Garth Peterson wanted \$195,000.00 for the vehicles and parts during his lifetime (CP 1183). The heirs wanted to buy the vehicles after the Personal Representative sold them to Mr. Waller, who wanted \$130,000.00 for the vehicles he paid \$34,800.00 (CP 1202).

In conclusion and for other reasons cited in this Brief, Smith failed to act in a fiduciary capacity thus breaching his duty as the personal representative.

**Issue No. 9. Did the Personal Representative properly inventory and sell the personal property of the Estate?**

RCW 11.44.015 provides:

(1) Within three months after appointment, unless a longer time shall be granted by the court, every personal representative shall make and verify by affidavit a true inventory and appraisal of all of the property of the estate passing under the will or by laws of intestacy...

The Personal Representative did not comply with the statute. The first interim report was filed March 28, 2011; over 6 months after appointment, and an 'inventory and appraisal of all property of the estate' was not included (CP 146). The Personal Representative's first motion to begin the appraisal process was filed on January 28, 2011, requesting the court grant the Personal Representative authority to hire an appraiser; this notice of intent to appraise was nearly five months after appointment and was solely for real property appraisal (CP 89). The Personal Representative also had access to previous appraisals of the personal property, including the antique cars and parts, however he did not provide or make a written record of these previous appraisals until March 28, 2011 (CP 230). The Personal Representative disposed of personal property he deemed 'unsalvageable' prior to inventory and prior to the

heirs having an opportunity to collect personal possessions (CP 152, Ln 13).

RCW 11.44.50 provides:

If any personal representative shall neglect or refuse to make the inventory and appraisal within the period prescribed, or within such further time as the court may allow, or to provide a copy as provided under RCW 11.44.015, 11.44.025, or 11.44.035, the court may revoke the letters testamentary or of administration; and the personal representative shall be liable on his or her bond to any party interested for the injury sustained by the estate through his or her neglect.

The Personal Representative neglected to fulfill the statutory requirements under RCW 11.44.50 and is thus liable under the statute.

RCW 11.44.015(2) provides:

...(2) The inventory and appraisal may, but need not be, filed in the probate cause, but upon receipt of a written request for a copy of the inventory and appraisal from any heir, legatee, devisee, unpaid creditor who has filed a claim, or beneficiary of a nonprobate asset from whom contribution is sought under RCW 11.18.200...

The Personal Representative was mailed a request for inventory and appraisal and a copy filed with the Court on September 20, 2011 pursuant to RCW 11.44.015 (CP 664). The Personal Representative neglected to provide such documentation at anytime after the request in violation of the statute.

The Personal Representative failed to comply with RCW 11.44.015, to file an Inventory within three months after appointment. The Personal Representative failed to determine the fair net value as of the date of decedent's death of each item contained in the Inventory and did not inventory all items in the Estate. The Personal Representative did not abide by the statutory guidelines; he simply liquidated Estate assets to ensure he would be paid his Administration fees and Creditor's Claim.

#### **IX. CONCLUSION**

The judgment of the Trial Court should be reversed. Judgment on the fees and costs should be reversed and vacated (CP 1287). The Personal Representative's fees and costs should be disgorged and the heirs be awarded their fees and cost by the personal judgment against Thomas Milby Smith. The heirs, Rena Peterson and Lyndra Peterson, should be appointed Co-Personal Representatives and the trial judge should not preside over the remainder of the probate proceedings.

#### **X. MOTION FOR ATTORNEYS FEES**

The heirs move the court for attorney fees on this appeal pursuant to RCW 11.96A.150. "Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award *In re Estate of Wegner v. Tesche*, 157 Wash. App. 554, 565, 237 P.3d 387, 392 (2010) citing *Steele*

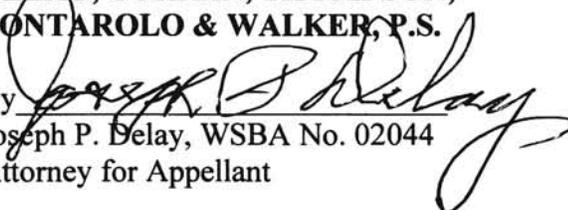
*v. Lundgren*, 96 Wash.App. 773, 787, 982 P.2d 619 (1999). "RCW 11.96A.150, which provides that such fees are available on appeal solely at the discretion of the court: "any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party ... [f]rom any party to the proceedings." *In re Estate of Wegner v. Tesche*, 157 Wash. App. 554, 565, 237 P.3d 387, 392 (2010).

The heirs also seek attorneys fees under RCW 11.28.250 and 11.68.070. These statutes allow for attorneys fees and costs to be paid personally by the Personal Representative if the Court finds that the mismanagement or waste has occurred or that the litigation was necessitated as a result of a breach of fiduciary duty. *In re Estate of Jones*, 152 Wash.2d 1, 93 P.3d 147 (2004) citing *Mahler v. Szucs*, 135 Wash.2d 398, 434–35, 957 P.2d 632, 966 P.2d 305 (1998). The Court should grant such other relief it deems just.

Dated this 2 day of July, 2012.

Respectfully Submitted.

**DELAY, CURRAN, THOMPSON,  
PONTAROLO & WALKER, P.S.**

By   
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Attorney for Appellant

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 306861

Spokane County Cause No. 10-401154-6

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

IN THE MATTER OF THE ESTATE OF  
GARTH BENJAMIN PETERSON, Deceased

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AFFIDAVIT OF MAILING  
APPELLANTS' OPENING BRIEF

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