

**FILED**

AUG 03 2012

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

NO. 30686-1-III

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OF THE STATE OF WASHINGTON

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IN RE THE ESTATE OF  
GARTH BENJAMIN PETERSON

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BRIEF OF RESPONDENT

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Thomas M. Smith  
WSBA #0687  
Attorney for Respondent

Thomas Milby Smith Inc., P.S.  
P.O. Box 1360  
Spokane, WA 99210  
(509) 990-6306 [New phone as of 8/1/2012]

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## I. INTRODUCTION

Respondent Thomas Milby Smith, Inc., P.S. (“Smith P.S.” or “Respondent”), a principal creditor of Mr. Garth Peterson’s estate, became administrator of the estate after Mr. Peterson passed away in May 2010. Smith P.S. was appointed as administrator based on its creditor status. For more than one year, Smith P.S. expended substantial effort to properly administer the estate. In the process, it faced numerous challenges, including obstruction by the estate’s heirs and the extreme disarray of the estate property.

Despite these obstacles, Smith P.S. properly performed all of its duties as personal representative of the estate. It notified all heirs of all proceedings, obtained appraisals, made an inventory of all known estate property, and obtained the trial court’s permission to dispose of the property. The trial court concluded Smith P.S. properly discharged his fiduciary duties to the estate and, in February 2012, allowed it to resign as administrator.

Despite Smith P.S.’s efforts, Appellants Rena and Lyndra Peterson (“the Petersons” or “Appellants”), two of the estate’s heirs, seek reversal of the entire proceedings below. The Petersons list a number of grievances, none of which provides ground for reversal. This Court

should affirm the trial court's orders and Smith P.S.'s proper handling of the estate's administration.

## II. STATEMENT OF THE CASE

### A. **Identity of Respondent: Thomas Milby Smith, Inc., P.S. ("Smith P.S.")**

Smith P.S. is a professional service corporation that provides legal representation. CP 2. Attorney Thomas M. Smith ("Smith") is the sole stockholder and officer of Smith P.S. CP 1268-1269.

### B. **Smith P.S.'s Judgment Against Garth Peterson**

In the late 1980s, Smith P.S. represented Garth Peterson ("Mr. Peterson"). *See, e.g.*, CP 929, 931. Mr. Peterson failed to pay Smith P.S. the full amount of its legal fees, and Smith P.S. sued Mr. Peterson to recover the fees owed. CP 8-10.<sup>1</sup> The case proceeded to arbitration. CP 8.

At the time, Judge Jerome Leveque, now a Spokane County Superior Court Judge, was a privately practicing attorney and served as a court-appointed arbitrator in the arbitration proceeding. CP 894-895, 898. Judge Leveque has no memory of serving as an arbitrator in Mr. Peterson's action. CP 352-353.

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<sup>1</sup> The Petersons claim that in 1991, a Bar complaint was filed against Smith relating to his representation of Garth Peterson. CP 687. Notably, this document does not mention

Smith P.S. obtained an arbitration award of \$20,725.18 and, in June 1992, a judgment based on that award. CP 8-10, 891. In 2002, before the judgment expired, Smith P.S. obtained a renewal of the judgment. CP 11-12.

**C. Appointment of Smith P.S. as Personal Representative of the Estate of Garth Peterson**

On May 11, 2010, Garth Peterson passed away. CP 13. Mr. Peterson had not paid the judgment. CP 3.

More than 40 days elapsed without anyone seeking to administer Mr. Peterson's estate. CP 2-3, 14.

On September 3, 2010, Smith, on behalf of Smith P.S., petitioned Spokane County Superior Court for Letters of Administration in Mr. Peterson's estate and for appointment of Smith P.S. as personal representative of the estate. CP 1-13. Smith P.S. did so based on its status as a principal creditor of the estate. CP 2-3. As proof of the estate's debt, Smith P.S. filed a creditor's claim with its petition. CP 17-25.

When Smith P.S. filed its petition, it knew of only one potential heir to Mr. Peterson's estate—his daughter, Appellant Rena Peterson. CP 2, 76-77. Despite his previous representation of Mr. Peterson, Smith

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Smith by name, there is no evidence a copy was ever provided to Smith, and no

did not know of or could not recall any other heirs at that time. CP 76-77.

On September 3, 2010, the trial court issued an order confirming Smith P.S.'s status as a principal creditor of Mr. Peterson's estate. CP 14-16. The trial court, recognizing Smith as president of Smith P.S. and therefore a person authorized by Washington law to administer the estate, authorized him to do so. CP 14-16. The trial court did not, however, issue letters of administration on that date. CP 15. Instead, it conditioned issuance of letters of administration on the filing of an oath and a \$10,000 bond. CP 15. Only then, according to the order, would the court issue letters of administration. CP 15.<sup>2</sup>

On September 30, 2010, Smith filed the Oath of Administrator/Personal Representative and a \$10,000 Bond of Probate as required by the court's September 3 order. CP 28, Supp. CP 1382-1385. Smith also filed a Notice to Creditors and a Notice of Appointment directed to Rena Peterson, the sole heir known to Smith at the time. CP 27, 76-77. Smith P.S. served the Notice of Appointment on Rena

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complaint was presented by the decedent. CP 886-889.

<sup>2</sup> The September 3, 2010 order incorrectly identified Smith, rather than Smith P.S., as the personal representative authorized to administer the estate upon filing of the oath and bond. CP 15-16, 1268-1271. The court later acknowledged this error and, in a *nunc pro tunc* order, corrected it by identifying Smith P.S. as personal representative. CP 1268-1271.

Peterson by mail on October 7, 2010. CP 76-77. That same day, the court issued Letters of Administration which specifically named Smith individually, not Smith P.S., as personal representative and authorized Smith to administer the estate. The trial court later corrected the letters of administration by *nunc pro tunc* order to name Smith P.S. as personal representative:

1.2 On September 3, 2010 the court appointed: **THOMAS M. SMITH, INC. P.S.** to administer the estate of the decedent according to law.

1.3 The personal representative has qualified.

## II. AUTHORIZATION

**THIS CERTIFIES: THOMAS M. SMITH, INC. P.S.** is authorized to by this court to administer the estate of the above decedent according to law.

CP 29.

### **D. Notice to Heirs and Smith's Efforts to Locate Heirs**

One week after the court issued Letters of Administration, Smith, unsure of where Rena Peterson lived, mailed copies of the Notice of Appointment to two addresses where he believed Ms. Peterson might reside: one in Spokane and one in Klamath, Falls, Oregon. CP 31, 76. Smith sent an additional copy of the Notice to the Spokane address via

certified mail. CP 31. Smith also sent Rena Peterson a letter on October 6, 2010 asking her to produce the decedent's records. CP 76.

On September 3, 2010, Smith did not know of or could not recall any other heirs. CP 76-77. Smith therefore conducted substantial research to confirm the existence and location of any additional heirs to Mr. Peterson's estate. CP 36-37, 76-88. In the course of doing so, Smith discovered Rena Peterson had specifically instructed an acquaintance of Garth Peterson not to give attorney Smith her address or the addresses of other heirs. CP 37, 81. Smith encountered other difficulties in his search, including numerous unreturned telephone calls and apparently active attempts by heirs to avoid contact with Smith and prevent him from discovering their addresses. CP 37, 42-43, 80-86.

Smith did not learn until November 11, 2010 that the estate had more than one heir. CP 77-80. Smith only discovered this fact after speaking with neighbors of Garth Peterson's Rockwell property. CP 77-78. Even then, Smith had no names or addresses of any of Rena Peterson's siblings. CP 77-78.

After confirming the existence of additional heirs, Smith conducted substantial research, using the Internet and visiting the Spokane County Health Department and Community Cremation Services

in attempts to find contact information for the additional heirs. CP 78-79. At Community Cremation Services, Smith obtained a copy of the cremation and disposal authorization, which listed the names, but not the addresses, of Mr. Peterson's children. CP 79. Smith P.S. then employed a private investigator to determine the addresses of each of four children believed to be the estate's heirs. CP 79-80.

Smith determined that the heirs were Mr. Peterson's four children: Rena Peterson, Lyndra Peterson, David Peterson, and Leighann Yocom. CP 35-36. On December 27, 2010, Smith P.S. moved for permission to serve all four heirs by mail at the addresses Smith believed current. CP 35-38. The court granted Smith P.S.'s motion the same day. CP 39-41. The Petersons have not appealed this order. CP 1353-1380.

The court updated the heirs' addresses as necessary during the estate's administration. *See, e.g.*, CP 196, 444-450. The Petersons have not appealed these determinations. CP 1353-1380. Smith P.S. served all filings on the addresses of all four heirs, as authorized by the court's orders, throughout administration of the estate. *See, e.g.*, CP 35-41, 69-71, 98-104, 121-122, 328-329.

Based on certain heirs' apparent efforts to avoid contact with it, Smith P.S., anticipating further difficulty in dealing with the estate's

heirs, requested and obtained an order assigning the probate proceeding to Spokane County Superior Court's trial department. CP 42-46. The court assigned the case to Judge Jerome J. Leveque. CP 46.

Despite their later contentions that they did not receive proper notice, both Rena and Lyndra Peterson appeared in court,<sup>3</sup> and all four heirs filed statements or motions at various times. *See, e.g.*, CP 348-353, 355-360, 465-472, 474-480, 482-488, 491, 494-496, 499-509; *also, e.g.*, RP<sup>4</sup> 1, 54, 82.<sup>5</sup>

#### **E. Administration of the Estate**

Administration of the estate required substantial investments of time and effort. When he died, Mr. Peterson owned two lots with houses in Spokane County: one at 2619 West Rockwell (the "Rockwell lot" or "Rockwell house") and another at 122 North Conklin (the "Conklin lot" or "Conklin house"). CP 1-2, 90.

Even before gaining access to the houses, Smith learned of the properties' poor condition. Farmers Insurance told Smith that the Rockwell house had suffered significant damage from water and mold and needed repair. CP 48-68. Farmers also advised Smith that Rena

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<sup>3</sup> Appellants' Brief, p. 17; *see also, e.g.*, RP 54, 82.

<sup>4</sup> All "RP" citations refer to page numbers from the verbatim reports of proceedings.

Peterson interfered with the cleaning of the Rockwell house, a fact confirmed by the cleaning service hired to perform that work. CP 49-51; CP 236-240. The Conklin house featured a yard filled with car bodies and rubbish and apparently had sat unoccupied for about 18 years. CP 86.

Despite strong evidence that Rena Peterson had access to the Rockwell house and likely lived there for a time following her father's death, Smith's initial attempts to contact her failed. CP 76-79, 82-85, 93-96. Smith P.S. therefore could not enter either house, forcing him to ask the court's permission to break, enter, and change the locks to secure the two properties for valuation and appraisal. CP 90-91. To expedite administration of the estate, Smith P.S. also asked the court to require Rena Peterson to appear before the court and produce any documents and information she might have that would assist in the estate's administration. CP 93-96. The court granted these requests. CP 113-119. The court also approved Smith P.S.'s request to hire appraisers and labor at estate expense to assist in valuing and sorting through the estate's property. CP 117-118. The Petersons have not appealed these orders. CP 1353-1380.

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<sup>5</sup> While all four heirs filed statements in this proceeding, only Rena and Lyndra Peterson appeal the Superior Court's orders. Appellants' Opening Brief ("Appellants'

Because of Rena Peterson's interference with attempts to repair the Rockwell house, Smith P.S. sought a hearing requiring her to demonstrate why she should not vacate the house. CP 105-112. The court granted this request. CP 113-114. Smith then personally served Rena Peterson with the court's show cause order at the Rockwell house, during which she acted hostile and ordered Smith off the property. CP 123-124. Rena Peterson failed to appear at the show cause hearing, and the court granted Smith P.S. a writ of restitution for the Rockwell lot. CP 125-132. The Spokane County Sheriff served the writ by posting it at the Rockwell house on March 4, 2011. CP 142-145.

On March 10 and March 15, 2011, respectively, Smith P.S. gained access to the Rockwell and Conklin houses and found both in terrible condition. CP 146-155, 169-181, 192-235, 276-278. Both houses showed significant water damage. CP 148-150, 154. The Rockwell house was filled with refuse and debris, and the Conklin house with car parts. CP 146-155. Smith P.S. hired help to clean and sort the contents of the Rockwell house, an effort that took weeks. CP 148-149.

During the cleaning and sorting of the Rockwell lot, Rena Peterson unlawfully accessed the house, removed items from it, and

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Brief"), p.1.

otherwise interfered with management of the property by the estate. CP 156-159.

On March 17, 2011, Smith found Rena Peterson at the Rockwell lot, spoke to her, and offered to let her remove items from the property. CP 159-160. Rena Peterson refused this offer while speaking and acting in a hostile and defiant manner. CP 159-161. A similar conversation occurred on March 24, 2011, at which time Smith told Rena Peterson there would be a court hearing on April 14, 2011. CP 192-194. Rena Peterson's behavior led Smith P.S. to seek a restraining order against her. CP 241-245.

As part of administering the estate, Smith P.S. obtained appraisals of estate property including the two houses, cars, coins, and served them on all heirs. CP 268-278, 292-315, 325-326, 328-329. Smith P.S. also sought to ensure payment of the estate's normal expenses and received offers to buy the estate. *See, e.g.*, CP 284-291, 341-347.

Because of her difficulty in finding an attorney, Rena Peterson twice obtained delays of a hearing on a number of motions relating to administration of the estate. CP 259-260, 264-267, 279-280, 330-332, 348-353. In an order dated May 19, 2011, the court ultimately set the hearing for July 22, 2011. CP 352-353.

In that same May 19 order, the trial court denied a motion by Rena Peterson to recuse itself based on Judge Leveque's role as an arbitrator in the proceeding awarding legal fees owed to Smith P.S. by Garth Peterson. CP 352-353. The trial court lacked any memory of that proceeding and found it unrelated to administration of Mr. Peterson's estate. CP 352-353.

Before the July 22 hearing, Rena Peterson asked for written notice of the estate proceeding, including sales of property and distribution of assets, and expressed particular interest in silver and coins. CP 355-360, 434. Smith replied in writing to Rena Peterson's request, explaining that she could bid on the silver and coins before the hearing. CP 435-436. Smith's letter also advised Rena Peterson of the July 22 hearing date. CP 435-436. By letter dated July 8, 2011, Smith P.S. notified all heirs of their need to submit bids for any estate items they wished to buy. CP 760-762.

On July 8, 2011, Smith P.S. served all heirs by mail with a petition to sell estate assets and to accept or reject offers to buy estate property. CP 361-372. Smith P.S. filed the petition with the trial court on July 14, 2011. CP 361-372. In support of the petition, Smith P.S. filed an inventory of known estate property and a report detailing

appraisal information and outstanding offers on estate property. CP 379-433. Smith P.S. served all of these documents on all heirs, along with a notice of the hearing date and time. CP 372, 383, 392, 437-438.

No heir submitted a bid on estate property before the July 22 hearing, nor did any heir appear at the hearing. CP 513-514. The court, therefore, granted Smith P.S.'s motions to sell estate property. CP 439-443. The court granted several other motions of Smith P.S., including one for a restraining order against Rena Peterson. CP 458-463. The court also required Smith P.S. to allow the heirs to remove personal property and family memorabilia, but not sale items, before August 25, 2011. CP 460-461. The order required heirs to contact Smith P.S. 10 days before August 25 to arrange retrieval of any such items. CP 460-461. Notably, the court's orders did not grant the heirs a right of first refusal of the sale of all estate property. CP 439-443, 458-463, 512-14. The Petersons do not appeal this order. CP 1353-1380.

On July 22, the court received a handwritten note from Rena Peterson explaining her failure to attend the hearing. CP 464-465. In response, the court allowed the heirs to move for reconsideration of the court's order allowing the sale of estate property. CP 464-472. All heirs filed additional statements claiming they did not receive adequate notice

of the proceedings. CP 501-508. Notably, none except David Peterson provided their current addresses. CP 501-508.

By letter dated August 15, 2011, nearly a month after the trial court authorized sale of the estate property, Rena Peterson, through attorney Bevan Maxey, asked to schedule a time to collect personal items and family memorabilia and offered to buy all estate property for the appraised value. CP 542.

On August 18, 2011, the court held a hearing requiring Smith P.S. to show cause that he had complied with the court's order allowing the heirs to remove personal property and family memorabilia before an estate sale. CP 481. The court found in Smith P.S.'s favor, expressly finding Smith P.S. properly notified the heirs of all appraisals of estate property, including all cars and car parts, and that the heirs failed to provide proper written notice of their objections to any such valuations. CP 511-516. The court made these findings despite the heirs' filing of numerous affidavits claiming they received no notice concerning estate property. CP 499-510. The Petersons have not appealed the trial court's August 18 order. CP 1353-1380.

On September 28, 2011, the court denied motions by the heirs to reconsider its July 22 order authorizing the disposition of estate assets

and its order denying Rena Peterson's motion for recusal. CP 668-671.

The Petersons have not appealed this order. CP 1353-1380.

Smith P.S. filed a report on September 16, 2011, moved to replace Smith P.S. as administrator, and scheduled the hearing for September 30. CP 627-643, 647-648. In order to consider new objections by the Petersons, the court continued the September 30, 2011 hearing until November, again to December 9, and yet again to January 12, 2012. CP 1011-1013, RP 208.

**F. Heirs' Challenges to Administration of the Estate**

In or about October 2011, Rena and Lyndra Peterson retained counsel and raised a number of objections to the estate's final accounting and Smith P.S.'s creditor's claim, including challenges to Smith P.S.'s qualifications to administer the estate, the manner in which he did so, and even the court's jurisdiction over the estate. CP 674-694, 729-732, 1014-1020, 1035-1050.

Rena and Lyndra Peterson filed an objection to Smith P.S.'s accounting on January 5, 2012 and a motion for attorney fees on January 12, 2012. CP 1035-1050, 1078-79. The court moved the hearing again, to January 17. RP 82, 212.

On January 13, 2012, Smith P.S. filed a “Second Supplemental” to his initial September 16, 2011 report to update the court on burglaries that occurred at the estate property since the last hearing and the additional time and expenses incurred. CP 1103-1111.

At the January 17 hearing, the court denied the Petersons’ motions and approved Smith P.S.’s accounting, payment of Smith P.S.’s creditor’s claim, disbursement of estate monies, and Smith P.S.’s resignation as administrator. CP 1261-1267, 1272-1288, 1291-1292. The court also issued a *nunc pro tunc* order correcting a clerical error that incorrectly identified attorney Smith as the estate administrator instead of Smith P.S. CP 1268-1271.

The court discharged Smith P.S. as administrator of the estate on February 3, 2012 and, in an order dated February 17, 2012, denied the heirs’ motion to reconsider the court’s January 17, 2012 orders. CP 1341-1343, 1351-1352. This did not, however, close the estate. The estate remains open, as underscored by the Petersons’ desire to succeed Smith P.S. as administrator. CP 1265-1267.

The heirs now appeal the court’s orders of January 17, February 3, and February 17, 2012. CP 1353-1378.

### **III. SUMMARY OF ARGUMENT**

Smith P.S., a principal creditor of Mr. Peterson's estate, held a judgment against the decedent and thus a valid creditor's claim against the estate. Based on its status as a principal creditor, the trial court properly appointed Smith P.S. administrator of the estate. The trial court also properly corrected an initial clerical error by issuing a *nunc pro tunc* order naming Smith P.S. as the proper administrator. Even without the *nunc pro tunc* order, the trial court retained jurisdiction at all times after Smith P.S. initiated the estate proceedings.

Once appointed, Smith P.S. properly performed all of its duties as personal representative. It gave timely notice to the one known heir and promptly found and served the other three. It inventoried the estate property, had it appraised, notified all heirs of all proceedings, and obtained trial court permission to conduct a sale of estate assets. Despite difficult relations with the estate's heirs, Smith P.S. fulfilled its duties to them and to the estate, as established by a series of trial court orders the Petersons failed to appeal. Smith P.S.'s efforts took substantial time and effort, justifying the fees the trial court ultimately awarded him. The trial court acted well within its discretion in all of its action and committed no errors of law.

#### **IV. ARGUMENT**

**A. Standards of Review**

While courts have recognized that probate matters are subject to *de novo* review,<sup>6</sup> trial courts retain broad discretion to take actions and issue orders necessary to administer estates. *In re Estates of Foster*, 165 Wn. App. 33, 46-47, 268 P.3d 945, 951-52 (2011); *see also* RCW 11.96A.020(1)(a); RCW 11.96A.060. Appellate courts therefore may not reverse certain rulings in estate proceedings, such as appointment and removal of administrators, *nunc pro tunc* orders, and fee determinations, unless Appellants show the trial court clearly abused its discretion. *In re Estate of Peterson*, 12 Wn.2d 686, 728, 123 P.2d 733, 752 (1942). Such rulings are not, as Appellants claim, subject to *de novo* review. Throughout its argument, Respondent will indicate where the abuse of discretion standard applies.

**B. The Trial Court Always Had Jurisdiction Over Mr. Peterson's Estate.**

While courts have held that the notice requirement of RCW 11.28.237 has jurisdictional effects, a superior court retains jurisdiction over an estate even if the administrator completely fails to notify heirs. *In re Estate of Walker*, 10 Wn. App. 925, 930-31, 521 P.2d 43, 46-47 (1974). A superior court has subject matter jurisdiction over one who

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<sup>6</sup> *In re Estate of Bowers*, 132 Wn. App. 334, 339-40, 131 P.3d 916, 918-19 (2006).

dies leaving property in its county and personal jurisdiction over those who appear in the proceeding—even if they do not receive the required notices. *Id.* A person who submits to the court’s jurisdiction in any hearing waives the right to notice.

The superior court clearly has subject matter jurisdiction of the estate of one who dies leaving property within the county. Const. art. 4, § 6 (amendment 28). *See* RCW 11.16.050 *et seq.* Furthermore, the superior court has personal jurisdiction over the persons who appear in the proceedings regardless of whether they receive the requisite notices. RCW 11.16.083 provides: "Any person who submits to the jurisdiction of the court in any hearing shall be deemed to have waived notice thereof."

*Id.* Moreover, estate proceedings bind persons who participate in them.

It is our opinion, therefore, that the superior court did have jurisdiction over the subject matter of the estate of Amy Walker, and had personal jurisdiction over appellants and the other heirs who appeared and participated in the proceedings, to the extent that they must be held bound by those proceedings. RCW 11.16.083.

*Id.*<sup>7</sup> Interpreting RCW 11.28.237 otherwise would require courts to repeat entire estate administrations whenever an administrator failed to notify any heir, even if other heirs participated in the probate proceeding.

Were we to hold that the failure to give notice to the 16 heirs deprived the court of all jurisdiction, as the dictum in *Hesthagen*

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<sup>7</sup> Rena and Lyndra Peterson concede they appeared and participated in the proceedings, but claim they waived notice only for the preliminary hearing and only as to themselves, not the other heirs. This affords no basis for voiding the court’s orders, as will be explained *infra*. Even if the heirs had not received sufficient notice of the July 22 and January 17 hearings, which Smith P.S. strongly disputes, the court considered their arguments afterward in both cases—at an August 18 show cause hearing and a motion for reconsideration, respectively. *See* CP 511-516, 1378-1379.

suggests, then all that has transpired in more than 2 years of administration would be a nullity and would have to be redone at great inconvenience, delay, and expense to the parties. Therefore, we decline to rule that the entire administration has been a nullity.

*In re Estate of Walker*, 10 Wn. App. at 931, 521 P.2d at 47.<sup>89</sup> Rather than voiding the entire proceeding, lack of notice only makes the proceedings voidable by heirs who received no notice and choose to bring a collateral attack. *Id.*

This authority provides an important counterpoint to the Petersons' insistence on strict adherence to the 20-day time limit to preserve trial courts' jurisdiction over estate proceedings. Notably, the cases cited by the Petersons all involve administrators who completely failed to notify one or more heirs. *Hesthagen v. Harby*, 78 Wn.2d 934, 937-38, 481 P.2d 438, 441 (1971); *In re Estate of Walker*, 10 Wn. App. at 927-28, 521 P.2d at 45; *In re Estate of Little*, 127 Wn. App. 915, 917-18, 113 P.3d 505, 506-07 (2005). These cases are thus inapplicable to situations where the administrator discovers heirs through significant effort and notifies them promptly thereafter. Under the Petersons' interpretation, any case in which the administrator missed the 20-day time limit would become voidable and subject to being re-opened—even

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<sup>8</sup> This quotation notes that the language in *Hesthagen* upon which The Petersons rely in claiming that failure to serve known heirs within 20 days is dicta, not part of the Supreme Court's holding.

if the decedent died with property in the court's jurisdiction, and even if the heirs participated in the proceedings. Acceptance of the Petersons' position would throw open the courthouse doors in any estate where the 20-day limit was not met. This Court should not adopt that approach.

Here, the court had jurisdiction over the estate and all heirs throughout this proceeding, regardless of whether Smith P.S. strictly complied with the 20-day time limit in RCW 11.28.237. Mr. Peterson died with property in Spokane County, giving the court subject matter jurisdiction over his estate. *See* CP 14. After Smith P.S. commenced the estate proceeding, the Petersons, along with the other two heirs, appeared and participated in it. *See, e.g.*, CP 348-353, 355-360, 465-472, 474-480, 482-488, 491, 494-496, 499-509; *see also, e.g.*, RP 1, 54, 82. The Petersons thus waived their right to notice and are bound by the court's orders.

**C. The Trial Court Correctly Found Smith P.S. Qualified to Serve as Administrator of Mr. Peterson's Estate.**

**1. The Personal Representative's Qualification to Serve Is Distinct from Performance of Its Duties.**

Initially, it is critical to distinguish Smith P.S.'s qualification to serve as personal representative from its performance of the personal representative's duties. RCW 11.28.120 defines the qualifications for a

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personal representative, while other statutes and law define the personal representatives duties. Respondent addresses the Petersons' complaints about its qualifications to serve in this section and their complaints about performance in the next.

**2. Both Smith P.S. and Smith are Entitled by Statute to Serve as Personal Representative.**

The Petersons' complaint that Smith, not Smith P.S., administered the estate draws an irrelevant distinction. Smith is the sole stockholder, officer, and attorney of Smith P.S. CP 1268-69. Indeed, the court noted that even if the court's initial order had correctly named Smith P.S. instead of attorney Smith, attorney Smith would still have been the only person acting on Smith P.S.'s behalf, and thus the person administering the estate. CP 1268-1269. Therefore, while Respondent believes this entire argument is much ado about nothing, it will be addressed.

If no person given priority by RCW 11.28.120 petitions for letters of administration within 40 days after the decedent dies, a court may appoint "any suitable person" to administer the estate. RCW 11.28.120(7). A principal creditor is a "suitable person." RCW 11.28.120(6). Moreover, RCW 11.28.120(7) does not require a "suitable person" to be a principal creditor or any other person identified in

subsections (1) through (6). A court may, therefore, determine that an individual, such as the president and sole stockholder of a creditor corporation, is a “suitable person” to serve as personal representative. RCW 11.28.120(7).

Smith P.S.’s judgment against Mr. Peterson made it a principal creditor of the estate and thus a proper administrator. *See* CP 2-3, 8-10, 11-12, 17-25, 891. Since no one given priority sought letters of administration within 40 days after Mr. Peterson died,<sup>10</sup> Smith P.S.’s appointment was within the court’s discretion and thus entirely proper.

Smith, individually, was also a “suitable person” to administer the estate under RCW 11.28.120(7). That statute grants the trial court authority to determine that the president and sole stockholder of a creditor corporation is a “suitable” personal representative. Thus, even if the trial court had never corrected its clerical error in the September 3, 2010 order, it would have committed no error appointing Smith as personal representative. Regardless of whether the trial court appointed Smith P.S. or attorney Smith personally as administrator, it committed no error.

**3. The Court Corrected Any Issue With the Propriety of Appointing Smith as Personal Representative by Properly Entering a *Nunc Pro Tunc* Order Making**

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<sup>10</sup> *See* CP 2-3, 14.

**Smith P.S. the Estate’s Personal Representative.  
Abuse of Discretion Governs This Ruling.**

In response to the Petersons’ complaint, the trial court entered a *nunc pro tunc* order making Smith P.S. the personal representative. A trial court “...has inherent power to enter a judgment *nunc pro tunc* to correct omissions from the record, i.e. clerical errors as opposed to judicial errors of a substantive nature.” *Winia v. Mathis*, 117 Wn. App. 1088, fn.1, *rev. denied*, 151 Wn.2d 1023, 91 P.3d 95 (2004) (citing *State v. Smissaert*, 103 Wn.2d 636, 640-41, 694 P.2d 654 (1985)); *see also In re Estate of Carter*, 14 Wn. App. 271, 274, 540 P.2d 474, 476 (1975). Entry of *nunc pro tunc* orders falls within the trial court’s discretion. *Carter*, 14 Wn. App. at 274, 540 P.2d at 476. Trial courts retain broad power to exercise this discretion, and appellate courts give great weight to a trial court’s determination that it corrected its own clerical error. *See, e.g., Bastajian v. Brown*, 19 Cal. 2d 209, 214-16, 120 P.2d 9, 11-13 (Cal. 1941). This Court may therefore only reverse a *nunc pro tunc* order if Appellants show the trial court’s issuance of the *nunc pro tunc* order was “manifestly unreasonable.” *Carter*, 14 Wn. App. at 276, 540 P.2d at 477-78.

The trial court acted reasonably when it corrected its initial error through a *nunc pro tunc* order. Indeed, the court’s very first order in this

proceeding recognized that Smith P.S., not Smith individually, was the creditor of the estate. CP 15. The trial court recognized that this clerical error was not consistent with the court’s intent to appoint the creditor—namely, Smith P.S.—as administrator. CP 1269. The court also concluded that the heirs suffered no prejudice because of this error, a finding the Petersons do not challenge on appeal. CP 1269. The court declared that all pleadings designating attorney Smith as administrator refer instead to Smith P.S., Thomas Milby Smith, Inc., P.S. CP 1270.

The court acted well within its discretion when it corrected its error by *nunc pro tunc* order. The initial, erroneous naming of Smith affords no basis for reversal.

**4. The Trial Court Correctly Found No Conflict of Interest That Would Prevent Smith P.S. from Administering the Estate.**

The Petersons assert Smith P.S. failed to disclose a conflict of interest, supposedly stemming from two things: “antagonism” between Mr. Peterson and Smith P.S. and a 1991 Bar complaint. Appellants’ Brief at 30. The trial court correctly declined to find a conflict on either of these grounds.

First, the Petersons fail to cite any authority supporting “antagonism” as a disqualifying conflict of interest. An estate creditor by

definition has some adverse relationship to the estate, yet RCW 11.28.120(7) allows appointment of a creditor to administer an estate. The statute does not disqualify a creditor for perceived “antagonism.”

Second, the Petersons appear to base their “conflict of interest” claim partly on a “Bar complaint” Mr. Peterson supposedly filed against Smith in 1991. CP 687. Smith, however, never received notice of that complaint, and nothing in the record suggests otherwise. CP 886-889. Moreover, the “Bar complaint” failed to name Smith as its subject. CP 886-889. Smith could harbor no “antagonism” based on a complaint of which he never knew, and he certainly could not disclose such an unknown item to the trial court. It certainly provides no ground for disqualifying Smith P.S. from serving as personal representative. The trial court was correct to let Smith P.S. serve in that capacity.

**D. Smith P.S. Properly Performed All of Its Duties as Personal Representative.**

Although raised various places, one of the Petersons’ running complaints concerns the alleged failure of Smith P.S. to perform its duties as personal representative.<sup>11</sup> However, the trial court repeatedly found Smith P.S. fulfilled its duties and complied with applicable

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<sup>11</sup> The Petersons assert many such complaints with little or no legal authority. *See, e.g.*, Appellants’ Brief, pp. 22-27.

statutes. Respondent will address all of the Petersons' complaints on this subject in this section to avoid redundancy.

**1. Smith P.S. Timely Gave Proper Notice of Its Appointment as Administrator to All Heirs.**

**a. Smith P.S. Notified the Only Known Heir of His Appointment Within 20 Days.**

The personal representative of an estate must give notice of his appointment within 20 days to all heirs whose names and addresses he *knows*.

(1) Within twenty 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, legatee and devisee of the estate and each beneficiary or transferee of a nonprobate asset of the decedent *whose names and addresses are known to him or her*, and proof of such mailing or service shall be made by affidavit and filed in the cause.

RCW 11.28.237(1) (emphasis added). Notably, the statute contains no requirement of service on heirs of which the personal representative *should* have known. *Id.*

Even after a court issues an order appointing a personal representative, it may not issue letters of administration until the personal representative complies with the oath and bond requirements of RCW

11.28.170 and 11.28.185. See RCW 11.28.170, RCW 11.28.185.<sup>12</sup> Until an administrator fulfills these requirements, his appointment does not take effect and he lacks power to act on the estate's behalf.

We conclude Williams-Moore's appointment [as personal representative] was not effective until she complied with the statutory and court-ordered requirements to file an oath and bond.

*Williams-Moore v. Estate of Shaw*, 122 Wn. App. 871, 877-78, 96 P.3d 433, 436-37 (2004). The statute's time limit thus runs from the date the appointment takes effect—namely, when the proposed administrator complies with the oath and bond requirements of RCW 11.28.170 and 11.28.185.

It is apparent that Smith P.S. complied with the notice requirements of RCW 11.28.270. As in *Williams-Moore*, the court conditioned the appointment of the administrator on his filing of an oath and bond. CP 14-16, 28, Supp. CP 1382-1385. Here, Smith P.S. filed both on September 30, 2010, and the court issued Letters of Administration the same day. CP 28, 29, Supp. CP 1382-1385. Seven days later, Smith P.S. notified Rena Peterson, the only heir known to him at that time, of his appointment and the pendency of the proceeding. CP 31, 76-77. Smith P.S. thus served notice on the only *known* heir much

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<sup>12</sup> Courts retain discretion to determine whether a personal representative must post a bond. RCW 11.28.185. The court imposed that requirement in this case. CP 14-16.

sooner than 20 days from the day his appointment took effect, unquestionably meeting the statute's notice requirement.

**b. Smith P.S. Determined the Identities and Addresses of the Remaining Heirs and Properly Served Them With Notice.**

The statute governing notice to heirs establishes no time limit for notifying heirs who remain unknown to the administrator more than 20 days after his appointment. *See* RCW 11.28.237. It also provides no guidance in situations, like this one, where heirs initially attempt to avoid contact with the administrator. *See, e.g.*, CP 37, 42-43, 80-86.

By any reasonable standard, Smith P.S. promptly and properly notified the remaining three heirs. Smith did not know Lyndra Peterson, David Peterson, and Leighann Yocom were heirs within 20 days of receiving Letters of Administration. CP 76-77. Smith conducted substantial research to confirm the existence and location of any additional heirs to Mr. Peterson's estate. CP 36-37, 76-88. Despite the heirs' apparently deliberate efforts to avoid contact with Smith,<sup>13</sup> he managed to determine their identities and addresses and serve notice by mail on them by December 27, 2010—long before the court had entered any order determining the disposition of estate property. CP 35-41, 79-

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<sup>13</sup> *See, e.g.*, CP 37, 42-43, 80-86.

81.<sup>14</sup> Likewise, when hearings on disposition of assets occurred, Smith P.S. notified all heirs in advance. *See, e.g.*, CP 69-71, 98-104, 121-122, 328-329. Smith P.S. invested significant effort to determine the names and addresses of all heirs and, using the court-approved addresses for all four, notified them as soon thereafter as he could. *See, e.g.*, CP 35-41, 69-71, 98-104, 121-122, 328-329. The heirs suffered no prejudice to their rights during the administration of Mr. Peterson's estate. Smith P.S. fulfilled its duty to notify all heirs.

**2. The Trial Court Correctly Found That Smith P.S. Gave Sufficient Notice of All Hearings. Smith P.S.'s Notices Also Fully Complied With the Petersons' Request for Notice of Proceedings.**

Smith P.S. gave ample advance notice of all motions relating to sales of estate property and served them on all heirs at their court-approved addresses of record. Indeed, the trial court found that all heirs received necessary notice of proceedings. CP 1363-1364. The Petersons

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<sup>14</sup> The Petersons' insistence that Smith should have discovered all four heirs' identities sooner rests on only two documents, neither of which supports their claim. The first is a single entry in Smith P.S.'s time records from his initial representation of Garth Peterson, which were submitted by Rena Peterson. CP 927. The second is a cremation document, which Smith did obtain but which did not provide him with sufficient information to contact all four heirs. CP 78-79. Neither provides ground for the bold claim that Smith failed to diligently discover the heirs' identities. Smith has explained that he did not know, or simply did not recall, that Mr. Peterson had more than one child. CP 76-77. That stands to reason since Smith P.S. represented Mr. Peterson roughly 20 years ago. Smith P.S. obviously exercised due diligence by searching for, promptly finding, and serving all four heirs before any disposition of estate property occurred.

did not challenge this finding. It is thus a verity on appeal. *See, e.g., In re Estate of Jones*, 152 Wn.2d 1, 8-9, 93 P.3d 147, 151 (2004).

The Petersons specifically contend they received no notice of the sale of used cars or car parts, which the court permitted in its July 26, 2011 order. Appellants' Brief at 18-19; CP 458-463. The Petersons' claim is unfounded. Smith P.S.'s motions seeking court authorization of the estate's assets, which included sale of the cars and car parts, were initially noted for April 14, 2011 and continued twice—once until May 19, 2011 and again until July 22, 2011. CP 257-258, 330-332, 437-438. Smith P.S. served all notices on all heirs at their court-approved addresses of record. *Id.* Smith P.S. did likewise with his petition to sell estate assets and inventory of estate property, which it served by mail on all heirs on July 8, 2011. CP 361-372, 379-433. In granting Smith P.S.'s motions, the court also required Smith P.S. to allow the heirs to remove personal property and family memorabilia, but not sale items, before August 25, 2011. CP 460-461.

Moreover, Appellant Rena Peterson obviously received personal notice of the July 22 hearing. Ms. Peterson knew of the hearing, attempted to attend, and left a note for the court explaining her absence. CP 464-465. The court went so far as to schedule a hearing requiring

Smith P.S. to show it had complied with the order allowing the heirs a chance to gather personal items from the estate before any sale. CP 481. Ultimately, in an order the Petersons do not contest on appeal,<sup>15</sup> the court found Smith P.S.'s notice sufficient and found the heirs, despite notice, failed to timely submit claims. CP 1272-1288. Having failed to appeal this order, the Petersons are bound by its factual and legal determinations.

Smith P.S. expended substantial effort to ensure the heirs received notice of all sales of estate property, and that they had every chance to purchase or claim any items they wished to keep. Smith P.S. fully complied with the heirs' request and breached no duty.

**3. The Trial Court Correctly Found That Smith P.S. Properly Inventoried and Sold the Personal Property in the Estate.**

A personal representative must inventory the estate's property within three months unless the court allows a longer time period.

(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 appraisalment of all of the property of the estate...

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<sup>15</sup> CP 1353-1380.

RCW 11.44.015 (emphasis added). Notably, this statute does not require that it be filed or sent to an heir, except upon the heir's request.<sup>16</sup> If the personal representative does not produce an inventory, the court may remove the personal representative, or he may be liable on his bond for damages suffered by an injured party. RCW 11.44.050. The statute imposes no requirement that the trial court issue an order lengthening the time limit.

While it is true that Smith P.S. did not produce an inventory within three months, Smith P.S. encountered extreme difficulty in gaining possession of the property that made delay inevitable and entirely excusable. Smith P.S. had to obtain a court order to gain entry to the Rockwell and Conklin properties, which took until March 10 and March 15, 2011. CP 91-93, 105-108, 115-122, 131-132, 136-147. Smith P.S. then promptly filed appraisals of the two properties, cars, and car parts in April 2011 and mailed them to the four heirs. CP 268-278, 292-307, 311-315, 328-329. The poor conditions inside the houses made appraisal of all household items and car parts prohibitively expensive, likely exceeding the value of the goods. CP 147-155. Smith P.S. also filed a complete inventory and appraisals of all known estate property and served it on all heirs on July 8, 2011. CP 361-372, 379-383. The heirs,

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<sup>16</sup> See RCW 11.44.015(2).

by contrast, submitted no valuations of their own nor protested the content of the inventory filed in July 2011. After receiving no bids from the heirs, and after a show cause hearing allowing them to contest the court's July 26 order, Smith P.S. obtained court approval to conduct a sale of estate property. CP 372, 383, 392, 437-443, 513-514.

Because of the difficulties it encountered, the trial court implicitly allowed Smith P.S. the extra time, imposing no sanction or penalty for failure to comply with that limitation. Given the poor condition of the estate property, the difficulty Smith P.S. encountered in gaining entry to the decedent's homes, the obstruction of that effort by Rena Peterson, and the time needed to sort through and inventory the voluminous items in the two homes, the extra time was necessary, and a truly complete inventory of estate property was never practical. *See, e.g.*, CP 76-79, 82-85, 90-91, 93-96, 105-112, 117-118, 123-132, 142-161, 169-181, 192-235, 241-245, 276-278. The Petersons have made no showing that the time of the filing of the inventory or the content of the filed inventory caused them any damage.

Smith P.S. did everything possible to ensure proper disposition of estate assets and to ensure market prices for their sale. The trial court

properly approved the accounting and declined to award any penalty given the facts of this case.

**4. Smith P.S. Gave Proper Notice for the January 17, 2012 Hearing on Its Accounting of the Estate.**

**a. Smith P.S. Filed Its Initial Report and Accounting in September 2011, Months Before the January 17, 2012 Hearing.**

The Petersons complain they did not receive 20 days' notice of the January 17, 2012 hearing. Assuming for argument's sake a 20-day time limit applied to the January 17 hearing, the Petersons had 120 days' notice. Smith P.S. filed its initial "final" report on September 16, 2011 and scheduled the hearing for September 30. CP 627-643, 647-648. The hearing was, however, continued until November, continued again to December 9, 2011, and continued yet again to January 12, 2012 at the December 9 hearing, which Rena and Lyndra Peterson attended. CP 1011-1013, RP 208. Obviously aware of the January 12 hearing, Rena and Lyndra Peterson filed an objection to Smith P.S.'s accounting on January 5, 2012. CP 1035-1050. The January 12 hearing was continued to January 17, 2012.

The court ultimately held the hearing on January 17. RP 82, 212. Before that hearing, on January 13, 2012, Smith P.S. filed a "Second Supplemental" to his initial September 16, 2011 report. CP 1103-1111.

The purpose of the Second Supplemental was to advise the trial court on burglaries that occurred at the estate's properties in December 2011, advise the court of minor expenses advanced by Smith P.S., and to update the court on the additional time the intervening hearings on the Petersons' motions had forced the personal representative to incur. CP 1103-1111. The Petersons base their objection solely on the filing of the "Second Supplemental" report of January 13. That provides no basis for invalidating the court's January 17 order. The Petersons knew since September 2011—four months before the hearing—of the substance of Smith P.S.'s report. The Petersons cannot now complain that a supplemental report provides a basis for voiding the court's order.

Even if notice to the heirs had been insufficient, the court reconsidered the issue and reaffirmed its decision in an order dated February 17, 2012 after allowing briefing by both parties. CP 1351-1352. The court remedied the situation by allowing the Petersons ample time to object and be heard. There is no basis for reversal.

**b. The Statute Requiring 20 Days' Notice of a Final Report Does Not Apply.**

An administrator must file a final report and petition for distribution where an estate is ready to be closed.

When the estate shall be ready to be closed, such personal representative shall make, verify, and file with the court his or her final report and petition for distribution.

RCW 11.76.030. The requirement of notifying heirs 20 days in advance applies to such estates.

Whenever a final report and petition for distribution, or either, shall have been filed in the estate of a decedent and a day fixed for the hearing of the same, the personal representative of such estate shall, not less than twenty days before the hearing, cause to be mailed a copy of the notice of the time and place fixed for hearing to each heir, legatee, devisee and distributee whose name and address are known to him or her...

RCW 11.76.040.

Mr. Peterson's estate was not ready for closure when Smith P.S. filed its September 16 and January 17 reports. Even after Smith P.S. resigned as administrator, considerable administration of the estate remained to be completed. CP 1335-1336. Smith P.S. merely filed reports concerning the anticipated completion of his own tenure as administrator. CP 627. Indeed, Smith P.S.'s September 2011 report anticipated appointment of a new administrator. CP 627. Because the estate was not ready for closure, the 20-day time limit does not apply.

**5. The Trial Court Correctly Found That Smith P.S. Fulfilled Its Fiduciary Duty to the Heirs.**

The Petersons complain, in various contexts, that Smith P.S. breached its fiduciary duties to the estate. In support of this assertion, the

Petersons repeat familiar charges: that antagonism between Smith P.S. and Mr. Peterson created a conflict of interest, and that Smith P.S. sold the cars for less than their market value. Appellants' Brief at 41-43. Smith P.S. has addressed these arguments. The trial court correctly found that Smith P.S. properly administered the estate and breached no fiduciary duties. CP 1284. No ground for reversal exists.<sup>17</sup>

**E. The Trial Court Properly Entered Judgment on Smith P.S.'s Creditor's Claim.**

**1. The Trial Court's *Nunc Pro Tunc* Order Cured Any Deficiencies in Smith P.S.'s Creditor's Claim.**

It is not clear exactly why the Petersons claim the creditor's claim should not be honored. The Petersons appear to find fault with the appointment of Smith, rather than Smith P.S., as personal representative. As explained previously, however, the trial court could properly have appointed either, making approval of the creditor's claim proper no matter which was personal representative. In any case, the trial court corrected its initial appointment with a *nunc pro tunc* order, making this a non-issue. CP 1269-1270. If anything, the trial court's approval of the

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<sup>17</sup> The Petersons cite no authority supporting reversal of a trial court's finding that the administrator breached no fiduciary duty. *In re Estate of Larson*, 103 Wn.2d 517, 694 P.2d 1051 (1985), involved reduction of an attorney fee award. *Hesthagen*, discussed *supra*, centered on a failure to notify heirs.

creditor's claim serves as additional evidence that the trial court meant to appoint Smith P.S. as administrator from the beginning.

The Petersons also refer to the formalities of the creditor's claim, but they fail to explain any deficiency in the claim itself. Indeed, there is none, as the claim complies with all requirements of RCW 11.40.070. CP 17-25. It correctly names the claimant, states the basis, amount, and character of the claim, as required by the statute. Moreover, no one has ever, to date, disputed the amount of the creditor's claim, which was initially reduced to judgment 20 years ago. It is quite late to revisit the issue now. The trial court was correct to enter judgment on Smith P.S.'s creditor's claim.

**2. Smith P.S. Fully Complied With RCW 11.40.070 and RCW 11.76.080 In Filing Its Creditor's Claim.**

The Petersons also claim Smith P.S. failed to follow TEDRA procedures and obtain proper court approval in making his creditor's claim, citing RCW 11.40.070 and RCW 11.96A.080. Appellants' Brief at 28. The Petersons are incorrect. Smith P.S. complied with the provisions of all of these statutes, including all required information in his creditor's claim and filing it with his petition initiating these proceedings. CP 1-13, 17-25. Aside from repeating the argument that

Smith P.S. was the proper creditor, the Petersons offer no explanation to the contrary. Appellants' Brief at 28-30.

Smith P.S. held a valid claim judgment against Mr. Peterson for 18 years. CP 17-25. The judgment became a proper creditor's claim when Mr. Peterson died and Smith P.S. filed its claim, and the court approved it. The trial court committed no error in approving Smith P.S.'s creditor's claim.

**F. The Trial Court Never Granted the Heirs a Right of First Refusal Over Any Estate Property. Moreover, Smith P.S. Properly Notified All Heirs of Their Right to Purchase and Retrieve Property from the Estate.**

The trial court never ordered a right of first refusal. CP 512, lines 23-24. The court reiterated that there was no right of first refusal in its January 17, 2012 order. CP 1361. The Petersons do not challenge that finding on appeal.

What the trial court did do was order that heirs could buy estate property if they filed notice with the court with proof of service on all other heirs. CP 511-512. No heir submitted a bid on estate property before the July 22 hearing, nor did any heir appear at the hearing, even after ample notice by Smith P.S. CP 361-372, 379-433, 513-514. The court thus granted Smith P.S.'s motions to sell estate property, but also required Smith P.S. to allow the heirs to remove personal property before

August 25, 2011. CP 439-443, 460-461. Moreover, the court allowed hearing on August 15 and August 18, 2011, allowing the heirs an extra chance to demonstrate their right to any property. CP 481. The Petersons had ample opportunity to buy estate property and simply failed to take proper steps to do so.

The Petersons also contend Smith P.S. breached its fiduciary duty by selling estate assets below market value. That is incorrect. Smith P.S. obtained appraisals of estate property and obtained court approval to sell it at the appraised values. *See* CP 384-436, 460-461. Smith P.S. breached no duties.

**G. The Trial Court Properly Exercised Its Discretion in Refusing to Appoint the Petersons as Estate Administrators.**

As the Petersons concede,<sup>18</sup> trial courts have broad discretion to appoint estate administrators. *In re Estate of St. Martin*, 175 Wash. 285, 289, 27 P.2d 326, 327 (1933). Trial courts also retain discretion to determine who would be a “suitable” administrator. RCW 11.28.120(7). The law’s preference for decedents’ relatives does not control this decision. *Estate of St. Martin*, 175 Wash. at 289, 27 P.2d at 327. Appellate courts reverse trial courts’ appointment of administrators only where a clear abuse of discretion occurred. *Estate of St. Martin*, 175

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<sup>18</sup> Appellants’ Brief at 34.

Wash. at 289, 27 P.2d at 327-28. The trial court properly exercised its discretion in this regard. It considered and denied the Petersons' motion to replace Smith P.S. CP 1267. The Petersons did not appeal this order,<sup>19</sup> and they offer no reason why that ruling constitutes abuse of discretion.

Smith P.S. expresses no opinion on who should succeed it as personal representative. However, other heirs who are not parties to this appeal should have the chance to express their views on the subject.

**H. The Trial Court Properly Denied the Heirs' Request for Recusal.**

The fact that Judge Leveque made the original arbitration award did not require him to recuse himself under the Code of Judicial Conduct. The relevant rule provides:

A judge shall not act as an arbitrator or a mediator or perform other judicial functions in a private capacity unless authorized by law.

CJC 3.9. This rule only prohibits a judge from working as a private arbitrator while serving as a judge. Likewise, the comments to Canon 3, cited by the Petersons, only apply to past cases where the judge served as a lawyer or witness, not as an arbitrator. CJC, Canon 3, Comment D.

CJC 2.11 likewise does not require disqualification in this case.

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<sup>19</sup> CP 1353-1380.

(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;...

CJC 2.11.

None of these rules prohibited the trial court judge, Judge Leveque, from hearing this case. Judge Leveque had no memory of serving as a court-appointed arbitrator in the action between Smith P.S. and Mr. Peterson 20 years before. CP 352-353. 894-895, 898; RP 56-62. It strains credulity to ascribe bias to him in this case. Moreover, Judge Leveque did not serve as a lawyer for any party or as a witness in the arbitration proceeding. No reasonable interpretation of Judge Leveque's role in the arbitration proceeding disqualified him from hearing Mr. Peterson's estate proceedings. The trial court's denial of recusal was thus proper.

**I. The Trial Court Acted Within Its Discretion in Approving the Administrator's Fees and Costs, Which Were Necessary Given the Difficulty of Administering the Estate.**

As reflected in the record, the Petersons fought Smith P.S. at every turn. It is therefore disingenuous of them to complain about the fees that were caused by their lack of cooperation. Moreover, no legal ground exists for disturbing the trial court's determination of fees and costs.

In the administration of an estate, a trial court retains broad discretion to determine allowable fees. *Peterson*, 12 Wn.2d at 728, 123 P.2d at 752 (approving fees of \$10,000 in 1942). Appellate courts defer to trial court decision on fees absent "a clear showing of abuse of discretion." *Id.* Contrary to the Petersons' argument, therefore, the trial court's determination of Smith P.S.'s fees and costs stands absent clear abuse of discretion.<sup>20</sup>

A court must consider the time and labor required in a task when determining whether a lawyer charged a reasonable fee.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The

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<sup>20</sup> The Petersons cite authority establishing abuse of discretion as the proper standard, but then, without citing any legal authority, argue this Court should review the fee determination *de novo*. Appellants' Brief at 12-13. The Petersons' sole justification appears to be their unhappiness at the amount of fees. No legal authority justifies applying a new standard to this issue. Abuse of discretion is the proper standard. Appellants' Brief at 40; CP 932-940.

factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly...

RPC 1.15.

In fixing attorneys' fees, the trial court considers factors including the amount of time required, the nature and amount of services, and the diligence of the attorney.

In fixing the amount to be allowed as a fee for the attorney of a decedent's personal representative, the court should consider the amount and nature of the services rendered, the time required in performing them, the diligence with which they have been executed, the value of the estate, the novelty and difficulty of the legal questions involved, the skill and training required in handling them, the good faith in which the various legal steps in connection with the administration were taken, and all other matters which would aid the court in arriving at a fair and just allowance.

*Id.*

The trial court awarded Smith P.S. a fee amount that, while large, reflected the significant effort necessary to locate all heirs and account for estate property. This was not a simple estate subject to administration for fees of \$5,000.<sup>21</sup> Smith faced a difficult task in locating heirs who actively frustrated his efforts to find them. *See, e.g.*, CP 37, 42-43, 76-86, 93-96. Once located, Smith found the heirs

uncooperative and often hostile. *See, e.g.*, CP 49-51, 123-124, 156-162, 236-240. Moreover, Smith found the decedent's property in an awful state, making accounting and valuing it an extremely time-consuming—and, at some point, impractical—task. *See, e.g.*, CP 146-155, 169-181, 192-235, 276-278. Despite these obstacles, Smith P.S. filed regular reports and inventories of estate property, obtained bids and offers for property, and served all documents on all four heirs at their court-approved addresses, which Smith labored to update whenever he uncovered new information. *See, e.g.*, CP 48-68, 76-88, 146-223, 268-275, 292-315, 341-347, 379-436, 945-964, 1103-1162. The length and detail of Smith P.S.'s reports to the trial court and his accounts of estate property demonstrate the time and effort Smith P.S. devoted to properly administering the estate. *Id.* The trial court found these efforts warranted the fees Smith P.S. generated. CP 1283-84, 1286. Given the unusual facts of this case, no abuse of discretion occurred. This Court should not disturb the trial court's award of fees.<sup>22</sup>

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<sup>21</sup> Appellants' Brief at 40; CP 932-940.

<sup>22</sup> The remaining authorities cited by The Petersons do not counsel in favor of reversing the attorney fee amount in this case. In *Maryhew v. Gilligan*, the court found the disgorgement claim barred. *Maryhew v. Gilligan*, 77 Wn. App. 752, 755, 893 P.2d 692, 694 (1995). *In re Estate of Price* involved an administrator who commingled his services to the estate with operations of his farm. *In re Estate of Price*, 53 Wn.2d 393, 398, 333 P.2d 929, 932 (1959). And while *Eriks v. Denver* does involve disgorgement of fees, the case concerns a class action against promoters of a tax shelter scheme for violations of the Code of Professional Responsibility and the Consumer Protection Act.

**J. Because This Appeal Lacks Merit, This Court Should Not Award Attorney Fees or Costs to the Petersons.**

This appeal is without merit, and this Court should decline to award fees to the Petersons. Smith P.S. was qualified to administer the estate, has fulfilled all duties required by law, and has expended substantial effort to do so. Smith P.S. has committed no waste or fraud, as the Petersons claim. Moreover, RCW 11.28.250 and RCW 11.68.070, which govern costs associated with a trial court hearing to remove a personal representative or restrict its powers for breach of its duties, do not apply here. There is no ground for an award of fees or costs.

**K. This Court Should Award Attorney Fees and Costs to Respondent Smith P.S.**

The Court should award fees to Smith P.S. for having to defend against a meritless appeal. As the Petersons concede, this Court has discretion to award fees to any party in this appeal. RAP 18.1(a); RCW 11.96A.150. The Petersons' pursuit of a meritless appeal warrants a fee award to Smith P.S.

**V. CONCLUSION**

After more than 40 days without anyone seeking to administer Mr. Peterson's estate, the trial court properly appointed Smith P.S., a

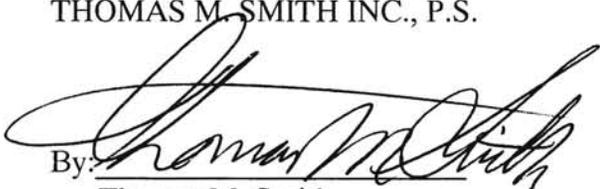
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It does not involve an estate at all. *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992).

principal creditor, to act as administrator. Despite encountering numerous obstacles, including estate property in disarray and uncooperative heirs, Smith P.S. faithfully executed its fiduciary duties. As promptly as possible, he served notice on all heirs, accessed and inventoried estate property, had it appraised, and obtained trial court approval to conduct sale of the property. Despite their complaints of lack of notice and antagonistic relations, Smith P.S. made every effort to keep the heirs informed at every stage of the proceedings and allow them to bid on the property if they wished. The fact that the heirs failed to take advantage of that opportunity and had personal issues with Smith P.S. does not create a conflict or breach of duty. Smith P.S. fully discharged its duties. This Court should affirm the trial court's rulings.

Dated: August 3, 2012

Respectfully submitted,  
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NO. 30686-1-III

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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IN RE THE ESTATE OF  
GARTH BENJAMIN PETERSON

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AFFIDAVIT OF MAILING  
RESPONDENT'S BRIEF

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