



## TABLE OF CONTENTS

<u>Description</u>	<u>Page No.</u>
I. RESTATEMENT OF THE ISSUES	1
Issue No. 1	1
Issue No. 2	1
Issue No. 3	1
Issue No. 4	1-2
Issue No. 5	2
II. COUNTERSTATEMENT OF THE CASE	2
III. ARGUMENT	8
<b>Issue No. 1:</b> There are no genuine issues of material fact with respect to the Appellant’s TEDRA Petition and his claims under that Petition were properly dismissed by the trial court as a matter of law.	8
A. Appellant is not entitled to participate in this Estate because he was divorced from the decedent, is not an heir and is, in fact, a major debtor of this Estate.	10
B. RCW 26.16.125, RCW 11.114.060 and <u>Troxel v. Granville</u> do not give the Appellant any special rights to participate in this Estate.	12
<b>Issue No. 2:</b> RCW 11.96A <i>et. seq.</i> does not require mediation if the matters are properly decided on summary judgment.	18
<b>Issue No. 3:</b> The creditor’s claim of Yoko Futagi was never allowed and has since been withdrawn, rendering Appellant’s complaint regarding the same moot.	20

	<b>Issue No. 4:</b> The Appellant's complaint for removal of the trial judge on remand is improperly before this Court, and without merit, in any event.	22
	<b>Issue No. 5:</b> The Estate is entitled to attorney fees on appeal.	25
IV.	CONCLUSION	26

TABLE OF AUTHORITIES

CASES

Baker v. Baker,  
22 Or.App. 285, 538 P.2d 1277 (1975). . . . . 11

Hartman v. Smith,  
100 Wash.2d 766, 674 P.2d 176 (1984). . . . . 11

In re Estate of Black,  
116 Wn.App. 476, 483, 66 P.3d 670 (2003),  
aff'd, 153 Wn.2d 152, 102 P.3d 796 (2004). . . . . 26

In re Estate of Riddell,  
138 Wn.App. 485, 492, 157 P.3d 888 (2007). . . . . 18

In re Irrevocable Trust of McKean,  
144 Wn.App. 333, 343, 183 P.3d 317 (2008). . . . . 19

Meyer v. Nebraska,  
262 U.S. 390, 399 (1923) . . . . . 15

Miller v. Miller,  
29 Or.App. 723, 565 P.2d 382 (1977). . . . . 11

Moore v. Burdman,  
84 Wn.2d 408 (1974) . . . . . 16

Pierce v. Society of Sisters,  
268 U.S. 510 (1925) . . . . . 15

Prince v. Massachusetts,  
321 U.S. 158 (1944) . . . . . 15

Rice v. Bank of Cal.,  
146 Wash. 537, 264 P. 12 (1928). . . . . 10

<u>Santosky v. Kramer,</u> 455 U.S. 745 (1982). . . . .	16
<u>Stapel v. Stapel,</u> 4 Kan.App.2d 19, 601 P.2d 1176 (1979) . . . . .	11
<u>State v. Waters,</u> 93 Wash.App. 969, 974, 971 P.2d 538 (1999). . . . .	24
<u>TransAlta Centralia Generation LLC v. Sickelsteel Cranes, Inc.,</u> 134 Wn.App. 819, 825, 142 P.3d 209 (2006) . . . . .	8
<u>Troxel v. Granville,</u> 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) . . . . .	12, 14 15
<u>Washington v. Gluksberg,</u> 521 U.S. 702 (1997) . . . . .	16
<u>Wisconsin v. Yoder,</u> 406 U.S. 205 (1972) . . . . .	16

**STATUTES, RULES AND REGULATIONS**

RCW 4.12.040. . . . .	22, 23
RCW 4.12.040(1) . . . . .	23, 24
RCW 11.04.015(2)(a) . . . . .	10
RCW 11.12.051. . . . .	10
RCW 11.28.240. . . . .	11
RCW 11.40.080. . . . .	21
RCW 11.76.095. . . . .	13, 14 24

RCW 11.76.095(3) . . . . .	14
RCW 11.96A. . . . .	18, 19 20
RCW 11.96A.020 . . . . .	20
RCW 11.96A.020(1)(a),(b) . . . . .	18
RCW 11.96A.020(2) . . . . .	19
RCW 11.96A.100 . . . . .	19
RCW 11.96A.100(6). . . . .	19
RCW 11.96A.100(8). . . . .	19, 20
RCW 11.96A.100(9). . . . .	19, 20
RCW 11.96A.150 . . . . .	25
RCW 11.114 . . . . .	14
RCW 11.114.010(6). . . . .	14
RCW 11.114.060 . . . . .	12, 13
RCW 11.114.060(1). . . . .	14
RCW 11.114.090 . . . . .	14
RCW 26.16.125. . . . .	12, 13

**OTHER**

<u>Webster’s Universal College Dictionary</u> , p. 2 (2001). . . . .	17
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**In re: Estate of Etsuko F. Toland,**

**Respondent**

**and**

**Peter Paul Toland, Jr.,**

**Appellant**

**Case No. 41388-4-II**

**Brief of Respondent  
Estate of Etsuko F. Toland,  
deceased**

**I. RESTATEMENT OF THE ISSUES**

**Issue No 1:** There are no genuine issues of material fact with respect to the Appellant's TEDRA Petition and his claims under that Petition were properly dismissed by the trial court as a matter of law.

**Issue No. 2:** There is no requirement under TEDRA that the Appellant's TEDRA claims be mediated prior to dismissal of those claims on summary judgment, and Appellant's petition for mediation was properly denied.

**Issue No. 3:** The Appellant's complaint against the Personal Representative concerning the creditor's claim of Yoko Futagi without merit and, in any event, moot, because the creditor's claim has been withdrawn.

**Issue No. 4:** The trial court judge did nothing wrong by indicating

that the Appellant's improper withholding of payment of a lawful judgment in favor of the Estate, and offer to pay the judgment to someone else of Appellant's choosing, was a form of "blackmail," regardless, the Appellant's complaint is not properly before this Court..

**Issue No. 5:** The Estate is entitled to reasonable attorney fees on appeal.

## **II. COUNTER STATEMENT OF THE CASE**

The Decedent and the Appellant were married in Japan on March 22, 1995 (CP 14, 180-181) and lived there and in Kent, Washington during their marriage, the Appellant having been in the Navy and was stationed accordingly. CP 14. The child of the parties, Erika, was born and raised in Japan. CP 14, 181. While the child was an infant, on July 13, 2003, the Decedent separated from the Appellant because of his verbal, mental and emotional abuse of the Decedent (CP 14, 16, 17, 25, 26, 27, 133) by removing herself and the child from Navy housing and relocating to an apartment near Tokyo. CP 14.

The Decedent advised the Appellant on the day of separation of the whereabouts of herself and the child (CP 135), and he made contact with her and the child both prior to Decedent's institution of divorce

proceedings in Japan and thereafter. CP 14, 181. The mandatory mediation procedure in Japan started by the Decedent in November, 2003, prior to institution of the divorce, and provided for visitation between the Appellant and the child, and he exercised same. CP 14, 15. When there was no reconciliation of the marriage, the Decedent went forward with the divorce proceeding. CP 23, 181.

As is set out in the Japanese Final Decree of Divorce, the Appellant was represented by four attorneys throughout the entire divorce (CP 22, 181), but they were discharged on the final day of the divorce and did not appear at the Final Hearing. CP 135, Paragraph 1.4. The Divorce was unofficially entered in September, 2005 and after further proceedings through the Japanese court system, an official Japanese Final Decree was entered in March, 2006. CP 187, 188, 135, paragraphs 1.4 and 1.6.

The Appellant filed a Complaint for Divorce in Pierce County, Washington in September, 2003 where the Decedent and Appellant had lived in 1999 before Appellant returned to Japan by Order of the Navy. CP 15, 16, 181. The Appellant appealed dismissal of the Washington divorce, and this Court of Appeals affirmed the dismissal. CP 180-195. A Mandate of this Court issued awarding the Decedent attorney's fees. CP 178. Approximately fifteen days later the Decedent committed suicide. CP 93, 134.

Since the Decedent's death, the child of the parties, Erika, has continued to reside in Japan in the same home with her maternal Grandmother where she was living with the Decedent prior to the death. CP 14, 53-54. Any reports about alleged abduction to the U.S. Federal Government have all been filed by the Appellant without Notice of or a copy of same to the Decedent before she died, or to the Estate or its Representative since her death, and all are self-serving to the Appellant. CP 260, 374, 382-383. Appellant has failed and refused to file for custody of the child in Japan where she resides. Id.

The maternal Aunt of the child, Dr. Yoko Futagi, who resides in New Jersey, has never had custody of the child and has not agreed to arrangements to bring the child to the United States. CP 298-310. Dr. Futagi never asked the Appellant to prepare any agreement relating to bringing the child to the United States; he did so on his own accord and forwarded it to Dr. Futagi without permission or solicitation from her to do so. CP 298-310. There were no "negotiations" with Dr. Futagi because she had no authority to negotiate and merely indicated she would look at them and forward the Appellant's proposal to her Mother, the Grandmother. CP 298, 307, 308.

Since entry of the Guardianship the Appellant has continued to refuse to file for custody in Japan and has in fact declared that he has no intention of doing so. CP 226. The Grandmother and Dr. Futagi do not wish to be

harassed about this matter and have instructed the Appellant to stop contacting them directly and to communicate with them through Attorney Judy Dugger. CP 356-357. There has been no request from the Appellant to Counsel to arrange for visitation with the child. CP 356-357.

Grandmother, Dr. Futagi, and the child met with U.S. State Department officials for a welfare visit in August, 2008, but have declined any further visits since then. CP 364, 114-115.

Dr. Futagi filed the initial Petition for Probate in this proceeding and sought to be appointed as Personal Representative. She alleged that Erika was the sole beneficiary of the Estate. CP 3. Dr. Futagi was appointed Personal Representative on the condition that she post bond, but after she could not post bond, the court appointed attorney Bryce Dille as the substitute Personal Representative. CP 71-72. The court also appointed Michael B. Smith as the guardian ad litem for the child at that time. CP 74. Mr. Smith's appointment was unknown to the Estate for some time, as the Estate had filed the proposed Order for his appointment but was not notified by the Court that the Order was entered with the name of Michael Smith as appointed Guardian.<sup>1</sup>

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<sup>1</sup>The Estate had previously explained this procedural issue to Judge Culpepper and there is a record of the same in Pierce County Cause No. 10-2-07487-8, the case filed to enforce the Japanese judgments.

The Inventory of the Estate was filed in May, 2009 (CP 60-61) and listed the Judgments set out in the Japanese Decree as well as the amount owed to the Decedent as a result of the Mandate of this Court of Appeals entered in November, 2007. The Japanese Judgments have been contested by the Appellant, he not wanting to pay the same which are for the sole benefit of his minor daughter pursuant to litigation pending at the time of the writing and filing of these Briefs and as referenced hereinabove at footnote 1.

The Washington State Department of Social and Health Services has not been notified of this probate, and a Notice to Creditors has not been published, because the decedent never received state money during the brief time she resided here, and there are no creditors so the estate has determined publication is an expense that need not be incurred.

The Appellant filed a Request for Special Notice of Proceedings pending outcome of a hearing held in the Registration of the Japanese Decree case. CP 78-80. His request was initially granted but then revoked after the Court, in the Registration case, determined that the Japanese divorce was valid, that the Appellant is not a "surviving spouse" of the Decedent, and thus under Washington statute is not entitled to the Special Notice. CP 213-217; CP 488-492.

The Appellant filed a TEDRA Petition and raised several issues. CP 83-

89. The primary issue is that he should be the custodian of the funds of the Estate that will ultimately be paid to the child as sole beneficiary. CP 88-89. The Estate has resisted his being appointed on the grounds that he comes before the Court with unclean hands since he has failed and refused to pay the Judgment based on the Court of Appeals Mandate, has stated through Counsel that he will pay it other than to the Estate though it is a valid Judgment that is owing to the Estate, and has resisted all of the Estate's efforts to register the Japanese Final Decree of Divorce to avoid payment of the judgments contained therein to the Estate for the benefit of his minor daughter. CP 221-234. The Estate claims that his resistance to payment of these Judgments is further indicia of his bad faith and unclean hands and why he should not be appointed as custodian of the child's funds since same is not in her best interest. CP 132-202.

Though the Appellant filed for mediation of issues raised in the TEDRA Petition (CP 517), the Estate filed for Summary Judgment as to the TEDRA Petition and objected to Appellant's request for mediation. CP 493-510. The Court heard all motions on October 8, 2010. CP 1-21. Following argument, the Court granted summary judgment to the Estate which dismissed the TEDRA Petition and denied the Appellant's Motion

for Mediation. CP 628-631;RP 17-18. In doing so, the Trial Court noted that the Appellant's offer to pay the Judgment pursuant to this Court's Mandate to someone other than the Estate could perhaps be considered as blackmail. RP 17-18. The Appellant has filed this appeal from the dismissal of the TEDRA Petition and his request for Mediation. CP 638-641.

### III. ARGUMENT

The Appellant argues that the issues on appeal are subject to *de novo* review. This is correct. The Appellant's Petition under TEDRA (Washington's "Trust and Estate Dispute Resolution Act") was dismissed on summary judgment, and the standard of review on summary judgment is *de novo*, with the court engaging in the same inquiry as the trial court. TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc., 134 Wn.App. 819, 825, 142 P.3d 209 (2006). Summary judgment is proper if the pleadings, affidavits, depositions, and admissions on file demonstrate that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

**Issue 1: There are no genuine issues of material fact with respect to the Appellant's TEDRA Petition and his claims under that Petition were properly dismissed by the trial court as a matter of law.**

The Appellant's TEDRA Petition "Prayer for Relief" requests the Court "declare the rights of the parties or legal relations," and then sets forth eleven "matters," all of which matters were ruled upon by the trial court judge as a matter of law. The Appellant fails to assign error to the summary judgment decision related specifically to any of his eleven requests. He instead complains generally that the dismissal results in his being "denied the opportunity to have any input into fundamental issues such as who will be responsible for managing his daughter's assets." Appellant's Brief at p. 14.

The Appellant claims he is entitled to participate in this probate because it is his constitutionally protected parental right. Appellant's Brief at p. 11. But the Appellant's ex-wife had legal custody of her child, who was born in Japan and has never left that Country, either before or since the time that she died, and the Appellant refuses to seek custody of his child by application to the Japanese courts; therefore, the Appellant has no interest in this Estate. CP 6-31, and RP p.14, lines 24-25, and p. 15, line 1. Significantly, the primary estate assets subject to probate in Washington consist of over \$100,000.00 in unpaid judgments owed by the Appellant to this Estate, including unpaid child support. CP 60-64. The Appellant's

argument ignores this undisputed fact. Furthermore, the legal authority offered by Appellant in support of his position is not applicable to this case.

**A. Appellant is not entitled to participate in this Estate because he was divorced from the decedent, is not an heir and is, in fact, a major debtor of this Estate.**

The decedent's Will provides that her minor daughter is sole heir of her estate. CP 6-11. Although in the record, that Will has not been offered to probate (to avoid unnecessary expense), but the decedent's sole heir under Washington's intestacy statute is her minor daughter in any event. RCW 11.04.015(2)(a).

The Appellant was legally divorced from the decedent by official Japanese decree in March of 2006. CP 12-31. The validity of that decree was recognized by this Appellate Court in previous litigation. CP 32-50. Although the decedent's Will does not mention her ex-husband, after the divorce any provisions in the Decedent's Will granting an interest or power to the Appellant are revoked. RCW 11.12.051. This statute codifies long established Washington law recognizing that divorce revokes a Will as to a divorced spouse. See Rice v. Bank of Cal., 146 Wash. 537, 264 P. 12 (1928).

The Appellant requested “special notice” of the decedent’s probate proceedings, but he is not entitled to such notice under the plain language of RCW 11.28.240 which provides, in relevant part:

“(1) At any time after the issuance of letters testamentary or of administration or certificate of qualification upon the estate of any decedent, any person interested in the estate **as an heir, devisee, distributee, legatee or creditor** whose claim has been duly served and filed, or the lawyer for the heir, devisee, distributee, legatee, or creditor may serve upon the personal representative or upon the lawyer for the personal representative, and file with the clerk of the court wherein the administration of the estate is pending, a written request stating that the person desires special notice of any or all of the following named matters, steps or proceedings in the administration of the estate, to wit:[. . .]”

Emphasis added.

The Appellant is neither an heir, devisee, distributee, legatee nor creditor of this estate. The Appellant does not have custody or guardianship of the minor heir of this estate.<sup>2</sup> As is set forth in the inventory, the estate consists of over \$100,000.00 in unpaid judgments which are owed by the Appellant to the estate pursuant to (1) a ruling of

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<sup>2</sup>One of the assets of this estate is the judgment Appellant owes for past due child support under the Japanese Decree, but this is a cause of action that lies with the custodial parent, and *not with the child*. CP 60-61, and see Hartman v. Smith, 100 Wash.2d 766, 674 P.2d 176 (1984), citing Miller v. Miller, 29 Or.App. 723, 565 P.2d 382 (1977), Stapel v. Stapel, 4 Kan.App.2d 19, 601 P.2d 1176 (1979); Baker v. Baker, 22 Or.App. 285, 538 P.2d 1277 (1975).

this appellate court (for an award of attorney fees to the decedent), and (2) a Japanese divorce decree, including a judgment for child support. CP 60-61. The Appellant owes major debts to this estate and therefore comes before this Court with unclean hands. Under these facts and law, the Appellant has no statutory or common law right to participate in his ex-wife's Estate proceeding.

**B. RCW 26.16.125, RCW 11.114.060, and Troxel v. Granville do not give the Appellant any special rights to participate in this Estate.**

Appellant cites RCW 26.16.125, RCW 11.114.060, and Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000), to support his argument that he has a statutory and constitutional right to participate in this Estate. The Appellant's authority is inapplicable to this Estate proceeding.

First, RCW 26.16.125 pertains to *custody* of a child and therefore has no application in a probate proceeding:

**“26.16.125. Custody of children**

Henceforth the rights and responsibilities of the parents in the absence of misconduct shall be equal, and one parent shall be as fully entitled to the custody, control and earnings of the children as the other parent, and in case of one parent's death, the other parent shall come into full and complete control of the children and their estate.”

The Estate can locate no authority, either in case law or statute, to suggest that RCW 26.16.125 gives a surviving parent special rights to participate in a child's *deceased parent's* estate.

Second, RCW 11.114.060 does not give the Appellant a special right to select a custodian for the minor heir, or otherwise participate in this probate, under the facts of this proceeding. RCW 11.76.095 is the statute applicable to this estate proceeding and distribution of estate assets to the minor heir. RCW 11.76.095 provides:

“When a decree of distribution is made by the court in administration upon a decedent's estate or when distribution is made by a personal representative under a nonintervention will and distribution is ordered under such decree or authorized under such nonintervention will to a person under the age of eighteen years, it shall be required that:

(1) The money be deposited in a bank or trust company or be invested in an account in an insured financial institution for the benefit of the minor subject to withdrawal only upon the order of the court in the original probate proceeding, or upon said minor's attaining the age of eighteen years and furnishing proof thereof satisfactory to the depository;

(2) A general guardian shall be appointed and qualify and the money or property be paid or delivered to such guardian prior to the discharge of the personal representative in the original probate proceeding; or

(3) A custodian be selected and the money or property be transferred to the custodian subject to chapter 11.114 RCW.”

RCW 11.76.095 does not provide for any special rights to the surviving parent of a minor heir. RCW 11.76.095 requires the court to direct deposit of money per subsection (1), or to select a guardian or appoint a custodian under subsections (2) or (3). If the court elects to proceed under RCW 11.76.095(3), after selection of the custodian, the transfer will then proceed as directed in the Uniform Transfers to Minors Act (RCW 11.114 *et.seq.*).

The Appellant’s reliance on RCW 11.114.060(1) is misplaced. There has been no transfer creating “custodial property” as defined by RCW 11.114.010(6) and effected as set forth in RCW 11.114.090. The Estate here is not in a position to make a distribution of assets to the minor heir. Indeed, there can be no transfer of assets and final estate distribution at this time, because a substantial asset of this estate are the judgments which the Appellant owes and has failed and refused to pay. Without any transfer of “custodial property,” RCW 11.114.060(1) simply has no application.

Finally, the Appellant relies on Troxel, *supra*, and six other U.S. Supreme Court Cases, along with one Washington Supreme Court case, all

of which Appellant claims establish his “fundamental right” to participate in his ex-wife’s probate proceeding. These cases are irrelevant to this probate. Not one of these cases involves a probate proceeding. Not one of these cases deals with an parent who is the major debtor of the Estate to which a minor child is the sole heir. Not one of these cases has any factual similarity to the instant action.

The following summarizes the irrelevance of the Appellant’s cited “authorities:”

1. In Troxel, supra, grandparents were denied the right to increased visitation with their deceased son’s children because such visitation violated the due process clause of the fourteenth amendment which protects fundamental right of parents to make decisions as to care, custody, and control of their children. Troxel at 66.
2. In Meyer v. Nebraska, 262 U.S. 390, 399 (1923), a teacher’s criminal conviction for teaching the German language in school was overturned and a law prohibiting teaching any language but English was deemed unconstitutional.
3. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), Oregon’s “Compulsory Education Act,” which required attendance at public schools, was held unconstitutional.
4. In Prince v. Massachusetts, 321 U.S. 158 (1944), a state statute forbidding boys under 12 and girls under 18 to sell magazines in the street or public places,

and penalizing parents or custodians who permitted this conduct, was upheld as constitutional even where a custodian gave religious periodicals to the minor child to sell and distribute.

5. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that the first and fourteenth amendments prevent a state from compelling Amish parents to cause their children, who have graduated from the eighth grade, to attend formal high school to age 16.
6. In Santosky v. Kramer, 455 U.S. 745 (1982), the Court ruled that, before a state may terminate the rights of parents in their natural child, due process required at least clear and convincing evidence rather than a fair preponderance.
7. In Washington v. Glucksberg, 521 U.S. 702 (1997), the Court held that the “right to assistance in committing suicide” was not a fundamental liberty interest protected by the due process clause and that Washington's ban on assisted suicide was rationally related to legitimate government interests.
8. In Moore v. Burdman, 84 Wn.2d 408 (1974), the Court remanded for consideration a mother's petition for writ of habeas corpus to secure custody of her three-year-old child, who was in foster care, on the mother's “sacred right” to custody and control of her minor child.

Here, the trial court's decision to dismiss the Appellant's TEDRA proceeding had nothing to do with the Appellant's “sacred right” to custody and control of his minor child. This probate is not a proceeding for custody, and custody is not an issue before the probate court. The

Appellant has no “fundamental right” to participate in his ex-wife’s probate. It is a legal fiction created by the Appellant to avoid payment of judgments, including a judgment of this Appellate Court.

The Appellant repeatedly expresses a concern that control over this Estate will rest with his child’s “abductors” if he has no right to participate. The Appellant’s accusations are inflammatory and untrue.

To “abduct” is to carry off or lead away (a person) illegally and in secret, or by force (esp. to kidnap). Webster’s Universal College Dictionary, p. 2 (2001). To “kidnap” likewise means to carry off (a person) by force or fraud. Id.

It is undisputed that (1) the decedent and the Appellant had a child in the decedent’s homeland of Japan, (2) that the decedent and the Appellant were living in Japan when the decedent separated from the Appellant and moved with their baby to live with the decedent’s mother in Tokyo, (3) that the parties were later divorced by Japanese decree and the mother was awarded custody, along with other judgments including for property division and child support. CP 12-31.

It is also undisputed that (1) the decedent died in October 2007, (2) that, after her death, the decedent’s young child continued to live in Japan

with her grandmother, and in fact has never left Japan, and (3) that the Appellant has never applied, in Japan, for custody of his minor child. See CP 1-4.

The Appellant has known at all times where his minor daughter is living; his child was never forcibly, secretly, or illegally taken from the Appellant. The Appellant went through a divorce similar to those that take place every day in Washington State. His ex-wife was awarded custody. On her death, he has refused to apply for custody in Japan. That does not make his child's current living situation an abduction, or a kidnaping, and to make such a claim is disingenuous and misleading in the extreme.

**Issue 2: RCW 11.96A *et. seq.* does not require mediation if the matters are properly decided on summary judgment.**

Under TEDRA, the trial court has full and ample power and authority to administer and settle all estate and trust matters. RCW 11.96A.020(1)(a),(b); In re Estate of Riddell, 138 Wn.App. 485, 492, 157 P.3d 888 (2007). Moreover, even where TEDRA may be inapplicable, insufficient, or doubtful with reference to the administration and settlement of trust and estate matters, the court nonetheless has full power and authority to proceed with administration and settlement in any manner and way that to the court seems right and proper -- all to the end that the

matters are expeditiously administered and settled by the court. RCW 11.96A.020(2); see also In re Irrevocable Trust of McKean, 144 Wn.App. 333, 343, 183 P.3d 317 (2008).

Per RCW 11.96A.100, a judicial proceeding under TEDRA is commenced by filing of a petition and service of a special form of summons, a hearing is scheduled on that petition, and an answer to the petition is due at least five days before the hearing.

While RCW 11.96A.100(6) does provide that TEDRA proceedings are subject to mediation and arbitration proceedings as defined in RCW 11.96A, RCW 11.96A.100(9) in turn provides:

“Any party may move the court for an order relating to a procedural matter, including discovery, **and for summary judgment**, in the original petition, answer, response, or reply, or in a separate motion, or at any other time. . .”

RCW 11.96A.100(8) provides that, unless requested otherwise by a party in a petition or answer, the initial TEDRA hearing must be a hearing on the merits to resolve all issues of fact and all issues of law.

After the Appellant’s TEDRA petition was filed, the Estate moved for summary judgment as expressly permitted by statute. CP 235-253. While the Appellant had petitioned for mediation, the Estate objected to mediation because the material facts were undisputed, and the Appellant’s

Petition was appropriately resolved as a matter of law. CP 493-510. Once the Estate's motion for summary judgment was granted, there was nothing to mediate.

Nothing in RCW 11.96A requires mediation take place before a summary decision. In fact, that argument runs contrary to RCW 11.96A.020 and 11.96A.100(8) and (9). TEDRA matters are to be expeditiously administered and settled by the court, including by way of an initial hearing on the merits to decide all factual and legal issues, and a summary ruling may be requested at any time in the proceedings, including in the original petition itself.

**Issue 3: The creditor's claim of Yoko Futagi was never allowed and has since been withdrawn, rendering Appellant's complaint regarding the same moot.**

The Appellant next complains that the Personal Representative's failure to respond to a creditor's claim filed by Yoko Futagi constitutes a breach of fiduciary duty. This complaint is without merit because the claim was never allowed and is, furthermore, moot, because the claim has been withdrawn. See Respondent's Clerk's Papers; CP 644-645.

A creditor's claim by the the decedent's sister, Yoko Futagi, was filed June 29, 2010, for monies Ms. Futagi loaned to her deceased sister for

attorney fees to assist in defending legal proceedings involving the Appellant in Washington and Virginia. CP 130-131.

After filing and receipt of Ms. Futagi's claim, the Personal Representative took no action to either accept or reject the claim. Under RCW 11.40.080, the claimant therefore had the right to petition to have her claim allowed, but she did not exercise this right, and has withdrawn the claim at this time. There is no factual or legal basis to support a claim that the Personal Representative breached any fiduciary duty with respect to this claim. In any case, the issue is rendered mute by withdrawal of the claim.

The Court should note that the Washington proceeding to which the creditor's claim refers was necessarily the divorce proceeding filed in Washington by the Appellant<sup>3</sup>, which on appeal to this Court resulted in an attorney fee award in favor of the decedent, a judgment the Appellant has failed and refuses to pay. CP 33-50. For the Appellant to complain about a creditor's claim filed, in part, to recoup money loaned to the decedent, which money the Appellant himself has been court-ordered to pay is

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<sup>3</sup>Other than this probate proceeding, and a later filed foreign judgment registration action, there was no other Washington proceeding involving the decedent and the Appellant, except a divorce the Appellant filed, which was ultimately dismissed.

offensive to justice and equity.

**Issue 4: The Appellant's complaint for removal of the trial judge on remand is improperly before this Court, and without merit in any event.**

The Appellant finally complains about a comment by the trial court judge after hearing on the Estate summary motion, as follows:

“I would note for the record, an offer to pay that which is ordered under a valid court order, conditioned on sum [*sic*] assurances, is perhaps considered blackmail, Mr. Kiger.”  
RP 17, lines 20-23.

The trial judge's comments were in response to the Appellant's attorney's oral argument, in which he repeatedly stated:

“I would also right up front, too, like to remove the issue of Mr. Toland being a debtor of the estate. Mr. Toland would issue a check to Mr. Smith [the Guardian ad Litem] next week in full satisfaction of that Court of Appeals judgment if there could be some sort of assurance that that money would be protected for Commander Toland's daughter until something can be resolved in this case.” RP 12, lines 22-25, and 13, lines 1-3.

The Appellant requests the appeals court remand the case with direction that the trial judge be removed from this case as biased or prejudiced against the Appellant. The Appellant's request is improper on appeal. RCW 4.12.040 is the applicable statute, and the Appellant has failed to avail himself of the procedures required in that statute to remove

the trial court judge:

4.12.040. Prejudice of judge, transfer to another department, visiting judge--Change of venue generally, criminal cases

(1) No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established **as hereinafter provided** that said judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge in judicial districts where there is more than one judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court. In all judicial districts where there is only one judge, a certified copy of the motion and affidavit filed in the cause shall be transmitted by the clerk of the superior court to the clerk of the superior court designated by the chief justice of the supreme court. Upon receipt the clerk of said superior court shall transmit the forwarded affidavit to the presiding judge who shall direct a visiting judge to hear and try such action as soon as convenient and practical.

[ . . . ]

Emphasis added.

The Appellant in this case has not applied to the presiding judge of the Pierce County Superior Court for removal of the trial court judge. His first complaint against the trial court judge appears in this appeal. The Appellant should be required to follow the procedures of RCW

4.12.040(1) before he seeks relief in this appeals court. See State v. Waters 93 Wash.App. 969, 974, 971 P.2d 538 (1999) (“Any party may establish prejudice by motion, supported by affidavit, that the judge before whom an action is pending is prejudiced.”).

Without waiver of argument that the Appellant’s complaints concerning the trial court judge are not properly before this court, the judge’s comment in direct reply to Appellant counsel’s oral argument does nothing other than state a fact, and does not establish prejudice or bias sufficient to require her removal from this case. The Appellant has repeatedly stated, at least through counsel, that he will pay or would pay judgments rendered against him, but only under *his* conditions. RP 12, lines 22-25, and 13, lines 1-10.

The Appellant ignores the statutory safeguards of the probate statutes which restrict distributions of monies to minors. RCW 11.76.095. There is a court appointed, bonded, personal representative in this case. CP 71-72. There is a court appointed guardian ad litem in this case. CP 74. There are adequate safeguards in place for the minor heir of this estate. The Appellant is desperate to gain control of his ex-wife’s estate, only because he owes over \$100,000.00 to the estate.

The Appellant's debt to this estate includes an appellate court judgment, valid in every respect, and not subject to further appeal. By refusing to pay this judgment alone, the Appellant comes to this court with unclean hands. The trial court's statement was an accurate description of the Appellant's actions toward this Estate and in her courtroom, not an indication of bias or prejudice.

**Issue 5: The Estate is entitled to attorney fees on appeal.**

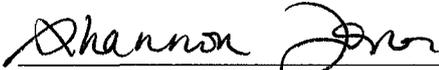
The Estate was awarded attorney fees on summary judgment. CP 630-631. RCW 11.96A.150 provides that either the superior court or the court on appeal may additionally, in its discretion, order costs, including reasonable attorney fees, in TEDRA matters. It is appropriate that the Estate collect additional attorney's fees on appeal. The Appellant unnecessarily increases the costs of collecting valid judgments against him by insisting he be in a position of control over his ex-wife's estate. He attempts to argue custody issues at every turn, while at the same time refusing to file for custody in the country of Japan, the jurisdiction where his minor child resides, and has always resided during her lifetime. The Estate and its sole heir, the minor child, should not be penalized by bearing the cost of litigating custody issues which are not before this court

in a probate proceeding.

#### IV. CONCLUSION

Probate proceedings are equitable in nature. In re Estate of Black, 116 Wn.App. 476, 483, 66 P.3d 670 (2003), aff'd, 153 Wn.2d 152, 102 P.3d 796 (2004). Equity is not served by placing an ex-husband effectively in charge of his deceased ex-wife's estate, particularly where he is the major debtor to that estate and has no legal authority, by custody order or guardianship, to act on behalf of the minor heir. The Estate requests this appeal be denied, the summary judgment order of the trial court be upheld, and for an award of attorney's fees.

Respectfully submitted this 21 day of April, 2011.

  
\_\_\_\_\_  
Judy Dugger, WSBA #6136  
Shannon R. Jones, WSBA #28300  
Attorneys for Respondent

in a probate proceeding.

#### IV. CONCLUSION

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Respectfully submitted this \_\_\_\_\_ day of April, 2011.



Judy Dugger, WSBA #6136  
Shannon R. Jones, WSBA #28300  
Attorneys for Respondent

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

CLERK OF COURT OF APPEALS, DIV II  
STATE OF WASHINGTON

In Re:

Estate of Etsuko Toland

No. 41388-4-II

DECLARATION OF  
SERVICE

Shannon R. Jones, being first duly sworn on oath, deposes and  
says:

That on the 21<sup>st</sup> day of April, 2011, she delivered the original Brief  
of Respondent and two (2) copies, and this original Declaration of Service,  
to the Court of Appeals, Division II.

That also on the 21<sup>st</sup> day of April, 2011, she delivered a true copy  
of the Brief of Respondent and this Declaration of Service, to the  
following attorney(s) at their addresses below:

Douglas N. Kiger  
**Blado Kiger Bolan, P.S.**  
4717 S. 19<sup>th</sup> St., Ste 109  
Tacoma, WA 98405

Michael Smith  
**Comfort, Davies & Smith, P.S.**  
1901 65<sup>th</sup> Avenue West, Suite 200  
Fircrest, Washington 98466

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STATE OF WASHINGTON  
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DIVISION II

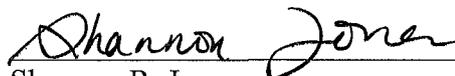
ORIGINAL

That also on the 21<sup>st</sup> day of April, 2011, she caused a true copy of the Brief of Respondent and this Declaration of Service, to be delivered via facsimile and First Class Mail to the following attorney(s) at the address below:

Kimberly Quach  
1 SW Columbia, Ste 1800  
Portland, OR 97214-2327  
**503-224-0092**

I hereby declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Puyallup, Washington this 21<sup>st</sup> day of April, 2011.

  
Shannon R. Jones

Declaration of Service

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