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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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No 68155-9-I

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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In Re the Estate of  
YOLANDA "LANI" SLOUGH,  
ROBERT SLOUGH, Appellant  
v.  
CHRISTINE CALDERBANK, Respondent

---

REPLY BRIEF OF APPELLANT

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## ARGUMENT

### The Issue

The one crucial question upon which this appeal rests is this: Was the arbitration conducted between the parties conducted in accordance with RCW11.96A 260 - 320?

Since it was, Mr. Slough is entitled to a trial de novo on all issues of fact and law. RCW 11.96A.320(9)

Respondents do not deny that if the arbitration was under TEDRA that all required notices were timely.

The genesis of the arbitration which is the subject of this appeal was the respondents' request for TEDRA mediation, which was ordered. CP 31 Respondents agree that TEDRA mediation was ordered on two issues. (brief page 5) On June 25, 2010 an agreed order was entered ordering arbitration of the two issues for which TEDRA mediation had previously been ordered. CP 34

Respondents assert that the resulting arbitration could not have been under TEDRA, because it was not initiated under the procedure set forth in RCW 11.96A.310(2). Respondents are correct that it was not

initiated under that specific part of the statute. It was ordered under previous provisions of the statute.

Arbitration was ordered under RCW 11.96A.310(1)(d): “The court has ordered that the matter must be submitted to arbitration.” CP 34 The court ordered that precisely what the respondents agree was the subject matter of TEDRA mediation be converted to arbitration, but they it could not be TEDRA arbitration, but they then claim that when TEDRA mediation was converted to arbitration by court order it was not converted to TEDRA arbitration.

The respondents object that because the parties agreed to arbitration (which is specifically allowed under RCW 11.96A.310(c)) the resulting arbitration is “contractual” and hence (?) not under TEDRA

The respondents repeatedly refer to the arbitration that the parties engaged in as “contractual arbitration,” as if arbitration entered into on the basis of an enforceable agreement could not be conducted under the TEDRA statutory scheme. The respondents’ inference depends on (1) ignoring RCW 11.96A.310(1) and (2) relying on a necessary but suppressed and assumed premise that the parties, while they can specify or limit the scope of TEDRA mediation, if they agree to limit or specify the scope of arbitration, in precisely the same way, are no longer proceeding under TEDRA arbitration.

That silently assumed legal premise, which is essential to the respondents' argument, is not provided by the law. On the contrary, the TEDRA statutory scheme specifically allows and encourage agreements. The statutes are replete with provisions allowing agreements specifying and outlining disputes. "The purpose of RCW 11.96A.220 through 11.96A.250 is to provide a binding nonjudicial procedure to resolve matters through written agreements among the parties. . . ." RCW 11.96A.210

"If all parties agree to the resolution of any such matter, the agreement shall be evidenced by a written agreement signed by all parties. Subject to the provisions of RCW 11.96A.240, the written agreement shall be binding and conclusive on all parties interested in the estate or trust. The agreement shall identify the subject matter of the dispute and the parties. " RCW 11.96A.220

"Any party . . . may file the written agreement. . . with court.... On filing the agreement or memorandum, the agreement will be deemed approved by the court and is equivalent to final court order binding on all persons interested in the testate or trust." RCW11.96A.230

Limitation of issues is also allowed. While usually the initial hearing will be on all issues, it need not be: "**Unless** requested otherwise

by a party, in a petition or answer the initial hearing must be on the merits to resolve all issues.” RCW 11.96A100(8)

In this case, when the initial hearing did not resolve all the issues and the parties determined that mediation would not do so either, they entered into an agreed order, prepared by the respondents, to arbitrate two underlying issues, as authorized by RCW 11.96A.100: “If the initial hearing on the merits does not result in a resolution of all issues of fact and all issues of law, the court may enter any order it deems appropriate, which order may (a) resolve such issues as it deems proper. . . .”

“The intent of RCW 11.96A.260 through 11.96A.320 is to provide for the efficient settlement of disputes in trust, estate and nonprobate matters though mediation and arbitration by providing any party the right to proceed first with mediation and then arbitration before formal judicial procedures may be utilized. Accordingly, **any** (emphasis supplied) of the requirements or rights under RCW 11.96A.260 through 11.96A.320 are subject to contrary agreement between the parties or the parties’ virtual representatives.” RCW11.96A.270

One way, but not the only way, of initiating TEDRA arbitration is that **part** of RCW 11.96A.310 cited by the respondents: “If the parties. . . agree that mediation does not apply **and** have not agreed to another

procedure for resolving the matter, a party **may** commence arbitration. . .  
by serving a written notice of arbitration . . .

Respondents seem to be arguing that because the order the court entered ordering arbitration was agreed to, the resulting arbitration was “contractual” and therefore (?) not under TEDRA. That position simply is not compatible either with the express language of the TEDRA statutes or their spirit.

In short, respondents claim, that because the method the court used in ordering arbitration did not conform to **one** of the ways TEDRA arbitration may be commenced it was not under TEDRA at all.

#### Two Subsidiary Issues

The respondents also claim that not only was the arbitration not under TEDRA but even if a trial de novo were granted there would be nothing to appeal, the arbiter’s decisions for which a trial de novo was requested being so obviously right that it would be pointless to ask a judge to revisit the facts and law.

Mr. Slough believes the respondents are wrong about that, and he believes he is entitled to the day in court that he has so far been denied. When the court’s order denying Mr. Slough his right to a trial de novo “on all issues of fact and law” is vacated, there will be no arbiter’s awards left

to enforce and those judgments, being parasitic on the order finding no jurisdiction for a trial de novo, are a fortiori vacated as well.

After the court ruled that Mr. Slough had no right to a trial de novo, it confirmed the arbiter's awards from which Mr. Slough had appealed.

Plainly, the court's award of judgments for rent and for attorney fees were based on the arbiter's awards. The arbiter's awards were based on his erroneous holding that a claim of ownership interest in a particular piece of property was a general claim against the estate, contrary to *Witt v. Young*, 168 Wn.App. 211, 275 P.3d 1218 (2012) and the earlier cases cited to the arbiter.

Even had the arbiter been right about Mr. Slough's claim of ownership interest being barred, that did not justify his award on rent and attorney fees in the amounts awarded.

The justification respondents give for both judgments is incorrect:

**Rent.** Respondents cite two cases, *Estate of Marcella Jones*, 152 Wn.2d 1, 93 P.3d 147 (2004) and *In re Boston's Estate*, 80 Wn.2d 70, 491 P.2d 1033 (1971), for the proposition that if the personal representative occupies property he owes rent. That is a misleading over-simplification. What the cases actually say that if the PR occupies the property under certain conditions he owes rent.

Appellant's **only** (emphasis supplied) right to possession of the property arose from his status as executor, as he had no right to occupancy as an individual. *In re Estate of Peterson*, 12 Wash. 2d 686, 123 P.2d 733 (1942) Where there are reasonable alternatives open, particularly alternatives which would produce rents and profits from the property, an executor has no right to remain on and use the property. For such continued use he, as an individual, should be charged a reasonable rent. Cites omitted.

*Boston* at 72

Where a person's **only** (emphasis supplied) right to possession of the property arises from his status as executor, he does not have the right to remain on the property when there are other reasonable alternatives (e.g. renting the property). *Id.* If he chooses to use the property for his own benefit, he must pay rent. Cites omitted.

*Jones* at 14

*Jones and Boston* enunciate this principle: **If (1) a personal representative occupies the property (2) for his own benefit and (3) there are reasonable alternatives available, then the personal representative owes the estate reasonable rent for the period when the three conditions obtain.**

An examination of the facts will show that Mr. Slough did not occupy the house solely for his own benefit. None of his actual alternatives was without serious difficulty. With a trial de novo on all facts and law, a judge will not take two short cuts to a decision by ignoring those facts and ignoring the word "only," as respondents do and the arbiter did.

**Attorney fees.** It is also not true, as respondents claim that they were automatically entitled to all of their fees as prevailing parties at arbitration. “A party **shall** bear its own costs and expenses, including legal fees and witness expenses, in connection with arbitration proceeding.” RCW 11.96A.310(5)(e)(ii). Emphasis supplied

This is the American Rule, which Washington follows, unless there is a statute or recognized equitable ground for an exception.

The exception is RCW 11.96A.310(6): “Costs of arbitration. The arbitrator **may** order costs, **including reasonable attorneys’ fees** and expert witness fees, to be **paid by any party** to the proceedings **as justice may require.**” Emphasis supplied.

As a preliminary, RCW 11.A.310(5)(e)(ii) is mandatory and universal. RCW 11.96A.310(6) is discretionary and limited. In any event, RCW 11.96A.310(6) is far from saying that the prevailing party automatically gets his attorney fees from the losing party.

The lack of success does not indicate bad faith or lack of probable cause in making the challenge. *Kubick*, at 420, 513 P.2d 76. Mrs. Magee exercised good faith in bringing this appeal, which involves justiciable issue not previously resolved by case law. Thus fees against her personally will be denied.

*Matter of Estate of Magee*, 55 Wn.App. 692, 696, 780 P.2d 269 (1989)

Finally, Jeanne argues that the court erred in awarding the daughters attorney fees because they were not prevailing

parties. However the statute does not limit the award of attorney fees to prevailing parties, but rather, as stated, permits an “award as justice may require.”

*In the Matter of the Estate of James M. Magee v. Raymond Magee*, 55 Wn.App. 692, 696, 780 P.2d 269 (1989)

The arbiter was required to exercise his discretion and award only reasonable fees. Multiplying hours times a rate is insufficient.

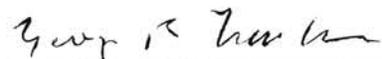
Finally, the determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful plaintiff can bill. . . . Therefore, the trial court, instead of merely relying on the billing records of the plaintiff’s attorney, should make an independent decision as to what represents a reasonable amount of attorney fees. The amount spent by the plaintiff’s attorney is may be relevant, but it is by no means dispositive.

*Nordstrom v. Tampourios*, 107 Wn.2d 735, 734, 733 P.2d 208 (1987)

#### CONCLUSION

Rent and attorney fees are side issues. This appeal stands or falls on one issue. Was the arbitration conducted under TEDRA. Since it was, Mr. Slough is entitled to a trial de novo on all issues of fact and law. RCW 11.96A.310(9)(a) He asks that the case be remanded to the Superior Court for that trail de novo on all issues of fact and law.

Dated: 22 April 2013



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

In re Estate of Yolanda "Lani" Slough,  
Deceased.

Cause No. 05-4-05352-3SEA

STIPULATION AND ORDER TO  
COMPEL ARBITRATION

Clerk's Action Required

WHEREAS by its March 30, 2010 order, this Court ordered the parties to conduct mediation on the issues enumerated therein. The parties have determined that arbitration would more efficiently and effectively resolve those issues. The parties have agreed that Judge Terry Lukens shall serve as arbitrator.

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Stipulation and Order To Compel Arbitration - :

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From Impact Law Group Fax 1206-452-0855 To Carolyn Balkema Fax: +1 (206) 524-8460 Page 3 of 3 6/21/2010 2:25

1 THEREFORE, THE PARTIES HEREBY STIPULATE Judge Terry Lukens shall serve  
2 as arbitrator to resolve the issues enumerated in this Court's March 30, 2010 order. The parties  
3 further stipulate that the arbitration shall occur on or before August 10, 2010. Judge Lukens'  
4 ~~schedule permitting~~ *be set after conference with Judge Lukens in order to determine a schedule.*

5 DATED this 25 day of June, 2010.

7 IMPACT LAW GROUP PLLC

LANDRUM & BALKEMA

8 By: *[Signature]* WSBA # 31841  
9 For: Jonah O. Harrison, WSBA #34576  
10 Attorneys for Petitioners

By: *[Signature]*  
Carolyn Balkema, WSBA #21430  
Attorney for Respondent

11 Pursuant to the foregoing Stipulation, it is hereby

12 ORDERED, ADJUDGED AND DECREED that Judge Terry Lukens shall serve as  
13 arbitrator to resolve the issues enumerated in this Court's March 30, 2010 order. The  
14 arbitration shall ~~occur on or before August 10, 2010. Judge Lukens' schedule permitting.~~ *be set by conference call w/ Judge Lukens.*

15 DONE IN OPEN COURT this \_\_\_\_ day of June, 2010.

17 Judge Commissioner

18 Presented by:

19 IMPACT LAW GROUP PLLC

LANDRUM & BALKEMA

20 By: *[Signature]* WSBA # 31841  
21 For: Jonah O. Harrison, WSBA #34576  
22 Attorneys for Petitioners

By: *[Signature]*  
Carolyn Balkema, WSBA #21430  
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23 Stipulation and Order To Compel Arbitration - 2

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No 68155-9-I

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STATE OF WASHINGTON DIVISION I

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STATE OF WASHINGTON  
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Estate of Yolanda "Lani" Slough )

ROBERT SLOUGH, )

Appellant, )

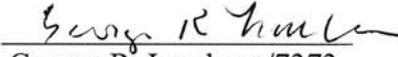
vs. )

CHRISTINE CALDERBANK, )

Respondent. )

PROOF OF SERVICE OF  
APPELLANT'S REPLY BRIEF

On April 22, 2013 I caused Jonah Harrison, attorney for Christine Calderbank, respondent herein, to be served with a copy of Appellant's Reply Brief by delivery by ABC Legal Messengers. This statement is made under penalty of perjury of the Laws of the State of Washington in Seattle Washington this 22nd day of April 2013.

  
George R. Landrum/7373  
Attorney for Appellant