

72095-3

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No. 72095-3-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

Lula S. Sloans, a single person,
Appellant,

v.

Nadine E. Berry & Robert M. Berry, in their capacity as co-administrators
of the Estate of Betty Jean Berry,
Respondents.

REPLY BRIEF OF APPELLANT

ORIGINAL

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I. SYNOPSIS OF REPLY ARGUMENT

The Personal Representatives (“PRs”) brief calls to mind the old adage in the law that goes: “If the law is against you, argue the facts. If the facts are against you, argue the law. If both are against you, pound the table and yell like hell.”

The PRs’ brief asks the Court to ignore the plain language of Ch. 11.96A RCW (“TEDRA”), to ignore the Legislature’s intent behind TEDRA and to ignore recent cases construing TEDRA. Their brief spends much time urging this Court to rule based on pre-TEDRA cases.

In particular the PRs ask this court to ignore TEDRA’s broad definition of “matter.” They also urge this court to ignore TEDRA’s mandatory supplementation of all of Title 11 RCW, including the creditor claim statutes. In doing so they ignore TEDRA’s legislative history; that history indicates the “matters” covered by TEDRA are broad and that the legislature intentionally expanded the types of “matters” probate courts can hear. Namely, special proceedings (i.e. TEDRA actions) may be used to pursue creditors’ claims as well as traditional civil actions. Citing little authority, the PRs also claim Sloans’ action wasn’t even commenced; however, the facts and established law are to the contrary.

Finally, the PRs claim the trial court properly applied the CR 12(b) and CR 56 standards. Given the facts presented to the trial court, and in light of TEDRA's broad definition of "matter," the PRs' argument on this issue also fails.

As to fees: the trial court's attorney fee award should be reversed and, unless this court finds there are no novel issues of statutory construction on appeal, no fees should be awarded on appeal either.

II. RECITATION OF PERTINENT FACTS

At issue is enforcement of the TEDRA Agreement signed by Appellant "Sloans" and the decedent "Berry".¹ CP 7-12. Although that agreement was pursuant to one of TEDRA's predecessor statutes, former RCW 11.96.170 (CP 7), that statute was re-enacted as a part of TEDRA at RCW 11.96A.220. CP 113 (WSBA comments to TEDRA, §402); *see also*, Sloan's opening brief Appendix ("OB Apdx.") 16. Hence, it is called the TEDRA Agreement. Sloans' original TEDRA Petition is found at CP 1-14. Her Amended TEDRA Petition is found at CP 42-56. Both petitions specifically allege they concern "matters" under TEDRA and men-

¹ The PRs are Berry's personal representatives.

tion the TEDRA Agreement. CP 4:11-20 & 45:23-46:7. The PRs' argument that Sloans' petitions did not allege TEDRA "matters" is simply wrong.²

Similarly, Sloans' Response Brief to the trial court detailed the TEDRA "matters" at issue before it. CP 93:4-7; 97:3-99:8. The breadth of TEDRA's definition of "matter" was squarely at issue as seen in the trial court's discussion of it:

MR. BARTLETT: It -- Your Honor, I would ask you to address, then, the section of TEDRA 11.96[A].030 Sub 2, where it talks about matters.

COMMISSIONER VELATEGUI: Yeah.

MR. BARTLETT: It says,
"A matter of any issue, question, or dispute involving, with respect to a non-probate asset, or with respect to any other asset... [or property] interest passing at death,... [including . . .] determination of any questions relating to the rights of... [creditors]."

COMMISSIONER VELATEGUI: As I say counselor, you -- your expansive reading of TEDRA would tell us that we could simply wipe out every chapter of Title Eleven except 11.96(A).

² For example, Respondent's Brief at p. 21 claims the petitions do not seek direction to the PR's as fiduciaries. However, the petitions at CP 4:19-20 & 46:6-7 specifically do ask for direction to the PR's as fiduciaries as one of the TEDRA "Matters" at issue. In another example, Respondent's Brief at p. 23 claims the petitions do not ask for determination of the parties relations under the TEDRA Agreement. However, the petitions at CP 4:11-16 & 45:23-46:3 specifically do ask for determination of the parties rights, responsibilities, duties and liabilities under the TEDRA Agreement and Deed.

MR. BARTLETT: I don't agree with that, Your Honor.

COMMISSIONER VELATEGUI: Well, that's where I think you are.

RP (5/15/14) 13:3-19.

III. REPLY ARGUMENT & AUTHORITY

A. **Parties Agree on the Standard of Review.** The PRs agree with Sloans the de novo standard of review applies to this appeal.

B. **The Legislature Intended TEDRA's Definition of "Matter" to be Broad.** The recent case of *In re Estate of J. Thomas Bernard*, 182 Wn. App. 692, 332 P.3d 480 (2014) confirms Sloans is correct that TEDRA's definition of "matter" at RCW 11.96A.030(2) is intentionally broad. Like the instant case, *Bernard* involved construing TEDRA agreements. *Id.* That court stated, at 495-496:

"RCW 11.96A.030(2) states:

"Matter" includes *any* issue, question, or dispute involving:

...

(c) The determination of any question arising in the administration of an estate or trust ... that may include, without limitation, questions relating to: (i) The construction of wills, trusts ... and other writings....

The plain words of this definition of "matter" make clear the broad scope of this term. There simply is no persuasive argument here that the subject of the TEDRA agreement did not fall within this definition.

Even if we were required to go beyond the plain words that define the very broad scope of this term, comments to the Senate Bill by the Washington State Bar Association Real Property, Probate & Trust Section support this conclusion:

The term “matter” establishes the issues, questions and disputes involving trusts and estates that can be resolved by judicial or nonjudicial action under the Act. This term is meant to apply broadly and is intended to encompass matters traditionally within the exclusive province of the courts. This is consistent with the overall purpose of the Act, which is to foster nonjudicial resolution of issues confronting estates and trusts.

(Bold text in original, underlined emphasis added)

Sloans’ opening appellate brief cited these same comments by the Washington State Bar Association, Real Property, Probate & Trust Section (“WSBA”) and included them in that brief’s Appendix. Appellant’s Opening Brief, p. 25-26 & OB Apdx. 9-19. Pertinent sections were also cited to the trial court. CP 112-113.

The *Bernard* court also cited as authority UW Professor Karen Boxx’s declaration at p. 491. Professor Boxx’s history of TEDRA is attached to Sloans’ opening brief at Apdx. 21-42. Karen Boxx confirms the definition of “matter” was expanded, and includes non-probate assets. OB Apdx. 29. As related in Sloans’ opening brief, the TEDRA Agreement Property is a non-probate asset under RCW 11.02.005(10). Professor

Boxx's history also confirms the legislature intended to expand probate court jurisdiction. OB Apdx. 29.

The trial court erred when it ruled TEDRA's definition of "Matter" was not as broad as its plain language says. The PRs' briefing attempting to limit the scope of a TEDRA "Matter" is similarly unsupported legally and factually. The broad scope of TEDRA "matters" includes the matters asserted by Sloans in her petitions at the trial court level (CP 1-14 & 42-56), in her briefing at the trial court level (CP 93:4-7 & 97:3-99:8), and in her opening brief on appeal (Appellant's Opening Brief at p. 23).

1. PRs' Misleading Quote Acknowledges the Breadth of a TEDRA "Matter" & the Strength of Sloans' Argument. RCW 11.96A.080(1) authorizes judicial proceedings for TEDRA "matters." On page 18 of their Responding Brief the PRs quoted the applicable text from that section as follows:

"any party may have a judicial proceeding for . . . the resolution of any other case or controversy that arises under the Revised Code of Washington and references judicial proceedings under [Title 11]"
(Emphasis in original of PRs' Responding Brief)

However, the PRs' quote is misleading; they removed the operative portion of this statute and highlighted text to make the statute's focus different from what it is. When the missing words from RCW 11.96A.080(1) are added, the pertinent text reads:

any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030; the resolution of any other case or controversy that arises under the Revised Code of Washington and references judicial proceedings under this title; or the determination of the persons entitled to notice under RCW 11.96A.110 or 11.96A.120.

(Emphasis added to show the text removed by the PRs)

RCW 11.96A.080(1) specifically says a party may have a judicial proceeding for the declaration of rights or legal relations with respect to a "matter" as defined in RCW 11.96A.030. The PRs' purposeful removal of this operative language in their quote seems to acknowledge the strength of Sloans' argument. The PRs cannot hide from the broad scope of TEDRA by editing out sections of pertinent law they dislike.

The PRs present no logical legal or factual argument why TEDRA's broad definition of "matter," does not apply to Sloans' claims. As argued in Section IV.D. of Sloans' Opening Brief, p. 20-24, the matters she presented for resolution by the trial court fall within the broad definition of "matter" intended by the legislature.

C. The Plain Language of TEDRA Means its Provisions Supplement (i.e., “add to”) the Creditor Claim Chapter of Title 11. The pertinent part of RCW 11.96A.080(2) states:

The provisions of this chapter shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title, including without limitation those contained in chapter 11.20, 11.24, 11.28, 11.40, 11.42, or 11.56 RCW. The provisions of this chapter shall not apply to actions for wrongful death under chapter 4.20 RCW.

(Emphasis added)

Chapter 11.40 RCW is the creditor claim statutes; the only one of those statutes at issue in this appeal is RCW 11.40.100. Under the plain language of RCW 11.96A.080(2), TEDRA mandatorily supplements RCW 11.40.100.

The PRs try to disavow the ruling in *In re Estate of Kordon*, 157 Wn.2d 206, 137 P.3d 16 (2006). However, *Kordon* specifically construed RCW 11.96A.080(2); that court stated:

While TEDRA applies to will contests, it “shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title,” including chapter 11.24 RCW. RCW 11.96A.080(2). A statute supersedes another statute by replacing it and supplements another statute by adding to it. *See* BLACK'S LAW DICTIONARY 1479, 1480 (8th ed.2004) (defining “supersede” as “To annul, make void, or repeal by taking the place of”

and “supplemental” as “Supplying something additional; adding what is lacking”).

157 Wn.2d at 212³. Under *Kordon*, and the plain language of RCW 11.96A.080(2), TEDRA adds to every section of Ch. 11.40 RCW. This logically means that a judicial proceeding under TEDRA is now included in the types of suits that may be brought under RCW 11.40.100.

The legislative history supports Sloans’ reading of these statutes. As noted in Sloans’ opening brief at Section IV.D.2 (p. 25-26) the scope of TEDRA’s matters was broadened under RCW 11.96A.030(2) from its predecessor statute, former RCW 11.96.070. OB Apdx. 9, TEDRA §104(1); OB Apdx. 29. The WSBA Commentary to TEDRA also states that as to former RCW 11.96.070:

Thus a party commencing an action relating to a matter that is described in RCW 11.96.070 can elect to commence such action either as a “special proceeding” under chapter 11.96 RCW or as a regular civil action.

OB Apdx. 12, TEDRA §302, 4th paragraph. Logically, this means an action relating to a “matter” described in RCW 11.96A.030(2) may continue to be commenced as either: a “special proceeding” (commonly called “a TEDRA action”), or a regular civil action. OB Apdx. 12, TEDRA §302; OB Apdx. 29.

³ Like the creditor claim statutes of Ch. 11.40 RCW, the Will contest statutes of Ch. 11.24 RCW are specifically listed in RCW 11.96A.080(2).

As stated in *Bernard*, 332 P.3d at 496, TEDRA represents a modernization of probate practice allowing probate courts to handle matters traditionally handled in courts of law. *See also* OB Apdx. 9, TEDRA §104(1); OB Apdx. 11-12, TEDRA §301; OB Apdx. 13, TEDRA §303. By “supplying something additional” or “adding what is lacking” to RCW 11.40.100, TEDRA logically adds special proceedings (i.e., a TEDRA petition under RCW 11.96A.100) to the types of cases that may be asserted under that statute.

In re Estate of Stover, 178 Wn. App. 550, 315 P.3d 579 (2013), supports Sloans’ position. *Stover* involved a creditor’s claim brought via TEDRA petition. *Id.* at 555. In *Stover* the 30 day requirement of RCW 11.40.100 was found to be unaffected by CR 6 for purposes of commencing the action by mail service. Logically there was no need for the *Stover* court’s analysis unless a TEDRA petition (i.e., a special proceeding) in support of a creditors claim was at issue. Namely, if there was a blanket prohibition against pursuing creditor claims via a TEDRA petition, as urged by the PRs, that would have been the holding of *Stover* and there would have been no need for that court to analyze the effect of TEDRA on the civil rules concerning commencement of actions. Instead, *Stover* sup-

ports using a TEDRA petition to recover creditor claims and confirms that conflicting civil rules are displaced in such actions.

1. The Legislature Did Not List Creditor Claims in the Exclusionary Language of RCW 11.96A.080(2). Finally, the Legislature only listed wrongful death actions under Ch. 4.20 RCW as actions excluded from TEDRA's application. Had the Legislature intended TEDRA not apply to creditor claim actions under RCW 11.40.100, it presumably would have listed it as an excluded matter. That it was not excluded indicates TEDRA applies to creditor claim actions. The maxim of statutory construction, *expressio unius est exclusio alterius*⁴, applies here.

D. The PRs Refuse to Recognize the Legislature Changed the Law when it Enacted TEDRA. It is also a maxim of statutory construction that the legislature is presumed to know previous law and that by changing the language of a statute the legislature is presumed to intend a change in the law. *State v. Carlson*, 65 Wn. App. 153, 158, 828 P.2d 30 (1992); *In re Adoption of Jackson*, 89 Wn.2d 945, 949, 578 P.2d 33 (1978). The legislature is clear in RCW 11.96A.080(2) that it was sup-

⁴ Namely, where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature. *State v. Swanson*, 116 Wn. App. 67, 75, 65 P.3d 343 (2003).

plementing (i.e., adding to) all of Title 11's applicable procedures and, as to the enumerated chapters of Title 11, the legislature intended them to be supplemented completely. In light of RCW 11.96A.080(2)'s plain language there is no doubt the legislature intended the changes it made; those changes make the pre-TEDRA cases relied on by the PRs irrelevant to construing and applying TEDRA.

E. Sloans Commenced a New Action. The PRs argue that Sloans did not commence her judicial proceeding as a new action under RCW 11.96A.090(2). TEDRA, at RCW 11.96A.100, determines how a proceeding involving it is commenced. RCW 11.96A.100(1) states a TEDRA action is commenced by filing a petition with the court. Under TEDRA issuance of a summons under RCW 11.96A.100(2) makes the matter a new action as to the parties served. CP 237 (WSBA CLE: Annual Trust and Estate Litigation Seminar: Handling the Challenges (2009)). Under RCW 11.96A.090(4) the civil rules of procedure apply unless inconsistent with TEDRA. Consistent with RCW 11.96A.100(1), under CR 3 filing a complaint (here, a petition) commences an action.

According to the Clerk's papers, Sloans' original TEDRA petition and the summonses for both PRs were filed on 2/19/14. CP 181, 182. The

Clerk's office accepted the \$240 filing fee at that time. CP 201. The PRs' attorney then accepted service of those documents. CP 223-224. This was sufficient under TEDRA and CR 3 to commence the action. The PRs took no action to object to the Clerk's action or to claim the record is erroneous.

In Washington an action is a prosecution in a court for the enforcement or protection of private rights and the redress of private wrongs. *Thorgaard Plumbing & Heating Co. v. County of King*, 71 Wn.2d 126, 426 P.2d 828 (1967). Sloans' petitions meet this test; they requested the court to enforce her rights under the TEDRA Agreement. CP 1-14 & 42-56. Her petitions also have a different caption from the Berry estate. Compare CP 120 with CP 183. Although the PRs call this "tinkering with the caption" (Responding Brief at p. 31) the different caption is required by King County Local Court Rule 98.14(a). That rule indicates one is to reference the probate estate at issue along with the names of the TEDRA litigants in the caption of a TEDRA action.

As to the mechanism of filing: the King County Clerk's on-line filing system only allows for new TEDRA actions to be filed upon pay-

ment of a filing fee, even if done so via an existing probate⁵. CP 235 (showing a TEDRA Petition can only be filed as a new action by paying the \$240 filing fee required by RCW 36.18.020). That statute states that filing a first paper in an action, namely a new action, requires payment of a \$240 filing fee, as was done here. RCW 2.32.050(4) requires the Clerk to file all papers delivered to it for that purpose as determined by statute. And under RCW 4.32.250 and 4.36.240 existence of an action is not determined by whether a caption/cause number information is correct or even exists. Pursuant to the above statutes Sloans' action was a new action; she presented her TEDRA Petition to the Clerk using its on-line system. She paid the new action fee which the Clerk accepted.

The legislative history behind RCW 11.96A.090(2) indicates it is a Clerk's record-keeping statute, not a statute of substantive law. CP 239 (Senate Bill Report). This is consistent with the fact the distinction between incidental and new actions in TEDRA continues to exist in RCW 11.96A.100(2) and in King County Local Court Rule 98.14(c). The essence of the PRs' argument is that a cause number determines a new action versus an incidental action. King County Local Rule 98.14(c) also

⁵ Almost all filings by attorneys in King County Superior Court must be e-filed via its on-line eFiling Application system. King County Local General Rule 30(b)(5).

debunks that theory; by its terms, that rule reveals incidental actions may have their own separate cause number.

In this case the Clerk was presented with a new action and filing fee and, following its duty under RCW 2.32.050(4) and 36.18.020, filed it on the date presented for filing. The TEDRA Petition was filed within 30 days of the PRs' rejection of the first claim. CP 179 & 1. Sloans' petition requested relief and named specific parties subject to the requested relief. CP 1-14. Summonses were issued and filed the same day. CP 15-16 & 17-18.

The PRs have no authority for the proposition that using the King County Clerk's online filing system to present a new action for filing, paying a new action filing fee, using a caption mandated by local rule in which the TEDRA Petition stated separate requests for relief and accompanied by TEDRA Summonses notifying the parties of the action is anything but a new action under RCW 11.96A.090(2).

1. Even Under the PRs' Theory: Sloans' Claims for Unpaid Taxes Were Timely Filed as a New Action. Even if the existence of a new cause number is a prerequisite to the existence of a new action, the

PRs overlook that their own theory validates Sloans' creditor claims for the unpaid taxes. After the Clerk issued a new cause number Sloans filed her amended petition using that number. CP 42-56. It was filed on April 18, 2014. CP 42. That date is less than 30 days after the PRs' rejected the creditors claim for the unpaid taxes on March 21, 2014. CP 202-203. While Sloans disagrees with the PRs theory on how to distinguish new actions from an incidental action, even under their theory the tax claims should not have been dismissed by the Court. At the dismissal hearing the Court acknowledged those taxes had not been paid by Berry. RP (5/15/14) 11:7-16. Even under the PRs' theory Sloans is entitled to relief and recovery of the unpaid taxes.

F. Inapplicability of Authority Cited by PRs. The PRs rely on a number of pre-TEDRA cases that are inapplicable to TEDRA actions. They also cite to post-TEDRA cases that are inapposite.

1. Pre-TEDRA Cases. TEDRA became effective January 1, 2000; consequently the following Pre-TEDRA cases relied on by the PRs did not address TEDRA's changes to Title 11 RCW, the probate code: *Shluneger v. Seattle-First National Bank*, 48 Wn.2d 188, 292 P.2d 203 (1956), *Archer Blower & Pipe Co. v. Archer*, 33 Wn.2d 317, 205 P.2d

595 (1949), Bailey v. Schramm, 38 Wn.2d 719, 231 P.2d 333 (1951), Spokane v. Constello, 57 Wash. 183, 106 P. 764 (1910), In re Gorkow's Estate, 28 Wash. 65, 68 P. 174 (1902), Wood v. Superior Court, 76 Wash. 27, 135 P. 494 (1913), Henley v. Henley, 95 Wn. App. 91, 974 P.2d 362 (1999) (discusses Ch. 11.96 RCW, not Ch. 11.96A RCW), O'Steen v. Wineberg's Estate, 30 Wn. App. 923, 640 P.2d 28 (1982), Compton v. Westerman, 150 Wash. 391, 273 P. 524 (1928), Baird v. Knutzen, 49 Wn.2d 308, 301 P.2d 375 (1956), Ashenbrenner v. Dept. of Labor & Industries, 62 Wn.2d 22, 380 P.2d 730 (1963). As argued above, the legislature is presumed to have known these cases existed prior to TEDRA's enactment and is equally presumed to have intentionally changed the law by enacting TEDRA. Carlson, supra; Jackson, supra. The legislative history is that one of TEDRA's goals was to modernize the probate code, Title 11 RCW. Bernard, supra. In light of TEDRA's plain language and its history, the PRs' pre-TEDRA cases are irrelevant to construing TEDRA.

2. Inapposite Cases. The following cases relied on by the PRs are inapposite for the following reasons:

a. In re Estate of Earls. 164 Wn. App. 447, 262 P.3d 832 (2011). This case was dismissed because a creditor claim had never been filed. Id. at 451. Filing of a claim is a prerequisite to commencing suit under RCW

11.40.100. RCW 11.40.050(1). In this case, Sloans filed her two creditor claims as required by statute. CP 158-168 & 169-178. Sloans complied with the holding of Earls. The PRs' broad statement that Earls means TEDRA petitions requesting money damages must be dismissed in mis-placed.

b. In re Estate of Black. 116 Wn. App. 476, 66 P.3d 670 (2014). This case is cited for the proposition a court must look to the probate code for its procedures. Although it is a post-TEDRA case, it does not appear to discuss the effect of TEDRA on creditor claims. There is no dispute the trial court is to follow Title 11 RCW, which includes TEDRA.

c. In re Guardianship of Wells. 150 Wn. App. 491, 208 P.3d 1126 (2009). This case relied on TEDRA to provide a guardian subject matter jurisdiction in the superior court to enforce a settlement agreement. This case does not appear to concern the definition of a TEDRA "matter", its supplementation of Title 11 RCW, or affect Sloans' creditor claims petitions.

d. In re 1934 Deed to Camp Kilworth. 149 Wn. App. 82, 201 P.3d 416 (2009). This case concerned whether TEDRA applied to reform a

deed which conveyed land prior to any estate being at issue. It did not concern creditor claims brought against a decedent's estate.

G. Dismissal is Not Supported by CR 12(b).

1. PRs Do Not Dispute a CR 12(b) Dismissal is an Extraordinary Action to be Rarely Taken. The PRs do not dispute dismissals under CR 12(b) are rarely to occur and that the standard of proof is beyond a reasonable doubt⁶ that no facts exist to justify recovery. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 881 P.2d 216 (1994). Nor do they dispute the trial court was to assume all facts listed in the Petitions were true. *Dennis v. Heggen*, 35 Wn. App. 432, 667 P.2d 131 (1983). Under the applicable law, Sloans' petitions factually and legally stated a basis for recovery. CP 1-14 & 42-56.

2. Sloans Requested Right to Amend Prior to the Order of Dismissal. Sloans' trial court Response Brief stated that amendment of her pleadings was a remedy the trial court should consider and cited *Caruso v. Local Union No. 690 of Int'l Broth. of Teamsters*, 100 Wn.2d 343, 670 P.2d 240 (1983) for that proposition. CP 94:12-15. *Caruso* states the

⁶ The beyond a reasonable doubt standard is a higher standard than the preponderance of the evidence standard. See *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 242 P.3d 936 (2010).

goal of amended pleadings is to foster Washington's notice pleading approach to litigation. It stated:

Amendments to pleadings are governed by CR 15(a) which provides, in pertinent part, that "a party may amend his pleading only by leave of court ... and leave shall be freely given when justice so requires." The purpose of pleadings is to "facilitate a proper decision on the merits", *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957), and not to erect formal and burdensome impediments to the litigation process. Rule 15 of the Federal Rules of Civil Procedure, from which CR 15 was taken, "was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result." *United States v. Hougham*, 364 U.S. 310, 316, 81 S.Ct. 13, 18, 5 L.Ed.2d 8 (1960). CR 15 was designed to facilitate the same ends.

Caruso, 100 W.2d at 349 (emphasis added).

Besides arguing to the court a CR 12(b) dismissal was unwarranted, Sloans also argued that the remedy of amendment should be considered before a dismissal. CP 94:12-15. Any amendments would relate back to the original pleading they amend. CR 15(c). Before ordering a dismissal the trial court should have allowed an amendment.

3. Under the CR 12(b) & CR 56 Standards, Dismissal was Unwarranted. The PRs also do not dispute the trial court considered facts outside the pleadings. Besides noting the property damage he saw in

the pictures and construing the TEDRA Agreement (RP (5/15/14) 8:8-11:6), the Commissioner agreed the taxes had not been paid – contrary to the TEDRA Agreement. RP (5/15/14) 11:7-16. The underpinning of the trial court’s legal reasoning was that a creditor’s claim cannot be pursued via TEDRA Petition. RP (5/15/14) 13:3-19. As argued above, this legal analysis was error. Instead, as also argued above, such claims can be pursued.

Under Sloan’s legal analysis the facts presented by her and considered by the court mean dismissal under CR 12(b) and CR 56 was improper. The decedent had the specific duties listed in the TEDRA Agreement. CP 8:9-9:18. There was admissible evidence considered by the trial court she breached those duties. CP 137-141 (unpaid taxes) & 142-157 (property damage pictures). Sloans timely filed her petitions which requested relief because the issue of Berry’s breach of the TEDRA Agreement were TEDRA “matters.” Under the law and facts, no dismissal can be supported under CR12(b) or CR 56. To the extent the dismissal was under those court rules – that was error.

H. Trial Court Attorney Fee Award Should be Reversed. The trial court awarded fees under TEDRA’s attorney fee statute, RCW

11.96A.150. It did so after construing TEDRA in a novel way – opposite of its plain meaning and contrary to the legislative history and court cases. Regardless of whether the Court of Appeals reverses the trial court’s ruling, it should reverse the attorney fee award. *Stover, supra* makes it clear an attorney fee award is improper under TEDRA if the dispute involves novel issues of statutory construction. *Id.* at 564. The following cases cited in the *Stover* case appellate briefing support the rule that RCW 11.96A.150 does not support a fee award when novel issues of statutory construction are present: *In re Estate of D’Agosto*, 134 Wn. App. 390, 401-02, 139 P.3d 1125 (2006), *review denied*, 160 Wn.2d 1016 (2007); *Estate of Burks v. Kidd*, 124 Wn. App. 327, 333, 100 P.3d 328 (2004), *review denied*, 154 Wn.2d 1029 (2005); *Mearns v. Scharbach*, 103 Wn. App. 498, 514-15, 12 P.3d 1048 (2000), *review denied*, 143 Wn.2d 1011 (2001). Regardless of whether the PRs prevail the trial court fee award should be reversed.

The PRs argue they should be allowed to retain the trial court fee award even if they lose on appeal. Besides the *Stover* prohibition, the equitable standard of RCW 11.96A.150 defeats the PRs argument. It would be inequitable under the RCW 11.96A.150 to allow the PRs to continue to

retain fees in a case that is reversed because the trial court's legal basis was contrary to established law.

The PRs claim Sloans' argument about the novel issues of statutory construction was not raised in her trial court response brief. However, they ignore the fact the trial court commissioner made his ruling after the briefing was filed. Namely, there was no opportunity to make such an argument because the novel basis of the trial court's ruling was unknown beforehand.

I. No Fees Should Be Awarded to Either Party on Appeal Unless No Novel Issues of Statutory Construction Exist. As to fees on appeal, *Stover, supra*, along with *D'Agosto, supra*, *Burks, supra*, and *Mearns, supra*, all support Sloans' position that no fees should be awarded. Only if the appellate court determines there are no novel issues of statutory construction should fees be awarded. In that case, and on the assumption Sloans prevails, then Sloans should be awarded fees under RCW 11.96A.150 pursuant to RAP 18.1.

IV. CONCLUSION & REQUESTED RULING

The trial court should not have dismissed Sloans' action and should not have awarded fees against her. The law cited by the PRs does not support their position; instead the plain language of the statutes and the legislative history support Sloans. The trial court's rulings should be reversed.

In light of the foregoing, Sloans requests the Court of Appeals rule as follows:

A. Vacate the Order Dismissing Lula Sloans' TEDRA Petitions and Forever Barring the Claims Referenced Therein and Awarding Attorneys' Fee entered on May 15, 2014, with the exception of the trial court's decision regarding mediation⁷. (CP 251-253);

B. Vacate the Order and Judgment on Personal Representative's Motion to Set Amount of Awarded Attorneys' Fees entered on June 6, 2014. (CP 292-295);

C. Order Sloans' creditor claims action reinstated and the attorney's fee award against her vacated;

⁷ As to the mediation decision, RCW 11.96A.300(2)(d) indicates such a decision is unappealable; however, if this action is returned to the trial court, Sloans intends to request mediation again.

D. Rule that a TEDRA “matter” that is the basis of a creditor claim may be pursued under RCW 11.40.100 as a TEDRA action;

E. Deny an award of attorney’s fees and costs under RCW 11.96A.150 if this Court finds this appeal involves novel issues of statutory construction;

F. If this appeal does not involve novel issues of statutory construction and Sloans prevails: that she be awarded her attorney’s fees and costs under RCW 11.96A.150 pursuant to RAP 18.1; and,

G. Enter such other relief as deemed appropriate by the Court.

DATED this 8th day of December, 2014.

Respectfully Submitted,



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