No. 44246-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

IN RE: THE ESTATE OF CATHERINE HENINGTON

RESPONDENT'S REPLY BRIEF

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1. INTRODUCTION

The Respondent, Roy Henington ("Mr. Henington"), is confident this court will, upon the requisite *de novo* review of the record, affirm the findings of fact and orders entered in the Superior Court by the Commissioner *pro tempore* and the Hon. Katherine M. Stolz, Judge. Additionally, the court should find this appeal lacks merit and attorney's fees and costs should be awarded to Mr. Henington.

After protracted probate proceedings, the Superior Court properly closed the estate of the Decedent, Catherine Henington. In closing the estate, Commissioner *pro tempore* Thomas Cena found: all notices required by law had been given; more than four (4) years had passed since the filing of creditor claims; neither Leonard Bradley ("Mr. Bradley") or *Ford Motor Credit* initiated litigation to resolve any creditor's claim; and, all amounts due to the IRS, according to the (Successor) Personal Representative had been paid.[1] Appropriately therefore, Commissioner *pro tempore* Cena ordered that any creditor claims of both Mr. Bradley and *Ford Motor Credit* were time-barred as a matter of law and that certain fees and distributions were to be made. The estate was closed.

[1] Mr. Bradley is the father of the Decedent, Catherine Henington.

Then, upon the Appellant's motion for revision to the trial court, Judge Stolz denied the motion to revise Commissioner *pro tempore* Cena's rulings except to increase the amount of fees paid to the Successor Personal Representative and correspondingly reduce the amount of remainder distributions to be made to the heirs.

Appellant, the Successor Personal Representative, Richard Wills, ("Mr. Wills") produced no evidence to the Superior Court that, at some unknown time in the future, the IRS will seek payment of any further taxes, penalties, or interest. Appellant also failed to produce any such evidence to this court for appellate review.

Whatever "creditor claims" Mr. Bradley may have had were never approved by Mr. Wills (nor were they rejected by Mr. Wills) and, despite having been represented by counsel at the time, Mr. Bradley failed to file any proceeding in the Superior Court for determination that any claim was a valid claim against the estate. Mr. Bradley's "claims" are based on, apparently, alleged oral promises to pay between the Decedent and her father and "the fact" that some repayment may have been made by the Decedent to her father before her death.

This court, like the Superior Court, will find facts sufficient to conclude that the estate was solvent, and that assets were available for

distribution under the terms of Catherine Henington's Last Will and Testament. All orders by the Superior Court should be affirmed and this appeal dismissed as meritless. The Respondent should be awarded his attorney's fees and costs.

II. RESPONSES TO APPELLANT'S ASSIGNMENTS OF ERRORS AND STATEMENT OF ISSUES

The Respondent will address each of the Appellant's Assignments of Error and thereafter restate the issues from the perspective of the Respondent.

1. The Superior Court's closure of the estate was proper. The finding of fact that "all amount due to the IRS, according to the Personal Representative, have been paid" was based on a complete lack of evidence to the contrary.

2. Appellant did not meet the burden of proof necessary to demonstrate that the Successor Personal Representative of the Estate remains personally liable to the IRS for any amount certain. Appellant Mr. Wills produced no evidence that any outstanding tax debt is owed by the estate.

3. The Superior Court had more than sufficient evidence before it to determine that the estate was solvent.

4. The Superior Court twice ruled properly that the claims of Mr. Bradley are time barred, that the statutorily required notices to creditors were sent, and that there was no evidence of the Decedent having entered into an oral promise to pay.

5. The Superior Court's closure of the estate complied with due process as required by RCW 11.76.

Additional Issues presented by the Respondent, Roy Henington, are:

6. Appellant Mr. Wills, as the Successor Personal Representative, has a conflict of interest in advocating for the payment of any creditor's claim.

7. Respondent Roy Henington is entitled to the award of attorney's fees in responding to a frivolous and meritless appeal.

III. RESPONDENT'S STATEMENT OF THE CASE

The Decedent, Catherine Henington, died March 15, 2008. Her Last Will and Testament was admitted to probate on March 27, 2008. CP 151-154. The Superior Court admitted the will to probate and appointed

the Respondent, Roy Henington, as the Personal Representative. CP 175-176. Thereafter, on the Appellant's resignation as Personal Representative, the Appellant, Mr. Wills, was appointed as the Successor Personal Representative on August 15, 2008. CP 213-214.

Leonard Bradley is the Decedent's father. In his claim for payment of a loan to his daughter, Mr. Bradley did not present any documentation of a claim other than his own assertion that his daughter had an obligation to repay a loan. CP 1-3. The only documentation concerning Mr. Bradley's "claims" are the actual claims filed with the Superior Court. CP 1-3. In the Appellant's Brief, at page 33, the argument is made that the Decedent may have written a check to her father, yet no action, whatsoever, was undertaken by Mr. Bradley, either *ante mortem* or *post mortem* to enforce any "obligation" the Decedent may have had to "pay" her father anything prior to the lapse of the three year statute of limitation. RCW 4.16.080. The record is completely silent in this regard.

Additionally, the record reflects that Mr. Wills rejected the Claim of *Ford Motor Credit*, CP 337-338, on May 5, 2010, and, again, the record is completely silent as to any action taken by *Ford Motor Credit*, after Mr. Wills' rejection of the Claim. Accordingly, any appellate argument that

somehow the Superior Court erred in ruling on *Ford Motor Credit's* Claim is without merit.

Finally, the record is also silent as to Mr. Wills's assertion that tax returns were ever presented to the Respondent, Mr. Henington, for his signature prior to their presentation, and the payment of more than $120,000, to the IRS.

IV. ARGUMENT

A. *Standard of Review.*

The appropriate standard of review of the trial court's orders is "*de novo* on the entire record." *In re Estate of Black*, 116 Wash. App. 476, 483, 66 P.3d 670, 673-74 (2003) *aff'd on other grounds*, 153 Wash. 2d 152, 102 P.3d 796 (2004) (citations omitted). The appellate court "may affirm the trial court's ruling on any grounds supported by the record" with the overriding consideration to determine the wishes of the decedent. *Id.* (citations omitted). Pursuant to RCW 11.96A.020(2), the court has "full power and authority" to proceed "in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court."

Unchallenged findings of fact become verities on appeal. *In re Estate of Jones*, 152 Wash.2d 1, 8-9, 93 P.3d 147, 151 (2004) (*citing State v. Hill*, 123 Wash.2d 641, 644, 870 P.2d 313 (1994)). The appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence. *Id.* (citation omitted). Substantial evidence is evidence that is sufficient to persuade a rational, fair-minded person of the truth of the finding. *Id.* Where the findings do not support the removal of a personal representative, the removal is arbitrary and improper. *Id.* (citations omitted). The appellate court reviews then reviews conclusions of law and questions of statutory interpretation *de novo*, because these are questions of law. *Id.* (citations omitted).

B. ***All known tax liabilities have been paid.***

1. <u>The record before the Superior Court supports the finding that all known tax liabilities have been paid to the IRS.</u>

The Appellant failed to present substantial evidence that the IRS has or had any outstanding claim against the estate for unpaid taxes, thereby supporting a finding that no tax debt was owed to the IRS.

RCW 11.40.030 establishes the strictly enforced procedure for notifying creditors that a probate has been initiated. The form of the notice is set forth in RCW 11.40.020.

Once creditors have filed their claims, RCW 11.76.110 provides a list of those claims having priority for payment. Fourth in priority on the list is "Debts having preference by the laws of the United States." RCW 11.76.110(4).

Admittedly, there was delay and confusion regarding outstanding the taxes owed by Catherine and Roy Henington. The Decedent's estate paid significant sums of money to an accountant to determine the tax debt. CP 733. Despite the Appellant's concerns that there may still be some outstanding tax debt, he failed to present any evidence in any form that any sums was owing to the IRS, other than entirely unsupported statements that there "might" be such sums owing in the future. CP750. Although Appellant believes he may become personally liable for any future tax debt, the trial court rejected this argument and the Superior Court properly refused to allow a withdrawal of additional funds from the estate to be held in reserve for unknown duration until such time in the future when the IRS possibly presents a potential claims. CP 66 – 69.

Not even in Mr. Wills's argument to this court is there one shred of evidence that the IRS is owed any money. For the same reasons that the Superior Court rejected those arguments, the Respondent asks this court to also reject those contentions and affirm the trial court in this respect.

2. Appellant's attempt to insert new facts into record should be rejected by this court.

It is a general principle of appellate procedure that new facts presented to the Court of Appeals will not be considered. In *State v. Keigan C.*, 120 Wash. App. 604, 610, 86 P.3d 798, 801 (2004), *aff'd sub nom,. State v. Hiett*, 154 Wash.2d 560, 115 P.3d 274 (2005), the Court of Appeals rejects appellants' attempt to raise new facts on appeal that were not presented to the trial court. Additionally, in the *Keigan* case, the appellant offered no reason why such facts were not presented other than his choice to proceed by way of a guilty plea. *Id.* Similarly, in *Martin v. Municipality of Metropolitan Seattle*, 90 Wash.2d 39, 40, 578 P.2d 525 (1978), the Washington Supreme Court rejected appellant's attempt to keep his appeal alive by inserting new facts into an appeal that was moot.

For the first time, ever in this case, Mr. Wills states in his opening brief that he received a notice and had allegedly paid the IRS for some future liability that may be owed. *See* p. 10, fn.4 of Appellant's Brief. Nowhere in the record before the Superior Court does Mr. Wills make this

allegation. Although he says that future liabilities may be owed, he does not state a sum due to the IRS, nor does he produce a copy of that notice. Further, the Superior Court record indicates that he did nothing to procure that information from the IRS. Here, as in the Superior Court, based upon Wills' inability to provide evidence of any additional IRS claims, real or imagined, the court should reject any notion that the estate owes the IRS any additional sum certain.

C. *Mr. Bradley's claims are unsupported by substantial evidence and were properly rejected by the trial court.*

RCW 11.40 .020 and RCW 11.40.030 set the procedure for notifying persons holding claims against an estate that a probate has been filed. Henington agrees that Mr. Bradley's claim was timely made. According to RCW 11.40.080, the Personal Representative has the duty to accept or reject a claim. If the Personal Representative fails to do so, the following procedure must be followed.

> (2) If the personal representative has not allowed or rejected a claim within the later of four months from the date of first publication of the notice to creditors or thirty days from presentation of the claim, the claimant may serve written notice on the personal representative that the claimant will petition the court to have the claim allowed. If the personal representative fails to notify the claimant of the allowance or rejection of the claim within twenty days after the personal representative's receipt of the claimant's notice, the claimant may petition the court for a hearing to determine whether the claim should be allowed or rejected, in whole or in part. If the court substantially allows the claim, the

> court may allow the petitioner reasonable attorneys' fees chargeable against the estate. RCW11.40.080(2).

Once a claim is made and a Personal Representative determines that a claim is properly payable, the list of priority is outlined in RCW 11.76.110. Since Mr. Bradley's claim was based on an oral promise by the deceased to repay her father's loan, it would fall in the seventh and final category in RCW 11.76.110.

Here, Mr. Wills failed to accept or reject the claim within the four month period after publication. Mr. Wills decided that he would just hold onto Mr. Bradley's claims until the estate was ready to be closed and then pay it. CP 6-7, 15, 16. Moreover, Mr. Bradley never protected his own interests, as allowed by statute, by serving Mr. Wills with a notice that he intended to petition the court to allow his "claims." It is self-evident that more than three years have passed since the filing of the claims, not to mention any underlying transaction. RCW 4.16.080.

D. *Henington seeks his attorney's fees and costs for a frivolous appeal.*

RAP 18.9 provides that a party who must respond to a frivolous appeal may seek and be awarded compensatory damages including attorney's fees as a sanction. *See also In re Marriage of Healy*, 35 Wash. App. 402, 667 P.2d 114 (1983); *Millers Cas. Ins. Co. v. Briggs*, 100

Wash.2d 9, 665 P.2d 887 (1983) (allowing payment of part or all of the moving party's attorney's fees as compensatory damages). An appeal is deemed frivolous if it presents no debatable issues and is devoid of merit. *Johnson v. NEW, Inc.*, 89 Wash. App. 309, 312, 948 P.2d 877, 879 (1997). In *Boyles v. Department of Retirement Systems*, 105 Wash.2d 499, 507, 716 P.2d 869 (1986) and *Millers Cas. Ins. Co., supra*, the court discussed what factors the appellate court should consider in awarding fees to a responding party on appeal:

> (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Id. at 506-507 (citing *Millers Cas. Ins. Co.*, 100 Wash.2d at 15).

V. CONCLUSION

The court should affirm the findings of fact and orders entered in the Superior Court by the Commissioner *pro tempore* and the Hon. Katherine M. Stolz, Judge.

Additionally, the court should find this appeal lacks merit and attorney's fees and costs should be awarded to Mr. Henington.

Respectfully Submitted this day, July 9, 2013.

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I HEREBY CERTIFY, under penalty of perjury under the laws of the State of Washington, that on July 10, 2013, I caused to be served a true and correct copy of Respondent's Reply Brief on counsel for the Appellant and other interest parties by first class mail with courtesy copy by first email if an email address has been provided:

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