No. 21-___

IN THE

Supreme Court of the United States

IN THE MATTER OF THE MADELINE M. THIEDE TRUST

On Petition for a Writ of Certiorari to the State of Washington Supreme Court

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The state courts have failed to dismiss a civil contempt that was decided during trial. The case was later settled. The failure conflicts with three decisions of this Court, *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 452, 31 S.Ct. 492, 55 L.Ed. 797 (1911); *Shillitani v. U.S.*, 384 U.S. 364, 372, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966); and *Spallone v. U.S.*, 493 U.S. 265, 280, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) requiring the least intrusive remedy. All three of these decisions vacated civil contempt fines after the cases settled or the term had expired.

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PETITION FOR A WRIT OF CERTIORARI

Robert E. Kovacevich, Pro Se, respectfully petitions for a writ of certiorari to review the denial of the Washington Supreme Court to hear the appeal of Robert E. Kovacevich.

PARTY REQUESTING REVIEW

The person requesting review is Robert E. Kovacevich, an attorney who initially represented Gordon R. Finch, the original Respondent in the case. Kovacevich had to resign when the Petitioner's attorney filed a joint motion of contempt against both Gordon R. Finch and Kovacevich. Kovacevich was never a formal party in the case.

OPINIONS BELOW

The opinion of the state of Washington Appeals Court Division III is not reported. It is available at 17 Wash. App.2d 1060 (Wash. App. 2021) 2021 WL 2104876 (App. B). The Petitioner filed for review by the Supreme Court of Washington. Review was denied October 6, 2021, 495 P.3d 848 (Table) (App. A). This petition is timely.

JURISDICTION

The opinion of the Washington State Court of Appeals Division III, Docket Numbers 36940-III, 37322-3-III, 37444-1-III is unpublished. It is printed at 17 Wash.App.2d 1060 (Wash. App. 2021). It was entered on May 25, 2021. (App. B) A review by the Washington State Supreme Court was timely requested, No. 99910-4, 495 P.3d 848, 2021 WL 4619046 (table). It was denied October 6, 2021. (App. A) Jurisdiction of this Court is invoked pursuant to 28 USC § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

U.S. CONST.

AMENDMENT XIV § 1

CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall made or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. SECTION 28 OATH OF JUDGES. Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

Wash. Rev. Code 11.96A.080(2) Persons entitled to judicial proceedings for declaration of rights or legal relations.

(2) the provisions of this chapter apply to disputes arising in connection with estates of incapacitated persons unless otherwise

covered by *chapters 11.88 and 11.92 RCW. 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.

Wash. Rev. Code 7.21.030(1). Remedial sanctions — payment for losses. (1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

Wash. Rev. Code 4.12.050 Notice of disqualification. (1) Any party to or any attorney appearing in any action or proceeding in a superior court may disqualify a judge from hearing the matter, subject to these limitations: (a) Notice of disqualification must be filed and called to the attention of the judge before the judge has made any discretionary ruling in the case.

Wash. Rev. Code 11.04.250 When real estate vests—rights of heirs. When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his

or her title shall vest immediately in his or her heirs or devisees, subject to his or her debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other funding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent; PROVIDED, that no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues, and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees, excepting only the personal representative when appointed, and persons lawfully claiming under such personal representative; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interest in any such lands, tenements, or hereditaments and the rents, issues, and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the personal representative and those lawfully claiming under such personal representative.

STATEMENT OF THE CASE

Robert E. Kovacevich, petitioner, as attorney represented Gordon R. Finch, son of Madeline M. Thiede, who acted as successor to Madeline M. Thiede's revocable trust. The trust became irrevocable on her death. (App. F, page 4, 5) The case was settled by all the actual parties in the case. The litigation settled by a probate settlement statute titled the Trust and Estate Dispute Resolution Act. (TEDRA) Wash. Rev. Code 11.96A.080(2) indicates that TEDRA supplements the normal probate code. The trust was never probated. The trust dispute was settled. Gordon R. Finch, who was jointly held in contempt for out of court disobedience accusing Finch of paying legal fees to Kovacevich. Finch was allowed by the state court to proceed in a settled case to transmute himself from joint indirect contemnor into a complainant against Kovacevich. The relief sought from this court is to determine that a trial court in a settled case has no jurisdiction to continue its jurisdiction allowing one joint contemnor to become a complainant to collect from another where no probate proceeding was ever commenced to give any court jurisdiction. The litigants were the four beneficiaries of the revocable trust. The settlement agreement was kept secret from Kovacevich until it was filed in the trust case. State law holds that an unsettling party must be notified by normal summons process or by the TEDRA process to bind a non party non signer. *In re Estate of Kordon*, 137 P.3d 16, 18-19 (Wash. 2001); *In re Estate of Harder*, 341 P.3d 342, 345 (Wash. App. 2015). No notice was ever given. During the initial motion phase, the opposing attorney for a 24% trust beneficiary moved for joint civil contempt against both Kovacevich and his then client, Gordon R. Finch on the basis that Finch should not have paid the legal

fees from trust funds. (App. D) Kovacevich, due to the conflict created, was in conflict with his client and had to voluntarily resign. Two fee payments were disputed, one during the time Gordon R. Finch acted as trustee and one after he was removed. The Trust, Appendix F, page 10 allows attorneys for the trustee to be paid from the trust. Finch claimed that Kovacevich told him to pay the fees from trust funds, a statement that Kovacevich disputes. Finch did not dispute that the fees were earned and payable. Kovacevich repaid the fee that he earned after Finch was removed as Trustee. Since Kovacevich refunded the fee to the Trustee that was earned after Finch was removed as Trustee, that contempt was purged. The second fee disputed was for services by Kovacevich while Finch was acting as Trustee. (Appendix G) It was a proper payment from the Trust. The trial court had no authority to rewrite the trust. The egregious result is that Kovacevich is found in contempt for getting paid from the right account. He is being pursued by his former client by a court that has no authority or jurisdiction to enter such an order. Regardless of the of the factual dispute, no bad faith was possible as the payment was valid. The order on the remaining contempt (Appendix D) was made without the presence of Kovacevich or his attorney. It does not contain a repayment clause. The failure to notify alone, is grounds to vacate the order. See *Ex parte Robinson*, 86 U.S. 505, 22 L.Ed 205, 19 Wall. 505 (1873). "The principle that there must be citation before hearing and a hearing or opportunity of being heard before judgment, is essential to the security of all private rights." *Id*. at 513 (underline added) The Declaration of Kovacevich, Appendix G, was never controverted under oath by Finch. Kovacevich disputes Gordon R. Finch's allegation. The trial court

never held any hearing to determine credibility of Gordon R. Finch. The secret settlement contained a clause that even though all parties had settled, Gordon R. Finch could by assignment, pursue his former attorney, Robert E. Kovacevich for costs incurred by Finch in defending Finch's joint contempt citation.

REASONS FOR GRANTING THE PETITION

The issue that Kovacevich seeks review from this Court is to apply the three U.S. Supreme Court cases that hold when the case is settled or the proceeding is otherwise terminated, the civil contempt proceedings also terminates. Additionally, the least intrusive remedy rule must be applied. Both the Washington Supreme Court and the Washington Court of Appeals erred. They never mentioned the key cases extensively reviewed in Kovacevich's brief that are cited. (Appendix H) Both courts completely ignored the cases holding that the settlement agreement of the parties prevented enforcement of the civil contempt fine against Kovacevich. The issue is jurisdictional. *Arbaugh v. Y&H corp*., 546 U.S. 500, 126 S. Ct. 1235, 163 L.Ed.2d 1097 (2006) states: "First 'subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived" *Id*. at 514. "Moreover, courts including this Court, have an independent obligation to determine whether subject-matter jurisdiction exits, even in the absence of a challenge from any party." *Ibid* at 514. *United States v. Cotton*, 535 U.S. 625, 630, 122 S. Ct. 1781, 152 L.Ed.2d 860 (2002) considers power to adjudicate to be "constitutional." *Id*. at 630. "This latter concept of subject-matter jurisdiction because it involves a court's power to hear a case, can never be forfeited or waived." *Ibid* at 630. The compelling reason to grant this writ is that the state courts, even when the party

challenged their jurisdiction (App. H) ignored their obligation to find whether they had the power and authority to adjudicate.

The court's admonition also applies to the state courts. "Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it." *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). The federal Due Process Clause (U.S. Const. XIV § 1) applies to state contempt cases. *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423, 99 L.Ed.2d 721 (1988) states that applicability of contempt constitutional protections "raises a question of federal law." *Id.* at 630. Wash. Rev. Code 7.21.010(1) requires a finding of "intentional disobedience." Failure to pay a fine may violate due process. *Smith v. Whatcom County Dist. Ct.*, 52 P.3d 485, 492 (Wash. 2002). Contempt is guided by applying the 14th Amendment of the U.S. Constitution. *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S. Ct. 2552, 129 L.Ed.2d 642 (1994) applies: "If a court delays punishing a direct contempt until the completion of trial for example, due process requires that the contemnor's right to notice and hearing be respected." *Id.* at 832. *U.S. Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72, 108 S. Ct. 2268, 101 L.Ed.2d 69 (1988) is controlling precedent. "We hold that a nonparty witness can challenge the court's lack of subject matter jurisdiction in defense of a civil contempt citation, notwithstanding the absence of a final judgment in the underlying action." *Id.* at 76. The state courts of Washington on this issue is the same as the federal law. "A court must have subject matter jurisdiction in order to decide a case." *Eugster v.*

Wash. State Bar Assn., 397 P.3d 131 (Wash. App. 2017). "We lack authority to address other defenses of the WSBA if we lack subject matter jurisdiction." *Id*. at 139. In this case a settled party by settlement agreement was allowed to invent subject matter jurisdiction. *.Ins. Co. of Ireland v. Compagnei des Bauxites*, 456 U.S. 694, 702, 102 S. Ct. 2099, 72 L.Ed.2d 492 (1982) states: "For example [n]o action of the parties can confer subject matter jurisdiction." The burden of proof is on the party who seeks court jurisdiction. See *Outsource Services Management LLC., v. Nooksack Business Corp.*, 292 P.3d 147 (Wash. App. 2013). "Once challenged, the party asserting jurisdiction bears the burden of proof to establish its existence." *Id*. at 151.

The universal controlling authority on this issue is *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 31 S. Ct. 492, 55 L.Ed. 797 (1911). *Gompers* held that the contempt involved was a civil contempt. "The present proceeding necessarily ended with the settlement of the main cause of which it is a part." *Id*. at 452. The Court of Appeals (See brief attached as Appendix H) not only did not follow the case, it was never construed or cited anywhere.

State ex rel. Kerl v. Hofer, 482 P.2d 806 (Wash. App. 1971) cites *Gompers* and aligns the courts of Washington with the majority rule stating: " Following what appears to be the majority rule we, therefore, hold that the underlying malpractice cause of Kerl v. Hofer, No. 52258 was dismissed with prejudice based on a settlement of all matters in controversy between the parties, the pending civil contempt proceedings brought under RCW 7.20 were necessarily terminated." *Id*. at 810. The Kerl case at page 809 aligns

itself with the federal case law citing 17 C.J.S. Contempt's § 68 (1963):

> It is generally held that civil contempt proceedings terminate when the suit in which the contempt arose is abated or finally disposed of, as by reversal in a contempt proceeding, complainant in the main cause is the real party in interest with respect to a remedial order, and if for any reason complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated. *Id*. at 809.

The Kerl opinion also states:

> For, on the hearing of the appeal and cross appeal in the original cause in which the injunction was issued, it appeared from the statement of counsel in open court that there had been a complete settlement of all matters involved in the case of Buck's Stove & Range Co. v. American Federation of Labor. This court therefore declined to further consider the case, which had become moot, and those two appeals were dismissed. 291 U.S. 581, 55 L.Ed. 345, 31 Sup.Ct.Rep. 472. When the main case was settled, every proceeding which was dependent on it, or a part of it, was also necessarily settled - of course, without prejudice to the power and right of the court to punish for contempt by proper proceedings. Worden v. Searls, 121 U.S. 27, 30 L.Ed. 858, 7 Sup.Ct. Rep. 814. If this had been a separate and independent proceeding at law for criminal contempt, to vindicate the authority of the court, with the public on one side and the defendants on the other, it could

> not, in any way, have been affected by any settlement which the parties to the equity cause made in their private litigation.
>
> But, as we have shown, this was a proceeding in equity for civil contempt, where the only remedial relief possible was a fine, payable to the complainant. The company prayed 'for such relief as the nature of its case may require.' and when the main cause was terminated by a settlement of all differences between the parties, the complainant did not require, and was not entitled to, any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is part. *Id.* at 809-810. (Underline added)

Gompers is cited hundreds of times including in *ePlus Inc., v. Lawson Software*, 789 F.3d 1349 (Fed. Cir. 2015) a case dismissing contempts where the reason for the contempts was cancelled. They were "void ab initio." *Id*. at 1358. The case was not final as motions were pending. The case applies here as this case was not final. It was never tried. The complainants settled and no longer had a live controversy. *ePlus*, 789 F.3d at 1357 followed *Worden v. Searles*, 121 U.S. 14, 7 S. Ct. 814, 30 L.Ed 853 (1887) also cited in *Gompers*, 221 U.S. at 446. 134 years of contempt jurisprudence mandates that the court grant this writ.

Shillitani v. U.S., 384 U.S. 364, 86 S. Ct. 1531, 16 L.Ed.2d 672 (1966) is conclusive. It follows *Gompers*. "Once the grand jury ceases to function, the rational for civil contempt vanishes." *Id*. at 372. Thus, *Shillitani v. U.S.*, 384 U.S. 364, 86 S. Ct. 1531, 16 L.Ed.2d 622 (1966) is also conclusive. It holds that

contempt for failure to testify before a grand jury ceases when the term of the grand jury is ended. "[S]ince he then has no further opportunity to purge himself of contempt." *Id*. at 371. "Having sought to deal only with civil contempt, the District Courts lacked authority to imprison longer than the term of the grand jury. This limitation accords with the doctrine that a court must exercise "[t]he least possible power adequate to the end proposed." Ibid. at 371. Citing *Anderson v. Dunn*, 6 Wheat 204, 231, 5 L.Ed 242 (1821).

A. The Least Intrusive Method was Ignored by the State Courts.

Kovacevich was fined for contempt as his then client Gordon R. Finch paid his undisputed fee amount from a trust instead of the client's personal funds. If the client substituted his personal check, Kovacevich would not have been held in contempt. Finch was a party Respondent. Kovacevich was not a named party in the suit. Payment by the client was the least intrusive method. *Spallone v. U.S.*, 493 U.S. 265, 110 S. Ct. 625, 107 L.Ed.2d 644 (1990) applies. Like Kovacevich, "But petitioners had never been made parties to the action." *Id*. at 274.

> We hold that the District Court, in view of the 'extraordinary' nature of the imposition of sanctions against the individual councilmembers, should have proceeded with such contempt sanctions, first against the city alone in order to secure compliance with the remedial order. Only if that approach failed to produce compliance within a reasonable time should the question of imposing contempt sanctions against petitioners even have been considered.

> This limitation accords with the doctrine that a court must exercise [t]he least possible power adequate to the end proposed. (Internal quotes omitted)

Citing *Anderson v. Dunn*, 6 Wheat 204, 231, 5 L.Ed. 242 (1821) and *Shillitani v. United States*, 384 U.S. at 371, 86 S. Ct. at 1536. *Id.* at 280.

Waste Conversion v. Rollins Environmental Services, 893 F.2d 605 (3d Cir. 1990) reversed a criminal conviction of attorneys who advised their client not to honor a witness subpoena. The advice was only to preserve an objection until the court ruled. The opinion states: "Had the witness obeyed the subpoena before the court ruled on Rollins' objections, its arguments would have become moot." *Id*. at 611. The opinion also states: "The Court has cautioned repeatedly, however, that exercise of the authority must be restrained by the principle that only [t]he least possible power adequate to the end proposed should be used in contempt cases." (Internal quotes omitted) *Id*. at 608. *In re Watts*, 190 U.S. 1, 23 S. Ct. 718, 47 L.Ed 933 (1903) states: "In the ordinary case of advice to clients, if an attorney acts in good faith and in honest belief that his advice is well founded and in the just interest of his client, he cannot be held liable for error in judgment." *Id*. at 29. Here, Kovacevich did not give erroneous advice. The Trust allowed the only fee payment in question. The contempt order in this case on the payment of the $17,919.38 (Appendix D) is outrageous as the trial court in probate cannot rewrite the deceased's admonition. The intent of the trustee controls.

B. The Case is Moot. All the Parties Settled.

International Union United Mine Workers of America v. Bagwell, 512 U.S. 821, 114 S. Ct. 2552, 129 L.Ed.2d 642 (1994) legally and factually supports the granting of the writ. It also, like Kovacevich's petition, occurred in state court before the case was settled. Similar to the case of Kovacevich, the trial court, in Bagwell, after the case settled the court appointed Bagwell as special commissioner to collect the fines. *Id*. at 825. Two state appeals followed. The highest state court allowed the fines. The U.S. Supreme Court granted certiorari. The U.S. Supreme Court held that the fines were criminal and had to be enforced by a jury trial. "Summary adjudication of indirect contempts is prohibited." *Id*. at 833. *National Rifle Ass'n of America v. McCraw*, 719 F.3d 338 (5th Cir. 2013) applies. "If a claim is moot, it 'presents no Article III case on controversy, and a court has no constitutional jurisdiction to resolve the issue it presents.'" *Id*. at 344. *Pearce v. Pearce*, 226 P.2d 895 (Wash. 1951) involved a restraining order prohibiting the wife in a divorce action from seeking employment where a person named Art Kringel was employed. *Id*. at 897. The court held the contempt order void. "We are of the view that the restraining order was an attempted extension of the equity power beyond any proper limits, and that it amounted to an unwarranted and unjustified interference with the personal rights of Mr. Pearce." *Id*. at 898. "The purport of our holding is that the restraining order is void, being in excess of the jurisdiction of the court. This brings the case within the rule that, where the order is absolutely void, and not merely erroneous, the invalidity of the order, in an of itself, works a purging of contempt." *Ibid* at 898.

C. Gordon Finch Cannot Reverse his Position in the Same Litigation.

A party cannot assume a certain legal position and when its interest has changed seek to continue the case. See *Already LLC.v. Nike Inc.*, 568 U.S. 85, 94, 133 S. Ct. 721, 184 L.Ed.2d 553 (2013); and *New Hampshire v. Maine*, 532 U.S. 742, 755, 121 S. Ct. 1808, 149 L.Ed.2d 968 (2001). Both dismiss the case when a party succeeds one way and then seeks a contrary position.

D. Out of Court Contempt Requires an Evidentiary Hearing.

Contempt committed in the presence of the court is subject to summary adjudication as it preserves the court's authority to maintain order in the courtroom. Indirect contempts occurring out of court must comply with due process. *In re Gates*, 600 F.3d 333 (4th Cir.) also applies. The court found that failure to appear for a hearing was negligent but not willful or reckless. The contempt citation was reversed as it did not "comport with due process." *Id*. at 342. The opinion states: "There is a fundamental distinction between contemptuous conduct that occurs in the presence of a judge of the judges (direct contempt) and contemptuous behavior that occurs beyond the courthouse doors and outside of the judge's presence (indirect contempt)." *Id*. at 337. *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1955) reversed a criminal contempt when the judge became a witness. The court concluded that the judge may have been a witness hence a criminal conviction was reversed as it jeopardized due process. The court stated "moreover, as shown by the judge's statement here a 'judge-grand jury might himself many times be a very material witness in a later trial for contempt." *Id*. at

138. His judgment was based on what had occurred in the grand jury room and his judgment was based in part on "this impression, the accuracy of which could not be tested by adequate cross-examination." *Id*. at 138. The due process clause of the Fourteenth Amendment was violated. *Id*. at 135. The case applies here as the trial judge ruled on his observation that Kovacevich was in the courtroom. See Appendix D, page 6. "This court disagrees, finding that Mr. Kovacevich is a Washington resident, an attorney licensed to practice in Washington, was present when the Court issued its January 8, 2018 ruling and was represented (sic) Gordon Finch from the inception of the action until late 2018."

E. The Trial Judge Should Not Have Determined the Motion for Contempt.

At the trial the trial judge, Harold Clarke III told Kovacevich he didn't have time to read the cases stating: "Quite frankly, I appreciate the argument about, well . . . and I apologize, I don't have a law clerk and I don't have endless amount of time to research this . . ." Appendix C page 60. The issue was Wash. Rev. Code 11.04.250 that vests title to real estate immediately on death of the owner even if no probate is ever commenced. "Administration of the estate is not necessary to effect a transfer of title of real property from decedents to their heirs in all cases." "It can be a 'useless ceremony.'" *J.P. Morgan v. Unknown Heirs of Porter*, 481 P.3d 1114, 1118 (Wash. App. 2021). A judge in the state of Washington shall disqualify himself if he is "likely to be a material witness." Code of Judicial Conduct (Washington) Rule 2.11(A)(2)(d). On the Order on Contempt Judge Clarke used his own knowledge stating that Kovacevich was in court and whether he was a resident of the state of

Washington. The record has no other statement verifying these fact. The trial judge became a witness. *Offutt v. U.S.*, 348 U.S. 11, 75 S. Ct. 11, 99 L.Ed. 11 (1954) applies: "The record is pervasive that instead of representing the impersonal authority of the law, the trial judge permitted himself to become personally embroiled with the petitioner." *Id.* at 17. The state of Washington, Wash. Rev. Code 4.12.050 only allows a party to replace a judge for prejudice if the motion is made before the judge rules on the case. See *State v. Spokane County District Court*, 491 P.3d 119, 124 (Wash. 2021). Due process requires a fair trial. "Confidence in the integrity of the judiciary is not promoted when a judge fails to devote sufficient attention to the case before him." *Mississippi Commission on Judicial Performance v. Sheffield*, 235 So.3d 30 (Miss. 2017). "Judge Sheffild's misconduct- while causing a severe outcome-appears mostly to a matter of inattention." *Id*. at 35.

CONCLUSION

The courts below blithely paid no attention to the most universal issue of whether its jurisdiction continued to exist after all the parties settled. The appeals courts sidestepped the issue. Whether a court has power to adjudicate is the most important issue that faces any court in the United States. The writ should be granted.

Respectfully submitted,

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December 22, 2021

APPENDIX

APPENDIX A

THE SUPREME COURT OF WASHINGTON

[Filed October 6, 2021]

No. 99910-4

In the Matter of the:

MADELINE M. THIEDE TRUST

Court of Appeals
No. 36940-4-III
(consolidated with
Nos. 37322-3-III
and 37444-1-III)

ORDER

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its October 5, 2021, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 6th day of October, 2021.

For the Court

/s/ [Illegible]
CHIEF JUSTICE

APPENDIX B

17 Wash.App.2d 1060

Note: UNPUBLISHED OPINION,
See Wa R Gen Gr 14.1

COURT OF APPEALS OF WASHINGTON,
DIVISION 3

[Filed May 25, 2021]

In the MATTER OF:
MADELINE M. THIEDE TRUST

Gerald Verhaag, a beneficiary of
Madeline M. Thiede Trust,

Plaintiff,

v.

GORDON FINCH, a beneficiary and Trustee
of Madeline M. Thiede Trust,

Respondent.

No. 36940-4-III, (consolidated with
No. 37322-3-III, No. 37444-1-III)

Honorable Harold D. Clarke III, Judge

Attorneys and Law Firms

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UNPUBLISHED OPINION

Siddoway, A.C.J.

After Gordon Finch was replaced as trustee of a trust created by his mother, he made several payments of trust funds to himself and his then-attorney, Robert Kovacevich, based on advice received from Mr. Kovacevich. When the payments were challenged as contempt of court in this TEDRA[1] action, Mr. Finch retained new counsel and returned all the funds he had paid to himself. He later entered into a TEDRA agreement with the other trust beneficiaries under which he assumed their expenses and losses incurred in connection with the improper payments and took an assignment of their claims against Mr. Kovacevich. Based on the assignment, two judgments against Mr. Kovacevich were entered in favor of Mr. Finch.

In these consolidated appeals, Mr. Kovacevich challenges a number of orders and judgments entered by the trial court. Because many were not timely appealed and, where his appeals are timely, he demon-

[1] Trust and Estate Dispute Resolution Act, chapter 11.96A RCW.

strates no error or abuse of discretion by the trial court, we affirm and award reasonable attorney fees to Mr. Finch.

FACTS AND PROCEDURAL BACKGROUND

On the death of Madeline Thiede in April 2014, Gordon Finch, her son, became the trustee of the Madeline M. Thiede 2009 Revocable Trust (as amended and restated in 2013). The trust had four beneficiaries: Gordon; his brother, James Finch; Kenneth Verhaag; and Gerald Verhaag.[2] A major asset of the trust was a small shopping center located in Spokane Valley.

A disagreement arose over Gordon's management of the trust, and Gerald filed the TEDRA action below, seeking Gordon's removal as trustee; to replace him with James Spurgetis, a professional trustee; an accounting; remedies for any self-dealing; and other related relief. At a hearing on January 8, 2018, at which Gordon and his then-attorney, Robert Kovacevich, were present, the trial court orally granted the motion to remove Gordon as trustee and appoint Mr. Spurgetis to replace him. A written order memorializing the ruling was entered on January 10, 2018, and was mailed to Mr. Kovacevich. In communications between Gordon and Mr. Spurgetis or Mr. Spurgetis's paralegal thereafter, Gordon was authorized to continue managing the shopping center and to pay certain operating expenses until Mr. Spurgetis's office could "get[ ] up to speed." Clerk's Papers (CP) at 973. Mr. Spurgetis assumed management responsibility by approximately the end of March 2018.

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[2] Given surnames that are common to multiple players in the appeal, we hereafter refer to the beneficiaries by their first names. We intend no disrespect.

First contempt proceeding: receipt by Mr. Kovacevich of $11,211.80 [3]

In December 2018, Gerald brought a motion for an order holding Gordon and Mr. Kovacevich in contempt after learning that Gordon made unauthorized payments of trust funds to himself and Mr. Kovacevich after the January 8, 2018 hearing at which he was removed as trustee. Kenneth was permitted to intervene in the TEDRA action and joined in the motion. Since Gordon claimed to have relied on advice from Mr. Kovacevich in making the payments, a conflict of interest existed, so Gordon engaged new counsel to represent him in the proceedings below.

The motion was argued to the court on March 1, 2019, and was taken under advisement. In a letter ruling sent to the parties on March 27, 2019, the trial court found that four payments made by Gordon with trust funds between January 8 and March 12, 2018, were in willful violation of a clear and unambiguous order. It reasoned that Gordon's reliance on advice of counsel did not absolve him, and found both Gordon and Mr. Kovacevich in civil contempt.

Gordon had returned the trust monies in his possession on December 21, 2018, within days after he retained new counsel. The trial court found that

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[3] In proceedings below, the first contempt proceeding initiated by beneficiaries addressed the failure of Gordon to timely deliver trust records and assets to Mr. Spurgetis. As a result, this challenge to Mr. Kovacevich's receipt of $11,211.80 in trust funds in March 2018 is referred to in proceedings below as the second contempt proceeding.

The failure to timely deliver trust records and assets is not at issue on appeal, so we begin our numbering of the contempt proceedings with the December 2018 contempt motion.

he had thereby purged his contempt. It imposed a sanction on Gordon in the form of liability for the attorney fees incurred by the Verhaags in bringing the motion.

Since Mr. Kovacevich had not returned $11,211.80 in trust funds improperly paid to him, the trial court ordered him to return the sum to Mr. Spurgetis by the close of business on April 5, 2019, failing which he would be subject to a civil penalty of $250.00 per day until paid. It imposed a sanction of the Verhaags' attorney fees on Mr. Kovacevich as well, stating that Mr. Kovacevich would be solely responsible for the Verhaags' fees incurred after December 21.

Reading the trial court's March 27, 2019 letter ruling triggered Gordon's memory that he had made a $17,919.38 payment of trust funds to Mr. Kovacevich on January 9, 2018, (again relying on Mr. Kovacevich's advice), that had not been addressed by the Verhaags' motion or the court's order. He disclosed the fact of that payment to his attorney, who informed attorneys for the other beneficiaries on April 9, 2019.

Findings, conclusions and an order in the first contempt proceeding were entered on May 3, 2019.[4] The order directed the Verhaags to present evidence of their fees and costs within 10 days.

Mr. Kovacevich filed a timely motion for reconsideration. An order denying the motion for reconsideration

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[4] Several of the orders at issue or mentioned on appeal were signed on one day and filed with the clerk of court a day (or more) later. In such cases, the parties and the court have referred inconsistently to when they were "entered." Since the trial judge did not note on any of the orders that it had permitted filing with him, we refer to the orders as being entered on the day they were filed with the clerk of court. See CR 5(e), 58(b).

was entered on June 13, 2019. At some point, Mr. Kovacevich returned the $11,211.80 as required by the contempt order.

On September 11, 2019, the trial court entered an order fixing the amount of the attorney fees and costs it had previously ordered were recoverable by the Verhaags. For this first contempt proceeding, the reasonable amounts it found them to have necessarily incurred after December 21, 2018, recoverable solely from Mr. Kovacevich, were $19,727.79 for Gerald and $5,645.00 for Kenneth.

Mr. Kovacevich filed motions for reconsideration and to vacate the attorney fee award. The motions are not included in the record on appeal or in any briefing. An order denying the motion for reconsideration that was filed on November 8, 2019, indicates the motion was filed on September 20, 2019. An order fixing a November 15, 2019 date for hearing the motion to vacate identifies the motion as a "CR 60(b)(1)(6) (11) motion . . . dated September 20, 2019." CP at 1068. The trial court orally denied the motion to vacate at the conclusion of the November 15 hearing and entered a written order denying the motion on December 19, 2019.

Second contempt proceeding: receipt by Mr. Kovacevich of $17,919.38 [5]

On May 3, 2019, the Verhaags-acting on Gordon's disclosure of the $17,919.38 payment of trust funds to Mr. Kovacevich on January 9, 2018—obtained an order to show cause directed to Gordon and Mr. Kovacevich. The order directed them to appear and show cause on May 31, 2019, why they should not be held in

[5] This was referred to in proceedings below as the third contempt proceeding. See n.3, *supra.*

contempt for violating the trial court's January 8, 2018 ruling by making (in Gordon's case) and accepting (in Mr. Kovacevich's case) the $17,919.38 payment. The order was served on Mr. Kovacevich's counsel, but Mr. Kovacevich filed no response and neither he nor his attorney appeared on the return date. In an order entered on June 14, 2019, the trial court again found that both Gordon and Mr. Kovacevich violated its January 8, 2018 oral ruling. The trial court found that Gordon purged the contempt by voluntarily disclosing the $17,919.38 payment and demanding that Mr. Kovacevich return the money to the trust.

The trial court ordered Mr. Kovacevich to return the $17,919.38 to Mr. Spurgetis within 10 days of its order, failing which he would be subject to a civil penalty of $250.00 per day until the amount was returned. The trial court also ordered Mr. Kovacevich to pay the Verhaags' attorney fees and costs incurred in bringing this second contempt motion. Mr. Kovacevich failed to return the $17,919.38.

The trial court's September 11, 2019 order fixing the attorney fee and cost awards for the first contempt proceeding also fixed Gerald and Kenneth's recoverable fees and costs for the second contempt proceeding. It found that the reasonable amounts necessarily incurred, all of which were recoverable solely from Mr. Kovacevich, were $8,416 for Gerald and $3,135 for Kenneth.

As previously recounted, Mr. Kovacevich filed motions for reconsideration and to vacate the attorney fee award, both of which were denied.

TEDRA agreement, Mr. Kovacevich's unsuccessful challenges to the agreement, and Gordon's action on his assignment

Meanwhile, on June 11, 2019, the beneficiaries of the trust entered into a nonjudicial binding agreement in which they settled disputes among themselves, obviating any need for trial (hereafter "the agreement" or "the TEDRA agreement"). The agreement provides that it "shall settle all claims pending in this instant proceeding between and among Gerald, Kenneth, James, and Gordon." CP at 238. The agreement was approved by the court by an order entered on June 13, 2019.

The agreement recounts Mr. Kovacevich's outstanding liability to the trust, including attorney fees and costs in amounts to be determined; actions that Gordon took on the advice of Mr. Kovacevich; and the extent to which those actions had exposed Gordon to findings of contempt and financial liability.

Sections IV.F through IV.G of the agreement address how the parties proposed to address their legal claims against Mr. Kovacevich, including the Verhaags' then-pending right to recover attorney fees and costs in an amount to be determined. Briefly stated, they provide that in distributing the assets of the trust, Gordon's share would be reduced by all attorney fees in the superior and appellate court that the Verhaags had been awarded or would be awarded against Mr. Kovacevich. They provide that the Verhaags would assign their right to recover the fees from Mr. Kovacevich to Gordon, so that he could enforce orders of the court and pursue recovery from Mr. Kovacevich. They provide that Gerald, Kenneth, James, and the trust would assign to Gordon any and all claims they may have against Mr. Kovacevich.

In a "Release" provision of the agreement, Gerald, Kenneth, James and Gordon released

> each other, their successors, estates, legal representatives, agents, assigns and all persons or entities acting for, by or through any of them from any and all claims, losses, actions, causes of action, judgments, damages, liabilities and demands of every kind, name or nature, known or unknown, in any way having to with the Madeline M. Thiede Trust and the litigation pending under Spokane County, Washington cause number 16-4-01301-7 in accordance with the terms of this Agreement.

CP at 243.

Applying the TEDRA agreement, Gordon's share of the trust assets, which would have been $289,470.79, was reduced by $17,919.38 for the check paid to Mr. Kovacevich on January 9, 2018, by Gerald's attorney fees of $150,714.94, and by Kenneth's attorney fees of $54,417.50.

Mr. Kovacevich became aware of the TEDRA agreement sometime in June 2019. The record on appeal, although very incomplete on this score, reveals several unsuccessful efforts on Mr. Kovacevich's part to challenge the validity of the TEDRA agreement while at the same time arguing that it released him and required the TEDRA action to be dismissed. On June 28, 2019, he filed a 29-page motion attacking the TEDRA agreement on multiple grounds. On July 22, 2019, he filed a motion for dismissal of the June 13, 2019 order holding him in contempt. Among other arguments, Mr. Kovacevich contended the TEDRA agreement was not valid because he had not received notice of it and an

opportunity to be heard; at the same time he argued that the Verhaags could not assign their claims against him because, by the terms of the TEDRA agreement, they had released them.

On July 2, 2019, Gordon filed a declaration attesting to the assignment to him of the beneficiaries' claims against Mr. Kovacevich. He attached a copy of a fully-executed assignment agreement. Since Mr. Kovacevich had failed to pay the $17,919.38 that he had been ordered to pay within 10 days of the June 13, 2019 order on the second contempt, Gordon filed a motion for entry of findings, conclusions and a judgment, noting it for hearing on July 18, 2019.

At the July 18 hearing, Mr. Kovacevich's attorney objected on grounds that he had not been served with the order to show cause why Mr. Kovacevich should not be held in contempt a second time, which is why neither he nor Mr. Kovacevich were present on the return date. His second argument was that "this case is over, so I don't think the Court has jurisdiction." Report of Proceedings (RP)[6] at 70. He also argued that "Mr. Kovacevich was never a party in this action." *Id.* at 71.

Answering Mr. Kovacevich's claim that he was never served, Gordon's attorney expressed his understanding that the Verhaags did serve Mr. Kovacevich's attorney. His response to the challenge to jurisdiction was that "[t]he Court in its contempt order found it has jurisdiction. I don't know that we need to keep repeating that." *Id.* at 77.

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[6] Two nonconsecutively paginated verbatim reports of proceedings have been filed with this court. The only one cited in this opinion is the volume reporting four hearings taking place in 2019.

The trial court orally ruled that it had both subject matter and personal jurisdiction. It rejected all of Mr. Kovacevich's challenges except his claim that he had not been served with notice of the show cause hearing, which the court had not realized was an issue. The court stated it would accept the findings, conclusions and judgment proposed by Gordon but would give the parties a short period of time to submit evidence on the issue of whether Mr. Kovacevich's attorney was served with the order to show cause.

On August 19, 2019, having received proof that Mr. Kovacevich's attorney was served with the order to show cause, the trial court entered the findings, conclusions, judgment summary and judgment in Gordon's favor for the $17,919.38 that Mr. Kovacevich had been ordered to repay together with the civil penalty, calculated through July 18, 2019 to be $5,750.00.

As of January 2020, Mr. Kovacevich had failed to pay the Verhaags the attorney fees and costs he had been ordered to pay in September for which he alone was liable: $19,727.79, $5,645.00, $8,416.00, and $3,135.00, for a total of $36,923.79. Gordon, relying on his assignment, moved for entry of a second judgment against Mr. Kovacevich. A judgment in the amount of $36,923.79, together with findings and conclusions, was entered on February 5, 2019.

Notices of appeal and appealability

Mr. Kovacevich filed three notices of appeal that are before us in this consolidated matter. They were filed on July 9, 2019, January 13, 2020, and February 27, 2020. The notice of appeal filed on January 13, 2020, attached and purported to appeal eight orders, some dating as far back as June 2019. It was placed on

our commissioner's calendar for a determination of appealability.

On March 17, 2020, our commissioner ruled that Mr. Kovacevich's January 13, 2020 order timely appealed only two orders entered on December 19, 2019: the order denying motion to vacate and the order re: order denying motion to vacate. Our commissioner observed that a third order identified—the trial court's June 13, 2019 denial of Mr. Kovacevich's motion for reconsideration of the contempt order—was timely appealed in one of the other consolidated matters.

Our commissioner ruled that the following five orders were not timely appealed:

- June 13, 2019 order approving TEDRA,
- June 14, 2019 order on petitioner Gerald Verhaag's and intervenor Kenneth Verhaag's joint motion for contempt,
- August 19, 2019 judgment, judgment summary and findings of fact, conclusions of law — Robert Kovacevich,
- September 11, 2019 order re: attorney fees, and
- November 8, 2019 order on motion for reconsideration. Mr. Kovacevich's motion to modify the commissioner's ruling was denied, as was his petition to the Washington Supreme Court for discretionary review.

ANALYSIS

Mr. Kovacevich's opening brief makes 13 assignments of error, many related only to final orders that were not timely appealed. He fails to identify issues pertaining to the assignments of error. He includes a very short statement of the case and then embarks on argument that is untethered to specific notices of appeal, let alone specific assignments of error. It is impossible to address his opening brief as we ordinarily would, by tracking his assignments of error or the organization of his argument. We would have to figure out on our own if, when, and how the claimed errors were timely appealed.

Instead, we organize our analysis by separately addressing the three notices of appeal and relying on our commissioner's ruling on appealability for which trial court decisions were timely appealed by the January 13, 2020 notice of appeal.[7]

We begin by identifying in the table below the orders of the trial court that were final orders as to which Mr. Kovacevich was an aggrieved party and our commissioner's earlier, affirmed, ruling on whether they were timely appealed.

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[7] Should Mr. Kovacevich petition for review, we point out to the Supreme Court that the appealability issues are not addressed in the parties' RAP Title 10 briefs. Instead, they were extensively briefed in correspondence addressed to our commissioner in February and March 2020, in connection with her review of appealability, and in briefs filed in April and May 2020, in support of and opposition to Mr. Kovacevich's motion to modify the commissioner's ruling.

	First contempt proceeding	**Second contempt proceeding**
Order finding Mr. Kovacevich in contempt, ordering return of trust funds, setting the civil penalty to be imposed in the event of noncompliance, and awarding attorney fees and costs in an amount to be identified	The order was entered on May 3, 2019, followed by a timely motion for reconsideration, which was denied on June 13, 2019. **The reconsideration order was timely appealed on July 9, 2019.**	The order was entered on June 13, 2019. **This order was not timely appealed.**
Findings, conclusions, judgment and judgment summary in favor of Gordon, for failure to disgorge the $17,919.38 improperly paid and reflecting the civil penalty daily civil penalty	N/A	The findings, conclusions and judgment were entered on August 19, 2019. **This order was not timely appealed.**
Order fixing the amount of reasonable attorney	The order was entered on September 11, 2019.	The order was entered on September 11, 2019.

fees and costs to be awarded	**This order was not timely appealed.**	**This order was not timely appealed.**
Order denying motion to vacate the fee and cost-fixing order issued on September 11, 2019 (and related order explaining the order denying motion to vacate)	These orders were entered on December 19, 2019. **The orders were timely appealed on January 13, 2020.**	These orders were entered on December 19, 2019. **The orders were timely appealed on January 13, 2020.**
Judgment for attorney fees and costs in favor of Gordon	The judgment was entered on February 5, 2020. **The order was timely appealed on February 27, 2020.**	The judgment was entered on February 5, 2020. **The order was timely appealed on February 27, 2020.**

Since the June 13, 2019 order finding civil contempt for what we term the second contempt was not timely appealed, we will not entertain assignments of error that relate to the finding of contempt for Mr. Kovacevich's receipt of the unauthorized payment of $17,919.38 in trust funds and the remedies imposed (an order to return the funds, per diem penalty for noncompliance, and an award to the Verhaags of reasonable attorney fees and costs in an amount to be determined).

Similarly, since the August 19, 2019 entry of findings, conclusions, and a judgment and judgment summary in favor of Gordon against Mr. Kovacevich was not timely appealed, we will not entertain assignments of error to the findings, conclusions, or judgment.

We turn in chronological order to the orders that were timely appealed and address the assignments of error that relate to them.

I. THE JULY 9, 2019 APPEAL OF THE MAY 3, 2019 ORDER

Mr. Kovacevich's July 9, 2019 appeal of the trial court's May 3, 2019 contempt order was timely by virtue of his timely motion for reconsideration, which was denied by the trial court on June 13, 2019. *See* RAP 2.4(c)(3) (appellate court will review a final judgment not designated in the notice if the notice designates a timely motion based on CR 59).[8]

Mr. Kovacevich was aggrieved by the May 3 order in the following ways: the order found him in contempt for accepting Gordon's unauthorized payment of $11,211.80 in trust funds; it ordered him to return that amount to Mr. Spurgetis; it announced the civil

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[8] Mr. Kovacevich's opening brief contends that his July 9, 2019 notice of appeal also appealed the TEDRA agreement. It did not; it plainly appealed only "the contempt part of the court judgment dated May 2, 2019." CP at 257. It "notified" this court "[p]ursuant to RAP 7.2(e)" that actions to change or modify a decision were "pending . . . in the trial court," CP at 258, reflecting an apparent misunderstanding of RAP 7.2(e). After an appeal has been filed, that rule provides a means for pursuing further decisions *in the trial court* that this court may or may not give the trial court permission to enter. It does not enlarge the scope of an appeal.

penalty that would be assessed if he failed to comply; and it awarded the Verhaags their reasonable attorney fees and costs in an amount to be determined. Mr. Kovacevich chose to return the $11,211.80 paid to him and is no longer aggrieved by the order to return that amount or by the civil penalty. Any issues presented by those aspects of the order are moot. An appeal is moot if it presents "purely academic issues" and it is "not possible for the court to provide effective *relief*" *Klickitat County Citizens Against Imported Waste v. Klickitat County,* 122 Wn.2d 619, 631, 860 P.2d 390, 866 P.2d 1256 (1993).

Mr. Kovacevich's motion for reconsideration of the May 3 order raised two issues, both of which challenged the finding of contempt. His principal argument was that an attorney cannot be jointly liable with his client for contempt, on the basis of "advice honestly given," relying on *State ex rel. Nicomen Boom Co. v. N. Shore Boom & Driving Co.,* 55 Wash. 1, 14, 103 P. 426 (1909). A second argument was that the motion for contempt "should have been commenced by James Spurgetis," not trust beneficiaries.[9] CP at 213. His motion for reconsideration raised no challenge to the award of attorney fees to the Verhaags apart from challenging the underlying finding of contempt.

Mr. Kovacevich has designated and arranged for a record on review that we could find insufficient for us to review any assignment of error to the May 3 order. He did not even designate as a clerk's paper the

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[9] A third, passing, argument, was that "a court has no jurisdiction over the fee agreements between attorney and client." CP at 213. Mr. Kovacevich's briefing on appeal never speaks of this "fee agreement" issue; the only jurisdictional issues he attempts to raise on appeal depend on events taking place after the May 3 order.

response to his reconsideration motion.[10] Since the motion for reconsideration was decided without oral argument, there is no way for this court to know what arguments were made in response to the motion for reconsideration.

Equally glaring is that of the 21 submissions the trial court identified in its May 3 order as having been considered by the court, Mr. Kovacevich failed to designate most as clerk's papers, and the majority of the missing submissions are the responses and replies of the Verhaags.[11] Also missing is Mr. Kovacevich's response to the Verhaags' contempt motion.

"The party presenting an issue for review has the burden of providing an adequate record to establish such error, and should seek to supplement the record when necessary." *State v. Sisouvanh,* 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (citation omitted). The respondent has a right to supplement, but that is a right, not a duty to cure a deficient record designated by the appellant. This court "may seek to supplement the record on its own initiative when appropriate, [but] we may instead `decline to address a claimed error when faced with a material omission in the record,' or we may simply affirm the challenged decision if the incomplete record before us is sufficient to support the decision, or at least fails to affirmatively establish an abuse of discretion."Id. (citations omitted) (quoting *State v. Wade,* 138 Wn.2d 460, 465, 979 P.2d 850 (1999)); *see also In re Det. of Halgren,* 156 Wn.2d 795,

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[10] The trial court's decision denying the motion states that a response filed on May 28 was considered by the court.

[11] Based on our review, Mr. Kovacevich failed to designate the documents identified by the court's order as (3), (4), (7), (8), (9), (10), (11), (14), (16), (17), (18), (19), and (20).

804-05, 132 P.3d 714 (2006); *Easley v. Elmer,* 101 Wash. 408, 409, 172 P. 575 (1918); *Lau v. Nelson,* 92 Wn.2d 823, 829, 601 P.2d 527 (1979).

Under these circumstances, while we will review the two issues that Mr. Kovacevich raised in his motion for reconsideration, we will not address any other issues that he may believe were presented by the underlying May 3 order.

A. *Since Mr. Kovacevich took action disobedient to a lawful order of the trial court, he could be held jointly liable with Gordon for contempt*

Mr. Kovacevich assigns error to the trial court's alleged failure to follow the Washington Supreme Court's decision in *Nicomen Boom Co.,* which he characterizes as holding that an attorney who advises his client in good faith cannot be jointly liable for civil contempt with the client. Br. of Appellant at 32.

The decision states, "There is nothing in the [contempt] statute to indicate that it was intended to include one who in good faith advises the wrong." *Nicomen Boom Co.,* 55 Wash. at 13. As previously recognized by this court, the Supreme Court's reasoning that good faith legal advice cannot constitute contempt does not apply when the lawyer himself violates a court's order:

> [*Nicomen Boom Co.*] dealt with a lawyer, Mr. Abel, who did not himself violate the court's order as Mr. Gorman did here. [55 Wash.] at 14. Mr. Abel "advised the officers to do the things complained of," but "did not directly participate therein himself." *Id. at* 17 (Mount, J., dissenting). As observed by the majority opinion, "An offending attorney would be

> liable . . . for a willful disregard of the orders of the court, but it would require a forced construction of the statute to make him subject to civil liability because of his advice honestly given." *Id.* at 14 . . . . Mr. Gorman was not found in contempt for his advice, but for his actions.

In re Structured Settlement Payment Rights of Rapid Settlements, Ltd., 189 Wn. App. 584, 603-04, 359 P.3d 823 (2015) (first alteration in original) (emphasis omitted).

In finding Mr. Kovacevich in contempt, the trial court, like this court in *Rapid Settlements,* found that Mr. Kovacevich himself violated the court's order:

> Kovacevich was present when the Court gave its January 8th ruling and was mailed a copy of the January 10th order. On January 18th, Mr. Kovacevich moved to extend the time set forth in the January 10th order and on January 19th he moved for reconsideration. Mr. Kovacevich prepared and submitted a billing after January 10th to the prior Trustee for services incurred after the 10th; he accepted payment for those services; and he declined to return the funds after being requested to do so by successor Trustee Spurgetis and by attorney Kyle Nolte.

CP at 269-70.

We agree with the trial court. Had Mr. Kovacevich merely advised Gordon to use trust funds to pay *others,* and were he able to demonstrate that he provided that advice in good faith, the reasoning of *Nicomen Boom Co.* would apply. Mr. Kovacevich did more. He accepted a substantial payment of trust funds in

March 2018 from a client he knew had been removed as trustee two months earlier. His action is fairly characterized as contempt of a court order that he had heard announced in open court and seen in its written, entered form in January 2018. *See* RCW 7.21.010(1)(b) ("contempt of court" includes "[d]isobedience of any lawful . . . order, or process of the court").

Mr. Kovacevich argues that treating his acceptance of payment as contempt "would have . . . required [him] to refuse the payment of his earned legal fees." Br. of Appellant at 33. But if Mr. Kovacevich believed that services he performed were for the benefit of the trust and compensable with trust funds, he should have presented his bill for services to Mr. Spurgetis. The trial court did not err when it found him in contempt and jointly liable with Gordon.

B. *The Verhaags had standing to move for a finding of contempt*

Mr. Spurgetis wrote to Mr. Kovacevich demanding he return the $11,211.80. Mr. Kovacevich briefly argued in moving for reconsideration of the May 3 order that for him to be found in contempt, Mr. Spurgetis should also have been the one to bring the contempt motion. He based his argument on common law distinctions between the authority of trustees and beneficiaries to take action on behalf of a trust.

We are dealing here with a TEDRA action, however, not common law. Whether the Verhaags had standing under TEDRA to seek an order of contempt against Mr. Kovacevich is a question of statutory interpretation. We review questions of statutory interpretation de novo. *In re Estate of Rathbone,* 190 Wn.2d 332, 338, 412 P.3d 1283 (2018).

Under TEDRA, *"any party* may have a judicial proceeding for the declaration of rights or legal relations with respect to *any matter* . . . ." RCW 11.96A.080(1) (emphasis added). "Matter" is broadly defined to include "[t]he determination of any question arising in the administration of an estate . . . ." RCW 11.96A.030(2)(c). "Party" is defined to include trust beneficiaries who "ha[ve] an interest in the subject of the particular proceeding." RCW 11.96A.030(5)(e).

Our Supreme Court held in *In re Estate of Becker,* 177 Wn.2d 242, 247, 298 P.3d 720 (2013), that in the context of a will contest, a party had a sufficient interest where she "ha[d] a direct, immediate, and legally ascertained pecuniary interest in the devolution of the testator's estate, such as would be impaired or defeated by the probate of the will or benefited by the declaration that it is invalid." In other words, while some actions on the part of an estate may only be taken by the personal representative, beneficiaries have a sufficient interest to participate in a TEDRA proceeding when it could affect their pecuniary interest in the estate's devolution.

By the time Gerald's motion for contempt was heard, Kenneth had intervened in support of the motion and the Verhaags collectively represented a 48 percent interest in the trust. The trust provided that on the death of Madeline Thiede, "the balance of trust assets, both income and principal. shall be distributed" to the beneficiaries in accordance with their interests. CP at 1276. Unauthorized payments to third parties of trust assets would deplete assets available for distribution to the beneficiaries. Under *Becker,* the Verhaags had a sufficient interest in unauthorized payments to Mr. Kovacevich.

Mr. Kovacevich argues that the Verhaags lacked authority to move for a finding of contempt under chapter 7.21 RCW because they were not "aggrieved" within the meaning of RCW 7.21.030(1). He relies on *Freedom Foundation v. Bethel School District,* 14 Wn. App. 2d 75, 469 P.3d 364 (2020). but that case did not involve any issue of contempt, let alone address the meaning of "aggrieved" under RCW 7.21.030(1). It addressed whether a party was aggrieved under the unique three-part criteria required to have standing to appeal agency action under chapter 34.05 RCW. Clearly, that three-part test does not apply here.

Chapter 7.21 RCW does not have its own definition for "aggrieved," nor has any Washington decision announced a contempt-specific definition. The most logical basis for recognizing a party to a TEDRA action as "aggrieved" for purposes of making a contempt motion is whether the party was entitled to bring or participate in the TEDRA action. As explained above, the Verhaags had a sufficient interest under RCW 11.96A.030(5)(e). They therefore had standing to move for a finding of contempt.

II. THE JANUARY 13, 2020 APPEAL OF THE DECEMBER 19, 2019 ORDERS

Mr. Kovacevich's next timely appeal was of the trial court's December 19, 2019 order denying his motion to vacate its September 11, 2019 order fixing the amount of attorney fees and costs awarded to the Verhaags. He also timely appealed a December 19, 2019 order that explained why the trial court was rejecting Mr.

Kovacevich's objections to the form of its order denying the motion to vacate.[12]

As previously noted, Mr. Kovacevich did not include his motion for a CR 60(b) order to show cause or any of the briefing on his motion to vacate in designating clerk's papers. According to the December 19, 2019 order denying motion to vacate, the briefing included a motion and declaration of Mr. Kovacevich, a response from Gordon, and a reply. Our only record is the order setting the hearing date, a transcript of the argument and oral decision taking place on November 15, 2019, and the final order.

CR 60(b) identifies limited grounds on which a party may obtain relief from a judgment or order. A motion to vacate cannot be used as a means to review and correct errors of law that are thought to have been committed in entering the order or judgment sought to be vacated. *State v. Keller,* 32 Wn. App. 135, 140, 647 P.2d 35 (1982) (citing *Hurley v. Wilson,* 129 Wash. 567, 568, 225 P. 441 (1924)). CR 60(b) does not authorize vacation of judgments except for reasons extraneous to the action of the court or for matters affecting the regularity of the proceedings. *Id.* (citing *Marie's Blue Cheese Dressing, Inc. v. Andre's Better Foods, Inc.,* 68 Wn.2d

[12] The trial court's order re: order denying motion to vacate on December 19, 2019, explained that its order denying motion to vacate was in a form presented by Gordon after the trial court orally denied the motion to vacate at the hearing on November 15, 2019. Mr. Kovacevich's attorney participated in that hearing telephonically, wished to have an opportunity to review the order, and later objected to it. The order re: order denying motion to vacate explains that since Mr. Kovacevich's objections did not go to whether the order denying motion to vacate conformed to its oral ruling (the issue on presentment), it was entering the order in the form originally proposed on November 15.

756, 415 P.2d 501 (1966)). " '[I]rregularities justify vacation whereas errors of law do not. For the latter the only remedy is by appeal from the judgment.'" *Id.* (alteration in original) (quoting Philip A. Trautman, *Vacation & Correction ofJudgments in Washington,* 35 Wash. L. Rev. 505, 515 (1960)). " 'An irregularity is deemed to be of such character as to justify the special remedies provided by vacation proceedings, whereas errors of law are deemed to be adequately protected against by the availability of the appellate process.'" *Id.* (quoting Trautman, *supra).*

Our record on appeal is wholly inadequate to review any error assigned to denial of the motion to vacate. It is impossible to determine whether Mr. Kovacevich's motion even raised an irregularity correctable by a motion to vacate. His opening brief on appeal strongly suggests he did not, since it makes no reference to "60(b)" and the word "irregularity" is never used. The transcript of the November 15 oral argument of the motion also suggests that no viable CR 60(b) motion was made, since Mr. Kovacevich presented only the same arguments of legal error he had been raising and the trial court had been rejecting for months.[13] In addition to being legal errors, the claimed errors took place at earlier hearings, not the September 11 hearing that Mr. Kovacevich was challenging as

[13] Mr. Kovacevich argued that (1) the TEDRA action was "over" when the beneficiaries entered into the TEDRA agreement in June, (2) approval of the TEDRA agreement under RCW 11.96A.240 was improper without notice to Mr. Kovacevich and a hearing in which he had the opportunity to participate, (3) the court made insufficient findings to support subject matter or personal jurisdiction, and (4) there should have been an evidentiary hearing on contribution. RP at 98-100.

irregular.[14] It is impossible to identify and review assignments of error associated with denial of the motion to vacate.

III. FEBRUARY 27, 2020 APPEAL OF THE FEE JUDGMENT ENTERED ON FEBRUARY 5, 2020

The final matter that was timely appealed was the February 5, 2020 judgment entered in Gordon's favor against Mr. Kovacevich for the aggregate in $36,923.79 attorney fees and costs that had been awarded to the Verhaags, which Mr. Kovacevich timely appealed on February 27, 2020.

Mr. Kovacevich's assignments of error fail to heed this panel's denial of his motion to modify our commissioner's ruling on appealability; he persists in raising challenges to the underlying orders finding him in contempt and imposing sanctions. We will not consider them.

When Gordon relied on his assignment to recover a liability owed to the Verhaags, Mr. Kovacevich did have a right to challenge whether the Verhaags could point to a claim they had against him, because in any action on an assigned claim, the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor. "If the right of the assignor would be . . . unenforceable against [the

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[14] If we were to find the September 11, 2019 order reviewable, it would be reviewable only as to the *amount* of fees, which is not challenged. Where a trial court first determines a legal basis for awarding fees and only later determines their amount, an appeal challenging the legal basis for the award must be filed within 30 days of the former decision; an appeal of the latter decision comes too late. *Bushong v. Wilsbach,* 151 Wn. App. 373, 377, 213 P.3d 42 (2009).

obligor] if no assignment had been made, the right of the assignee is also subject to that infirmity." 6 Am. Jur. 2D *Assignments* § 117 (2018) (citing Restatement (Second) of Contracts § 336(1) (Am. Law Inst. 1981)). In response to Gordon's motion for entry of a judgment, Mr. Kovacevich timely asserted the defense that the Verhaags had released their claims against Mr. Kovacevich in the TEDRA agreement. We address that challenge.

We also address Mr. Kovacevich's contention, raised in the trial court, that entry of the judgment violated RAP 7.2.

A. *The Verhaags did not release their claims against Mr. Kovacevich*

Mr. Kovacevich defended against entry of Gordon's judgment on the basis that "the fees sought to be collected . . . were released by the Verhaags in the [TEDRA] Agreement, who waived all claims in the case against [Gordon's] attorney. The release includes Kovacevich, who was [Gordon's] attorney in the case." CP at 1113. He relies on section IV.K of the agreement, captioned, "Release," which states that "Gerald, Kenneth . . . individually, and their successors . . . do hereby fully release, acquit, and forever discharge each other, their successors, estates, *legal representatives* . . . from any and all claims, losses, actions, [etc]." CP at 243 (emphasis added) (boldface omitted).

Washington follows the objective manifestation theory of contracts, under which we declare the meaning of what is written. *Go2Net, Inc. v. C I Host, Inc.,* 115 Wn. App. 73, 85, 60 P.3d 1245 (2003). Our interpretation of a contract can be informed not only by its language but also by its subject matter and objective, all

the circumstances surrounding its making, and the reasonableness of the respective interpretations advocated by the parties. *Scott Galvanizing, Inc. v. Nw. EnviroServices, Inc.,* 120 Wn.2d 573, 580-81, 844 P.2d 428 (1993). Our primary goal in interpreting a contract is to ascertain the parties' intent. *Paradise Orchards Gen. P'ship v. Fearing,* 122 Wn. App. 507, 516, 94 P.3d 372 (2004). Where, as here, the meaning of the contract was disputed on the basis of language, not extrinsic evidence, we determine the contract's meaning as a matter of law, and therefore de novo. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.,* 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008).

Even the contract language on which Mr. Kovacevich relies does not support his position. Since the release provision does not release the releasing parties'" past and present" legal representatives, it is reasonably read to release only their present legal representatives, and Mr. Kovacevich was not a legal representative of Gordon's when the TEDRA agreement was signed. Elsewhere, the agreement expressly identifies Gordon's legal representative for purposes of the agreement: the introductory paragraph of the agreement identifies, for each beneficiary represented by counsel, the party's legal representative. It states, with respect to Gordon, that he "is represented by Scott R. Smith of Bohrnsen Stocker Smith Luciani Adamson PLLC." CP at 237.

Elsewhere, the agreement states, "[t]his Agreement does not resolve claims . . . that may exist against Gordon's *former* attorney, Robert Kovacevich," "Gordon will be assigned these claims and resolve these matters directly with Mr. Kovacevich," "Gerald [and] Kenneth . . . shall assign any and all claims . . . they may have against Robert Kovacevich," "Gordon shall own

any recovery against Mr. Kovacevich," "Gerald, Kenneth and their counsel shall execute such pleadings or documents as are necessary for Gordon to . . . pursue recovery from Mr. Kovacevich . . . for all sums that the Court has ordered or may order Mr. Kovacevich to pay," and "Gordon is paying attorney fees that the Court has/or will order Mr. Kovacevich to pay, and therefore, any recovery of attorney fees from Mr. Kovacevich shall belong to Gordon." CP at 238, 240-41 (emphasis added).

Manifestly, the TEDRA agreement did not release Gerald and Kenneth's claims against Mr. Kovacevich.

B. *The trial court was authorized to reduce to judgment the attorney fees and costs previously awarded*

The Rules of Appellate Procedure make a distinction between finality on the merits and finality of costs. *Denney v. City of Richland,* 195 Wn.2d 649, 655, 462 P.3d 842 (2020). The fact that the merits have been resolved by a final judgment does not prevent the trial court from later determining an award of fees or costs. *See, e.g.,* RAP 2.2(a)(1) (allowing a party to appeal a final judgment "regardless of whether the judgment reserves for future determination an award of attorney fees or costs").

Contrary to Mr. Kovacevich's argument, entry of an order or judgment awarding attorney fees or costs does not require this court's authorization under RAP 7.2(e). After review is accepted by the appellate court, "[t]he trial court has authority to act on claims for attorney fees, costs and litigation expenses." RAP 7.2(i). Rather, as provided by that rule and by RAP 2.4(g), a timely appeal from the judgment on the merits will bring up for review an award of attorney fees by the

trial court that is entered after the appellate court has accepted review. *Denney,* 195 Wn.2d at 655.

A party may transfer its interest in litigation pendent lite and the trial court may order substitution on the motion of any party. *Stella Sales, Inc. v Johnson,* 97 Wn. App. 11, 17, 985 P.2d 391 (1999); CR 25(c). "Posttrial and even postjudgment substitutions, though infrequent, are contemplated by CR 25(c)." *Id.* at 18 (citing *Panther Pumps & Equip. Co. v Hydrocraft, Inc.,* 566 F.2d 8, 21-28 (7th Cir. 1977)).

The trial court was presented with the TEDRA agreement and a fully-executed assignment of rights that evidenced the Verhaags' transfer of their attorney fee and cost awards to Gordon. Mr. Kovacevich identifies no reason why the trial court lacked authority to enter a judgment for the attorney fee and cost award, substituting Gordon as the judgment creditor.

IV. ATTORNEY FEES ON APPEAL

Gordon requests an award of reasonable attorney fees and costs on appeal, relying on RAP 18.1, RCW 7.21.030(3), and RCW 11.96A.150. Mr. Kovacevich opposes the request, arguing that because Gordon is an assignee he cannot be awarded attorney fees.

RAP 18.1(a) allows this court to award attorney fees and costs on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses." RCW 7.21.030(3) allows the court to order a person found in contempt to pay a party for any losses suffered by a party as a result of the contempt, including reasonable attorney fees. RCW 11.96A.150 gives courts broad authorization to award attorney fees to "proceedings governed by [Title 11 RCW], including but not limited to proceedings involving trusts,

decedent's estates and properties, and guardianship matters." RCW 11.96A.150(2).

In all three of Mr. Kovacevich's notices of appeal in this consolidated matter he named Gordon as the respondent. As a respondent (thereby a party), and having identified two legal bases for recovering reasonable attorney fees and costs, Gordon is entitled to our consideration of his request. We award Gordon his reasonable attorney fees and costs on appeal subject to his timely compliance with RAP 18.1(d).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Lawrence-Berrey, J. Staab, J.

APPENDIX C

[1] IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

Cause No. 16-4-01301-7

COA Cause No. 36940-4-III

IN RE: THE MATTER OF: MADELINE M. THIEDE TRUST

GERALD VERHAAG, a Beneficiary of the
Madeline M. Thiede Trust,

Petitioner,

vs.

GORDON R. FINCH, a Beneficiary and Trustee of
Madeline M. Thiede Trust,

Respondent.

January 8, 2018

VERBATIM REPORT OF PROCEEDINGS

* * *

[60] special-needs trust, their job is to pay out over time. If it's a trust where it says upon death you pay it out, his job is to wind it down and pay it out. That is his job. I don't know how it could be any less clear.

Quite frankly I appreciate the argument about, well, – and I apologize, I don't have a law clerk and I don't have endless amounts of time to research this – I believe in all my heart the law is pretty clear that the

trust holds this property, or if you want to be more particular, it flows into his name, and as the trustee, he holds it in the sense of legal title. Maybe. Maybe not.

But I don't think it's these gentleman, the four of them, holding it as tenants in common.

As I thought about that, my belief is I took us down a road that was probably inappropriate. Had there been no trust, had the will simply left 24 percent, 24 percent, 26, and 26, yes, there are three, and yes, we should be in a partition. We're not. We're not doing that. We're in a trust.

So, one, I'm going to have an order –

First of all, I'll do a separate order, CR 24. Then I'll do an order that removes Mr. Finch as trustee and appoints Mr. Spurgetis. I'll give him authority to hire an accountant, if he thinks is appropriate. Mr. Finch, I'll put it in the order, is to turn over all the accounts,

* * *

APPENDIX D

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

[Filed June 14, 2019]

No. 16-4-01301-7

IN RE: THE MATTER OF: MADELINE M. THIEDE TRUST

GERALD VERHAAG, a Beneficiary of
Madeline M. Thiede Trust,

Petitioner,

v.

GORDON R. FINCH, a Beneficiary and Trustee of
Madeline M. Thiede Trust,

Respondent.

ORDER ON PETITIONER GERALD VERHAAG
AND INTERVENOR KENNETH VERHAAG'S
JOINT MOTION FOR CONTEMPT
(THIRD CONTEMPT)

THIS MATTER came before the Court for hearing on the return of an Order to Show Cause Re Contempt (Gordon Finch; Robert Kovacevich) (Third Contempt) entered by the Court on May 3, 2019.

Attorney Kyle W. Nolte appeared at hearing on behalf of the Verhaags. Attorney Scott R. Smith appeared at hearing on behalf of, and accompanied by, Respondent Gordon Finch. Neither attorney Aaron Lowe nor attorney Robert Kovacevich appeared for hearing, either in person or telephonically.

The Order to Show Cause Re Contempt (Gordon Finch; Robert Kovacevich) (Third Contempt) was issued based upon Petitioner Gerald Verhaag and Intervenor Kenneth Verhaag's Joint Motion and Declaration for Order to Show Cause Re Contempt (Third Contempt) presented to the Court on May 3, 2019.

The Order to Show Cause Re Contempt (Gordon Finch; Robert Kovacevich) (Third Contempt) was served on Respondent Gordon Finch and Robert Kovacevich by serving their respective legal counsel on May 6, 2019.

The Order of Show Cause Re Contempt (Gordon Finch; Robert Kovacevich) (Third Contempt) was also served upon the appointed Trustee, James P. Spurgetis and upon beneficiary James C. Finch on May 6, 2019. A Certificate of Service evidencing the above service upon all parties and individuals was filed with the Court on May 6, 2019.

On May 24, 2019, Gordon Finch filed Gordon Finch's Response Re: Order to Show Cause Third Motion for Contempt.

Attorney Robert Kovacevich did not file a response to the Order to Show Cause Re Contempt (Gordon Finch; Robert Kovacevich (Third Contempt).

The Court heard arguments by Mr. Nolte on behalf of the Verhaags, and by Mr. Smith on behalf of Respondent Gordon Finch.

The Court reviewed and specifically considered the following pleadings, and having heard prior motions in this matter was aware of and considered all prior filings and reviewed the relevant pleadings and records:

(1) Petitioner Gerald Verhaag and Intervenor Kenneth Verhaag's Joint Motion and Declara-

tion for Order to Show Cause Re Contempt (Third Contempt) dated and presented to the Court on May 3, 2019;

(2) Order to Show Cause Re Contempt (Gordon Finch; Robert Kovacevich (Third Contempt), dated and filed with the Court on May 3, 2019;

(3) Certificate of Service of Order to Show Cause Re Contempt (Gordon Finch; Robert Kovacevich) (Third Contempt), dated and filed with the Court May 6, 2019;

(4) Affidavit of Gordon Finch Re: Check, dated April 10, and the exhibits thereto, and filed with the Court on April 11, 2019;

(5) Gordon Finch's Response to Second Contempt and Return of Trust Funds, filed January 11, 2019; and,

(6) Order on Petitioner's Motion for Contempt, Return of Trust Funds, Forfeiture and Sanctions, entered on May 3, 2019.

The underlying facts have been set forth in the pleadings on file in this matter. For purposes of Petitioner Gerald Verhaag and Intervenor Kenneth Verhaag's Joint Motion for contempt (Third Contempt), THE COURT MAKES THE FOLLOWING FINDINGS AND CONCLUSIONS OF LAW:

I.

The Court gave its oral ruling following hearing on January 8, 2018, removing Respondent Gordon Finch as Trustee of the Madeline M. Thiede Trust ("Trust") and appointing successor, James Spurgetis. Both Respondent Gordon Finch and his then-attorney, Robert Kovacevich, were present at hearing when the

Court issued its ruling removing Gordon Finch as Trustee on that date.

II.

Trustee Spurgetis permitted Gordon Finch to continue temporarily to pay maintenance expenses and act as manager of the commercial real estate owned by the Trust ("Cedar Tree Plaza") until approximately the end of March, 2018. Accordingly, Grodon Finch issued checks from the Trust to pay miscellaneous expenses related to Cedar Tree Plaza, including for insurance, sewer and utilities not at issue in this motion for contempt.

III.

Gordon Finch also wrote checks out of the Trust after the hearing on January 8, 2018, for expenses that were clearly not related to the temporary maintenance or management of Cedar Tree Plaza. The Court has previously addressed several of those check payments issued by Gordon Finch in prior order, finding both Gordon Finch and Robert Kovacevich in contempt. The only check payment at issue in this motion is the check payment issued by Gordon Finch issued on January 9, 2018, to wit: check number 477 drawn on the Trust account held at Banner Bank and ending in 9811, and made payable to Robert Kovacevich, PLLC, in the total amount of $17,919.38.

IV.

The Court's ruling of January 8, 2018, was lawful, clear and unambiguous. Gordon Finch was on that date removed as the Trustee and thus, after that date was without authority to issue any check payments from the Trust or to dispose of any Trust funds or property in any way. Again, the only limited exception

was the direction of the successor Trustee James Spurgetis, authorizing Gordon finch to temporarily pay routine maintenance expenses for Cedar Tree Plaza pending the complete transfer of each of the Trust's accounts to Trustee Spurgetis.

V.

On January 9, 2018, when Gordon Finch issued said payment to Robert Kovacevich, PLLC, all funds within the Trust account held at Banner Bank and ending in 9811, were the property of the Trust.

VI.

Gordon Finch's issuance of the January 9, 2018, check payment from Trust to Robert Kovacevich, PLLC, violated the Court's January 8, 2018, ruling. No reasonable person could believe Gordon Finch's payment of Robert Kovacevich's attorney's fees in the amount of $17,919.38 could be categorized as a routine maintenance or management expense of Cedar Tree Plaza under any circumstances or by any definition.

VII.

The Court's January 8, 2018, ruling was violated by both Gordon Finch and Robert Kovacevich in that on January 9, 2018, both knew Gordon Finch was without authority to issue any payments from Trust, including to Robert Kovacevich. There has been no showing of mistake, accident or inadvertence and thus, Gordon Finch's act in issuing the check payment, and Robert Kovacevich's act in accepting the check payment were both willful and intentional and done contrary to the Court's January 8, 2018 ruling.

VIII.

Gordon Finch relies here upon his prior written response to the prior contempt (Second Contempt) filed with the Court on January 11, 2019. In said response, Gordon Finch claims he was acting upon advice of counsel. This does not excuse Gordon Finch. This is a civil contempt proceeding for violation of a Court order, not a question of a challenge to acts on behalf of the Trust.

IX.

Mr. Kovacevich filed no response to this Third Contempt and neither his counsel nor he appeared for hearing, despite that the Court briefly delayed the proceedings to see if either would appear in person or by phone. The Court notes that in his response to the prior contempt (Second Contempt), Mr. Kovacevich claimed that because he was not a named party to this action to this action, he could not be subject to a contempt proceeding before this Court. This Court disagreed, finding that Mr. Kovacevich is a Washington resident, an attorney licensed to practice law in Washington, was present when the Court issued its January 8, 2018, ruling and was represented Gordon Finch from the inception of this action until late 2018. The Court noted then, that Mr. Kovacevich apparently believes that as an officer of the Court he can participate in circumventing a valid ruling of this Court, but assume no responsibility. This Court disagreed in its prior order of May 3, 2019, and disagrees now.

X.

Robert Kovacevich is directed to return and deliver the sum of $17,919.38 to the successor Trustee, James Spurgetis, within ten (10) days of entry of this order.

If said sum is not returned and delivered to Trustee Spurgetis by then, Robert Kovacevich shall pay a civil penalty of $250.00 per day until said sum has been delivered to Trustee Spurgetis.

XI.

Gordon Finch has purged contempt by voluntarily disclosing the January 9, 2018, payment of $17,929.38, to Robert Kovacevich in an affidavit filed with the Court on April 11, 2019, and by demanding Robert Kovacevich return and deliver the $17,919.38 to Trustee Spurgetis. Gordon Finch is not required to take any action to further purge contempt.

XII.

Robert Kovacevich may purge the contempt by returning and delivering to Trustee Spurgetis the sum of $17,919.38.

XIII.

Robert Kovacevich shall be personally responsible for payment of the fees and costs incurred by the Verhaags as concerns this joined motion for contempt (Third Contempt). Prior to filing this motion, Intervenor Kenneth Verhaag's counsel requested Robert Kovacevich return and deliver the $17,919.38 to Trustee Spurgetis. Gordon Finch's counsel made the same request. As of the date of the hearing, Robert Kovacevich had refused to do so. Robert Kovacevich remains in possession of the $17,919.38, and could have returned and delivered the $17,919.38 to Trustee Spurgetis and avoided the necessity and cost of this joined motion for contempt (Third Contempt), he alone shall be responsible for the fees and costs incurred by the Verhaags.

IT IS ORDERED:

1. The Verhaag's joined motion for contempt (Third Contempt) is GRANTED.

2. Robert Kovacevich shall return and deliver the sum of $17,919.38 to successor Trustee, James Spurgetis, within ten (10) days of entry of this order. If he shall fail to do so, he shall be subject to a civil penalty of $250.00 per day until said sum is returned and delivered to Trustee Spurgetis.

3. As sanctions, the Verhaags are awarded the attorney's fees and costs they have incurred as a result of their joined motion. Robert Kovacevich shall be personally responsible for payment of the Verhaag's fees and costs.

4. The Verhaags shall provide evidence of their fees and costs within ten (10) days of entry of this order.

DONE IN OPEN COURT this 13 day of June, 2019.

/s/ Hon. Harold D. Clarke, III
Judge Spokane County Superior Court

Presented by:

Stamper Rubens, P.S.

/s/ Kyle W. Nolte
Kyle W. Nolte, Attorney for Kenneth Verhaag.

Approved:

PAINE HAMBLEN

[see attached]
Gregory S. Johnson, attorney for Gerald Verhaag

Approved:

BOHRNSEN STOCKER SMITH LUCIANI ADAMSON PLLC

[see attached]
Scott R. Smith, attorney for Gordon Finch

AARON L. LOWE & ASSOCIATES, P.S.

Failed to appear at hearing.
Aaron L. Lowe, attorney for Robert Kovacevich

Presented by:

Stamper Rubens, P.S.

[see attached]
Kyle W. Nolte, Attorney for Kenneth Verhaag.

Approved:

PAINE HAMBLEN[, LLP]

/s/ Gregory S. Johnson
Gregory S. Johnson, attorney for Gerald Verhaag
[WSBA #13782]

Approved:

BOHRNSEN STOCKER SMITH LUCIANI ADAMSON PLLC

[see attached]
Scott R. Smith, attorney for Gordon Finch

AARON L. LOWE & ASSOCIATES, P.S.

Failed to appear at hearing.
Aaron L. Lowe, attorney for Robert Kovacevich

Presented by:

Stamper Rubens, P.S.

Kyle W. Nolte, Attorney for Kenneth Verhaag.

Approved:

PAINE HAMBLEN

Gregory S. Johnson, attorney for Gerald Verhaag

Approved:

BOHRNSEN STOCKER SMITH LUCIANI ADAMSON PLLC

/s/ Scott R. Smith
Scott R. Smith, attorney for Gordon Finch

AARON L. LOWE & ASSOCIATES, P.S.

Failed to appear at hearing.
Aaron L. Lowe, attorney for Robert Kovacevich

APPENDIX E

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

No. 16-4-01301-7

IN THE MATTER OF: MADELINE M. THIEDE TRUST

GERALD VERHAAG, KENNETH VERHAAG,
beneficiaries of Madeline M. Thiede Trust,

Petitioner,

vs.

GORDON FINCH, a beneficiary and
Trustee of Madeline M. Thiede Trust,

Respondent.

MOTION AND MEMORANDUM IN SUPPORT OF CONTEMPT, RETURN OF TRUST FUNDS, FORFEITURE AND SANCTIONS

I. SECOND MOTION FOR CONTEMPT AND RETURN OF TRUST FUNDS

Pursuant to RCW 7.21, CR 7(b), and LCR 40(b), Petitioner Gerald Verhaag moves this Court for a second order of contempt that provides the following relief:

1. Hold that Finch/Kovacevich remain in contempt for failing to comply with this Court's January 8, 2018, ruling, its January 10, 2018, order (Exhibit H), and its January 27, 2018, letter ruling (Exhibit I);

2. Order Finch/Kovacevich to cure their contempt by immediately returning funds that were illegally removed from Trust accounts to Trustee, Spurgetis,

including interest at Washington's pre judgment interest rate of 4.396% from the time of removal until the funds are returned;

3. Personally subject Finch/Kovacevich to a forfeiture of $1,000.00 per day for every day that they have and continue to fail to return the funds to the Trust; and,

4. Order Finch/Kovacevich to personally pay Petitioner Verhaag's reasonable attorney's fees and cost incurred from this Motion.

Petitioner's Motion is based on the Memorandum, below, the Declaration of Gregory S. Johnson and its attached exhibits, and the records and files herein.

II. MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION

A. Background, Procedural History and Argument.

Trustor, Madeline Thiede, died on April 9, 2014. Finch was named the trustee of her Trust. Mandatory Trust terms required that upon her demise, "the balance of the trust assets, both income and principal, shall be distributed." Exhibit A. An integral part of Ms. Thiede's Trust was "Schedule A," which, under her signature, listed her Trust assets. In accordance with Schedule A, these assets included: Banner Bank Checking Account X7115; Banner Bank Checking Account X9811; Banner Bank Money Market/ Checking Account X3813; U.S. Back Checking Account X0599; her home at 24018 E. Alki Lane, Liberty Lake; and Cedar Tree Plaza at 101 N Argonne Road, Spokane Valley. Exhibit A, pg. 4.

In a May 15, 2014, email to the Trust beneficiaries, then Trustee Finch represented: "I will be preparing a year end statement, a plan for distributions, and a plan for the future liquidation of the trust assets and dissolving the trust." Exhibit B.

Trustee Finch never issued the plans nor did he liquidate the Trust assets and dissolve the Trust. It took him several years to sell Ms. Thiede's home. When it sold, contrary to his representations and Trust terms, Finch unilaterally informed the Trust beneficiaries:

> I am distributing 60% of the net proceeds from the sale of Mom's house. The remaining funds will be held for ongoing expenses, repairs, potential TI improvements and legal fees. I intend to send an email within the week outlining my position on Cedar Tree Plaza.

Exhibit C. Contrary to Finch's representations, a significant portion of the funds he claimed he was holding for the Cedar Tree Plaza's ongoing expenses and repairs improperly went to Finch, his brother, and attorney Kovacevich (*See, infra*).[1]

Because Trustee Finch ignored material Trust terms, beneficiary Gerald Verhaag filed a Petition to remove Finch as the trustee of the Thiede Trust. In answer to Verhaag's Petition for Removal, Finch admitted that

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[1] Equally troubling is that Cedar Tree Plaza's initial Purchase & Sale Agreement for was for $1,040,000.00. Exhibit E. After performing a feasibility study, the Buyers requested a sale price reduction to $965,000 to cover what needed to be done to the property. After renegotiation, the sale price was lowered to $1,015,000.00. Exhibit F. Given that Finch unilaterally retained funds "for ongoing expenses, repairs, [and] potential TI improvements" a $25,000 price reduction should not have been necessary and the Trust beneficiaries have been damaged in that amount.

Ms. Thiede's Liberty Lake home and Cedar Tree Plaza were a part of her Trust. Exhibit D.

On January 8, 2018, this Court granted Petitioner's Motion to Remove Finch as trustee. Finch and Kovacevich were present when the court ruled that the Trust's assets and documents should be immediately turned over to the new Trustee, James Spurgetis.

Unbeknownst to Petitioner, the day after the Court's bench ruling replacing Finch as Trustee, Finch unilaterally and illegally[2] wrote a $17,833.46 check from Trust Account #X9811 to himself as a "Commission." Exhibit G. Notably, Mrs. Thiede listed account X9811 as a Trust asset in Schedule A.

On January 10, 2018, this Court issued an order appointing Mr. Spurgetis as successor trustee and ordered Finch to provide all Trust assets and records to Mr. Spurgetis by January 20, 2018. Exhibit H.

On January, 18, 2018, Finch moved to extend, claiming he could not timely comply with the order. Beneficiaries Verhaag contested Finch's extension request.

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[2] Per 18 U.S. Code §1344, "whoever knowingly executes a scheme or artifice to obtain funds under the custody or control of a financial institution, by means of false or fraudulent pretenses or representations shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both." Finch wrote checks that removed funds from bank accounts that held Trust assets when he knew he was no longer the Trustee therefore had no legal authority to do so. Under the terms of the statute, he knowingly executed a scheme or artifice to obtain funds under the custody or control of a financial institution, by means of false or fraudulent pretenses or representations. His actions constitute *a prima facie* violation of the statute.

This court's January 27, 2018, extension ruling was succinct:

> It was this Court's intent that Mr. Gordon Finch would immediately, following the last hearing [1/8/18], commence whatever steps are necessary to deliver, or cause to be delivered, the trust records and assets to Mr. Spurgetis. Even with Mr. Finch being out the area, the process should be ongoing, especially on the part of the accountant involved. Additionally, it is the Court's intent that Mr. Gordon Finch not conduct himself as the trustee as of the close of the hearing on the 8th of this month.

Exhibit I (emphasis added). The Court allowed Finch until close of business on January 31, 2018, to complete delivery of all Trust records, documents, assets to Mr. Spurgetis. *Id.*

On January 30, 2018, unbeknownst to Petitioner, Finch illegally[1] wrote a second check from Trust Account #X7115 which transferred $85,698.46 to the Money Market/Checking Account #X3813 for "Jim & Gordon's Inheritance." Exhibit J.[3] Mrs. Thiede's Schedule A listed both accounts (X7115 and X8313) as Trust assets.

On February 7, 2018, Finch's motion for reconsideration of the order removing him as the trustee was denied. Exhibit K. On March 5, 2018, Finch appealed the denial. Exhibit L.

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[3] In a June 26, 2018, email, paralegal Stephanie Spurgetis confirmed this transfer and indicated that Finch had never given Trustee Spurgetis control of Trust account #X3813. Exhibit M. Finch's failure to relinquish control of this Schedule A trust account constitutes further evidence of contempt.

On March 12, 2018, unbeknownst to Petitioner, Finch illegally' wrote a third check from Trust Account #X9811 to attorney Kovacevich, in the amount of $11,211.80 for "Vrhaag suit Bob attorney fees 17818." Exhibit N.

On April 30, 2018, Division III's Commissioner Wasson ruled that Finch's appeal was not appealable as a matter of right and she denied discretionary review. Exhibit O. On May 30, 2018, Finch moved Division III to modify Commissioner Wasson's ruling. Exhibit P. On July 23, 2018, a panel headed by Division III's Chief Judge, Robert Lawrence-Berrey, denied Finch's motion to modify. Exhibit Q.

On August 21, 2018, Finch appealed Division III's denial of his motion to modify to the Washington Supreme Court. Exhibit R. On October 5, 2018, Washington Supreme Court Commissioner Johnston terminated Finch's requested review. Exhibit S. Hence, this Court's holding replacing Finch with Trustee Spurgetis stands.

B. Legal Argument.

1. Finch Remains in Contempt of Court.

The uncontested facts establish that in accordance with this Court's January 8, 2018, oral ruling, its January 10, 2018, order (Exhibit H), and its January 27, 2018, letter ruling (Exhibit I), Finch was removed as the trustee of the Thiede Estate and he was not to conduct himself as the trustee as of the close of the January 8, 2018, hearing. Further, Finch was to begin delivering all Trust assets to Trustee Spurgetis. Clear and convincing evidence establishes that when Finch was no longer the trustee, he illegally[1] wrote a series of checks from the Trust accounts listed on Schedule A that benefited himself (Commission check for $17,833.46

(Exhibit G)); he and his brother (inheritance check for $85,698.46 (Exhibit J)); and Kovacevich (Verhaag suit, for $11,211.80 (Exhibit N)). Because Finch was no longer the trustee, he had no legal authority to write checks that removed funds from Trust accounts. Further, Finch's illicit actions were in contempt of the Court's ruling and order. Moreover, both Finch and Kovacevich knew or should have known that Finch could not pay attorney fees and costs from Trust accounts after his removal as the trustee.

Prior to knowledge of the illicit checks, Beneficiary, Kenneth Verhaag, obtained a March 22, 2018 order to show cause as to why Finch should not be held in contempt for fai ing to complete delivery of Trust items and funds on or prior to January 31, 2018. Exhibit T. A few days prior to the contempt hearing, Finch produced hundreds of documents. Among those documents were the illegal checks. Neither the Court nor legal counsel were able to review all of the produced documents prior to the hearing. Via a May 10, 2018, letter to Kovacevich, Kenneth Verhaag's legal counsel, Kyle Nolte, demanded a return of the attorney fees and the "Commission" funds that had been illegally removed from the Trust. Exhibit U. Finch/Kovacevich ignored the letter.

On June 19, 2018, this Court held Finch in contempt and ordered him to personally pay each of the Verhaags legal counsel $2,000.00 (Exhibit V). In its order, the Court expressed "grave concerns over evidence that Mr. Finch wrote checks on Trust accounts after January 8th, the date the Court announced in his presence that he was replaced as Trustee." Given the Court's grave concerns and Kovacevich's obligations

as an officer of the court,[4] one would have expected Finch/Kovacevich to instantly return the funds to Trustee Spurgetis; they did not.

On June 25, 2018, Trustee Spurgetis delivered a letter to Kovacevich which indicated that Finch was not authorized to pay Kovacevich's bill from the Trust's funds for services rendered to Finch and that the funds should be returned within ten days. Exhibit W. The funds were not returned.

Beneficiaries Verhaag sought a hearing date to obtain the return of the funds; Kovacevich interceded by filing two appeals regarding the attorney fees this Court ordered Finch to personally pay. Petitioner moved Division III to lift the stay created by the appeals, so this Court could address matters not under review by Division III. On November 28, 2018, Division III granted Petitioner's motion.

The amount of the attorney's fees at issue on appeal are about $16,000.00. The amount of the fleeting funds removed by Finch, not including interest, is $114,743.72.

2. Finch/Kovacevich Have No Viable Defense.

Acting on advice from counsel in refusing to obey a court order is not a defense to a civil contempt proceeding for such violation. *Ramstead v. Hauge* 73

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[4] Pursuant to the Preamble and Scope of the RPCs: "[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs . . . . A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Wn.2d 162, 166, 437 P.2d 402 (1968), *citing, State ex rel. Porter v. First Judicial Dist. for Lewis & Clark Cy.,* 123 Mont. 447, 215 P.2d 279 (1950); *In re Pierce,* 54 Kan. 519, 38 Pac. 812 (1895). Further, "[c]ounsel can be called to account for contemptuous behavior." *Am States. Ins. Co. Ex Rel. Kommavongsa v. Nammathao,* 153 Wn. App. 461 (Div III, 2009).

Whatever explanation Finch/Kovacevich offer regarding the illicit checks is i indefensible because Finch was removed as the trustee and had no legal authority to write checks from the Trust accounts listed on Schedule A. Moreover, Finch was ordered to provide all Trust assets to Trustee Spurgetis. To the extent Finch/Kovacevich believed they were entitled to Trust funds, it was incumbent upon them to request distribution from Trustee Spurgetis and for Spurgetis to decide whether distribution was appropriate, or to seek distribution permission from this Court.

As to Finch's *ipse dixit* $85,698.46 inheritance claim (Exhibit J), Finch and Kovacevich have claimed that because the Trust was revocable, any cash that existed at the tine of Ms. Thiede's death was hers, and per her Will, these funds were to be split fifty-fifty amongst the Finch's. They have also claimed that Ms. Thiede intended that Finch and his brother have an inheritance. These claims are without merit.

First, Mrs. Thiede's Schedule A listed her Liberty Lake home and the bank accounts at issue as Trust assets (Exhibit A, pg. 4), not items that were to be distributed by a Will.

Second, in Finch's answer to Mr. Verhaag's Petition, Finch asserted and therefore admitted that Ms. Thiede's Liberty Lake property was part of her Trust.

Hence, the funds that flowed from the sale were also part of her Trust.

Third, Exhibit X, shows that the Liberty Lake property closing generated $305,146.88. Exhibit X, pg. 1. The April 13, 2016, Banner Bank Statement for account X7115 reflects a $305,146.88 deposit) and shows that prior to this deposit, account X7115 contained but $2,836.95. Exhibit X, pg. 2. The July 13, 2016 Banner Bank Statement for account X7115 shows a balance of $128,533.55, which reflects the 60% distributions made the beneficiaries. Exhibit X, pg. 3. A December 13, 2018 Banner Bank Statement for account X7115 shows a balance of $128,819.27. Exhibit X, pg. 4. A check for $43,125.75 (Exhibit X, pg. 5) reflects closing of account #X7115 and a check which transferred $85,698.46 to the Trust's Money Market/ Checking Account #X3813 for "Jim & Gordon's Inheritance." Exhibit X, pg. 6). This clear and convincing evidence establishes that with the exception of the $2,836.95 that existed in account X7115 prior to the home sale, the funds Finch wrongly withdrew from the account came from the sale of the Trust asset that was Mrs. Thiede's home. Even if this were not so, Schedule A, lists account X7115 and account X3813 as Trust assets.

Fourth, Finch's removal of Trust funds as an *ipse dixit* inheritance is counter to Finch's email assertion that the remaining forty percent of the Liberty Lake sale funds were to be held for "ongoing expenses, repairs, potential TI improvements, and legal fees." Exhibit C.

Fifth, Finch has consistently maintained that Mrs. Thiede's Trust was in lieu of a will and probate.[5] There is no Trust language that is contrary to the fifty-two percent/forty-eight percent Finch/Verhaag distribution (Exhibit A), nor is there any Trust language that leaves a separate inheritance from the Schedule A Trust assets (Exhibit A, pg. 4) to the Finch brothers.

Sixth, despite multiple opportunities to do so, Finch has not placed competent evidence before this Court or the Appeals Courts that supports a Finch brothers inheritance. Further, any Finch affidavit/declaration that is counter to the established evidence and the Trust language would not be legally viable as what the Finchs' claim Mrs. Thiede allegedly s id vis-á-vis an inheritance would constitute hearsay and violate Washington's Deadman's Statute (RCW 5.60.030).

Seventh, Finch's inheritance claim does not meet the minimal Will requisites set forth in RCW 11.12.020.

As part of Finch's Washington Supreme Court appeal, he moved to strike information and argument from Verhaag's answering brief regarding the illegal checks, claiming they were immaterial, impertinent, or scan-

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[5] At page 5 of Respondent's Response to Trustee's Second Report (Exhibit Y), Finch argued:

> Once again, the categorization of the Trust must be considered. It is not a long term trust to support beneficiaries. It is intended to terminate after death. That is what a will substitute does. It is titled "2009 Revocable Trust" (sic) it is merely a conduit to avoid the delay and expense of probate. RCW 11.104.250 and the Trust mandates distribution. (Article IV 4.1(c), page 5). Both require the same result. The Trust is irrevocable. It cannot be rewritten as a will substitute. A will cannot be rewritten to change disposition of assets. The same rules apply to a trust.

dalous under CR 12(f).[6] In support, Finch provided an email stream (Exhibit Z) which he asserts authorized him to continue to manage the Trust until the new trustee got "up to speed." A review of the email stream demonstrates that as to Cedar Tree Plaza, Finch was "receiving calls for maintenance items and billing questions from tenants. I need direction as to what (sic) am allowed to do and if I would be reimbursed." Exhibit Z, pg. 2. Trustee Spurgetis' paralegal, responded: "Jim said for you to use your judgment until we get up to speed." . . . Therefore please work with the tenants at this time and I'll let you know as things progress on our end." Exhibit Z, pg. 1. The authority requested and granted in this email exchange involved Finch working with Plaza tenants regarding maintenance items and billing questions. Finch's claim that this email stream authorized him to write checks from Trust account(s) that held funds that resulted from Mrs. Thiede's home sale is incongruous. Moreover, this claim is contrary to Trustee Spurgetis' June 25, 2018, letter which, with regard to Trust funds used to pay Kovacevich, states: "I did not authorize Mr. Finch to pay your bill from the Trust's funds ..." Exhibit W.

For all of the reasons above-stated, Finch remains in contempt of the Court's January 8, 2018, bench ruling, its January 10, 2018, order (Exhibit H), and its January 27, 2018, letter ruling (Exhibit I). Thus, he should be ordered to return the funds he illegally removed from the Trust accounts, including interest, *post haste.* Additionally, he should be held in contempt of court and appropriately sanctioned.

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[6] Washington Supreme Court Commissioner Johnston denied Finch's Motion to Strike.

3. Contempt Sanctions Are Warranted.

This Court has the authority to coerce compliance with lawful court decisions, directions or orders through contempt proceedings. *See, e.g., Moreman v. Butcher,* 126 Wn.2d 36, 42, 891 P.2d 725 (1995), *citing,* RCW § 7.21.010. The power to censure contemptuous behavior is inherent in a court of general jurisdiction and has likewise been conferred on the courts by the Legislature. *See, Nielsen v. Nielsen,* 38 Wn.App. 586, 587-88, 687 P.2d 877 (1084), *citing State v. Estill,* 55 Wn.2d 576, 349 P.2d 210 (1960); and, *Johnston v. Beneficial Management Corp. of America,* 26 Wn.App. 671, 614 P.2d 661 (1980). Not only does this court have this authority, but it is the duty of the courts to enforce their valid orders, and when it ponies to their knowledge that such orders are not obeyed, they should enforce obedience by punishment for contempt. *State v. McCoy,* 122 Wash. 94, 98, 209 Pac. 1112 (1922).

Washington law recognizes three categories of contempt power: (1) criminal contempt, prosecuted by the State under §7.21.040; (2) civil contempt, initiated by an aggrieved party or the court under R.C.W. §7.21.030 or other similar authority; and (3) contempt proceedings resulting from the court's exercise of its inherent authority. *See, e.g., In re Marriage of King,* 44 Wn.App. 189, 721 P.2d 557 (1986); *State v. Boatman,* 104 Wn.2d 44, 46-48, 700 P.2d 1152 (1985); RCW §7.21.010 *et seq.* Where the primary purpose is to coerce a party to comply with an order or judgment, the contempt proceeding takes on a civil character, in which case the respondent's due process rights are satisfied through notice, a reasonable time to prepare a defense, and a hearing. *Nielsen, supra,* 38 Wn.App. at 588, *citing, inter alia, Keller v. Keller,* 52 Wn.2d 84, 323 P.2d 231 (1958); *Rainier Nat'l Bank v. McCracken,*

26 Wn.App. 498, 615 P.2d 469 (1980); *Taylor v. Hayes,* 418 U.S. 488, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

RCW §7.21.010 (b) defines "contempt of court" as: "[d]isobedience of any lawful judgment, decree, order, or process of the court." A finding that the violations were willful and deliberate is unnecessary because only "disobedience of any lawful judgment, decree, order or process of the court" need be found. *Mathewson v. Primeau,* 16 Wn.2d 929, 934, 396 P.2d 183 (1964).

If the Court finds a person has failed to perform an act that is yet within the person's power to perform, the Court may find the person in contempt of Court and impose one or more of the following remedial sanctions:

> (a) Imprisonment if the contempt of court is of a type defined in RCW 7.21.010(1) (b) through (d). The imprisonment may extend only so long as it serves a coercive purpose.
>
> (b) A forfeiture not to exceed two thousand dollars for each day the contempt of court continues.
>
> (c) An order designed to ensure compliance with a prior order of the court.
>
> (d) Any other remedial sanction other than the sanctions specified in (a) through (c) of this subsection if the court expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

RCW §7.21.030(2). In addition, the Court may further order a person found in contempt "to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with

the contempt proceeding, including reasonable attorney's fees." RCW §7.21.030(3).

Finch/Kovacevich have deliberately subverted this Court's January 8, 2018 ruling, its January 10, 2018, order, and its January 27, 2018, letter ruling that Finch not act as the Trustee after the January 8, 2018, hearing. There is little doubt that Finch/Kovacevich were aware of the Court's ruling as they were both present when the Court issued it. Further, they were provided a conformed copy of the Court's order on January 10, 2018. Moreover, the Court expressed "grave concerns over evidence that Mr. Finch wrote checks on Trust accounts after January 8th, the date the Court announced in his presence that he was replaced as Trustee." Further, Kenneth Verhaag and Trustee Spurgetis requested that Finch/Kovacevich return the funds but they refused to do so. The Court should exercise its contempt and inherent powers to coerce Finch's/Kovacevich' compliance with its ruling and order. Specifically, the Court should:

1. Hold that Finch/Kovacevich remain in contempt for failing to comply with this Court's January 8, 2018, ruling, its January 10, 2018, order (Exhibit H), and its January 27, 2018, letter ruling (Exhibit I);

2. Order them to cure their contempt by immediately returning the funds that were illegally removed from Trust accounts to Trustee, Jim Spurgetis, including interest at Washington's pre judgment interest rate of 4.396% from the time of removal until they are returned;

3. Personally subject them to a forfeiture of $1,000.00 per day for every day that they have and

continue to fail to return the funds to the Trust; and,

4. Order Finch/Kovacevich to personally pay Petitioner Verhaag's reasonable attorney's fees and costs incurred from this Motion.

IV. CONCLUSION

Each of Petitioner's requests are consistent with Washington law and the purpose and intent of the Court's inherent powers of contempt and are reasonably calculated to both ensure Finch's/Kovacevich's compliance with the Court's directives and help minimize potential damage to Petitioner. As such, the requested relief is appropriate and should be granted.

DATED this 7th day of December, 2018.

PAINE HAMBLEN LLP

By:/s/ Gregory S. Johnson
Gregory S. Johnson, WSBA #13782
for Petitioner Gerald Verhaag

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of December, 2018, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Robert E. Kovacevich
ROBERT E. KOVACEVICH PLLC
818 W Riverside Ave., Suite 525
Spokane, WA 99201-0916

Attorneys for Respondent

__X__ HAND DELIVERY
_____ U.S. MAIL
_____ OVERNIGHT MAIL
_____ FAX TRANSMISSION
_____ EMAIL

Kyle W. Nolte
Hailey L. Landrus
STAMPER RUBENS, P.S.
720 West Boone, Suite 200
Spokane, WA 99201

Attorneys for Kenneth Verhaag

_____ HAND DELIVERY
__X__ U.S. MAIL
_____ OVERNIGHT MAIL
_____ FAX TRANSMISSION
__X__ EMAIL

James P. Spurgetis
JAMES P. SPURGETIS, P.S.
422 W. Riverside Ave., Suite 620
Spokane, WA 99201

Trustee

_____ HAND DELIVERY
__X__ U.S. MAIL
_____ OVERNIGHT MAIL
_____ FAX TRANSMISSION
__X__ EMAIL

James C. Finch
14722 E. 48th Lane
Veradale, WA 99037

_____ HAND DELIVERY
__X__ U.S. MAIL
_____ OVERNIGHT MAIL
_____ FAX TRANSMISSION
_____ EMAIL

/s/ Gregory S. Johnson
Gregory S. Johnson

APPENDIX F

MADELINE M. THIEDE
2009 REVOCABLE TRUST

Agreement made at Spokane, Washington, on June 11, 2009, between Madeline M. Thiede ("Trustor" herein), and Madeline M. Thiede as Trustee. The Trust shall be named the Madeline M. Thiede 2009 Revocable Trust. Its provisions are as follows:

Transfer of Property. Trustor has transferred and delivered, or will shortly transfer and deliver, to Trustee the property of Trustor's itemized on Schedule A attached hereto. This property, together with other additional property which may be added to this trust by Will or otherwise shall be held, managed and distributed by Trustee as herein provided.

ARTICLE I

TRUSTOR PROPERTY

Trustor is a widow. She is the surviving spouse of Earl S. Thiede. She has two sons of a prior marriage. James C. Finch and Gordon R. Finch. She has established another trust, the Madeline M. Thiede 1985 Revocable Trust. The two trusts are to be separately administered.

ARTICLE II

TRUSTEES AND THE TRUST ESTATE

The following, including the proceeds investments and reinvestments thereof, and the accumulated income therefrom, if any, shall constitute the "trust estate" as that term is used herein:

2.1 Investments and real estate described in the list attached as Schedule "A" hereto, the receipt of

which from Trustor is hereby acknowledged by Trustees; and

2.2 Any and all other property transferred to, and accepted by, Trustees for administration hereunder.

2.3 During her lifetime, Madeline M. Thiede, Trustor, shall act as the sole Trustee of this Trust, except for disability as stated in paragraph 2.4 below.

2.4 If Trustor, due to death, illness, disability, or for any reason Madeline M. Thiede is unable to direct or manage the Trust, the Trustees designated in paragraph 2.5 below, shall act as. replacement Trustees. If disability is the reason for Trustor's replacement, Trustee shall certify disability by a letter of a competent physician.

2.5 If any named Trustee is unable or unwilling to serve, then Gordon R. Finch shall be successor Trustee to Madeline M. Thiede. If both Madeline M. Thiede and Gordon R. Finch named above are unable or unwilling to serve as Trustee of the Trust created, then James C. Finch is appointed as successor Trustee. If all persons named in this paragraph 2.5 are unable to serve or continue to serve, then Marla J. Finch shall be appointed as successor. No bond shall be required of any named Trustee.

ARTICLE III

RIGHTS RESERVED BY TRUSTOR; REVOCABILITY

The following rights are reserved by Trustor:

3.1 The right to revoke this trust in its entirety, by instrument in writing provided;

(a) Such rights shall be personal to Trustor, and shall not be exercised by any other person, including a guardian.

(b) The powers and duties of Trustee shall not be changed without Trustee's written consent.

3.2 Trustor also reserves the right to direct the distribution of all income from, and principal of, the property held in this trust. Directions given hereunder may be given orally or in writing, but if given orally shall be confirmed in 'writing by Trustor, if Trustee so requests. All payments made from trust assets shall be deemed to have been made from the Trustee to the Trustor, and then from the Trustor to the payee, rather than requiring an actual distribution from the trust to the Trustor and then a payment by the Trustor to the payee, since a major purpose of this trust is to facilitate the handling of Trustor's financial affairs and estate planning.

3.3 To withdraw from the operation thereof any part or all of the trust estate, or to revoke this trust in whole or in part or modify this instrument, including the right to change beneficiaries, their shares, and the plan of distribution as to each assets or modification to be valid and fully accomplished whenever Trustee shall have received from Trustor written notice thereof; provided, as to any such partial revocation or modification, that such written notice shall contain specific instructions as to the terms thereof; provided further, that the powers, duties and liabilities of Trustee shall not be materially changed by reason of any such partial revocation or modification without the written consent of the Trustees;

3.4 The right to transfer to Trustee at any time and from time to time additional assets acceptable to them for administration hereunder; and

3.5 The right to exercise control over the investment, reinvestment, exchange, sale and management of assets of the trust estate provided in Article V.

3.6 This instrument shall become irrevocable upon the death of Trustor.

ARTICLE IV

BENEFICIARIES; PURPOSES; DISTRIBUTIONS; SEPARATE TRUSTS

4.1 Beneficiaries; Purposes.

(a) During Lifetime of Trustor. Trustor, during her lifetime, shall be the only beneficiary of the trust estate, and the purposes thereof shall be to provide for her reasonable care, support, health and maintenance, including recreation and travel to the extent that the assets of the trust estate are sufficient to permit the same.

(b) Trustee shall pay to Trustor or her order, so much of the net income or principal, or both, as Trustor shall direct. Upon, Trustor's death, Trustee shall pay from the trust estate the expenses of Trustor's last illness, funeral and burial, debts and any applicable death taxes.

(c) After Death of Trustor. Upon the death of the Trustor, if this instrument is still in effect, the balance of trust assets, both income and principal, shall be distributed as follows twenty five percent (25%) to James C. Finch; twenty five percent (25%) to Gordon R. Finch; and fifty percent (50%) to Earlene Verhaag. If James C. Finch predeceases

Trustor, his share shall be distributed equally to Marilyn Finch and Christopher Finch. If Gordon R. Finch predeceases Trustor, his share shall be distributed to Marla Finch. If Earlene Verhaag predeceases Trustor, 50% of the distribution that. would have been distributed to Earlene Verhaag shall be distributed to Kenneth Verhaag and 50% to Gerald Verhaag.

ARTICLE V

GENERAL ADMINISTRATIVE PROVISIONS

5.1 Duties of Trustees and Limitations on Powers.

(a) Annual Accountings. Trustee shall furnish, within sixty days after the end of each of the income tax years for the trust, to each person who is then a beneficiary of such trust, or to the legal representative, if any, of such beneficiary, a statement showing how the assets of such trust are invested and all transactions relating thereto for the preceding tax year.

(b) Investments. In acquiring, investing, reinvesting, exchanging, selling and managing the assets of each trust, Trustee shall exercise the judgement and 'care under the circumstances then prevailing, which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital; provided, that Trustor specifically reserves the right, exercisable by written notice to Trustees at any time and from time to time as long as Trustor is living and not incapacitated, to give directions to Trustees regarding ,the investment, reinvestment,' exchange,

sale and management of trust assets. Trustees shall be fully protected in following any such direction given by Trustor, and losses, if any, attributable thereto shall be for the sole account of the trust estate.

(c) Income. Income, if any, distributed to Trustee by Trustor's Executors, shall be treated by Trustee as any other income. Income accrued from the assets of any trust and income received therefrom and held undistributed shall, at the termination of the interest or estate or Trustor or any other beneficiary, be for the benefit of the beneficiaries entitled to the next eventual interest therein in the proportions in which they take such interest. Income which, in the exercise by Trustee of the beneficiary of the trust from which such income was derived shall be added to the principal of such trust not less frequently than annually.

(d) Death Taxes Attributable to Trust Estate. If any assets of the trust estate are included in the estate of any beneficiary hereunder for the purposes of any tax becoming payable by reason of her death, including state transfer tax, as Trustees shall pay all the death taxes, state and federal, from this trust including tax on assets in the 1985 Madeline M. Thiede Revocable Trust and any assets passing outside of either trust.

5.2 Powers of Trustees. In administering the trust estate, Trustee shall, subject only to the instructions, duties and limitations on powers contained in the preceding provisions of this Article V have and exercise all of the power, authority and discretion which the absolute owner of the assets of such trust could have and exercise. Without in any way limiting the generality of the foregoing, but as further evidence

thereof, Trustees shall as to each such trust have full power, discretion and authority to:

(a) Investments. Acquire and retain, within the limitations of the standards set forth, every kind of property, real, personal or mixed, and every kind of investment, specifically including, without limitation,

(i) Debentures and other corporate obligations, stocks of investment companies, participating shares of investment trusts, Limited Partnerships, investment securities of management type investment companies and stocks, preferred or common, of other corporations which men of prudence, discretion and intelligence acquire for their own account,

(ii) The investment of trust funds in any common trust fund operated by Trustees for Trustee's trust accounts,

(iii) The investment of trust funds in savings accounts in banks, trust companies, mutual savings banks or national banking associations (including any bank or trust company acting as Trustee hereunder), and

(iv) The investment of trust funds in insurance policies of the life of any person in whom Trustee, as such, has an insurable interest;

(b) Retention of Assets: Business Continuation; Delegation of Discretionary Powers. Subject to such directions as are from time to time given to Trustees by Trustor as provided in this Article V or other trust provisions, hold and retain in the same form in which it is received any and all property transferred to Trustee for administration

hereunder even though such property may not be of a character authorized by this Article V or other trust provisions or by the law of the State of Washington or any other state or jurisdiction for trust investments or be unsecured, unproductive, over-productive, underproductive, or of a wasting nature, or be inconsistent with usual concepts of diversification of trust assets, including, without limitation,

(i) The retention of any policy of insurance on the life of another,

(ii) The retention and the continuation of the operation at the sole risk of the trust estate of any unincorporated business or farm or business property transferred to Trustee for administration hereunder, the proceeds and losses therefrom to be attributed to the trust estate and not to Trustees; and, in addition thereto,

(iii) The right to issue proxies to the guardian of the person or parent of any minor beneficiary hereunder or of any adult beneficiary hereunder, to any two or more such persons, for the voting of shares of stock issued by any corporate trustee hereunder,

(iv) The delegation to others of such duties, powers and authority, including discretionary powers, as may be deemed by Trustee to be reasonably necessary or proper in continuing the operation of any unincorporated business, farm or business property, and

(v) The delegation to others of such duties, powers in the incorporation of, any such unincorporated business, farm or business property; (c) Income and Principal. Subject to the

provisions of Article III, determine what is principal and what is income, specifically including the right to make any adjustments between principal and income for premiums, discounts, depreciation or depletion;

(d) Agents and Attorneys. Employ such agents and attorneys as Trustees may deem necessary or advisable for the proper administration of the trust, or in connection with any uncertainty, controversy or litigation which may arise hereunder and pay reasonable compensation to such agents and attorneys for their services;

(e) Purchase and Probate Assets: Loans. If Trustee shall deem such action to be in the best interests of the beneficiaries of the trust estate, without regard to the provisions of Article 5.1(b);

(i) purchase at any time with trust funds, at the fair market value thereof at the time of purchase, any asset or assets of the probate estate of Trustor, or

(ii) in addition thereto or in lieu thereof, make at any time any loan or advancement, secured or unsecured, to the Trustor or his representative; and, in addition thereto, shall have all of the power, authority and discretion given a trustee under the laws of the State of Washington, the provisions of which are incorporated herein and made a part hereof.

5.3 Miscellaneous.

(a) Reliance on Agents and Attorneys. Trustees shall be fully protected in relying upon the advice of legal counsel on questions of law and shall not be liable for loss or damage caused by any agent or

attorney selected by Trustee if reasonable care was exercised in selecting and retaining such agent or attorney.

(b) Trustee's Good Faith Actions Binding. Any and every action taken in good faith by a Trustee in the exercise of any power, authority, judgment or discretion conferred upon Trustees hereunder shall be conclusive and binding upon all persons interested in the assets of any trust hereunder.

(c) Trustee's Accounting Acts. To the extent that the law permits, Trustees are relieved from all of the duties which would otherwise be placed upon Trustees by the act relating to accountings by Trustees in force in the State of Washington at the time this instrument is executed or any amendment or amendments thereof, or by any similar act or acts of the same or any other state or jurisdiction.

(d) Trustee's Fees and Expenses. Trustees shall be entitled to be paid out of the assets of each trust, and from time to time during the term thereof, such compensation for the acceptance and administration thereof and for the payments and distributions made by Trustee thereunder, including extra compensation for unusual or extraordinary services performed by Trustee, as is at such time or times customarily and generally charged by the trust departments of banks in the community for like services performed for similar trusts, and Trustees shall be entitled to reimbursement out of the assets of each trust for all costs and expense reasonable incurred in the proper administration thereof.

(e) Resignation; Successor Trustee. During Trustor's lifetime, Trustee may resign her trusteeship hereunder by giving to Trustor and Trustees named successors, written notice of such resignation. Upon notice, the persons named in 2.5 above shall succeed in order as Trustee.

(f) Law Governing; Savings Clause. The provisions of this instrument shall be governed by the laws of the State of Washington. Any provision thereof which is prohibited by law or is unenforceable shall be inoperative and all of the remaining provisions thereof shall, nevertheless, be carried into effect.

(g) Unless some meaning and intent is apparent from the context, the plural should include singular and vice versa, and masculine, feminine and neuter words shall be used interchangeably in this trust document.

EXECUTED by Trustor and Trustees on June 11, 2009.

/s/ Madeline M. Thiede
TRUSTOR, MADELINE M. THIEDE

/s/ Ordon R. Finch
SUCCESSOR TRUSTEE, ORDON R. FINCH

/s/ James C. Finch
SUCCESSOR TRUSTEE, JAMES C. FINCH

STATE OF WASHINGTON }
} ss.
County of Spokane }

On this day personally appeared before me Madeline M. Thiede, James C. Finch and Gordon R. Finch, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 11th day of June, 2009.

[NOTARY STAMP]

/s/ Robert E. Kovacevich
Notary Public in and for the State of Washington, residing at: Spokane

My Commission Expires Oct 4, 2009

Signed Sept. 30, 2013

AMENDMENT NO. I

FIRST AMENDMENT AND RESTATEMENT AND REPUBLICATION OF THE MADELINE M. THIEDE 2009: REVOCABLE TRUST

This Amendment No. 1 to the Trust known as the Madeline Thiede 2009 Revocable Trust is made and entered into between MADELINE M. THIEDE Spokane, Washington, as "Trustor", and MADELINE M. THIEDE of Spokane, Washington, as "Trustee

RECITALS

The original 2009 revocable trust was .executed on June 11, 2009. The beneficiaries :and living family has Changed since, 2009 due to the intervening death of Earlene Verhaag. However, the name and schedule of assets will remain the current form but the trust will be updated and revised to meet current family status and conditions. Now therefore, pursuant to Article III including 3.3 allowing revocation in whole or in part of Madeline M. Thiede 2009 Revocable Trust Agreement dated June 11, 2009, Madeline M. Theide, Trustor, revokes and cancels Article IV, 4.1.(c) of said trust dated June 11, 2009 and in place of the cancelled paragraph replaces it with the following.

MADELINE M. THIEDE

RESTATED AND AMENDED 2009 REVOCABLE TRUST

The Amendment to the Trust is to Article IV, 4.1(c). The original paragraph is revoked and replaced with the following paragraph:

ARTICLE IV 4(1)(c)

(c) After Death of Trustor: Upon the death of the Trustor, if this instrument is still in effect; the balance of trust assets, both income and principal, shall be distributed as follows: twenty six (26%) to James C. Finch; twenty six percent (26%) to Gordon R. Finch; and twenty four percent (24%) to Kenneth Verhaag and twenty four percent (24%) to Gerald Verhaag if James C. Finch predeceases Trustor, his share shall be distributed equally to Marilyn. Finch and Christopher Finch. If Gordon R. Finch predeceases Trustor his share shall be distributed to Marla Finch. If Gerald Verhaag does not Survive Trustor, his share of the trust shall be added to the share of Kenneth Verhaag. If Kenneth Verhaag does not survive Trustor, his share will be distributed equally to Gabriel Verhaag and Monica Verhaag, children of Kenneth Verhaag. If both Gerald Verhaag and Kenneth Verhaag fail to survive Trustor, their respective shares shall be distributed equally to Gabriel Verhaag and Monica Verhaag.

The intent of this Amendment is that the 2009 Trust, with its schedule of property and federal I.D. No. shall remain in:full force and effect as amended by this Amendment No. 1.

Dated this 30th day of September, 2013.

/s/ Madeline M. Thiede, Trustor
Madeline M. Thiede, Trustor

/s/ Madeline M. Thiede, Trustee
Madeline M. Thiede, Trustee

STATE OF WASHINGTON }
} ss.
County of Spokane }

On this day personally appeared before me Madeline N. Thiede, to me known to be the individual described in and who executed the within and foregoing instrument and acknowledged that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 30th day of September, 2013.

/s/ Robert E. Kovacevich
Notary Public in and for
the State of Washington
[NOTARY SEAL] Residing in: Spokane
My commission expires
10-14-2013
Robert E. Kovacevich

APPENDIX G

Honorable Judge Harold D. Clarke III

SUPERIOR COURT, STATE OF WASHINGTON,
COUNTY OF SPOKANE

No. 16-4-01301-7

In the Matter of:

MADELINE M. THIEDE TRUST, GERALD VERHAAG,
A Beneficiary of Madeline M. Thiede Trust;

Petitioner,

v.

GORDON R. FINCH, A Beneficiary and Trustee
of Madeline M. Thiede Trust;

Respondent.

RESPONSE OF ROBERT E. KOVACEVICH TO
AFFIDAVIT OF GORDON FINCH RE: CHECK

Robert E. Kovacevich, through his attorney, Aaron L. Lowe, submits the following points and authorities in objection to the Affidavit of Gordon Finch dated April 10, 2019. The grounds for the objection are as follows:

Gordon Finch, by his Affidavit filed herein dated April 10, 2019, states at page 2 that "I am compelled to bring this to the Court's attention." Finch also states "I was instructed by Mr. Kovacevich to write the check and did so." Gordon Finch is not entitled to any return

by Kovacevich for many reasons. Among the reasons are that Kovacevich is not a party to the case. There is a dispute between the April 10, 2019, Affidavit of Gordon Finch in his Affidavit of January 10, 2019. At page 6, of the January 10, 2019 Affidavit, Finch states that he was advised by Kovacevich to pay the $11, 211.80 billed. The Declaration of Kovacevich of January 24, 2019, page 11, also filed herein states: "The Trust authorizes payment of legal fees to me while Gordon Finch was in control of the funds. The fees were earned before any order of removal." A copy of the billing of Kovacevich is attached to this response.

The time Kovacevich spent was prior to the Court's verbal statement of removal on January 8, 2019. The entries clearly are before January 8, 2019. The billing is dated January 6, 2018 and was paid by Gordon Finch's check on January 9, 2019. The time reported is obviously before Finch paid the check. The attached Declaration of Kovacevich indicates the bill was sent. The billing states that it was invoice 17795. Gordon Finch's check attached to his Affidavit lists the same number and states "Verhaag lawsuit." At page 7 of Finch's Affidavit of January 10, 2019, Finch states: "The checks I wrote were on the advice of Mr. Kovacevich and I thought were consistent with the authority given me by Mr. Spurgetis." Finch did not mention that he thought that he had authority from the Trustee to write the checks. Finch's two affidavits contradict each other on why he paid the checks. His admonition is that Mr. Kovacevich advised him each time he paid a fee check or also reimbursed himself and Marla Finch. Kovacevich's January 24, 2019 Declaration at page 5 states "My memory is that Gordon Finch detailed extraordinary services that he and Marla Finch expended in managing the property.

Mr Spurgetis indicated that Gordon Finch could be paid for these extra services."

No hearing has been held to determine the conflicting Declarations and Affidavits. Accordingly, these pleadings cannot be determined by the Court without testimony on the record. The January 24, 2019 Declaration at page 10 cites RCW 11.42.010 that requires a personal trustee or beneficiary to start a probate to collect assets. Neither Gordon Finch or James Spurgetis have filed a probate.

The recent case of Matter of the Estate of Rathbone, 190 Wn.2d 333, 343-44, 412 P.3d 1283 (2018) holds that the new TEDRA statues do not eliminate other statutes set forth in Title 11. The Opinion cites RCW 11.96A.020, a statute that applies to "all trusts and trust matters." RCW 11.96A.020(1)(b) specifically states "All trusts and trust matters." The prior cases of Crowe & Dunlevy v. Stidham, 640 F.3(11140, 1158 (10th Cir. 2011) holding lack of jurisdiction over attorney-client fee disputes and Dixon v. Fiat Motors, 8 Wn.App 689, 692-3, 509 P.2d 86 (1973) requiring a formal CR 14 to join a party, also apply.

CONCLUSION

Procedurally, before this matter can be determined, the allegation of Gordon Finch is not within the pleadings required. Factually, Gordon Finch's right to recover is barred by the facts as all fees were during his tenure of trustee or manager, or both.

I, Robert Kovacevich, pursuant to GR 13 under penalty of perjury state that the attached billing invoice dated January 6, 2018 is a true copy from my office records. It was sent to Gordon Finch.

/s/Robert E. Kovacevich
Robert E. Kovacevich

Spokane, Washington, June 14, 2019.

Dated this 14th day of June, 2019.

/s/ Aaron L. Lowe
AARON L. LOWE, WSBA #15120
1408 W. Broadway
Spokane, WA 99201
Telephone: (509) 323-9000
Fax: (509) 324-9029
Attorney for Robert E. Kovacevich

CERTIFICATE OF SERVICE

I hereby certify that on the day of June 14, 2019, the foregoing was personally delivered to the following:

Gregory E. Johnson
Paine Hamblen, LLC
717 West Sprague, Suite 1200
Spokane, WA 99201

Kyle W. Nolte
Hailey L. Landrus
Stamper Rubens, P.S.
720 West Boone, Ste. 200
Spokane, WA 99201

Scott R. Smith
Bohrsen, Stocker, Smith
Lucian, Adamson, PLLC
312 W. Sprague Avenue
Spokane, WA 99201

/s/ Jennifer Peterson
Jennifer Peterson
Legal Assistant

ROBERT E. KOVACEVICH P.L.L.C.
818 WEST RIVERSIDE AVENUE, STE. 525
SPOKANE, WA 99201

January 06, 2018

Gordon Pinch
Gordon Finch Homes
101 North Argonne Road, Suite C
Spokane Valley WA, 99212

Professional Services		Hrs/Rate	Amount
12/1/2017 REK	Phone call Gordon, read Johnson's email to Jim, email to Gordon.	0.25 225.00/hr	56.25
12/3/2017 REK	Review pleadings from Johnson and Nolte, research on tort and attorney's fees.	2.00 225.00/hr	450.00
12/4/2017 REK	Draft Motion to Continue, research waiver, finish draft of memo.	2.00 225.00/hr	450.00
JP	Type draft of Motion to Continue, start new memo to Gordon.	1.00 65.00/hr	65.00
12/5/2017 REK	Final Motion to Continue Motions, research on waiver and draft response to Kenneth's request for disbursement	2.50 225.00/hr	562.50

JP	Type up first draft of Memo to Client.	0.40 65.00/hr	26.00
JP	Type up changes and final Motion to continue, send email to Johnson and Nolte.	0.30 65.00/hr	19.50
12/6/2017 REK	Phone call to Judge Clarke's clerk, revise response to Kenneth's Motion to get paid, research on waiver and create draft.	2.50 225.00/hr	562.50
JP	Type up changes to Response to Verhaag's Motion to Disburse.	0.30 65.00/hr	19.50
12/8/2017 ST	Type email to Asta Mergaryan confirming avail-ability for hearing on 1/8/18	0.10 65.00/hr	6.50
12/10/2017 REK	Draft response to Verhaag motion including review of trust and declarations.	3.50 225.00/hr	787.50
12/11/2017 JP	Type up draft of Response to Motion to Replace Gordon Finch.	0.80 65.00/hr	52.00

12/12/2017 REK	Research fiduciary relationship, injury requirement, add to response to Gerald's Motion, read all Johnson's exhibits, get additional cases on tenants in common.	6.60 225.00/hr	1,350.00
12/15/2017 REK	Redraft Motion in Opposition, research law on waiver.	1.00 225.00/hr	225.00
12/18/2017 REK	Redo objection to distribution, research waiver, review declaration of Johnson, meet with Gordon and Maria to prepare Gordon's declaration.	7.00 225.00/hr	1,575.00
JP	Type up additions and changes to Response to Disbursement.	0.60 65.00/hr	39.00
12/19/2017 REK	Review pleadings, draft Gordon declaration, research income ownership of Madeline.	4.00 225.00/hr	900.00
JP	Type up changes to Gordon's Declaration.	1.50 65.00/hr	97.50

12/20/2017 REK	Review and add to Gordon's declaration, draft fax, get sent for review.	3.00 225.00/hr	675.00
JP	Type changes to Finch Declaration, fax to Bob for review, type fax to Gordon regarding changes to Declaration, send fax to Gordon.	1.00 65.00/hr	65.00
12/22/2017 REK	Phone call Gordon, review Declaration.	0.25 225.00/hr	56.25
12/23/2017 REK	Redo Kenneth Response, Gordon Declaration, response to Gerald's Request to Replace, etc.	4.00 225.00/hr	900.00
ST	Type up changes, proof read and check cites on the fallowing three documents Kenneth's Response, Finch Declaration and Gerald's Response.	4,00 65.00/hr	260.00

12/27/2017 REK	Redraft Response to accounting, etc, add cases, call Gordon, draft Motion on striking offer and research of eases.	5.00 225.00/hr	1,125.00
JP	Type up changes to Response to Verhaag Motion to Replace, Audit and Disburse funds, then type up second set of changes; type changes Kenneth's Motion; type draft of CR 12(8) Motion.	2.20 65.00/hr	143.00
12/28/2017 REK	Revise Response to request for accounting, add to Motion to Strike, check exhibits, get Declaration signed.	2.00 225.00/hr	450.00
12/28/2017 ST	Type up changes to Request for Accounting; type changes to Motion to Strike; type changes to Declaration of Pinch; final Response to Kenneth, get attachments; type up draft of Notice of hearing.	2.40 65.00/hr	156.00

12/29/2017 REK	Redo the Response to Accounting and Motion to Strike, proof, get filed, hand deliver to Nolte.	2.00 225.00/hr	450.00
ST	Final all five documents, get attachments, copy, deliver to opposing counsel.	2.10 65.00/hr	136.50
For professional services rendered		63.70	$11,660.50
Additional Charges:			
12/31/2017	Photo copy charges		97.65
	Total postage for the month		7.20
	Total Fax Charges for the month		56.00
	Research on Westlaw		273.53
	Total additional charges		$434.38
	Total amount of this bill		$12,094.88
	Previous balance		$3,402.56
	Accounts receivable transactions		
12/1/2017	Payment - thank you Check No. 468		($3.402.56)
	Total payments and adjustments		($3,402.56)
	Balance due		$12,094.88

1/1/2018	REK	Research on grantor trust, conduit rules and joint accounts	1.50 225.00/hr	337.50
1/2/2018	REK	Research on timeliness of Kenneth's intervention.	1.5 225.00/hr	337.50
1/3/2018	REK	Research and draft response to Kenneth Verhaag. Draft brief respond to Gerald.	4.50 225.00/hr	1,012.50
1/3/2018	JP	Type draft brief to Kenneth Verhaag's Response of 12/29/17.	3.00 65.00/hr	52.00
1/4/2018	REK	Revise and review response to Gerald Verhaag and Kenneth Verhaag. Research cases on motion In Amine and procedure.	4.00 225.00/hr	900.00
		Phone call Gordon.		
1/6/2018	REK	Research IRS law on grantor trusts, add to opinion letter.	1.5 225.00/hr	337.50
1/7/2018	REK	Review all Pleadings of Gerald. Draft notes for oral argument on 1/8/18.	3.00 225.00/hr	675.00
	REK	Work on opinion letter. Review AIA grantor rules, copy. Review tax law	1.00 225.00/hr	225.00
1/8/2018	REK	Preparation of proposed order in case.	4.50	1,012.50

		Prepare for argument on motions. Argue motions before Judge Clarke. Meet with Gordon after court.	225.00/hr	
	JP	Rough draft Verhaag's motion and order on Finch's Motion in Limine. Draft Finch oral argument. Changes and additions to ownership statement.	2.50 65.00/hr	162.50
1/9/2015	REK	Review issue on income of Madeline. Phone call with Gordon. Final letters and send to Gordon.	3.00 225.00/hr	675.00
	JP	Make changes/ additions to opinion letter, fax to Bob. Edit and final opinion letter. Type Email to Gordon. Scan RQWs and opinion letter. Prepare bill. Email all to Gordon.	1.5 65.00/hr	97.50
		For professional services rendered in January	29.3	5,824.50
		Previous balance		12,094.88
		Total amount due		17,919.38

The claim of advice of counsel either directly or through the trust document Itself does not excuse Mr. Finch. This is a civil contempt proceeding for violation of a court order, nota question of a challenge to acts on behalf of the Trust,

As to the first three checks listed above, the Court finds Mr. Finch in civil contempt for writing checks from the Trust without authority and in violation of the Court's order. The contempt has been purged by the monies being placed with the successor Trustee. The sanction will be fees awarded to Gerald Verhaag in conjunction with the motion of December 7, 2018. That sum will be determined by the Court upon submissions by the parties. Those fees shall Include any amounts incurred by the Petitioners in their work to have the monies returned to the trust up through December 21, 2018.

As to the fees paid under the fourth check above, the Court finds the issuance of that check does violate the terms of the Court's order of January 10, 2018. The Court finds the order was violated by both Mr. Finch and Mr. Kovacevich in that both knew no authority existed for Mr. Finch to pay attorney fees after January 8, 2018.

No reasonable person could believe that such an expense would be categorized as a maintenance expense for the commercial property in question, This was intentional, not a mistake or accident or inadvertence. A Trust check was written and accepted, and are both intentional acts and without authority under the Court's order.

Mr. Finch claims advice of counsel. As noted above, this is not a defense to a civil contempt action.

Mr. Kovacevich claims he is not a party and not subject to a contempt proceeding. Mr. Kovacevich is a resident of Washington; an attorney licensed to practice In Washington; representing Mr, Gordon Finch from the Inception of this action until late 2018; was present when the Court gave its ruling of January 8[6] and was mailed a copy of the January 10[t]h order; he prepared and submitted a billing after January 10th to the prior Trustee for services incurred after the 10t[h]; he accepted payment for those services; and he declined to return the funds after being requested to do so by the Trustee.

This Court denies Mr. Kovacevich's Motions to Dismiss and his asserted defenses, Apparently Mr. Kovacevich believes, though he Is an Officer of the Court, he can participate in circumventing an order of the court and can assume no liability. This Court disagrees with that position.

The Court directs Mr. Kovacevich to return the sum of $11,211.80 to the successor Trustee. This shall be done by close of business on April 5, 2019. If not paid by then, Mr. Kovacevich shall be subject to a civil penalty of $250 per day until paid, In addition to purging contempt with the return of fees to the successor Trustee, Mr. Kovacevich shall be responsible for fees incurred as it relates to this motion. Because he could have resolved this shortly after the motion was filed, he alone shall be responsible for fees incurred by Petitioners after December 21, 2018.

APPENDIX H

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION III

No. 369404

Spokane County Cause No. 16-4-01301-7

In the Matter of:
MADELINE M. THIEDE TRUST,
GERALD VERHAAG, a Beneficiary
of Madeline M. Thiede Trust

Respondent,

v.

GORDON FINCH, a Beneficiary
and Trustee of Madeline M. Thiede Trust

Respondent,

ROBERT E. KOVACEVICH,

Appellant.

OPENING BRIEF OF ROBERT E. KOVACEVICH

AARON L. LOWE
Aaron L. Lowe and Associates P.S.
1408 W. Broadway
Spokane, WA 99201
(509) 323-9000
Aaronllowe@yahoo.com
Attorney for Robert E. Kovacevich

TABLE OF AUTHORITIES

Appendices

Appendix A

Madeline M. Thiede 2009 Revocable Trust (Dkt. 60 - Response to Replace Motion, Appendix A)

Appendix B

RCW 7.21.030 (1) - Remedial Sanctions - Payment for losses.

RCW 11.04.250 - When real estate vests - Rights of heirs.

RCW 11.97.010 - Power of trustor - Trust provisions control.

RCW 11.97.020 - Trust term interpretation and property disposition – Rules of construction.

RCW 11.104A.030 (a); (c) (1) - Judicial control of discretionary powers.

TABLE OF CONTENTS

I. INTRODUCTION

Appellant, Robert E. Kovacevich, until he had to withdraw, was attorney for Gordon Finch, Respondent. This appeal seeks reversal of two contempt motions entered against him on motions by Gerald and Kenneth Verhaag, 24% heirs and beneficiaries of Madeline Thiede's living trust who died April 9, 2014. The Trust is of record (12/29/17 Response to Replace Motion, Dkt. 60, Appendix A) and is attached as Appendix A. It is a revocable living trust. Madeline Thiede was Gordon Finch's mother. The contempts originated from Finch's payment to Kovacevich for his legal fees. In the first order, Finch and Kovacevich were held in joint contempt. All the parties in the original case, including Gordon Finch, settled the case on June 12, 2019 by a TEDRA Non-Judicial Binding Agreement. CP 237-252. It released all the parties and their attorneys from all claims. The second contempt order was finally entered after the TEDRA settlement. The contempt facts occurred during the case. The trial court docket has 324 entries. The litigation is briefly reviewed in the Statement of the Case. This review includes first impression statutes (attached as Appendices) not previously construed by published Washington court opinions, they are: RCW 11.97.010 (trust provisions control over conflicting trust statutes); RCW 11.97.020 (will construction rules on interpretation and distribution of property apply to trusts); RCW 11.104A.030(a) and (c)(1) (the business judgment rule is applied to living trusts); RCW 11.04.250 (whether immediate automatic devises of real estate on death applies to a living trust); RCW 7.21.030(1) (whether an out of court sanction can be raised by a motion of a trust beneficiary). Among other first impression issues in this case is whether Gordon Finch, held in joint contempt with Kovacevich, can

transmute himself into an assignee of the proceeds of a contempt order that also found him in contempt. First impression issues are reviewed de novo. *State v. Grocery Mrfr's Assn.*, 195 Wn.2d 442, 461 P.3d 334 (2020). "This is an issue of first impression that depends on statutory interpretation and constitutional law and is reviewed de novo." *Id.* at 456.

II. ASSIGNMENTS OF ERROR

A. The Court can, pursuant to RAP 7.3 (c) and CR 1.2, review the settlement in the TEDRA Agreement.

B. The Court had no jurisdiction to adjudicate after the TEDRA settlement. The case could not continue by assignment.

C. The TEDRA Agreement released Kovacevich. It released all attorneys from claims involved in the case. This included Kovacevich. An assignee is subject to all defenses the obligor had against the assignor.

D. The parties alone tried to continue the Court's subject matter jurisdiction by a provision in the TEDRA settlement. Jurisdiction cannot be obtained by agreement.

E. The contempt was based on an invalid court order that violated RCW 11.104A.030, a recent enactment that does not allow court discretion. The court erred by not applying the statute.

F. The contempt was not specific since the court's oral hearing did not specify non payment from the existing bank account. The burden of proof is on the person seeking contempt by proof that is clear and convincing.

G. The second contempt order against Kovacevich was invalid since it ordered him to repay funds to a successor trustee. Gordon Finch paid Kovacevich for services rendered to Finch while Finch was trustee. There was no violation.

H. The contempt order was based on an order that was invalid and lacked due process by suspending its prior petition order that contradicted the trustee removal. The Court erred by suspending a partition order that eliminated trusteeship, the issue that is conclusive on the outcome of the case.

I. When a case is settled, the underlying contempt proceeding is vacated. The Court erred by not following universal law.

J. The contempt motion was not allowed by RCW 7.21.030 as the movant, a beneficiary, was not the aggrieved party. The trustee could be the only aggrieved party.

K. The contempt holdings were not the least intrusive remedy. *Spallone v. U.S.*, 493 U.S. 265, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990) holds that if one party to the action, here Gordon Finch, could have cured the contempt by repayment. This would be the least intrusive. RCW 11.104A.030(c)(1) is also the least intrusive as the court could have adjusted distributions to the Verhaags. It could also have been remedied by the Trustee's forensic accountant. The Court could have easily applied a least intrusive method by requiring Finch alone to repay the business account.

L. The trial court erred by sanctioning Kovacevich jointly with his then client, Gordon Finch. Washington case law, *State ex rel. Nicomen*

Boom Co., v. North Shore Boom and Driving, 55 Wn. 1, 107 P. 196 (1910) is binding on the appellate court. It dismisses the attorney's contempt.

M. The Court erred by not following the Washington case of *Ex rel. Carlson v. Superior Court for Pierce County*, 47 Wn.2d 429, 267 P.2d 1012 (1955).

III. STATEMENT OF THE CASE

This case was commenced on September 8, 2016 (CP 328-346) by Gerald Verhaag, a 24% heir of real estate devised by Gordon Finch's deceased mother, Madeline M. Thiede. She formed the 2009 Revocable Trust in which she was the lifetime trustor and only beneficiary. It is a will substitute. On her death the Trust was to be distributed. See Appendix A, page 1, 2. The Respondent in the case was Gordon Finch, a 26% owner and manager of a small eight unit strip mall owned by Madeline Thiede at her death. Gordon Finch took over management of the real estate properties. Madeline Thiede died on April 9, 2014. Finch engaged Robert E. Kovacevich in June of 2015 to handle a dispute over the property. The Verhaag's petition sought removal of Finch and sale of the property. CP 328-346. Finch counterclaimed for partition and sale of Gerald Verhaag's interest. CP 347-370. The Partition petition filed June 15, 2017 (CP 371-377) alleged that the real property was held as undivided interest. The Court granted the motion for Partition and Sale on September 27, 2017. CP 396-399. The order, at page 2, CP 397, references the Revocable Trust at paragraph IV (1)(c) stating that it "provides that on her death 26% of each of the assets of the Trust would be distributed to the heirs, her two children of a prior marriage. 24% of each would be distributed to Kenneth Verhaag and Gerald Verhaag.

At page 4 (CP 399) the Court cited RCW 7.52.010 stating: "The facts indicate that sufficient issues of partition exist to order referees to be appointed and report back to this court." Five motions, including a motion to replace Gordon Finch as trustee were set for hearing. The Court tried to hear all these motions on January 8, 2018 but postponed some of them, including a Motion in Limine. RP 3. The motion in limine by Finch, alleged that the parties were tenants in common. RP 28, 47. Kenneth Verhaag, son of Gerald Verhaag, who never filed a motion to intervene was allowed to be a party. Gerald Verhaag moved for orders of contempt against Finch and his then attorney, Robert E. Kovacevich on December 7, 2018. CP 3-17. Due to the conflict the motion by Verhaag created, Kovacevich withdrew, and attorney Scott Smith undertook representation of Finch. Aaron Lowe then undertook representation of Kovacevich. CP 29-30. All the heirs settled on June 12, 2019 in a Non Judicial Binding TEDRA settlement. CP 237-252. It was approved in an ex parte order by the Court, entered June 13, 2019. CP 253-4. The second contempt against Kovacevich was without notice one day after the case was settled. CP 255-6. The motions for contempt were granted and Kovacevich was ordered by the court to pay $11,211.80 and $17,919.38 back in attorney's fees he earned while representing Gordon Finch. CP 197-8. In addition, Kovacevich was ordered on February 5, 2020 (CP 1166-1169) to pay Gerald Verhaag's attorney's fees for bringing the contempt motion and also Kenneth Verhaag's attorney's fees. All the contempt rulings were made by the court by motions without an evidentiary hearing on the material disputed facts. (Entire Record).

The Partition Order in this case was never changed by the trial court. The trial court never entered any

further partition order. Kovacevich filed three discretionary notices of appeal. CP 257-327, 1072-1109.

IV. ARGUMENT

A. RAP 1.2, 2.4(a), 2.5(a) (1) and (2) and 7.3 Allows the Court to Hear the Issue of the TEDRA Release of Kovacevich that was timely appealed. 5.2(a). If there is no jurisdiction all the orders from June 12, 2019 must be vacated as the TEDRA Agreement fully settled the case. This issue is reviewed de novo with the burden on the party asserting jurisdiction

"We review justiciability de novo" *Eyman v. Ferguson*, 7 Wn.App.2d 312, 319, 433 P.3d 863 (2019). Settlement agreements are reviewed de novo. *McGuire v. Bates,* 169 Wn.2d 185, 188-189, 234 P.3d 205 (2010). All the issues in this case are remedial contempt issues. *In re Silva*, 166 Wn.2d 133, 206 P.3d 1240 (2009) states: "A court's authority to impose sanctions for contempt is a question of law which we review de novo." *Id*. at 140. *In re Rapid Settlements, LTD's*, 189 Wn.App. 584, 359 P.3d 823 (2015) states whether the contemptor's due process rights are violated "[are] question[s] of law which [are] reviewed de novo". *Id*. at 614. This case has not yet been tried. No evidentiary hearings were held. All orders and judgments were entered without evidentiary hearings. Conflicting declarations on material matters were ignored. See response affidavit of Kovacevich CP 1026-1036: "There is a dispute between April 10, 2019." CP 1027. A copy of the billing was attached. See also Objection CP 157. "Kovacevich's declaration filed herein dated January 24, 2019 disputes Gordon Finch's affidavit." *Matter of Marital Trust of Graham*, 11 Wn.App.2d 608, 455 P.3d 187 (2019) holds:

> An appellate court generally reviews de novo decisions based on declarations, affidavits and written documents. So we review the trial court's decision to deny Frederik's request for a declaration of rights de novo. When we conduct a de novo review, we substitute our judgment for that of the trial court. *Id*. at 611-612.

In re Estate of Bowers, 132 Wn.App. 334, 339, 131 P.3d 916 (2006) holds "Decisions based on declarations, affidavits and written documents are reviewed de novo."

The July 9, 2019 Notice of Appeal (CP 257-327) was not reviewed in the Commissioner's Ruling. The notice references RAP 7.2(e) (CP 258). The only notice questioned was the January 13, 2020 Notice of Appeal. The July 9, 2019 Notice of Appeal timely appealed the "Non Judicial Binding Agreement dated June 12, 2019. See CP 259. RAP 5.2 states the time, "30 days after the entry of the decision of the trial court". The recitation of release and void assignment in the Non Judicial Binding Agreement could terminate the case. "One or both may change or modify this appeal." CP 258. The Agreement was attached to the July 9, 2019 Notice. CP 259. In *Loveday v. Parker,* 50 Wash. 260, 97 P.62 (1908) one appeal was too late. The Court held: "But the fact that the order of July 30th cannot be reviewed does not operate to dismiss the appeal as to other orders that may be reviewed." *Id*. at 263. CR 2.3(1) applies. Further proceedings are useless. CR 2.5(a)(1) allows this Court to consider lack of jurisdiction even if not claimed at trial. CR 1.2 states: "These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." The Non-Judicial Binding Agreement (CP

237-252), filed June 13, 2019 at page 7 (CP 244) releases Kovacevich. The terms of the release are clear and unambiguous. The word "binding" is not superfluous. RCW 11.96A.220 is headed in bold: "**Binding Agreement**". The statute states "shall be binding and conclusive on all persons interested in the estate or trust". The Agreement states:

> K. **Release.** Gerald, Kenneth, James and Gordon individually, and their successors, estates, legal representatives, agents, assigns and all other persons or entities acting for, by or through them, for and in consideration of this Agreement, together with the covenants set forth herein, do hereby fully release, acquit, and forever discharge each other, their successors, estates, legal representatives, agents, assigns and all other persons or entities acting for, by or through any of them from any and all claims, losses, actions, causes of action, judgments, damages, liabilities and demands of every kind, name or nature, known or unknown, in any way having to with the Madeline M. Thiede Trust and the litigation pending under Spokane County, Washington cause number 16-4-01301-7 in accordance with the terms of this Agreement. (Underlining added).

The contempt order and attorney fee award was reversed in *Johnston v. Beneficial Management Corp. of America*, 96 Wn.2d 708, 636 P.2d 1201 (1982). "Settlement was reached in February 1978." The case was settled. *Id*. at 714. "It is evident from the specific abuses listed in the order and Manual that the concern for adopting the protective order is based upon problems that may arise prior to the final resolution of the

suit." *Ibid* at 714. "The settlement agreement superceded the original protective order." *Id*. at 715. *Boyce v. West*, 71 Wn.App. 657, 862 P.2d 592 (1993) released an employee where the release clearly released the employer. "A release is a contract in which one party agrees to abandon or release a claim, obligation or cause of action against another party." *Id*. at 662. *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 97 P.3d 11 (2004) states: "Generally, we are loath to vacate properly executed releases because Washington favors finality in private settlements." *Id*. at 382. *Palmer v. Davis*, 808 P.2d 128 (Utah 1991) released both co-employees even though no payment was made to support the person released. "[a] court will not make a better contract for the parties than they have made themselves." *Id*. at 132. The TEDRA Agreement was signed by all original parties including Finch and his attorney. CP 237-252. All parties, including Finch were aware of Kovacevich's representation. See *Pellham v. Let's Go Tubing*, 199 Wn.App. 399, 418, 398 P.3d 1205 (2017). "We note that the release's recitation of dangers warned Pellham." Kovacevich never knew of the Agreement until it was filed and certified by an ex parte order on June 13, 2019. CP 253-4. The Verhaag's and their attorneys released Finch from the contempt against him and all other relief sought in the case. Finch also released his former counsel Kovacevich. The term "legal representatives and assigns" applies to Kovacevich. See RCW 11.96A.220 and *Richard C. Sweezey Trust*, 194 Wn.App. 1002 (Unpublished 2016). "the Estate argues that the TEDRA Agreement served as an assignment by June to Rick . . . she could not assign what she had released." *Id*. at *7. The case states that the TEDRA Agreement, like the one in this case, "involved straight forward contract interpretation." *Id* *11. It interpreted

the assignment contained in the TEDRA settlement applying general principles of contract law. *Id*. at *5. *Federal Finance v. Gerald*, 90 Wn.App. 169, 949 P.2d 442 (1998) applies. "Our courts have consistently held that an assignee's rights are coextensive with that of the assignor at the time of assignment." *Id*. at 182. It also allows "a direct claim". *Ibid* at 182. The Verhaags had no rights, they bargained them away by the settlement. "The assignee takes the assignment subject to the defenses that could have been asserted against the assignor." *Id*. at 183. Further, waiver and estoppel apply. See *Wilson v. Westinghouse,* 85 Wn.2d 78, 81, 530 P.2d 298 (1975). Here the court ex parte approved the TEDRA Agreement ruling RCW 11.96A.240 requires the court to "determine whether or not the interested parties have been adequately represented and protected." Kovacevich is an interested party. See RCW 11.96A.030(5)(i). "Any other person who has an interest in the subject of the particular proceeding." By virtue of a conspiracy with his adversaries, Finch obtained an order ex parte to get a judgment against Kovacevich for fees he owed Kovacevich. The ex parte order (CP 253-254) violated due process. Kovacevich should have been able to contest rights he had against the Verhaags and also to allege that Finch still owed him legal fees that Kovacevich was ordered to pay back.

B. The TEDRA Release Deprived the Court of Subject Matter Jurisdiction.

Lack of subject matter jurisdiction can be raised at any stage in the litigation. *In re Marriage of McDermott*, 175 Wn.App. 467, 307 P.3d 717 (2013) dismissed a suit for lack of subject matter jurisdiction. "We review de novo questions of a court's subject matter jurisdiction." *Id*. at 479. The burden of proving

subject matter jurisdiction is on the party asserting jurisdiction. See *Eugster v. Washington State Bar Ass'n*, 198 Wn.App. 758, 774, 397 P.3d 131 (2017). The TEDRA Agreement ended all jurisdiction of this case.

Castellon v. Rodriguez, 4 Wn.App.2d 8, 418 P.3d 804 (2018) sets the standard of review. "A judgment is void if it is entered without personal jurisdiction or subject matter jurisdiction." "We review de novo whether a judgment is void." *Id*. at 14. Jurisdiction to hear a case cannot be conferred by agreement of the parties. Among the earliest of cases, *Stark v. Jenkins*, 1 Wash.Terr. 421 (1874), 1874 WL 3284 holds that "no consent of the parties nor willingness of judges can recall a controversy." *Id*. at 421.

B.F. Hibbard & Co., v. Morton, 184 Wn. 569, 52 P.2d 313 (1935) rejected appellate jurisdiction by stipulation. It states: "The parties have attempted to confer jurisdiction on this court by stipulation. This cannot be done." *Id*. at 570. *Jevne v. Pass LLC*, 3 Wn.App.2d 561, 416 P.3d 1257 (2018) upheld review presented for the first time on appeal citing RAP 2.5(a)(1). The opinion states "an appellate court can even raise the issue sue sponte." *Id*. at 565. "This is reviewed de novo." *Id*. at 264. Where a court lacks subject matter jurisdiction, its order is void. *Sullivan v. Purvis*, 90 Wn.App. 456, 966 P.2d 912 (1998) states "Jurisdiction cannot, therefore, be conferred by agreement or stipulation of the parties. . . Any judgment entered without jurisdiction is void." *Id*. at 460. Here, all interested parties were released by settlement. The court no longer had a viable proceeding on which to adjudicate.

C. Kenneth Verhaag attempted to Join the Case by Mere Appearance of His Attorney. His Father, Gerald Verhaag, the Petitioner, Also a 24% Beneficiary, Adequately Represented His Son. The Court's Award to Kenneth Verhaag Should be Denied As He Never Qualified as a Party. His Duplicate Request for Contempt Doubled the Attorney's Fee Award.

Kenneth Verhaag was not an original petitioner. His attorneys did not file a motion to intervene and a motion to strike was filed. On January 8, 2018 Judge Clarke denied the Motion to Strike stating: "The Respondent suffers no prejudice as the discovery and trial are of the same issues as if Gerald Verhaag was asserting claims." RP 15. The court found that Kenneth Verhaag was also allowed attorney's fees against Kovacevich. CP 1160- 1162. The reason the court gave for allowing Kenneth Verhaag to be a party is the reason that the motion should have been granted. "[T]he claims that were being brought by one party were essentially the same as everyone else's claim. CP 14. CR 24 contains the exception, "unless the applicant's interest is adequately represented by existing parties."

The court ex parte awarded both Gerald and Kenneth Verhaag attorney's fees for jointly filing the Motion for Contempt. CP 199-206. At most, there could only be one party seeking attorney's fees for return of one sum, i.e. $17,919.38. Allowing two parties to be "aggrieved" for failure to pay the same sum prejudiced Kovacevich and is a violation of due process and fundamental fairness. Gerald Verhaag's motion adequately represented Kenneth Verhaag. Gerald Verhaag, a beneficiary did not qualify to bring

a contempt motion. It also applies to Kenneth. Both are beneficiaries. The order multiplied by two, an order that at most should be only one award. The intervention and duplicate award is reversible error, even if the award to Gerald Verhaag survives the TEDRA Agreement.

D. *State ex rel Kerl v. Hofer*, 4 Wn.App. 559, 482 P.2d 806 (1971) also requires dismissal. When the suit is settled the contempt is vacated.

The moving party has the burden of proving contempt by clear and "convincing evidence that the contemnors violated a specific and definite order of the court." *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999). *Kerl* clearly holds that settlement of the main case requires that the contempt be terminated. "The present proceeding necessarily ended with the settlement of the main cause of which it is a part" "The criminal sentences imposed in the civil case, therefore, should be set aside." *Id*. at 566. 17 CJS Contempt 68 at 565 is cited. "If for any reason complainant becomes disentitled to the further benefit of such order, the civil contempt proceeding must be terminated." The case, at page 4 Wn.App. 565 follows: "a leading case in point." *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 451- 452, 31 S.Ct. 492, 55 L.Ed. 797 (1911). *Gompers* clearly holds: "when the main cause was terminated by a settlement of all differences by the parties, the complainant did not require, and was not entitled to any compensation or relief of any other character. The present proceeding necessarily ended with the settlement of the main cause of which it is a part." *Id*. at 453-4. *Mead School District No. 354 v. Mead Ed. Ass'n*, 85 Wn.2d 278, 534 P.2d 561 (1975) recognizes the *Kerl* and *Gompers*

cases. "[T]he case would fall within the rationale of *Kerl* and *Gomper's Buck's Stove and Range Co.*, 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1911)." *Id*. at 286. *Shillitani v. U.S.,* 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1966) applies. "Once the grand jury ceases to function, the rationale of civil contempt vanishes, and the contemptor has to be released." *Id*. At 372. See also *In re Grand Jury Proceedings*, 574 F.2d 445, 447 (8th Cir. 1978). "If the complaining party is no longer entitled to the benefit of the contempt order, the contempt proceedings should be terminated." *Yates v. U.S.*, 227 F.2d 844, (9th Cir. 1955), dismissed the contempt when the main case ended. "Once so concluded a trial is ended forever." *Id*. At 847. Here all the issues in the case was settled by the TEDRA Agreement, therefore the contempt has to be terminated.

E. The Court Order that Kovacevich Allegedly Violated is Void.

A void judgment is reviewed de novo. *Castellon v. Rodriguez*, 4 Wn.App.2d 8, 14, 448 P.3d 804 (2018). The extent of a trial court's discretion is reviewed de novo. *State v. D.L.W.*, __Wn.App.2d__, 472 P.3d 356, 359 (9/14/2020). Error of law is reviewed de novo. *State v. Boisselle*, 194 Wn.2d 1, 14, 448 P.3d 19 (2011). Among other material errors, the trial court committed reversible error in replacing Gordon Finch as Trustee by failing to apply the Business Judgment Rule, RCW 11.104A.030 and *in re Ehlers*, 80 Wn.App. 751, 911 P.2d 1017 (1996). The invalidity of the order on removal also vacates the contempt citations that were based on the order. At oral argument Kyle Nolte stated: "we have no idea why Trustee Finch can't pay the expenses for Cedar Tree from the rental income he receives from Cedar Tree." RP 18. The only money in

the account was from operating the Cedar Tree Plaza and sale of Madeline Thiede's residence. If the business bank account was emptied the rental real estate business could not operate. RCW 11.104A.120(b) allows: "A trustee who accounts separately from a business may determine the extent to which net cash receipts must be retained for working capital." The same statute at (c) includes activities to include "(4) management of rental properties." The statute, RCW 11.104A.120(e)(4) allows a real estate rental business and retention of working capital. RCW 11.104A.120(b) and RCW 11.104A.140. This is the main reason the order was void for impossibility of performance. Finch could not manage the property without the bank account. He was entitled to compensation for management. He never sought trustee fees as rarely is the only asset a rental business. Finch was allowed to continue to manage. He ahd to have the account to manage. It was an account of an ongoing business that James Spurgetis was not appointed to operate. The contempt motion never mentioned that Jim Spurgetis was not expected to manage the property and in fact did not take over the management and only bank account until long after March 12, 2018. "We don't want him to run the property." RP 55. Finch was not ordered to relinquish the account of the ongoing business. The reference is to successor trustee, Spurgetis. The oral argument transcript proves that the trial court left it up to the substitute trustee. "Maybe that is Mr. Finch." RP 61. There are no written findings on the oral or written order. Aaron Lowe stated: "On November 1, 2019 counsel for Kovacevich argued that the hearings should have been held." RP 99. An oral decision "has no final or binding effect, unless formally incorporated into the findings." *Ferree v. Doric Co.,* 62 Wn.2d 561, 567, 363 P.2d 900 (1963).

Greene v. Pinetree/Westbrooke Apartments LLC, 480 S.W.3d 434 (Mo. 2016) states the rule. "The court order serving as a basis for contempt must be so specific and definite as to leave no reasonable basis for doubt as to its meaning." *Id*. at 437-8. (Internal quotation marks omitted) There is no definite order prohibiting Finch from paying himself and his attorney or other existing debts from the rent money. The order of contempt in *Greene* was reversed as the oral hearing did not specifically prohibit the contact. "Without a court order specifically prohibiting Greene from contacting the title company, he cannot be held in civil contempt." *Id*. at 439. "Due process had not been met." *Ibid* at 439. *Zweifel v. Zweifel* 595 S.W.3d 526 (Ct. App. Mo. 2020) reversed a contempt order as a solicitation provision was "too vague and indefinite." The court held: "It must be so definite and specific as to leave no reasonable basis for doubt of its meaning." *Id*. at 534

The oral hearing involved five motions including an argument that Finch needed to be paid for his extra services and that Finch should be paid from the management account. Finch's good faith was not questioned. "I'm not suggesting Finch has put it in his back pocket." RP 4, 58. Finch paid Kovacevich the $17, 919.38 on January 8, 2020 before any written order was filed. CP 167. Formal findings of fact are required under CR 52. See also *DGHI Enterprises v. Pacific*, 137 Wn.2d 933, 946, 977 P.2d 1231 (1999). "Formal findings of fact were still required under CR 52(a)."

F. The Motion was Not Brought by the Aggrieved Party. Regardless of the TEDRA Settlement, it was still Non Assignable.

None of the judgments can apply if the parties could not bring the motion. RCW 7.21.030(1) can only be filed by the party aggrieved if the facts are not from in

court action. It states "or on the motion of the party aggrieved." In *Freedom Foundation v. Bethel School District*, 14 Wn.App.2d 75, 469 P.3d 364 (2020) the court reviewed a statute, RCW 34.05.530. The statute required that to be aggrieved they have to sustain a "direct economic effect." *Id*. at 89. *Naier v. Beckenstein*, 27 A.3d 104 (Conn. App 2011) found no aggrievement by a trust beneficiary for third party wrongful interference with the trust. The case states:

> The fundamental test for determining [classical] aggrievement encompasses a well settled twofold determination: first the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest in the subject matter of the decision, as distinguished from a general interest, such as a concern of all the members of a community as a whole. Second, the party claiming aggrievement must successfully establish that the specific personal and legal interest has been specifically and injuriously affected by the decision. *Id*. at 109.

G. The Contempt Motion Could Not Be Assigned.

Heian v. Fischer, 189 Wn. 59, 63 P.2d 516 (1937) prohibited assignment for a fraudulent misrepresentation stating: "The law is that an action for damages for fraud can only be brought by the one to whom the fraudulent representations were made." *Id*. at 63. *Federal Financial v. Gerald*, 90 Wn.App. 169, 949 P.2d 412 (1998) states: "Washington case law recognizes the existence or rights that are personal to the assignor and incapable of assignment. But no

Washington case explicitly defines the nature of a right that is personal and hence, not assignable." *Id*. at 178. *In re XTO Energy Inc.*, 471 S.W.3d 126 (C.A. Texas 2015) denied a mandamus action by a beneficiary against a third party. "To allow such an action would render the trustee authority to manage litigation on behalf of the trust illusory." *Id.* at 131. *Pillsbury v. Karmgard*, 22 Cal.App.4th 743 (Cal.App. 1994) denied a malicious prosecution action against a third party. The beneficiaries failure to allege that the trustee failed to file the action was a fatal defect. "Trustee alone is ordinarily the proper party to bring action against a third party." *Id*. at 755. Here, Gordon Finch, who settled, seeks an assignment from Gerald Verhaag, his adversary in the case who asserted aggrievement as a beneficiary when the trustee should have brought the motion. None of the subsequent orders would have happened if the order of the court on May 3, 2019 (CP 197-8) is invalid. The orders were not within subject matter jurisdiction if the release of Finch and the Verhaags of June 13, 2019 (CP 243) applies. The court is bound by the statute.

H. The Contempt Motions were not Brought by the Substitute Trustee: It was Brought by a 24% Beneficiary Without an Affidavit on Personal Knowledge to Obtain a 100% Repayment that in Fact was Ordered by the Court to be Paid to the Trustee. The Burden of Proof is on the Party Seeking the Contempt.

The Motion for Contempt (number one) against Finch and Kovacevich was brought under RCW 7.21.030(1) by the attorney for Gerald Verhaag, a 24% beneficiary. (CP 3-17) It alleged failure to comply with this Court's January 8, 2018 ruling alleging "illegally

removed from Trust accounts to Trustee Spurgetis". It was based on a declaration of Verhaag's attorney, Gregory Johnson. (CP 876-968) Johnson's Declaration did not contain any personal knowledge, it only listed pleadings filed in the case and third party documents "provided to declarant". It was titled "Second Contempt" as the first contempt was against Finch on discovery that did not result in contempt. The burden of proving contempt by preponderance of the evidence is upon the movant. *State v. Boren*, 44 Wn.2d 69, 265 P.2d 254 (1954). "As such the burden is on appellants." "This must be established by a preponderance of the evidence." *Id*. at 73.

The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definitive order by the court. *Federal Trade Commission v. Affordable Media LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). *Hardy v. Hardy*, 842 S.E.2d 148 (C.A. N.C. 2020), construing a similar North Carolina statute states "the burden of proof is on the aggrieved party". *Id*. at 152.

The transcript of the January 8, 2018 hearing (RP 1-62) in which the Court removed Finch never mentions whether or not Finch can pay or not pay his expenses. At RP 30-21 Kovacevich argued "the Trust allows Mr. Finch to pay his attorney on litigation . . . He is also probably entitled to fees. He negotiated and handled the lease money and so forth, so there would be expenses involved that he hasn't collected." There was no further comment by anyone including the Court about this statement.

In re Rapid Settlements, 189 Wn.App. 584, 601-2, 359 P.3d 823 (2015) states: "Where as in this case, the superior court bases its contempt finding on a court order, the order must be strictly construed in favor of

the contemnor and [t]he facts found must constitute a plain violation of the order." (Internal quotes omitted). *Joos v. Board of Supervisors of Charlston Township*, __ A.3d__, 2020 WL 4372312 (Penn. Commonwealth C. July 31, 2020) upheld a denial of contempt and states: "the burden is generally on the complaining party to prove non compliance with the court order." *Id*. at *8. The court never held an evidentiary hearing or trial to reconcile the facts that were in dispute. See CP 1026-1036. Kovacevich could not sign on the Finch accounts. There is no dispute as to whether Kovacevich earned the fees or amount of the fees. Both payments were when Finch was trustee or manager of the only remaining asset, Cedar Tree Plaza. Finch had a reason to pay from the management account since he kept managing until several months later. It only cost him 26% not 100%.

I. Gerald Verhaag Was Not the Aggrieved Party.

Error of law is reviewed de novo. *State v. Boisselle*, 194 Wn.2d 1, 14, 448 P.3d 19 (2019). Verhaag was not the trustee, he was only a 24% heir. On April 10, 2019 Gordon Finch filed an affidavit attaching a check to Kovacevich that was dated January 9, 2018 (CP 167). It was for time rendered before January 8, 2018, before Finch was removed as acting trustee. This order was not referenced on the second contempt ordered June 13, 2019. CP 255-6. It is undeniable that the trust funds held by Gordon Finch or James Spurgetis could be depleted for attorney fee payments. See Trust, Appendix A, 5.2(d), page 10; 5.2(a), pages 7, 8. The Verhaags had no right to operate the trust or the real estate. They were not aggrieved and should not have brought the motion or received attorney's fees from Kovacevich. When the contempt is not in court,

remedial contempt may be brought "on the motion of a person aggrieved by a contempt." RCW 7.21.030(1) only allows the court or 'a person aggrieved to file a contempt motion. The motion of Gerald Verhaag of December 7, 2018 (CP 3) admits that Verhaag was not aggrieved as it requests funds to be returned to Trustee Spurgetis. It asks that funds "were illegally removed from the trust account" and to be returned to Spurgetis the Trustee. CP 15. *Allard v. Pacific National Bank*, 99 Wn.2d 394, 663 P.2d 104 (1983) states: "Since the trustee is under no duty to pay money besides the trust income to the beneficiaries they have no action at law for breach of the trust agreement." *Id*. at 400. The Thiede Trust beneficiaries had no right to income or principal since the properties were to be immediately distributed. Therefore, they were not aggrieved. The Order of May 3, 2019, (CP 205) orders that "Kovacevich shall return the sum of 11,211.80 to successor trustee, Spurgetis. Kovacevich may file a claim for legal fees owed him by the trust for work appropriately incurred on behalf of the trust after January 8, 2019." The first payment to Kovacevich was when Finch was acting as Trustee. The Court's order infers that fees paid before January 8, 2019 do not have to be returned. It is undeniable that the funds held by Gordon Finch or James Spurgetis would be replenished. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) also dismissed a case as the statute requires a present interest in property and the plaintiffs did not qualify. "It is the responsibility of the complanent clearly to allege facts demonstrating that he is a proper party to involve judicial resolution of the dispute and the court's remedial powers." *Id*. at 518. "Generalized grievance" shared by others "does not warrant exercise of jurisdiction." *Id*. at 499. Here, the repayment was to

be paid 100% to James Spurgetis, the trustee who was to get the repayment. The $11,211.80 could not have been paid to the Verhaags as they could not be paid 100% as they only had a 24% each interest. Spurgetis' appointment by the trial court violated the living trust as James Finch was to be appointed if Gordon Finch was to be replaced. (Trust, Appendix A) Page 2, 2.5. See also RCW 11.97.010, 020, RCW 11.12. 230 stating that Trust provisions control over conflicting statutes and will interpretation also applies to trusts; intent of the testator is to be given effect. See also *in re Estate of Campbell*, 87 Wn.App. 506, 510, 942 P.2d 1008 (1997). "The purpose and duty of the court in construing a will is to give effect to the testator's intent." Except RCW 11.12.230, these statutes have not been construed by case law. They are also first impression subject to de novo review. See *State v. Grocery Mfr's Ass'n*, 195 Wn.2d 442, 456, 461 P.3d 334 (2020).

J. RCW 11.104A.030 Mandates that the Court not use its Discretion. It was cited. The Court Ignored it.

Kovacevich, at oral argument cited RCW 11.104A.030 stating "the court shall not determine that a fiduciary abused its discretion merely because the court would have exercised the discretion in a different manner." RP 29. Kovacevich also argued *in re Estate of Ehlers*, 80 Wn.App. 751, 911 P.2d 1017 (1996)*:* "I submit to Your Honor that the *Ehlers* case applies And the Trust applies." RP 51. At the oral argument the Court stated: "I don't have a law clerk and I don't have endless amounts of time to research this." RP 60.

"Statutory Construction is a question of law we review de novo." *Det of T.S.*, 14 Wn.App.2d 36, 38, 469

P.3d 315 (2020). The trust law codifies the Business Judgment Rule at RCW 11.104A.030 and contains the exact language prohibiting the Court's decision in this case. The statute states in part: "A court shall not determine that a fiduciary abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion." These portions were argued to the Court who never made conclusions of law in granting the removal of trustee. "Under the 'business judgment rule, corporate management is immunized from liability in a corporate transaction where . . . there is a reasonable basis to indicate the transaction was made in good faith." *Id*. at 709. *Scott v. Trans-System Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003) citing *Nursing Home Bldg. CoCP., v. DeHart*, 13 Wn.App. 489, 535 P.2d 137 (1975) a case denying liability where expenses running a nursing home were made within the proper exercise of business judgment. At the motion hearing on this case the Court stated "I'm not suggesting that Mr. Finch has put it in his back pocket. . ." RP 58. "I'm going to set aside the dispute about whether Mr. Finch, Gordon Finch, that is, has gotten a benefit that's inappropriate or has benefitted from the trust." *In re Estate of Ehlers*, 80 Wn.App. 751, 911 P.2d 1017 (1996) considered failure to account, conflict of interest, bad will, did not establish any breach of fiduciary duties and denied removal of the trustee.

The Business Judgment Rule also applies to management of a business. See *Para-Medical Leasing v. Hangen*, 48 Wn.App. 389, 396, 739 P.2d 717 (1987) and *McCormick v. Dunn and Black*, 140 Wn.App. 873, 887, 167 P.3d 610 (2007). The Trust, Appendix A, allows the business to be retained. 5.2(a), p 7, 8 appoints James Finch to be successor trustee to Gordon Finch.

2.5 page 2 allows attorneys to be paid by a Trustee on any litigation. See 5.2(d) p. 10.

Royal Harbour Yacht Club Marina v. Maresma, 2020 WL 1281089 (D.C. Fla. 2020 *2), quoting from another case, states "The Business Judgment Rule is a policy of judicial restraint born of the recognition that directors are, in most cases, more qualified to make business decisions than are judges." Here, Gordon Finch had years of experience and was operating under terms of a Trust and a business judgment statute. The application by the court's discretion was in total contravention of the Trust's statutes and case law. It should be voided and the contempt dismissed. If the court order on which the contempt is based is invalid, the contempt is dismissed. In *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968), the court dismissed the contempt imposed on an attorney. The appellate court held the order was vacated as the trial court abused its discretion in issuing the underlying order. "An attorney is entitled to consideration of a claimed privilege." *Id*. at 16. The case followed *State ex rel Sowers v. Olwell*, 64 Wn.2d 828, 394 P.2d 681 (1964) dismissing an attorney contempt: "Because the subpoena duces tecum in this case is invalid, since it required the attorney to testify without the client's consent regarding matters arising out of the attorney client relationship, the order finding the appellant to be in contempt and punishing him therefore is hereby reversed with directions to dismiss this proceeding." *Id*. at 836. See *Mowrer v. Superior Court*, 3 Cal.App.3d 223 (C.A. Cal 1969) dismissing attorney's contempt where the order was void. The trial court, after imposing the contempt, never allowed Kovacevich to mitigate the contempt by explaining that he never instructed Gordon Finch to pay him, but in fact, Gordon Finch requested the bill. See CP 44.

"Gordon Finch was considerate to tell me to get my bill in so it would get paid."

State v. Dennington, 12 Wn.App.2d 845, 460 P.3d 643 (2020) reversed a sanction where the attorney was not allowed to speak in mitigation. The court cited RCW 7.21.050 on the contempt committed in the court's presence. *Id*. at 854-5. That statute at (2) includes "a remedial sanction set forth in RCW 7.21.030(2)", the remedial sanction subsection. Here the court ordered the second sanction against Kovacevich, without hearing mitigation, on June 13, 2019 after the case was settled and without hearing Kovacevich or his attorney. CP 255-6. The Court's order of May 3, 2019 (CP 205) states at page 7: "Mr. Kovacevich may file a claim for legal fees he believes are owed to him by the Trust for work appropriately incurred on behalf of the Trust after January 8, 2019." The inference is that work before January 8, 2019 is beyond dispute. The Trust, 5.2d page 10 (Appendix A) allows the trustee to pay attorney's fees "as trustees deem advisable . . . in connection with any uncertainty, controversy or litigation." The contempt entered against Kovacevich for the $17,919.38 was for failure to return fees he earned while he represented Finch. Finch, in reality, was acting trustee and also manager of the business, a capacity that was continuing at least through January 8, 2019. Finch filed an affidavit requesting that the court order that the fees he paid before January 8, 2019 also be repaid by Kovacevich. Kovacevich, on June 14, 2019 filed his affidavit attaching his billing, (CP 1026-36) clearly indicating that his services were incurred on or before January 8, 2019, except one that was incurred January 9, 2019 before the written order of the Court. An evidentiary and mitigation hearing should have been held. The $17,919.38 was earned by Kovacevich

and well within the trust provision, a document that controls over statutes. See RCW 11.97.010. All the pleadings allowing recovery and attorney's fees on the contempt against Kovacevich are contrary to the facts of the case and also the law of contempt as the payment was a proper charge and it did not occur within the court's presence. There can be no beneficiary aggrieved within RCW 7.21.030(1) as the payment was a just debt of the trust. *Ex Parte Irwin*, 6 S.W.2d 597 (Mo. 1928) applies. The attorneys were directed to return a diamond ring their client had given them for a fee. The attorneys were held in contempt when they did not comply. *Id*. at 600. The court held that no hearing was held to determine the facts. "Disobedience of a void mandate, judgment or decree . . . is not contempt." *Id*. at 27. *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968) also applies. The court order was void. *Templeton v. Hurtado,* 92 Wn.App. 847, 965 P.2d 1131 (1998) holds that the mitigation was before the contempt finding. The contemnor must be allowed to speak in mitigation after the findings of contempt. *Id*. at 855. *State v. Jordan*, 146 Wn.App. 395, 190 P.3d 516 (2008) holds that failure to give a contempt hearing is a due process violation. The case must be remanded on this issue alone.

K. The Court Committed Reversible Error by Postponing the Partition that Eliminated Trusteeship.

The order combed five motions to be heard on January 8, 2018 including a Motion to appoint referees on partition that concluded the property was held as a tenancy in common. The Court stated: "I'm going to suspend the partition action until I get a report back from Mr. Spurgetis. . . I may have gotten sideways with this partition." RP 61. The motion was set for

hearing at the same time. RP 5. The Motion in Limine, if granted would have prevented the trustee turnover. RP 32. Distributions of real estate on death create tenancies in common since they are undivided fractional interests. See *In re Ehlers*, 20 Wn.App. 751, 762, 911 P.2d 1017 (1996). The court postponed the motion in limine that was relevant to the motion to remove the trustee stating: "I haven't read it. So I'm going to put the motion in limine over to that date, is what I'm saying." RP 54. The motion was never adjudicated. Gerald Verhaag's counsel argued "it's all interspersed". RP 17. The court did not make findings. The record is inadequate to determine why the court heard a motion that was among inconsistent orders. The Court ordered a partition that eliminated the trusteeship months earlier. CP 396-399. Two seminal decisions in direct conflict were both in force. This issue alone violates due process and supports a remand. See *State v. Cullen*, 195 S.W.3d 696, 699 (Tex. Crim. Appeal 2006) remanded for unexplained ruling to obtain findings of fact and conclusions of law. It also prevented an appeal of the partition order, the issue was the most material issue in this case. All these contentions follow from the intent of the Trust and RCW 11.97.010, 020. The law and facts of the partition dictated a tenancy in common. No attorney's fees are allowed 'if in fact they are not, the theory of cotenancy is right, we're back to the American Rule." RP 47. The court did not decide what legal theory applied to the management of the property. Kyle W. Nolte, attorney for Kenneth Verhaag, admitted that his client, Kenneth "waived his right to question Trustee Finch's administration of the Trust because he signed an Affidavit in 2016. . . .that Affidavit does not deprive him of his right to receive information." RP 19. "The Verhaags contradict themselves, saying, I want you to

run this property." RP 49. If the property was distributed, no fiduciary relationship existed. If none existed, there could be no contempt. The verbal order of January 8, 2018 did not address the issue. No findings were issued. Both conflicting theories are material and still exist in the trial court. The failure to reconcile the competing and materially inconsistent legal relationship theories, that would determine the outcome, require reversal. Kovacevich argued "you can't do both." RP 27.

L. The Contempt was not the Least Intrusive Method. RCW 11.104A.030(c)(1) Provides for Payment to Beneficiaries. It is also the Least Intrusive.

The Court in its oral hearing indicated that the new substitute trustee "can compile an accounting." RP 61. The beneficiaries at the oral hearing argued that "the money he received should be divided pursuant to their proportional shares." RP 22. Ch 11.104A is the 2002 Principal and Income Act. RCW 11.104A.030(c)(1) provides that a trustee abuses its discretion if the beneficiary distribution "is too small". The Court ignored the statutes stating "this court can exercise its discretion and remove him." RP 62. Kovacevich, at the January 8, 2018 oral argument cited the statute. RP 29. "It rules out how the court determines whether the discretion is exercised." RP 31. The statute requires that the court "may require the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to his or her appropriate position." The Verhaag beneficiaries were satisfied on Gordon Finch's management. They only wanted money to be distributed to them. RP 20, 21, 22. In addition, Spurgetis could hire a forensic accountant. RP 60, 61.

If the payments to Finch himself or to Kovacevich were determined to be repaid a statutory and accounting remedy that was not intrusive would provide the less intrusive remedy. In *Spallone v. U.S.*, 493 U.S. 265, 280, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990), like in this case, the court sanctioned the city of Yonkers for intentionally and systematically violating civil rights in housing. The individual council members were also found in contempt. *Id*. at 271-2. The judgment for contempt on the council member was reversed on the basis that the contempt against the city alone would have cured the remedial contempt for failure to obey the order. The court should have first proceeded against the city, not the non party councilpersons. It applied the doctrine "that a court must exercise [t]he least possible power adequate to the end proposed." *Id*. at 280 (internal quotes omitted). Kovacevich could not issue checks on Finch's accounts. The sanction required Kovacevich to repay $29,131.18 that was not disputed in amount, without an opportunity to explain. It was intrusiveness that could have been avoided. *Shillitani v. U.S.*, 384 U.S. 364, 86 S.Ct. 1531, 16 L.Ed.2d 622 (1996) also states: "a court must exercise [t]he least possible power adequate to the end proposed." *Id*. at 372.

M. *State ex rel. Nicomen Boom Co., v. North Shore Boom & Driving Co.,* 55 Wash. 1, 107 P. 196 (1910) is a Washington State Supreme Court Decision in Point. The Trial Court Erred by Not Following the Case. Kovacevich Cannot be Jointly Liable with his then Client on Contempt.

Error of law is reviewed de novo. *State v.* Sanchez, __Wn.App.2d__, 471 P.3d 910, 913 (2020). *Nicomen* is still the law in this state. The case reviews the

contempt law theory that is unchanged by later enactments. It holds that an attorney, who in good faith advises his client, cannot be jointly liable for civil contempt with his then client. The opinion is on rehearing of a former opinion, 103 Pac. 426, that ordered joint contempt with the attorney's client.

The conclusion of the court is:

> These considerations convince us that Mr. Abel cannot be held personally liable in this case. Aside from the general rule as to the liability of attorneys to third persons, it seems to us that to so hold would stifle the free expression of honest opinion upon any question where the law is unsettled and the issue in doubt. If the Nicomen Boom Company could not hold Mr. Abel in a direct proceeding - and we have shown that it could not- he cannot be held under the statute unless he comes within its terms. The injured party cannot make the attorney of his adversary a surety or sponsor for his debt because of his error of judgment. *Id*. at 16.

Rains v. State, 100 Wn.2d 660, 674 P.2d 165 (1963) dismissed a counterclaim against an attorney. "An independent and unintimidated private bar is essential to the operation of our legal system." *Id*. at 668. A decision by the Washington Supreme Court is binding on all lower courts of the states." *State v. Brown*, 13 Wn.App.2d 288, 291, 466 P.3d 244 (2020). The Court in its Order on Motion for Reconsideration (CP 255-6) distinguished *Nicomen* on the basis that 'Mr. Kovacevich was held in contempt of his own accord; the distinction defies common sense as Kovacevich would have been required to refuse the payment of his earned legal fees. If Finch did not request the bill, or

paid it from another account, the contempt would not have occurred. *Nicomen* thwarts what has happened in this case. Filing a motion on contempt disqualifies the opposing counsel. This is not a proper legal tool. The Court also erred by stating: "The Nicomen court did not find the lawyer in contempt." CP 256. *Nicomen*, 55 Wn. 1, 103 P. 426 (1909): "they are technically guilty of contempt." The appeal, 107 P. 196 (1910) was that the attorney W.H. Abel "should be held jointly". *Id*. at 13. In *F.T.C. v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004), a civil contempt case, the court held that each person or entity is not automatically engaged in contemptuous conduct. The case dismissed the contempt as the activity was only "to have been in receiving payment for ancillary services." *Id*. at 758. Each defendant was entitled to an individualized determination of his interests." *Ibid* at 758 (internal quotes omitted). Elements of contempt must be proven "by clear and convincing evidence." *Reliance Ins. Co., v. Mast Const. Co.,* 159 F.3d 1311, 1318 (10th Cir. 1998).

Nicomen, cited at page 14 and followed *Roth v. Shupp*, 50 A. 430 (Maryland 1901). That case involved an attorney who argued to the court by a complaint to eject an owner from land. The court reviewed the complaint by hearing testimony and also the argument of Douglas, the attorney for the opposing party. The opposite party sought to hold Douglas liable. The court discharged Douglas as he "only acted in the discharge of his duty to his client as he honestly believed it to be." *Id*. at 432. "It is abundantly sustained by authority that if a lawyer acts an honest part and is actuated by no improper motives, he cannot be liable." *Ibid* at 432. This case provides the ultimate answer to Kovacevich's contempt. It was not an improper motive to get paid. Finch held the least

intrusive remedy. All he had to do was to pay the business account. He didn't need Kovacevich to write the check. *Langen v Borkowski* 206 NW 181 (Wis. 1925) dismissed a case of malicious prosecution that involved among others, attorneys who advised their client. The court stated at page 190: "There is no reason, therefore, that we can perceive, why an attorney at law, in the discharge of his professional duties, should not to a large degree, at least, be immune from liability in the same manner as it is herein heard with respect to judicial officers." Here, the trial court never held a hearing and concluded on undisputed material facts that Kovacevich had intention. The court inferred intent by a desire to get paid. This is not intent.

Here, Gerald Verhaag, the Petitioner in the case sought recovery for contempt against Finch, the opposite party and Kovacevich, the attorney for the opposite party. *Jeckle v. Crotty*, 120 Wn.App. 374, 85 P.3d 931 (2004) adopts the attorney immunity rule in this state preventing the opposite party to obtain damages against the opposite party's attorney. This is the universal rule of litigation immunity privilege. "The privilege of attorneys is based upon a public policy of securing them as officers of the court the most freedom in their effects to secure justice for their clients." *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980). "[T]o effectuate its vital purposes, the litigation privilege is held to be absolute in nature." *Silberg v. Anderson*, 50 Cal.3d 205, 215, 786 P.2d 365 (S.C. Cal. 1990).

N. Finch's Attempt to Succeed to the Verhaag's Assignment of Their Contempt Orders Including Attorney's Fees is Void.

Conclusions of law are reviewed de novo. *State v. Boisselle*, 194 Wn.2d 1, 14, 448 P.3d 19 (2019). Gordon

Finch settled all his claims against the Verhaags in the TEDRA Agreement of June 13, 2019. CP 237-252. The settlement also was subject to mandatory dismissal pursuant to CR 41(a)(1)(A). The TEDRA Agreement, (CP 240, 241) created a conspiracy. It assigned all claims "against Kovacevich" owned by Gerald, Kenneth, James and the trust "were assigned to Gordon Finch." "Gerald, Kenneth, James and Gordon individually, do hereby fully release their legal representatives in any way having to do with the Madeline M. Thiede Trust and the litigation pending under Spokane County Washington cause number 16-4-01301-7." The provision also applies to "known or unknown" claims. Kovacevich represented Gordon Finch in this case. Gordon Finch, by this clause released Kovacevich from all claims by this provision. Additionally, Gerald Verhaag and Kenneth Verhaag released Kovacevich from the contempt motion and awards that followed from their contempt motions. *Federal Finance v. Humiston*, 66 Wn.2d 648, 404 P.2d 465 (1965) holds that the assignee of a contempt was subject to all the defenses available to the contract purchased. The assignee of a non negotiable instrument acquires no greater rights against the obligor than the assigner had against him at the time of the assignment." *Id*. at 652. Kovacevich has all defenses against the Verhaags to combat the Finch assignment including whether the Verhaag's qualified under RCW 7.21.030, the contempt statute. He also has payment rights against Finch but was not allowed to advance them. "Known and unknown" would include a remand of orders for conspiracy alleged in the pending motion in the case that as yet has not been heard. *Jammeh v. HNN Associates*, __F.Supp.2d __, 2020 WL 3266221 (slip copy D.C. W.D. Wn. 2020) applies. The case denied summary

judgment against a low income tenant evicted from the lease. The defendant assignee was subject to defenses against a money judgment including emotional distress and for collecting sums not owed. The court stated that:

> An assignee, such as Columbia takes the assigned debt 'subject to defenses assertible against an assignor' *Lonsdale v. Chesterfield*, 662 P.2d 385 (Wash. 1983) see also *Pac. NW Life Ins. Co., v. Turnbull*, 754 P.2d 1262, 1267 (Wash. Ct. App 1988) ("ordinarily an assignee takes a contract subject to defenses or set offs that an account debtor may have against a creditor/assignor") citing *Fed. Fin. Co., v. Humiston*, 404 P.2d 465, 468 (Wash 1965). *Id* at *7.

The case also applies to Gordon Finch's assignment to the Trust he established to become the "real party in interest." CP 243. *Federal Finance*, 66 Wn.2d at 652, states "(3) a sub assignee's right against the obligor is subject to the setoff and counter claim." Finch also tried to transmute himself as some sort of additional trustee in the settlement. "Mr. Spurgetis retain the sum of $25,000." CP 240. Apparently, the Agreement seeks to retain two trustees. Standing, including jurisdiction to hear a case, cannot be established by agreement of the parties. See *B.F. Hibbard and Co., v. Morton*, 184 Wn. 569, 52 P.2d 313 (1935) states "No consent of parties nor willingness of judges can recall a controversy." *Id*. at 569. In order to have standing the party must have "suffered an injury". *Jevne v. Pass LLC*, 3 Wn.App.2d 561, 565, 416 P.3d 1257 (2018). If standing is not proven the action is dismissed. See *Freedom Foundation v. Bethel School District*, 14 Wn.App.2d 75, 90, 469 P.3d 364 (2020). Kovacevich

was never informed and never agreed to the TEDRA Agreement. A unilateral assignment on a settled case is invalid. The Verhaags could not qualify to bring the contempt motions and Finch, who was held in contempt on the same facts, could not be a statutorily aggrieved party. Finch was an alleged wrongdoer. See Motion for Contempt of December 7,2018, CP 3-17.

Palmer v. Davis, 808 P.2d 128 (Utah App. 1991) establishes the rule on a similar release provision. The employee of a rancher was injured when run over by a truck driven by another worker. The employees settled with the employer. The settlement stated that the employee reserved rights against the other workers. No action against a co-worker's was barred. "The release, by its clear and unambiguous language, releases Davis from liability for his actions taken while he was an employee." *Id*. at 132. It released Kovacevich as attorney for Finch.

O. Even if the Assignment is Valid, Finch Has No Standing As He Cannot Be An Aggrieved Party As Required by RCW 7.21.030(1). Error of Law is Reviewed De Novo. *State v. Mohamad*, 186 Wn.2d 235, 241, 375 P.3d 1068 (2016).

Naier v. Beckenstein, 27 A.3d 104 (Conn. 2011) dismissed an action by a beneficiary who had settled his claim to a business interest in which he partially owned as a partner or beneficiary on lack of standing. "Second, the party claiming aggrievement must successfully establish that the specific personal and legal interests has been specially and injuriously affected by the decision." *Id*. at 644-5. "[T]he Plaintiffs are, at most, beneficiaries." *Id*. at 110. The court cited *Bogert Trusts and Trustees,* 1 2d.ed. Rev § 869, p. 87: "the beneficiary cannot maintain an action at law

against a third person." *Id*. at 646, 647. "Even if the plaintiffs could surmount the obstacle that, in general, it is the trustee, not the beneficiary, who has standing to bring suit, their relationship is too remote to confer standing." "Any injury was sustained by the trust and the settlement proceeds were transferred to the trust, not the plaintiffs." *Id.* at 112. "For the foregoing reasons, the court properly granted the motion to dismiss due to lack of standing." *Id*. at 114.

Taylor v. Comm. of Correction, 47 A.3d 466, 469 (Conn. App. 2012); and *Crowell v. Isaacs*, 235 Cal.App.2d 755 (Cal. App. 1965) both rejected statutory standing. *Crowell* at 758 stated: "By their first count, plaintiffs seek for themselves alone a remedy created by statute. They are not persons to whom the statute extends the remedy. Thus, they have stated no cause of action." *Id*. at 758. Gordon Finch, by a settlement tried to be the assignee. A remedy only allowed by RCW 7.21.030(1) to aggrieved persons. Finch cannot "chameleon-like" turn into an aggrieved person. The case should be dismissed.

P. If the Court Followed *State ex rel. Carlson v. Superior Court for Pierce County*, 47 Wn.2d 429, 267 P.2d 1012 (1955) It Would Have Fulfilled the Mandate of the Madeline Thiede Living Trust

Legal error is reviewed de novo. *State v. Mohamed*, 186 Wn.2d 235, 241, 375 P.3d 1068 (2016). Kovacevich argued the *Carlson* case at the January 8, 2018 hearing. RP 49. "This lady knew all the people, knew the customers and took - replaced the attorney with the person who ran the property. That's what we have here." The *Carlson* case judge applies common sense and replaced the attorney administrator with the widow who for several years operated a boat rental

business." *Id*. at 43. Here, Gordon Finch, his mother and brother ran the real estate rental business. The Court ignored the Trust provision, the controlling document in this case that required James Finch, Gordon's brother, to succeed him as Trustee and manager. See Appendix A, Article 2.5, page 2. Instead he appointed attorney James Spurgetis, the choice of the Verhaags, minority heirs, who did what the Verhaags wanted to, sell the business so they could get more money. "It does require sixteen hours a day, seven days a week." *Carlson* at 432. Cedar Tree Plaza requires the same. RCW 11.97.010, 020, 11.02.250 and the intent statute RCW 11.12.230 easily allows application of the probate case to a living will. The flurry of five motions and the Court's lack of time resulted in the sale of the strip mall that Madeline Thiede gave the Finchs control to operate. It's a pity that the case was not followed. It applies. The medical Hippocratic oath should apply. "First do no harm". *Carlson* would have prevented the contempt and the ruin of a small business.

CONCLUSION

The contempt was based on an invalid order. Regardless, it is vacated when the case settled. The case is to be remanded and dismissed or returned for evidentiary hearing.

Respectfully submitted this 30th day of October, 2020.

s/Aaron L. Lowe
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Appendix B

RCW 7.21.030

Remedial sanctions—Payment for losses. (Effective until July 1, 2021)

(1) The court may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related. Except as provided in RCW 7.21.050, the court, after notice and hearing, may impose a remedial sanction authorized by this chapter.

* * *

RCW 11.04.250

When real estate vests—Rights of heirs.

When a person dies seized of lands, tenements or hereditaments, or any right thereto or entitled to any interest therein in fee or for the life of another, his or her title shall vest immediately in his or her heirs or devisees, subject to his or her debts, family allowance, expenses of administration, and any other charges for which such real estate is liable under existing laws. No administration of the estate of such decedent, and no decree of distribution or other finding or order of any court shall be necessary in any case to vest such title in the heirs or devisees, but the same shall vest in the heirs or devisees instantly upon the death of such decedent: PROVIDED, That no person shall be deemed a devisee until the will has been probated. The title and right to possession of such lands, tenements, or hereditaments so vested in such heirs or devisees, together with the rents, issues, and profits thereof, shall be good and valid against all persons claiming adversely to the claims of any such heirs, or devisees,

excepting only the personal representative when appointed, and persons lawfully claiming under such personal representative; and any one or more of such heirs or devisees, or their grantees, jointly or severally, may sue for and recover their respective shares or interests in any such lands, tenements, or hereditaments and the rents, issues, and profits thereof, whether letters testamentary or of administration be granted or not, from any person except the personal representative and those lawfully claiming under such personal representative.

* * *

RCW 11.97.010

Power of trustor—Trust provisions control.

The trustor of a trust may by the provisions of the trust relieve the trustee from any or all of the duties, restrictions, and liabilities which would otherwise be imposed by chapters 11.95, 11.98, 11.100, and 11.104A RCW and RCW 11.106.020, or may alter or deny any or all of the privileges and powers conferred by those provisions; or may add duties, restrictions, liabilities, privileges, or powers to those imposed or granted by those provisions. If any specific provision of those chapters is in conflict with the provisions of a trust, the provisions of the trust control whether or not specific reference is made in the trust to any of those chapters, except as provided in RCW 6.32.250, 11.96A.190, 19.36.020, 11.98.002, 11.98.200 through 11.98.240, 11.98.072(1), 11.95.100 through 11.95.150, and chapter 11.103 RCW. In no event may a trustee be relieved of the duty to act in good faith and with honest judgment.

Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use

of such terms as "absolute," "sole," or "uncontrolled," the trustee must exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.

* * *

RCW 11.97.020

Trust term interpretation and property disposition—Rules of construction.

The rules of construction that apply in this state to the interpretation of a will and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property.

* * *

RCW 11.104A.030

Judicial control of discretionary powers.

(a) A court shall not change a fiduciary's decision to exercise or not to exercise a discretionary power conferred by this chapter unless it determines that the decision was an abuse of the fiduciary's discretion. A court shall not determine that a fiduciary abused its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(b) The decisions to which subsection (a) of this section apply include:

(1) A determination under RCW 11.104A.020 (a) or (e) of whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A determination of: (i) The factors that are relevant to the trust or estate and its beneficiaries; (ii) the extent to which they are relevant; and (iii) the weight, if any, to be given to the relevant factors, in deciding whether and to what extent to exercise the power conferred by RCW 11.104A.020 (a) or (e).

(3) A determination under RCW 11.104Á,040(g).

(c) If a court determines that a fiduciary has abused its discretion, the remedy is to restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused its discretion, according to the following principles:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court may require the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to his or her appropriate position.

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