IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Combined Estate of:		**No. 28376-3-III**
GARY ALLEN KUEST and DOROTHY ADELE KUEST,	)	**Division Three**
husband and wife, Both Deceased.	)	**UNPUBLISHED OPINION**

Siddoway, J. — Three of seven beneficiaries of Gary Allen Kuest's will petitioned for removal of the personal representative of these combined estates, but then deferred hearing or trial of their request for her removal for over two years, as other estate matters were concluded. After a core dispute over a beneficiary was resolved by appeal and the case was remanded, the personal representative moved to close the estates. The three beneficiaries objected that they must first be permitted to try their petition to remove the personal representative. The trial court disagreed, accepting the argument that with the estate ready to be closed and in light of the personal representative's own request to be discharged, the beneficiaries' petition was moot. The trial court dismissed the petition

and closed the estate.

The three beneficiaries contend that this was error. They also assign error to the trial court's alleged invalidation of a settlement agreement, alleged violations of civil rules dealing with presentment, and alleged abuse of discretion in awarding attorney fees. We find no error or abuse of discretion and affirm.

I. FACTS AND PROCEDURAL HISTORY

Gary Allen Kuest died in September 2006, having been predeceased by his wife, Dorothy Adele Kuest, in October 2003. Mr. Kuest's will named as his personal representative Kelli Anderson. Ms. Anderson was a friend of the Kuests, had worked in the banking industry, and had handled certain matters for Mr. and Mrs. Kuest under powers of attorney during their lifetimes. After Mr. Kuest's death, Ms. Anderson reportedly received erroneous advice from the drafters of the Kuests' wills about her authority to sell property of the estate prior to appointment as personal representative. This led to distrust and concern on the part of some of the beneficiaries, three of whom—Dallas, Daryl, and Dwayne Williams, Mr. Kuest's stepsons from Dorothy Kuest's first marriage (hereafter, the Williams)—hired an attorney, David Shotwell, to represent their interests. Mr. Shotwell contacted Ms. Anderson with his clients' concerns in early October 2006, and she promptly caused the will to be admitted for probate and obtained letters testamentary.

A couple of weeks later, Ms. Anderson engaged new counsel, Roger Coombs, who represented her as personal representative thereafter. Mr. Coombs filed Dorothy Kuest's will, which had named Mr. Kuest as personal representative but had never been filed for probate by Mr. Kuest, and obtained court approval to convert the Gary Allen Kuest probate to a combined administration of both estates.

Mrs. Kuest's will left her entire net estate to Mr. Kuest if he survived her, so Mr. Kuest's will controlled disbursements from the combined estates. Mr. Kuest's will named seven beneficiaries: the Williams; three children from Mr. Kuest's first marriage: Christian Kuest, Tracy Emmett, and Brian Kuest (collectively, the Kuest children); and a granddaughter, Jennica Conry.

In January 2007, the Williams commenced a proceeding against Ms. Anderson under the Washington Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, complaining about her actions taken in the several weeks before she was appointed personal representative and other matters, and asserting claims of embezzlement, alienation of estate property, and breach of fiduciary duty. The Williams' TEDRA action sought damages, the removal of Ms. Anderson as personal representative or an injunction, and attorney fees. The petition did not ask that the claims be decided in an initial hearing, but instead asked for a case schedule. The Williams' action was set for a March 2008 trial.

In March 2007, Ms. Anderson filed her own TEDRA petition to resolve potential ambiguity as to Ms. Conry's status as a beneficiary, and to respond to the Williams' contention that she needed to recover or collect estate assets from several family members. The Williams had alleged that Ms. Emmett had a loan outstanding from her father that was an asset of the estate; that Christian Kuest possessed firearms belonging to the estate; that Brian Kuest possessed camera equipment belonging to the estate; that other family members possessed jewelry belonging to the estate; and that Ms. Emmett's share of the estate should be charged with the value of a Rolex watch and ring belonging to her father because he had been buried wearing the watch and ring, with Ms. Emmett's authorization. Ms. Anderson took no position on these matters and, in an effort to hold down expense, asked the court to dismiss her as a party with respect to their resolution. Her motion was granted.

In October 2007, Ms. Anderson moved for summary judgment dismissing the Williams' TEDRA action against her. The trial court found that there was no genuine issue of material fact suggesting that damages had been caused by Ms. Anderson's actions, and dismissed the claims for damages. The court found there were issues of material fact with respect to the Williams' other requests for relief.

In January 2008, Ms. Emmett filed a motion for summary judgment on the matters raised by Ms. Anderson's TEDRA petition. The Williams filed a response and, in early

February, presented a stipulated order waiving the imminent trial of their own petition for removal of Ms. Anderson, voluntarily staying it until all matters raised by Ms. Anderson's TEDRA petition could be resolved. By the time of hearing of Ms. Emmett's motion, most of the issues raised by Ms. Anderson's petition had been resolved. The only issues remaining in dispute were Ms. Conry's status as a beneficiary and whether Brian Kuest possessed camera equipment belonging to the estate. The trial judge agreed with Ms. Emmett that Mr. Kuest's will unambiguously named Ms. Conry a beneficiary, but found that genuine issues of material fact prevented summary resolution of the dispute over the camera equipment. The trial judge referred the camera equipment issue to binding arbitration. The Williams appealed the decision that Ms. Conry was a beneficiary to this court.

With the appeal pending, on March 5, 2009, the Williams moved the court to lift their earlier-proposed stay of what remained of their TEDRA petition, and asked the court to set it for trial. As an attachment to the motion, they filed a "Settlement & Release Agreement Within Arbitration," by which, in lieu of arbitration, the Williams and Kuest children agreed that Brian Kuest and Ms. Emmett would allow a total of $5,600 otherwise due them to be distributed in equal parts to the remaining Williams and Kuest children. Ms. Conry was not a party to the agreement, nor did it provide for distribution of any of the $5,600 to her. The agreement did not disclose why two of the Kuest

children agreed to this diversion of amounts due them; in later hearings, counsel for the personal representative expressed concern that the $5,600 might be an offset for estate assets that would not be returned. The agreement further provided that itemized camera equipment in Brian Kuest's possession would be delivered not to Ms. Anderson, but to Mr. Shotwell, who would sell it and distribute proceeds as an estate asset.

The trial court denied the Williams' motion to lift the stay. Finding that the settlement agreement was not binding on Ms. Conry or Ms. Anderson, the trial judge granted Ms. Anderson's counter motion for an order directing Mr. Shotwell to turn over the camera equipment to the personal representative. Clerk's Papers (CP) at 27-28.

On May 12, 2009, this court affirmed the trial court's decision that Ms. Conry was a beneficiary. We thereafter issued a mandate authorizing the trial court to proceed; the mandate was filed in the trial court on June 23.

A week later, Ms. Anderson filed a final accounting and moved to close the estate. She noted the motion for an August hearing. Among specific matters Ms. Anderson asked be addressed at the August hearing were that the court (1) find and determine the reasonable fee to be paid her as personal representative; (2) find and determine the reasonable personal representative's attorney fee and expenses to be paid to Mr. Coombs; (3) close the estates, including the TEDRA proceedings incidental thereto; and (4) discharge her as personal representative, except for limited authority to finalize 2009

taxes. CP at 30-32. The motion to close the estate, notice, and supporting materials were served on other parties on July 1, thereby providing 49 days' notice. CP at 256-57.

In the face of the motion to resolve these final matters and close the estate, the Williams filed only a three-page opposition memorandum, objecting on grounds the motion was premature because the undismissed claims from their TEDRA petition had not been fully adjudicated. As an attachment to the opposition memorandum, the Williams included 23 pages of billing detail for Mr. Shotwell's services from October 10, 2006 to August 10, 2009. CP at 33-58. In a reply, Ms. Anderson argued that the Williams' TEDRA petition required no adjudication, because the only request for relief that remained—Ms. Anderson's removal as personal representative—was rendered moot by her own request to be discharged. CP at 59-63.

At the August hearing, Mr. Coombs again argued that the Williams' TEDRA complaint was moot and that it would be "a waste of judicial resources for the court to hold up closing the estate to apparently have a trial over whether [Ms. Anderson] ought to be removed when, in fact, she is asking to be removed at this time." Report of Proceedings (Aug. 18, 2009) (RP) at 6. In responding, Mr. Shotwell affirmed that the Williams did not object to Ms. Anderson's discharge as personal representative, but believed they were entitled to a postremoval trial on the issue of whether Ms. Anderson should have been removed for breaching her fiduciary duties. RP at 9-10.

The trial judge granted the relief requested by Ms. Anderson, and entered findings and an order that was first provided to the Williams' counsel and presented on the day of the hearing. RP at 8. The Williams timely filed this appeal, assigning error to the presentment process, and to the provisions of the decree dismissing their TEDRA petition, awarding Mr. Coombs all fees requested by the personal representative, and finding that the settlement and release agreement within arbitration was not binding on Ms. Conry or the personal representative. They also assigned error to the trial judge's declination to award them attorney fees.

II. ANALYSIS

A. Dismissal of the TEDRA Petition Without Trial

The Williams contend that the trial court's dismissal of their TEDRA petition was improper because their claims for relief other than money damages were dismissed without a legal basis, they were denied due process, and, without a trial of their claims, the court had no basis for properly assessing or awarding fees against or in favor of any party. Appellants' Br. at 12-14.

The trial judge granted Ms. Anderson's motion to dismiss the Williams' TEDRA petition as moot.[1] Dismissal for mootness has been variously characterized as an issue of

[1] The Williams argue that "[t]he court's legal basis to dismiss the TEDRA petition despite its earlier ruling is somewhat muddled," Appellants' Br. at 6, but it is clear to us that mootness was urged as the basis for dismissal, that it was the basis for dismissal, and that it was, in any event, a sufficient basis for dismissal. *See LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (trial court's judgment can be upheld upon any theory

subject matter jurisdiction or justiciability. *Compare*, *e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-10, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1988) (jurisdictional issue, requiring dismissal under Fed. R. Civ. P. 12(b)(1)), *with Oryszak v. Sullivan*, 388 U.S. App. D.C. 64, 576 F.3d 522, 526-27 (D.C. Cir. 2009) (Ginsburg, J. concurring) (justiciability issue, to be dismissed for failure to state a claim). However the issue is characterized, a decision to dismiss a claim as moot presents a pure question of law that we review de novo.

1. *Procedure and Context of the August 2009 Hearing*

RCW 11.96A.090(1) provides that proceedings under TEDRA are special proceedings under the civil rules of court, and that provisions of chapter 11.96A RCW control over any inconsistent provision of the civil rules. Any party may move the court for an order relating to a procedural matter at any time. RCW 11.96A.100(9). A party is entitled to a trial, including by a jury if demanded, but only if the issues "are not sufficiently made up by the written pleadings on file." RCW 11.96A.170. If the provisions of TEDRA are doubtful with reference to the superior court's power and authority to administer matters concerning estates and assets of deceased persons, the court nevertheless "has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end

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established by the pleadings and supported by the proof), *cert. denied*, 493 U.S. 814 (1989).

that the matters be expeditiously administered and settled by the court." RCW 11.96A.020(2). In all judicial proceedings under TEDRA that require notice, the notice must be personally served at least 20 days before the hearing unless a different period is provided by statute or ordered by the court. RCW 11.96A.110.

Ms. Anderson's motion to close the estate requested a decree that, among other matters, "[c]loses the Estate, including all TEDRA proceedings incidental thereto." CP at 31-32. The motion was served on the Williams' attorney over 45 days prior to the date set for hearing. The motion was therefore served with ample notice and the court had clear authority under TEDRA to dismiss the petition if it did not present issues requiring trial.

2. *What Remained of the Williams' TEDRA Petition was Moot*

The Williams argue that a litigant with genuine issues of material fact that a personal representative breached her duties should not suddenly face dismissal without legal basis. Appellants' Br. at 13. But mootness is a clear and firmly-established legal basis for dismissing a claim. A case is moot if a court can no longer provide effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984). Courts should ordinarily dismiss cases that involve only moot questions. *Client A v. Yoshinaka*, 128 Wn. App. 833, 841, 116 P.3d 1081 (2005).

Once the trial court addressed the final matters presented for resolution at the

August hearing, the Williams' claim against Ms. Anderson would be, and it became, moot. The Williams' claims for damages from Ms. Anderson had been dismissed by summary judgment almost two years earlier. All that remained was their request to prevent her, through removal or injunction, from further serving as personal representative. With the discharge she requested and was entitled to obtain, the trial court could no longer provide meaningful relief.

The real source of the Williams' complaint about dismissal of their TEDRA complaint appears to be their mistaken contention that issues of attorney fees—the personal representative's, and their own—required trial of their TEDRA complaint. But a pointless trial over Ms. Anderson's alleged misconduct was not necessary, nor would it have sufficed, to resolve either attorney fee issue.

Ms. Anderson's request for an award of a reasonable fee and expenses to Mr. Coombs was governed by RCW 11.48.210, which provides,[2] in pertinent part:

> An attorney performing services for the estate at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable. Such compensation may be allowed at the final account; but at any time during administration a personal representative or his or her attorney may apply to the court for an allowance upon the compensation of the personal representative and upon attorney's fees. If the court finds that the personal representative has failed to discharge his or her duties as such in any respect, it may deny him or her any compensation whatsoever or may reduce the compensation which would otherwise be allowed.

[2] We quote the current version of RCW 11.48.210, which was amended by Laws of 2010, chapter 8, section 2043 to make the language gender neutral.

If the Williams believed that Ms. Anderson's or Mr. Coombs' requested fees should be reduced under the "just and reasonable" standard or on account of any failure by Ms. Anderson to discharge her duties, then it was incumbent upon them to respond to, and oppose, the motion for fees. They did not respond, or request continued time to respond, or even file a motion for reconsideration. Because the issue of Mr. Coombs' fees was properly resolved at the August hearing, no issue of his fees remained that would require a trial.

The Williams' TEDRA petition had asked that the Williams and the estate be awarded damages for Ms. Anderson's alleged breaches, including reimbursement of attorney fees as damages. CP at 4-5 (Petition, § V, ¶¶ 5.1-5.5, § VI, ¶ 6.8). Their claim for attorney fees as damages was dismissed on summary judgment; nothing remained to be tried. CP at 7. The only request for attorney fees that arguably remained was the Williams' request for their own fees incurred in prosecuting their TEDRA action. CP at 5 (Petition, § VI, ¶ 6.7). But the statutory provision on which the Williams would rely for recovery of attorney fees, RCW 11.96A.150, does not require trial in order to recover. Instead, it provides:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party . . . . The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the

estate or trust involved.

RCW 11.96A.150(1). In this respect, TEDRA's cost and fee provision is distinguishable from statutes that require a party to prevail in order to recover attorney fees and, for that reason alone, can keep an otherwise moot dispute alive. *Compare Devine v. Dep't of Licensing*, 126 Wn. App. 941, 949, 956, 110 P.3d 237 (2005) (RCW 4.84.350(1), providing that a court award of fees and costs to a qualified prevailing party appealing agency action would require further proceedings on remand); *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 100, 117 P.3d 1117 (2005) (former RCW 42.17.340(4) (1992), providing for an award of fees to a party who prevails against an agency in enforcing a right to inspect public records can require further litigation even where records have been disclosed). RCW 11.96A.150(1), by its plain terms, does not require that a party prevail in order to recover fees and therefore does not alter the general requirement that moot claims be dismissed.

The Williams never moved for an award of their fees under RCW 11.96A.150, but they represent on appeal that if allowed to try their petition to remove Ms. Anderson, they would have requested compensation for Mr. Shotwell's services reflected in the 23 pages of billing entries filed with the court prior to the August hearing. Yet that itemization undercuts the Williams' position that the requested award was trial-related: it includes all their fees for all periods, not just the handful of entries related to limited proceedings on

their TEDRA claim. CP at 34-58. The fees that the Williams assert they hoped to be awarded not only did not require a TEDRA trial, they were for the most part unrelated to the Williams' TEDRA claim.

Finally, referencing the Washington Constitution, the Williams argue that the trial court's dismissal of their petition is a "reckless act of judicial indifference," that is a "violation of our most sacred rights of due process." Appellants' Br. at 13.

The Williams waived any claim of a due process violation by failing to raise it at the closure hearing or in a motion for reconsideration. Ordinarily, we will not review a claimed error for the first time on review unless it falls within an enumerated exception to RAP 2.5(a). RAP 2.5(a) provides an exception for "manifest error affecting a constitutional right," but the Williams provide no argument from which this court could find constitutional error. Their citation to "Section 21 of the Washington State Constitution"—presumably Wash. Const. art. I, § 21, but probably intending Wash. Const. art. I, § 3—is insufficient. Appellants' Br. at 13. *See* RAP 10.3(a)(6) (appellant should provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record").

B. Alleged Abuse of Discretion in Awarding Attorney Fees

The Williams argue that the trial court abused its discretion in awarding attorney fees to Mr. Coombs that they contend were excessive, and in failing to award fees to

them. We will not interfere with a trial court's award of attorney fees in probate matters unless facts and circumstances clearly show an abuse of the trial court's discretion. *In re Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985). An abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

1. *The Award of Fees to Mr. Coombs*[3]

In fixing the amount to be allowed as a fee for the attorney of a decedent's personal representative, the court takes into consideration criteria considered in determining a reasonable attorney fee under the code of professional responsibility; in this case, RPC 1.5(a). RCW 11.68.100(2); *and see In re Estate of Peterson*, 12 Wn.2d 686, 728, 123 P.2d 733 (1942) (discussing similar criteria); *Larson*, 103 Wn.2d at 522 n.2 (relying on factors provided by former CPR DR 2-106(b)).

Ms. Anderson supported her request for an award of Mr. Coombs' fees with a detailed itemization of his billings, verified by his declaration. She also submitted an affidavit of Steven W. Hughes, a probate practitioner in Spokane County, testifying that Mr. Coombs' hourly rate was within the range of rates customarily charged by lawyers with similar experience, and expressing his opinion, based upon his review of the

[3] The Williams' contention that they were deprived of an opportunity to object to Mr. Coombs' fees when their TEDRA petition was dismissed is groundless, as discussed in section II.A., above.

proceedings through May 21, 2009, that a $40,000 to $45,000 award for services performed through that date was reasonable. CP at 215-17. The portion of the fees for the period after May 21, 2009 was supported by Mr. Coombs' declaration. CP at 235, 258-60. The fees awarded by the trial judge were supported by these submissions. The Williams did not object to any specific portion of the work described in Ms. Anderson's attorney fees declarations; by failing to identify any inappropriate time expenditure or charge to the trial court, they waived any issues relating to the fees on appeal. Waiver aside, in light of this record and the factors outlined in RPC 1.5, the trial court unquestionably had a tenable basis for its award of fees to Mr. Coombs.

The Williams nonetheless argue that the trial judge should have discounted the request on her own; in light of her observation that "'an untoward amount of this estate has been eaten up during the last three years,'" they contend that she had a "duty" to reduce the fee award. Appellants' Br. at 21 (quoting RP at 20). The argument has no textual support in the applicable statute, RCW 11.48.210 (providing that the attorney performing services for the estate at the instance of the personal representative "shall have such compensation therefor out of the estate as the court shall deem just and reasonable"), and the Williams identify no other legal authority for their argument. The argument is unsupported in fact as well, since the trial court's comment was not directed at Mr. Coombs' fees, but at the Williams' request for further, and unnecessary,

proceedings.

2. *The Declination to Award Attorney Fees to the Williams*[4]

The Williams argue that because the prayer for relief in their TEDRA petition included a request for attorney fees and they filed an itemization of fees a week before the August hearing, this sufficed as a request for fees that the trial judge was required to consider. Appellants' Br. at 9. In oral argument, Mr. Shotwell suggested an award of $40,000 toward the personal representative's fees and $40,000 toward the Williams' fees as a "compromise" that would avoid the Williams trying their TEDRA claim at "significant attorney fees and costs" to the parties. RP at 11-12. The Williams finally argue that because attorney fees were awarded to Ms. Anderson, fees should have been awarded to them, relying on *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004).

The Williams were free to move for an award of fees upon receipt of notice of the proposed closing of the estate, or, if they believed their TEDRA petition sufficed as a request for fees, could have submitted evidence in support of an award. They had more than enough time to do so prior to the August hearing. They filed no motion at all; the billing detail they filed a week before the hearing was unverified, untotalled, and largely unexplained; and, at the time of hearing, Mr. Shotwell characterized the unverified billing

[4] The Williams' contention that only through trial of their claims of misconduct by Ms. Anderson could they recover attorney fees is groundless, as discussed in section II.A., above.

detail as having been submitted "just as an example." RP at 11. In appealing the declination to award them fees, it is incumbent on the Williams to identify facts and circumstances that clearly show an abuse of the trial court's discretion, which they have not done. The trial judge could properly have declined to award fees to the Williams based on their insufficient support for an award, or because, applying the factors she deemed relevant and appropriate, she did not regard them as having any equitable entitlement.

The Williams contend, however, that if an estate dispute involves multiple beneficiaries and affects the rights of all, the estate should pay the attorney fees of all, citing *Black*, 153 Wn.2d at 173. Appellants' Br. at 19-20. To begin with, *Black* and the cases on which it relies all appear to involve parties who filed and supported a motion for attorney fees. *Black* and the cases on which it relies are substantively distinguishable as well: they deal with disputes that involve all of the beneficiaries of the estate (thus imposing no burden on a beneficiary who was uninvolved), seeking to recover attorney fees under RCW 11.96A.150, in a proceeding that has resolved an issue necessary to administration of the estate. Here, most of the beneficiaries were not involved in the dispute, the only issue ever resolved was to determine which of the Williams' claims failed as a matter of law, and Mr. Coombs' entitlement to his fees was under RCW 11.48.210, not 11.96A.150. *Black* and its precursors do not compel or even

support an award of the Williams' fees.

C. The Court Did Not "Invalidate" a Settlement Agreement

The Williams' third assignment of error relies on an incorrect premise. The Williams contend that the court erred in "invalidating" a January 2009 settlement agreement between six of the beneficiaries. However, the finding from which they argue (and to which they have not assigned error) does not invalidate the agreement, it simply finds that neither Ms. Conry nor the personal representative are parties to the agreement, and that any adjustments to distributive shares provided by the agreement are not binding on the court. CP at 65 (Finding 1.4).

The Williams' apparent complaint is that the trial court did not treat the settlement agreement as binding and conclusive on all persons interested in the estate under RCW 11.96A.220. That complaint arises because they conflate mandatory arbitration under TEDRA, which would have been binding, with a private contractual agreement among less than all parties, which is not. The settlement agreement at issue was reached after the trial court referred a dispute over camera equipment to mandatory arbitration, only six of the seven beneficiaries (all but Ms. Conry) undertook to actively participate, and then, in lieu of arbitrating, the six participants reached a settlement agreement. Because the outcome of arbitration would have bound Ms. Conry under RCW 11.96A.310 despite her nonparticipation, the Williams are steadfast in their position that the six participants

could forego arbitration in favor of a settlement agreement that would bind Ms. Conry as well. But one does not follow from the other. Ms. Conry was entitled to forego participating in arbitration: a process that would be decided based on the evidence, by an independent arbitrator, and that she would have a right to appeal for trial de novo. Nothing in TEDRA supports the Williams' position that her nonparticipation in arbitration gave the six participants license to bind her to any agreement they later reached.

Still, the Williams protest that the only parties affected by the reallocation of assets by the settlement agreement are the six signatories, none of whom contests the agreement. Appellants' Br. at 15-17. If so, and if the agreement is unconditional, it presumably remains enforceable among the six. The trial court did nothing to invalidate the agreement. It simply—and properly—declined to declare the agreement binding and conclusive on all parties to the estate.

D. Alleged Error in Entering a Final Decree

The Williams contend that the trial court erred by entering a final decree, because the estate was not "ready to be closed" within the meaning of RCW 11.68.100(1), which provides in relevant part that "[w]hen the estate is ready to be closed, the court, upon application by the personal representative who has nonintervention powers, shall have the authority and it shall be its duty, to make and cause to be entered a decree." In arguing

below that the estate was not ready to be closed, the Williams pointed to what remained of their TEDRA claim, and argued that "[t]he Personal Representative has no authority to request closure of a judicial matter not yet adjudicated without meeting the burden of a motion to dismiss, or CR 12(b)." CP at 33.

A trial court should not close an estate without resolving outstanding TEDRA claims by adjudication, or by determining that they can be resolved as a matter of law. Here, the court properly found that what remained of the Williams' petition was moot. Consistent with its stated purpose that matters be "expeditiously administered and settled by the court," TEDRA gives trial courts considerable flexibility to resolve disputes at the first opportunity. *See*, *e.g.*, RCW 11.96A.020(2) (court's authority may be exercised in "any manner and way that to the court seems right and proper"); RCW 11.96A.170 (right to trial only if issues "are not sufficiently made up by the written pleadings on file"). Exercising that authority, the trial judge determined that the TEDRA petition could be dismissed before entering an order dismissing it and closing the estates.

E. Presentment Procedure

Finally, the Williams assign error to the trial court's failure to follow presentment procedures under CR 52(c) and Spokane County Local Court Rule 52. CR 52 requires the entry of findings in actions tried upon the facts to the court, including any decision where findings are specifically required by statute, by another rule, or by a local rule.

CR 52(a)(1), (2)(C). Findings and conclusions are not necessary on decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2). CR 52(a)(5)(B). If findings and conclusions are required, then, unless an emergency is shown or a party has failed to appear at a hearing or trial, they should not be signed unless the defeated parties have received five days' notice of presentment and been served with copies of the findings and conclusions five days in advance. CR 52(c); *Seidler v. Hansen*, 14 Wn. App. 915, 919, 547 P.2d 917 (1976).

Ms. Anderson argues that the trial court's order reflected only decisions on motions not subject to CR 52, but we need not decide that issue; first, because the Williams did not raise and afford the trial court the opportunity to rule on the asserted error, and as a result have not preserved the issue for appeal. RAP 2.5(a). Second, they fail to show prejudice. *See Seidler*, 14 Wn. App. at 919-20 (failure to comply with CR 52(c) does not require reversal when plaintiff suffered no prejudice). They concede they were not prejudiced to the extent the order and decree addressed matters requested by Ms. Anderson's motion as to which they had notice, but they claim surprise and confusion, and therefore prejudice, as to two matters: a "failure of the court to properly document the denial of Appellants' attorney fees," and "the improper invalidation of the TEDRA agreement." Appellants' Br. at 23. As earlier discussed, the order and decree of distribution did not invalidate the settlement agreement, so no prejudice is shown there.

Insofar as the court's order was silent on denial of the Williams' attorney fees (an issue that, to the extent raised, was raised by the Williams), they offer no explanation why they could not propose their own order. *See* CR 54(e) (if prevailing party fails to prepare and present proposed order on a decision within 15 days, any other party may do so). No prejudice has been shown.

F. Attorney Fees on Appeal

Both parties ask this court to exercise its discretion and award their attorney fees and costs on appeal pursuant to RCW 11.96A.150 and RAP 18.1. RCW 11.96A.150 gives us broad equitable discretion to award fees, and to determine whether they should be recovered from the estate or from other parties to the proceedings.

The Williams did not prevail on any assignment of error and their appeal has delayed final distribution to all the beneficiaries. The estate has already been substantially depleted by attorney fees. We decline the Williams' request for attorney fees.

Ms. Anderson asks this court to pay her attorney fees with an offset against the Williams' beneficiary shares of the estate. She asks that any portion of her attorney fees not awarded against the Williams be paid from the estate.

Ms. Anderson reasonably defended against the appeal and should be awarded her fees. The four beneficiaries who did not participate in this appeal have already borne a

pro rata share of the attorney fees charged to the estate for the proceedings below, and we are loathe to see their distributions diminished further. The appeal did not benefit the estate. It delayed its distribution. Despite their professed confusion at the proceedings, the Williams did not provide the trial court with a careful or considered response resisting Ms. Anderson's motion to close the estate nor, when it became clear that the trial judge was likely to close the estate, did they acknowledge their earlier confusion and request a continuance or, later, reconsideration. They raised issues on appeal not raised below (e.g., due process and procedural violations). Considering the equities, we award Ms. Anderson her attorney fees on appeal, to be recovered as an offset against the Williams' beneficiary shares of the estate.

III. CONCLUSION

The trial court's order approving final account and decree of distribution is affirmed, with instructions to modify the decree of distribution as necessary to effectuate

our award of attorney fees. Ms. Anderson's request for attorney fees on appeal is granted, subject to compliance with RAP 18.1(d).

A majority of the panel has determined that 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.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.