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NO. 71742-1-I

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

TERRI BLOCK
as guardian of SARAH BLOCK

Appellant,

v.

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC, a Washington Professional Limited Liability Company, BEN F. BARCUS and JANE DOE BARCUS, individually and the marital community comprised thereof; LEGGETT & KRAM, a Washington Partnership; PETER KRAM and JANE DOE KRAM, individually and the marital community comprised thereof,

Respondents.

BRIEF OF RESPONDENTS LEGGETT & KRAM, PETER KRAM, AND JANE DOE KRAM

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ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiff/Appellant Terri Block, as guardian of her daughter Sarah Block, sued Respondent Leggett & Kram, Peter Kram, and Jane Doe Kram (collectively "Kram") for legal malpractice and breach of fiduciary duty based upon facts to which she was on inquiry notice as early as May 2006, with Krams' representation terminating when Plaintiff fired them in late 2008. Yet, Plaintiff did not file this lawsuit until May 2013, almost five years later. Plaintiff waited too long to sue Kram. Further, Sarah's incapacity did not toll the statute of limitations under TEDRA, nor can she rely upon equitable tolling or equitable estoppel to alter this outcome. As such, the trial court's order granting Krams' motion for summary judgment on their statute of limitations affirmative defense should be affirmed.

II. COUNTERSTATEMENT OF ISSUES

1. Are Plaintiff's claims against Kram, which are subject to a three-year statute of limitations, time-barred under TEDRA even though Sarah is legally incapacitated, because Sarah was represented by a guardian (Plaintiff) and a guardian ad litem?

2. Has Plaintiff produced any evidence establishing fraudulent or inequitable conduct by Kram which precluded her from timely pursuing her claims against Kram?

III. KRAMS' STATEMENT OF THE CASE

A. Peter Kram, Esquire.

Peter Kram has been practicing law in Washington since 1976, focusing in the areas of probate and guardianship matters. Mr. Kram has handled hundreds of guardianship matters like the one at issue in this lawsuit over his 37-year career as an attorney. Mr. Kram has tried well over 200 cases during this time and is appointed as a guardian ad litem ("GAL") by the Pierce County Superior Court approximately 10-15 times a year. Mr. Kram has served as a Pro Tem Commissioner in Pierce County Superior Court and District Court, and Pro Tem Judge in District Court. He also acts as an arbitrator in King and Pierce County Superior Courts. CP 52-53, ¶ 2.

B. Kram is Hired to Obtain Plaintiff's Appointment as Guardian.

On October 5, 2005, Plaintiff signed. Krams' General Retainer Agreement to establish a Guardianship for Sarah Block, Plaintiff's daughter, following a head-on collision Sarah was involved in on Interstate 5 in Pierce County. Sarah was rendered comatose following the accident and airlifted to Harborview Medical Center. Rosalie Meeks, the driver of the other car, was killed in the accident. CP 54, ¶ 4.

On October 19, 2005, Kram filed a Petition for Guardianship of

Person RCW 11.88.030 ("Guardianship Petition"), for Sarah in Pierce County Superior Court asking the court to appoint Plaintiff as Sarah's Guardian. The Guardianship Petition requested the appointment of a GAL that was an attorney and familiar with "the interplay of Washington laws regarding torts, guardianship, insurance and probate claims, subrogation, medical payments and special needs trusts." The Guardianship Petition identified three potential persons to act as Sarah's GAL. The Guardianship Petition requested an order approving Krams' fees in preparing the Guardianship Petition, the Barcus firm's retainer agreement that Plaintiff had signed previously, and that the Barcus firm be allowed "to commence claim filing and litigation as necessary to perfect the claims of Sarah Block against the adverse driver and any other at fault parties." The Guardianship Petition also sought an order "requiring that the Law Offices of Ben F. Barcus report receipt of funds if any settlement is reached with the tortfeasors and disbursing such funds under court supervision." That same day, Pierce County Superior Court Commissioner Mary E. Dicke signed an order assigning attorney Judson Gray as Sarah's GAL ("GAL Gray"). CP 54, ¶ 5; 573-574, ¶ 2.

On November 9, 2005, GAL Gray filed his GAL Report, recommending the appointment of Plaintiff as Sarah's guardian and the retention of counsel to represent the Guardianship in pursuing claims

against the tortfeasor. CP 574, ¶ 3.

On November 10, 2005, Court Commissioner Dicke entered an order appointing Plaintiff as Sarah's Guardian. The order stated that GAL Gray was to remain as a settlement GAL to address any issues related to the settlement of any claims prosecuted on Sarah's behalf. The order also precluded the distribution of any settlement funds without a court order. The court approved Krams' $1,900 in fees as well as Plaintiff's retainer agreement with Barcus firm, which allowed them to commence litigation and perfect Sarah's claims from the accident. CP 55, ¶ 6; 574, ¶ 4.

C. Plaintiff Petitions Court to Distribute Settlement Funds and Establish Special Needs Trust.

On March 23, 2006, Plaintiff filed a verified Petition for Order Authorizing the Guardian to Execute a Special Needs Trust and Disbursement of Funds with the Pierce County Superior Court (the "Funds Petition"). The Funds Petition asked the court to "approv[e] the distribution of all assets, less the itemized expenses and reasonable attorney fees set forth in Exhibit "B," into the Special Needs Trust" (the "Trust"). The Funds Petition also ought approval to distribute to the Barcus firm their one-third contingency fee of the $2.1 million settlement, pursuant to the court-approved retainer agreement between Plaintiff and the Barcus firm. Plaintiff also sought court approval to pay Kram

$4,066.89 for work on Sarah's behalf. GAL Gray submitted a report requesting that the court approve the fees and costs identified in the Funds Petition. CP 122, ¶ 30; 574, ¶ 5.

On March 31, 2006, Pierce County Superior Court Pro Tem Judge Ronald Thompson entered an order approving Plaintiff's Funds Petition and Special Needs Trust (the "Trust") and further ordered the Barcus firm to distribute the funds as requested by Plaintiff ($4,066.89 to Kram, and $708,795.03 to the Barcus firm for their fees and costs). CP 57, ¶ 10.

GAL Gray was discharged as Sarah's GAL by the court on April 21, 2006. CP 575, ¶ 7.

On May 1, 2006, Kram received an April 26, 2006, letter from Plaintiff addressed to Mr. Kram, Ms. Lester, Mr. Barcus, and Trustee Bush expressing her appreciation and stating that she "believe[d] we have some of the best attorneys in Washington." She also wrote:

> I do realize our relationship is based on business and we will probably never be at peace with the huge fees you require, at the same time, I do believe you've done well for Sarah and I am thankful you are apart of our lives since Sarah's crash . . . My request is for none of you to take a break from Sarah's case until she and Dale board the plane to come home. I know you want things to be presented perfectly to a court, but nothing is perfect . . . You are all very smart and talented people, I have faith that you can do this.
>
> CP 58 ¶ 11.

From approximately May 2006, to October 2008, Kram continued his representation of the Guardianship in myriad ways: relocating Sarah to her home state of Alaska, assisting in the resolution of litigation by Providence against Sarah for medical expenses Providence paid related to her medical bills as a result of the accident, and complying with court requirements related to Guardianship reporting and accounting. CP 58-60, ¶ 11-15; 639, ¶ 4; 125, ¶ 35; 129, ¶ 39.

Unbeknownst to Kram, Plaintiff wrote Trustee Bush a letter dated October 7, 2008, informing him that she planned to have Kram removed as counsel for the Guardianship and again complained about the fees the Barcus firm collected following the $2.1 million settlement. She alleges she was told by the Barcus firm that:

> [A]ll the 2.1 mill[ion] would go into the trust & they would discuss their fees afterward. That never happened. I contacted Peter Kram nearly hysterical & he basically told me to shut up & appreciate my attorneys. Next Kari Lester & Ben Barcus said Farmer's tried not to pay & they had to work hard for it – I'd been getting the paper[s] from Farmer's & it was very, very quick involving 3 letters & they paid. Mike Caryl is deciding if he has a case. He's very respected – is the only attorney in the state that goes after [an] attorney taking exorbitant fees – Barcus just recently asked him for [sic] advise a few months ago . . . I'm seeking a new Guardian attorney as Peter Kram has been difficult, not reliable & not out for Sarah's best interest (more for Barcus, his old school friend I later learned) . . . I'm sorry to spring this onto [you] all of a sudden – but I had to wait [un]til the drunk driver case closed since we paid for that work to be done. I think

> we're all done with the Barcus firm now. Of course I feel I failed Sarah with those attorneys and allowed her to be stolen from by nearly a million - - I'm sick sick sick over it, have been for a long time. If Mike Caryl chooses to take this case – the trust will be fortunate and I'll have some peace.

CP 640, ¶ 6.

On October 16, 2008, Plaintiff sent Kram a handwritten letter informing him that she was "hiring a new [sic] gardian attorney [Eileen Peterson] and will no longer be using your services." Kram signed the substitution of counsel on November 29, 2008. CP 60, ¶¶ 17-18.

On December 23, 2008, Ms. Peterson filed a Petition with Pierce County Superior Court seeking leave to have the Trust pay to hire Mr. Caryl to investigate the reasonableness of the attorney's fees charged by the Barcus and Kram. Plaintiff "strongly believe[d] that the fees received by the Barcus Law Firm were excessive and inappropriate." Trustee Bush, on behalf of the Trust, opposed Plaintiff's request. CP 717, ¶ 8; 640-641, ¶ 8.

On January 16, 2009, the court entered an order finding that Mr. Bush appropriately exercised his discretion in declining to pay Mr. Caryl a retainer and that Plaintiff could pursue an investigation of the fee claim at her own expense. Plaintiff informed Mr. Caryl that she did not have the necessary retainer, thus he declined to accept the case. CP 718, ¶ 17.

In August 2011, Plaintiff signed an hourly fee agreement with Mr. Caryl. After reviewing the underlying files, Mr. Caryl offered to take the case on a contingency fee basis. Plaintiff accepted Mr. Caryl's offer in June 2012, seeking court approval to pursue those claims in January 2013, which was granted on January 25, 2013. Plaintiff finally filed this lawsuit—three-plus months later—on May 3, 2013. CP 718, ¶ 19; 104, ¶ 2; 1-25.

On February 25, 2014, the Honorable Laura C. Inveen of the King County Superior Court granted Krams' motion for summary judgment on their statute of limitations affirmative defense. Plaintiff's motion for reconsideration was denied by Judge Inveen on March 20, 2014. CP 1401-1405. This appeal followed.

IV. ARGUMENT

A. The Court's Standard of Review.

An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings,* 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Summary judgment involving the application of a statute of limitations should be granted when there is no genuine issue of material fact as to when the relevant statutory period commenced. CR 56; *Buxton v. Perry,* 32 Wn.App. 211, 214, 646 P.2d 779 (1982). The purpose of the

statute of limitations is to compel actions to be commenced within what the legislature deemed to be a reasonable time, and not postponed indefinitely. *Summerrise v. Stephens*, 75 Wn.2d 808, 812, 454 P.2d 224 (1969). They are designed to shield defendants and the judicial system from stale claims as evidence may be lost and witnesses' memories may fade. *Douchette v. Bethel Sch. Dist. No. 403,* 117 Wn.2d 805, 813, 818 P.2d 1362 (1991).

The statute of limitations for a legal malpractice action is three years and begins to run when a cause of action accrues. RCW 4.16.080(3); *Janicki Logging & Constr. Co. v. Schwabe, Williamson & Wyatt, P.C.,* 109 Wn. App. 655, 659, 37 P.3d 309 (2001). Accrual occurs when "the client `discovers, or in the exercise of reasonable diligence should have discovered the facts which give rise to his or her cause of action.'" *Id.* at 659 (quoting *Peters v. Simmons*, 87 Wn.2d 400, 406, 552 P.2d 1053 (1976)). "A party must exercise reasonable diligence in pursuing a legal claim." *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987).

The discovery rule does not require knowledge that a specific cause of action exists, just "enough facts to file suit" and "use [of] the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable." *Huff v. Roach*, 125

Wn. App. 724, 729, 106 P.3d 268 (2005); *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.,* 129 Wn. App. 810, 818, 120 P.3d 605 (2005); *Beard v. King County,* 76 Wn. App. 863, 868, 889 P.2d 501 (1995). "To so require [knowledge that a specific cause of action exists] would effectively do away with the limitations of actions until an injured person saw his/her attorney." *Gevaart v. Metco Const., Inc.,* 111 Wn.2d 499, 502, 760 P.2d 348 (1988).

The commencement of the three-year statute of limitations is also implicated by the "continuous representation rule," which tolls the statute of limitations "only during the lawyer's representation of the client in the *same matter* from which the malpractice claim arose." *Janicki, supra,* at 661.

The plaintiff bears the burden of proving that all essential facts were not discovered, and could not have been discovered by due diligence, more than three years before it commenced the action.[1] *G.W. Constr.*

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[1]To establish a claim for legal malpractice, a plaintiff must prove the following elements: (1) the existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. *See Hizey v. Carpenter,* 119 Wn.2d 251, 260-61, 830 P.2d 646, 651-52 (1992); *Hansen v. Wightman,* 13 Wn. App. 78, 88, 538 P.2d 1238 (1975); *Sherry v. Diercks,* 29 Wn. App. 433, 437, 628 P.2d 1336, review denied, 96 Wn.2d 1003(1981); see also *Bowman v. Doe,* 104 Wn. 2d 181, 185, 704 P.2d 140 (1985)(once an attorney-client relationship is established, the elements for legal malpractice are the same as for negligence).

Corp. v. Prof'l Serv. Indus., Inc., 70 Wn. App. 360, 367, 853 P.2d 484 (1993).

B. Plaintiff's Legal Malpractice Claim Against Kram Is Barred By The Statute of Limitations As She Discovered All Essential Facts Giving Rise To Her Claim Against Them Long Before May 3, 2010.

The undisputed facts establish that Plaintiff waited too long to sue Kram for legal malpractice. In *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.,* 129 Wn.App. 810, 120 P.3d 605 (2005), rev. den., 157 Wn.2d 1004, 136 P.3d 758 (2006), the plaintiff filed a legal malpractice and breach of fiduciary duty lawsuit against her former attorney alleging, among other things, that the statute of limitations did not commence regarding the defendant's conflicted representation until the plaintiff consulted with independent counsel and received sufficient information to understand the conflict. The trial court disagreed and the court of appeals affirmed, holding that the discovery rule did not apply because the plaintiff was aware of the dual representation as it was happening because the defendant/attorney did not conceal the fact that she was representing both parties. The *Cawdrey* court held that plaintiff waited too long to file suit as the three-year statute of limitations had expired, entitling the defendant/attorney to summary judgment.

Here, Plaintiff's malpractice allegations against Kram are related to their purported malpractice in the payment of co-defendant Barcus' contingent fee following the $2.1 million settlement and Krams' alleged conflict of interest in their purported dual representation of Plaintiff and

the Barcus firm in the Guardianship. However, just as in *Cawdrey*, the evidence before the Court establishes that Plaintiff had actual or constructive knowledge of the facts giving rise to her claim for Krams' alleged malpractice long before May 3, 2010, which is three years before she filed this lawsuit against them.

First, on March 23, 2006, Plaintiff filed a verified Funds Petition with Pierce County Superior Court requesting approval of the distribution to the Barcus firm of their one-third contingency fee of the $2.1 million settlement, pursuant to the court-approved retainer agreement between Plaintiff and the Barcus firm. The court entered the order on March 31, 2006. CP 122, ¶ 30; 57, ¶ 10.

Second, on May 1, 2006, following Plaintiff's March 23, 2006, Funds Petition request and court order granting her request, she admitted in writing that she would "probably never be at peace with the huge fees you require." CP 58, ¶ 11.

Third, in September 2008, Plaintiff contacted Mr. Caryl about investigating the reasonableness of the contingency fee from the $2.1 million settlement paid to the Barcus firm. CP 718, ¶ 17.

Fourth, a month later, in October 2008, Plaintiff informed Mr. Bush, the Trustee, that she wanted to hire Mr. Caryl to investigate potential claims related to the Barcus firm's fees, admitting that she had been waiting to do so pending expiration of the statute of limitations from the accident and the completion of the Barcus firm's representation:

> I'm sorry to spring this onto [sic] all of a sudden – but I had to wait till the drunk driver case closed since we paid for that work to be done. I think we're all done with the Barcus firm now. Of course I feel I failed Sarah with these attorneys and allowed her to be stolen from by nearly a million – I'm sick sick sick over it. Have been for a long time. . . . ."

CP 640, ¶ 6.

Fifth, in December 2008, Plaintiff petitioned the Pierce County Superior Court to have the Trust pay Mr. Caryl's retainer for purposes of investigating claims related to the Barcus firm's contingency fee from the settlement. In her supporting declaration, Plaintiff stated that she believed the fee paid to the Barcus firm for the $2.1 million settlement was "unconscionable." Plaintiff also filed a declaration in support of her reply, stating that she "strongly believe[d] that the fees received by the Barcus Law Firm were excessive and inappropriate" and claimed she "was not thoroughly counseled or even aware of the orders" approving the fees. CP 717, ¶¶ 8-9; 640-641 ¶ 8.

Finally, there was no conflict of interest regarding Krams' General Retainer Agreement. Nonetheless, just like *Cawdrey*, Plaintiff had knowledge of the purported conflict from the time she signed the General Retainer Agreement on October 5, 2005, and cannot rely on the discovery rule to toll the statute of limitations pending review by an attorney like Mr. Caryl.

This undisputed evidence establishes that Plaintiff's legal malpractice claim against Kram is time-barred as she had actual

knowledge of the essential facts (at the latest) at the time she fired Kram—in October 2008--yet she did not file suit until May 3, 2013, almost five years later. Given Plaintiff's actual knowledge of this undisputed evidence, it stands to reason that Plaintiff also cannot meet her burden by showing that the essential facts giving rise to her malpractice claim against Kram could not have been discovered by due diligence more than three years before May 3, 2010. *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, *supra,* 70 Wn. App. at 367.

The Court should also reject Plaintiff's claim that the three-year statute of limitations is tolled because of Krams' purported violation of RPC 1.9. App. Brief at pp. 37-39. First, Plaintiff fails to identify any legal authority supporting the proposition that an alleged RPC violation after an attorney is fired by his former client tolls the statute of limitations for a legal malpractice claim against that attorney. *Id.* Second, to the extent she is alleging Kram violated an RPC in his representation of her, it should be disregarded by the Court as such claims cannot form the basis of a civil action against an attorney. *Hizey v. Carpenter,* 119 Wn.2d 251, 258-262, 830 P.2d 646 (1992). Further, only the Washington Supreme Court has jurisdiction to entertain an attorney's alleged violation of an RPC. *See Hahn v. The Boeing Co.,* 95 Wn.2d 28, 34, 621 P.2d 1263, 1266-67 (1980).

Plaintiff's argument that a six-year statute of limitations should apply to her claims against Kram fail under *Davis v. Davis Wright Tremaine*, 103 Wn.App. 638 (2000). App. Brief at p. 36. In *Davis* the

court held that claims based on duties that arise by virtue of an attorney/client relationship, as opposed to specific contractual duties set out in a written agreement, are not governed by the limitation applicable to written agreements, but rather by the three-year limitation applicable to torts. *See also Owens v. Harrison*, 120 Wn.App. 906, 86 P.3d 1266 (2004) (distinguishing between a breach of contract claim for failure to draft a will from a tort claim for drafting a will negligently). Plaintiff's argument for a six-year limitations period regarding her claims against Kram fail as a matter of law because it is based on Krams' alleged duties in the attorney/client relationship, not the agreement itself.

The trial court's summary judgment motion in Krams' favor on Plaintiff's malpractice claim should be affirmed.

C. Plaintiff's Breach Of Fiduciary Duty Claim Against Kram is Barred By The Statute of Limitations As She Discovered All Essential Facts Giving Rise To Her Breach Of Fiduciary Duty Claim Against Them Before May 3, 2010.

Plaintiff's breach of fiduciary duty claim against Kram is subject to a three-year statute of limitations and the discovery rule. RCW 4.16.080(2); *Hudson v. Condon,* 101 Wn.App. 866, 873-874, 6 P.3d 615 (2000), rev. den., 143 Wn.2d 1006, 21 P.3d 290 (2001). As such, the undisputed evidence establishing Plaintiff's actual and constructive knowledge identified above also applies to defeat Plaintiff's breach of fiduciary duty claim against Kram here. That is, from March 2005, through at least October 2008, when she fired Kram, Plaintiff had actual

and constructive knowledge of facts supporting her breach of fiduciary duty claim against Kram, yet she did not file suit until almost five years later, on May 3, 2013.

As argued previously, to the extent Plaintiff's breach of fiduciary duty claim against Kram is based on alleged Rules of Professional Conduct ("RPC") violations, they should be disregarded by the Court as they cannot form the basis of a civil action against an attorney. *Hizey v. Carpenter, supra.* Only the Washington Supreme Court has jurisdiction to entertain an attorney's alleged violation of an RPC. *See Hahn v. The Boeing Co., supra.*

For these reasons, the trial court's summary judgment motion in Krams' favor on Plaintiff's breach of fiduciary duty claim should be affirmed.

D. Plaintiff's Claims Against Kram Were Not Tolled Under RCW 4.16.190(1).

Plaintiff argues that the statute of limitations related to her legal malpractice and breach of fiduciary duty claims against Kram are tolled indefinitely under RCW 4.16.190(1)[2], by virtue of her Sarah's incapacity,

[2] RCW 4.16.190(1) states: "Unless otherwise provided in this section, if a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW, or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action."

citing *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989), and as a result, this Court should reverse the trial court's summary judgment order in Krams' favor. Brief of Appellant ("App. Brief") at pp. 12-15.

In *Young*, the Washington Supreme Court held that appointment of a guardian did not stop tolling of an incompetent's claims under RCW 4.16.190 "without a clear directive from the Legislature" to that effect. *Id.* at 224. Plaintiff also cites to *Rivas v. Overlake Hospital Med. Ctr.,* 164 Wn.2d 264, 189 P.3d 753 (2008), which did not involve the appointment of a guardian, to support her argument.

Toward this end, Plaintiff argues that the trial court improperly applied Washington's Trust and Estates Dispute Resolution Act ("TEDRA") in ruling that the statute of limitations under RCW 4.16.190(1) is not tolled because TEDRA does not apply under the facts of this case. According to Plaintiff, her claims against Kram do not involve the administration of a trust or any similar allegations that fall within the parameters of TEDRA, which was alleged in the Complaint solely as "an alternative grounds for venue and jurisdiction." App. Brief at pp. 15-22. A reasoned analysis of Plaintiff's claims, the language of TEDRA, and the Washington Court of Appeal's interpretation of TEDRA, demonstrates that Plaintiff is wrong.

1. <u>The Trust and Estates Dispute Resolution Act.</u>

The Trust and Estates Dispute Resolution Act ("TEDRA"), was adopted in 1999, ten years after *Young*, "and represents the clear directive

from the Legislature" that the *Young* court alluded to in that opinion. TEDRA was promulgated to confirm Washington's "longstanding public policy of promoting the prompt and efficient resolution of matters involving trusts and estates." RCW 11.96A.070(3). Further:

> The overall purpose of this chapter is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under Title 11 RCW.

RCW 11.96A.010. Relevant to the conclusion that the trial court was correct in applying TEDRA to Plaintiff's RCW 4.16.090(1) tolling argument, TEDRA defines "Matter" to include "any issue, question, or dispute involving . . . The determination of any question arising in the administration of an estate or trust . . . ." RCW 11.96A.030(2)(c).

TEDRA also includes a provision--RCW 11.96A.070(4)--that creates a specific exception to the tolling statute Plaintiff attempts to rely upon:

> The tolling provisions of RCW 4.16.190 apply to this chapter except that the running of . . . any other applicable statute of limitations for any **matter** that is the subject of dispute under this chapter**, is not tolled as to an individual who had a guardian ad litem, limited or general guardian of the estate,** . . . to represent the person during the probate or dispute resolution proceeding.

Id. (Bold added.)

2. The Undisputed Facts Establish That the Trial Court Was Correct in Ruling That TEDRA Applies to Plaintiff's Claims Against Kram.

The Court need look no further than Plaintiff's allegations in the Complaint against Kram and the undisputed facts regarding the appointment of a guardian and guardian ad litem to conclude that TEDRA applies to this case.

a. TEDRA Applies to Plaintiff's Claims Against Kram Based on the Complaint.

Plaintiff's Complaint against Kram establishes that TEDRA applies to her claims against Kram. Specifically, Plaintiff admits that the trial court has jurisdiction and venue of her case against Kram based on TEDRA:

> ¶ 2.1 This Court has jurisdiction of this cause under the statutes and the Constitution of the State of Washington, **including but not limited to RCW 11.96A.020 and 11.96A.040.**
>
> ¶ 2.2. Venue is proper in King County pursuant to RCW 4.12.025 (1) and (3) because The Law Offices of Ben F. Barcus & Associates, PLLC transacts business and/or transacted business at the time the cause of action arose in King County**; and pursuant to RCW 11.96A.050.**

CP 3, ¶¶ 2.1, 2.2 (bold added). In addition, she re-alleges TEDRA's applicability as to each and every cause of action against Kram. CP 13, ¶ 5.1; 14, ¶¶ 6.1, 7.1.

In her Prayer for Relief, Plaintiff also seeks her attorney's fees and costs against Kram under TEDRA:

> ¶ 8.6 For an award of reasonable fee shifting attorney's fees and all costs provided for in RCW 11.96A.150.

CP 15, ¶ 8.6.

In short, Plaintiff's reliance upon RCW 11.96A.020 (providing courts with power to administer all matters concerning the assets of incapacitated persons), RCW 11.96A.040 (original subject matter jurisdiction for such claims), RCW 11.96A.050 (venue for such claims), and RCW 11.96A.150 (attorney's fees and costs) in pursuing her claims against Kram irrefutably establish that TEDRA applies to this case.

b. <u>The Facts Establish Plaintiff's Claims Against Kram Are Governed by TEDRA.</u>

Despite Plaintiff's bald admissions regarding the applicability of TEDRA identified above, she assigns error to the trial court's ruling in Krams' favor because the Complaint "is not a TEDRA action arising under Title 11." App. Brief at p. 16. The following undisputed facts, however, emphatically confirm that the trial court did not err and that TEDRA applied to Plaintiff's claims against Kram from the very beginning of their retention.

First, Sarah's Guardianship Petition was granted and a Guardian Ad Litem (Judson Gray) was appointed on Sarah's behalf on October 19,

2005. CP 573-574, ¶ 2. GAL Gray continued to act in that capacity until he was discharged on April 21, 2006. CP 575, ¶ 7. The creation of a Guardianship and the appointment of a GAL are governed by Title 11--specifically, RCW 11.92, et. seq. and RCW 11.88, et. seq. Further, the GAL was expected to be versed "and familiar with "the interplay of Washington laws regarding torts, guardianship, insurance and probate claims, subrogation, medical payments and special needs trusts." *Id.*

Second, Plaintiff was appointed as Sarah's Guardian shortly thereafter, on November 10, 2005. CP 55, ¶ 6. Once again, that appointment is governed by Title 11 and falls within TEDRA. Included in the order appointing Plaintiff as Guardian was the requirement that GAL Gray remain as a settlement GAL to address any issues related to the settlement of any claims prosecuted on Sarah's behalf, which would benefit the guardianship estate and is governed by TEDRA. *Id.* The order also precluded the distribution of any settlement funds without a court order. *Id.*

Third, on March 23, 2006, Plaintiff petitioned the court for the creation of a special needs trust for Sarah following a $2.1 million settlement obtained by the Barcus firm on Sarah's behalf. CP 122, ¶ 30. Included in the submission of the petition was a report from GAL Gray requesting that the court approve the fees and costs payable to the Barcus

firm identified in the petition. CP 574, ¶ 5. The court approved plaintiff's petition on March 31, 2006. CP 57, ¶ 10. The petition, creation, and court approval of trusts, including special needs trusts, are governed by RCW 11.98, et. seq.

Plaintiff's allegations against Kram and the undisputed facts before the Court demonstrate that TEDRA applies to this case. The trial court's ruling in this regard should be affirmed.

3. The Trial Court Correctly Ruled That TEDRA's Application to Plaintiff's Claims Against Kram Precludes Tolling of the Statute of Limitations Under RCW 4.16.190(1).

Washington courts interpreting TEDRA establish that TEDRA was the "clear directive" from the legislature in response to the Washington Supreme Court's ruling in *Young* that incapacitated persons claims are tolled indefinitely.[3] That is, TEDRA carved out an exception for those matters where the incapacitated person was represented by a "guardian ad litem, limited or general guardian." RCW 11.96A.070(4). Here, Sarah had both.

In *Kwiatkowski v. Drews,* 142 Wn.App. 463, 176 P.3d 510 (2008), *rev. den.,* 164 Wn.2d 1005, 190 P.3d 54 (2008), the Washington Court of

[3] Nor does *Rivas v. Overlake Hospital*, 164 Wn.2d 261, 189 P.3d 753 (2008) support Plaintiff's position. App. Brief at pp. 14-15. Unlike the present case, no guardian was appointed for the alleged incompetent in *Rivas*, which addressed only the standard by which incompetency is established.

Appeals confirmed that the tolling of a statute of limitations under RCW 4.16.190(1) does not apply to an incapacitated person if a GAL has been appointed on his behalf, citing RCW 11.96A.070(4). While Plaintiff attempts to distinguish *Kwiatkowski* from this case because *Kwiatkowski* "involved the specifically defined exception" under RCW 11.96A.070(4), this is a distinction without a difference as the plain language of the statute establishes that Plaintiff's Complaint is a "matter" that falls within RCW 11.96A.070(4). *See In re Estate of Bernard,* --- P.3d ---, 2014 WL 3842917, at *14 (Wn.App. Aug. 4, 2014)(plain words of this definition of 'matter' make clear the broad scope of this term."); *In re Estate of Kordon*, 157 Wn.2d 206, 211 (2006) (TEDRA is applicable to statutory claims arising outside of specific TEDRA provisions when claim "aris[es] in the administration of an estate").

Finally, Kram has met their burden in demonstrating the applicability of TEDRA to Plaintiff's claims, which were addressed in Krams' reply brief in response to Plaintiff's argument that Krams' statute of limitations defense failed because of tolling under RCW 4.16.190(1). Prior to receiving Plaintiff's opposition, Kram had no basis to present the applicability of TEDRA to the trial court, nor seek to refute a tolling claim that had not yet been made. Krams' arguments in this regard were properly before the trial court.

E. Plaintiff Fails to Support Her Claim that TEDRA's Statute Precluding Tolling Under RCW 4.16.190(1) is Unconstitutional.

"A legislative enactment is presumed to be constitutional." *In the Matter of the Interest of J.R.*, 156 Wn.App. 9, 18, 230 P.3d 1087 (2010), review denied 170 Wn.2d 1006, 245 P.3d 226 (2010). "Therefore, a party challenging a statute has the burden of proving it is unconstitutional beyond a reasonable doubt." *Id.* at 18-19. As the Supreme Court has explained, "The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violated the constitution." *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

Plaintiff has not met her burden to prove that the statute RCW 11.96A.070(4) is unconstitutional beyond a reasonable doubt. She relies solely on the Supreme Court's opinion in *Schroeder v. Weighall*, 179 Wn.2d 566, 316 P.3d 482 (2014) to support her position that the tolling statute violates the state constitution. However, in *Schroeder*, the

Supreme Court addressed the constitutionality of an entirely different exception to tolling than what is at issue here. In *Schroeder*, the petitioner challenged the constitutionality of RCW 4.16.190(2), which creates an exception for medical malpractice claims from the tolling of the statute of limitations for minors. The *Schroeder* Court held that RCW 4.16.190(2) violates the privileges and immunities clause, article I, section 12, of the Washington State Constitution, which provides that "[n]o law shall be passed granting to any citizen [or] class of citizens ... , privileges or immunities which upon the same terms shall not equally belong to all citizens...." The Court found that "RCW 4.16.190(2) confers a benefit on a privileged group of citizens, i.e., medical professionals, and burdens a vulnerable minority, by placing "a disproportionate burden on the child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf." The *Schroeder* court explained that courts in other jurisdictions have "recognized this problem, noting that statutes analogous to RCW 4.16.190(2) have the greatest impact on children in the foster care system, children whose parents are themselves minors, and children whose parents are simply unconcerned. [Citation.] It goes without saying that these groups of children are not accountable for their status." *Id.* at 578-579.

Unlike the exception to tolling at issue in *Schroeder*, the exception to tolling created by RCW 11.96A.070(4) does not single out any politically advantaged group of citizens or business concerns for special treatment. Because the law does not confer a privilege to a class of citizens, it does not violate the Privilege and Immunities Clause. *Grant County Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004).

Also, unlike the tolling exception at issue in *Schroeder*, RCW 11.96A.070(4) limits its tolling exception to individuals "who had a guardian ad litem, limited or general guardian of the estate, or a special representative to represent the person during the probate or dispute resolution proceeding." Therefore, it does not affect children generally, and it does not burden a child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf. Rather, it negates the tolling provision only to those individuals, children or otherwise incapacitated individuals, who are represented during a probate or dispute resolution proceeding by a representative who has the knowledge and incentive, in fact a duty, to pursue claims on the individual's behalf. To apply, the individual must already be represented in the probate or dispute resolution proceeding, this necessarily requires

that the individual is already a party to the proceeding and his or her claims are being represented in that proceeding.

The *Schroeder* decision has no applicability to the TEDRA provision at issue here. Because Plaintiff relies exclusively on the *Schroeder* decision to support her position that the TEDRA provision is unconstitutional, she has failed to meet her burden.

F. Plaintiff's Equitable Tolling Argument Fails to Raise an Issue of Material Fact and Should be Rejected by the Court.

Plaintiff's claim that she has "raised equitable issues to toll the statute of limitations" under equitable tolling and equitable estoppel based on Krams' purported misconduct, fail as a matter of law. App. Brief at pp. 42-46.

The equitable tolling doctrine "'permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed.'" *In re Carlstad*, 150 Wn.2d 583, 593, 80 P.3d 587 (2003). However, "application of equitable tolling ... must only be done in the narrowest of circumstances and where justice requires." *In re Pers. Restraint of Carter*, 172 Wn.2d 917, 929, 263 P.3d 1241 (2011). "'Courts typically permit equitable tolling to occur only sparingly, and should not extend it to a garden variety claim of excusable neglect.'" *City of Bellevue v. Benyaminov*, 144 Wn.App. 755, 761, 183 P.3d 1127 (2008) (internal quotation marks omitted), *rev. den.*, 165 Wn.2d 1020 (2009).

Equitable tolling requires bad faith which prevents the timely

assertion of a claim and due diligence by the claimant: "bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff." *Id.* at 379 (quoting *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998)). Further, in deciding whether to grant an equitable remedy, courts must balance the equities between the parties, taking into consideration the relief sought and the hardship imposed on the other party, and recognize that equitable tolling is appropriate only when consistent with the purpose of *both* the statute providing the cause of action and the statute of limitations. *Douchette v. Bethel School District No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). The party asserting that equitable tolling applies bears the burden of proof. *Benyaminov*, 144 Wn.App. at 767. The vast majority of cases considering the doctrine find it inapplicable.

Plaintiff offers no evidence whatsoever that would justify application of the doctrine in this case. There is no evidence of bad faith on the part of Krams' representation of Sarah.[4] Nor is there evidence of

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[4] The cases cited by Plaintiff contrast starkly with this case. In *Millay v. Cam*, *supra,* a property owner whose property had been sold at a sheriff's sale asked for a payoff amount to redeem the property. One day before the redemption period expired, the purchaser provided a grossly exaggerated payoff amount, causing the original owner to pursue a declaratory judgment regarding the redemption amount rather than pay the requested amount. The court held that redemption period should be equitably tolled in such circumstances, where the owner could not with due diligence have ascertained the correct amount in the time that remained, particularly in light of the "strong aura of manipulation" of the amount by the purchaser. 135 Wn.2d at 207. Similarly, in *Thompson v. Wilson,* 142 Wn. App. 803, 175 P.3d 1149 (2008), also cited by Plaintiff, the time period for challenging a coroner's determination as to the cause of death was tolled where the coroner delayed meeting with the family, then promised to review the file when they finally met, but then failed to do so and again refused to meet further with the family, contrary to the coroner's statutory obligations. No such evidence of concealment on the part of the defendants exists here.

diligence on Plaintiff's part. To the contrary, she was aware of the issues she now complains of in 2006, and when she did begin to pursue it in 2008, it took her almost five more years to file her claims. The only delay during those seven-plus years that might be attributed to Kram were five months between Plaintiff's request for copies of Krams' files in September, 2011, and when they were produced in March and April 2012. Such circumstances do not support application of equitable tolling, particularly in light of the fact that Plaintiff was on notice of the facts underlying her claims and could have filed within the statutory period,[5] as well as the extensive time that has passed and the prejudice to Defendants as a result. *See, e.g., Douchette, supra*, 117 Wn.2d at 812-13 (no equitable tolling because of prejudice arising from fact that 3 years have elapsed since events at issue occurred, "[w]itnesses may no longer be available, memories have faded, and relevant evidence may no longer be obtainable.").

Finally there is no evidence – or argument – that applying the equitable tolling doctrine here would be consistent with *both* the purpose of the statute providing the cause of action *and* the purpose of the statute of limitations. To the contrary, it is *inconsistent* with the policies at issue

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[5] *See, e.g., Gunnier v. Yakima Heart Center*, 134 Wn.2d 854, 953 P.3d 1162 (1998) (no equitable tolling where medical malpractice plaintiff was on notice of her claims and nevertheless failed to file within statutory period); *Finkelstein v. Sec. Properties, Inc.*, 76 Wn. App. 733, 739, 888 P.2d 161 (1995) (rejecting doctrine where plaintiff learned of cause of action five years before filing suit); *Hazel v. Van Beek*, 135 Wn.2d 45, 61, 954 P.2d 1301, 1308 (1998) (denied for lack of diligence); *Trotzer v. Vig*, 149 Wn. App. 594, 607, 203 P.3d 1056, 1062 (2009) (tolling denied when plaintiff failed to meet burden of showing "bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff").

here. TEDRA embraces a "longstanding public policy of promoting the prompt and efficient resolution of matters involving trusts and estates" (RCW 11.96A.070(3)) that would be severely undermined by applying this doctrine. Equitable tolling is not appropriately applied in the face of such policies favoring finality. *See, e.g., In re Bonds*, 165 Wn.2d 135, 141-44, 196 P.3d 672 (2008) (reversing application of doctrine based on policies favoring finality of judgments and lack of evidence of bad faith or diligence).

G. Plaintiff's Equitable Estoppel Argument Fails to Raise an Issue of Material Fact and Should be Rejected by the Court.

Plaintiff relies on the "[c]losely allied" doctrine of equitable estoppel, arguing that Kram should be estopped from asserting a statute of limitations defense. App. Brief at pp. 43-46. But "'[e]quitable estoppel is not favored, and the party asserting estoppel muse prove each of its elements by clear, cogent and convincing evidence.'" *Peterson v. Groves*, 111 Wn.App. 306, 310, 44 P.3d 894 (2002). The elements are (1) an admission, statement or act inconsistent with a claim afterword asserted; (2) action by another in reasonable reliance on that act, statement or admission; and (3) injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement or admission. *Id.* It is appropriate to prohibit a defendant from raising a statute of limitations defense only when a defendant has fraudulently or inequitably invited a plaintiff to delay commencing suit until the statutory period has expired. *Id.*

Here, the applicable limitations period commenced in 2006, or in November, 2008, at the very latest, when Plaintiff fired Kram. Yet, Plaintiff offers no evidence, much less clear, cogent and convincing evidence that would satisfy her burden of proof, of any admission, statement or act by Kram that is inconsistent with any claim afterward asserted, or that in any way invited her to delay commencing suit until after the statutory period expired.[6]

Further, in Washington estoppel to plead the statute of limitations does not last forever; a plaintiff must act with reasonable diligence to pursue a claim upon discovering that admissions, statements or acts relied upon were false. *Peterson, supra,* at 314. What constitutes a reasonable time depends on the facts of the case. *Id.* Whatever statement was made to Plaintiff that she claims was false and that she relied on (which she did not identify) she offers no evidence that she proceeded diligently upon learning otherwise. To the contrary, the record shows Plaintiff did *not* act diligently. *See Peterson, supra.* As a result, Plaintiff's argument in this regard must fail. The trial court's order should be affirmed.

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[6]Again, the cases cited by Plaintiff are in stark contrast. In *Ray v. Queen*, 747 A.2d 1137 (D.C. 2000), equitable tolling was applied where an attorney distributed the bulk of a settlement to the widow of a decedent, contrary to intestacy laws, but gave no notice of the distribution to the other heirs, who did not learn of it until their mother died years later. In *Hood v. McConemy*, 53 F.R.D. 435 (D.C. Del. 1971), an attorney hired to represent clients in a medical malpractice case actively concealed the fact that the case had been dismissed, and in fact assured them that the case was proceeding smoothly. In *Robbins v. Wilson Creek Bank*, 5 Wn.2d 584, 105 P.2d 1107 (1940), a bank that sold a promissory note to another bank later claimed that the note had been lost and was unpaid, while at the same time it was actually collecting on the note and its related security.

V. JOINDER IN RESPONDENT'S BRIEF

Pursuant to RAP 10.1(g), Kram joins in the arguments contained in the brief of the Barcus respondents to the extent applicable.

VI. CONCLUSION

The undisputed facts establish that Plaintiff, Sarah's court-appointed guardian, waited too long to sue Kram for legal malpractice and breach of fiduciary duty. Sarah's incapacity did not toll the statute of limitations under TEDRA, which applies to her claims against Kram, as she was represented by a guardian and guardian ad litem. Further, there is no basis for the court to apply equitable tolling or equitable estoppel. The trial court's summary judgment order granting Krams' statute of limitations affirmative defense should be affirmed.

RESPECTFULLY SUBMITTED this 6th day of October, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this day I caused to be served via email transmission and U.S. Mail the attached BRIEF OF RESPONDENTS LEGGETT & KRAM, PETER KRAM, AND JANE DOE KRAM on the following counsel of record:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 6th day of October, 2014.

Loida Gallegos, Legal Assistant