NO. 98399-2
(COA NO. 78932-5-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THOMAS GILLESPIE and MARIE GILLESPIE,

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

PETITION FOR REVIEW

Gregory M. Miller, WSBA No. 14459

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I. IDENTITY OF PETITIONERS & MOTION

Petitioners Thomas and Marie Gillespie ("Tom and Marie") were plaintiffs in the trial court, appellants in the Court of Appeals, and are petitioners herein. They seek the relief stated in Section A.

A. Relief Requested.

Tom and Marie ask the Court to consider this pleading and its appendices as their Petition for Review of the decision in the Court of Appeals ("Decision") filed February 3, 2020, following two extensions which have been granted, and grant their Petition for the reasons given herein, in their extension requests in this Court, and their reconsideration papers in the Court of Appeals.

This motion is based on the following filings which are included in the appendix hereto, in this order:

1) Tom and Marie's extension motion filed in this Court on 4/10/20, with appendices;
2) Tom and Marie's extension motion filed in this Court on 5/22/20, with appendices;
3) Counsel's post-argument letter to the panel filed 11/15/19;
4) Post-Argument additional authorities filed 11/15/19; and
5) Post-Argument additional authorities filed 11/26/19.

The Court of Appeals decision is at pages A-8 to A-34 of the appendix attached hereto.

B. Basis for Relief and Argument.

Tom and Marie's second extension request to this Court filed on May 22, 2020, informed the Court that one reason they could not proceed was because the result of the trial court rulings below have cut off their regular income source and compromised their ability to pay for further legal work. *See* Second Motion for Extension at p. 2, ¶ 2-6. They have therefore elected to conserve their financial resources for the supplemental brief and/or oral argument, both of which Ms. Tribe will assist with, as noted at p. 1 of the Second Motion for Extension.

Undersigned counsel can represent that Tom and Marie have not made any payments towards the appeal since September, 2019. As a courtesy to them, counsel is submitting a bare-bones Petition for Review on the belief there are meritorious issues. In particular, the validity, scope, and construction of the no-contest clause ("*In Terrorem* Clause") should be addressed to update and clarify the Court's case law and give much-needed guidance to the lower courts and parties in this important area.

The Petition should be accepted for consideration because it contains the essential elements of substance and form, including the statement of issues presented, tables of contents and authorities for this pleading, and a copy of the underlying decision. Tom and Marie respectfully request that any defects in form be waived. RAP 1.2(a).

II. FACTS AND COURT OF APPEALS DECISION

The trial court orders entered in summer and fall of 2018 resulted in cutting off various payments and assets to Tom and Marie since entry of judgment in September, 2018, based on application of a no contest clause in the Will of Tom's father T.R. Gillespie "TR"), as an offensive weapon in the litigation over the administration of TR's Estate. TR is also the father of the Estate administrator, Valerie Gillespie ("Val").

The Court of Appeals Decision affirmed in part and reversed in part and remanded to determine whether Tom and Marie proceeded with their claims in good faith. If they did, then the no-contest clause could not apply and there was not a proper basis for the trial court to disinherit them. However, the Decision adopted a broad reading of the language in TR's will setting forth the clause and then applied it broadly, contrary to current case law from the Court of Appeals and this Court. If the clause's scope and application are given the normal reading under established case law, which the Decision did not address at all despite it being raised in the opening brief and oral argument, it would not have applied in any event and the good faith issue would not need to be reached; the orders disinheriting Tom and Marie would be vacated as part of the appellate decision, rather than after a remand proceeding.

The no contest clause was called an "*In Terrorem* clause" in the Will and litigation, but it is in line with the general category of no contest or forfeiture clauses of various forms that Washington courts have addressed since the early 1900's.

However, this Court has not addressed how those clauses are to be interpreted and applied (*i.e.*, strictly or liberally, to further inheritance or exclusion) for over 65 years, since *Boettcher v. Busse*, 45 Wn.2d 579, 277 P.2d 368 (1954). As noted in Tom and Marie's reconsideration papers to the Court of Appeals, the February 3, 2020, decision they ask to have reviewed interpreted the no contest clause in TR's Will broadly, contrary to established Washington law and which was a necessary predicate to it being wielded as a sword. *See, e.g.,* Reconsideration Motion at pp. 12 and fn. 8, App. A-49 hereto.

The assets controlled by Val have all been withheld from Tom and Marie since the final judgment in September, 2018, so that Tom and Marie have no income or asset base from which to readily pay legal fees. They were able to pay for an opening brief and some of the cost of oral argument Court of Appeals. Their ability to finance further litigation is compromised and dependent on getting loans.

These facts bring into sharp focus the importance of a definitive statement from this Court on how such forfeiture clauses are interpreted and applied. Here it matters immediately and tremendously. Estate issues such as this are increasingly important as the post-WWII generation ages, and as the COVID pandemic continues.

III. ISSUES PRESENTED FOR REVIEW

A. The Court of Appeals decision's interpretation and application of the no contest clause conflicts with established Washington law which requires a strict construction and limited application.

This Court has not addressed how to interpret or apply such clauses since the *Boettcher* decision in 1954. However, the Court of Appeals has applied such clauses and consistently given strict construction and limited applications, but as explained in the Reconsideration Motion, the Decision conflicts with that rule:

> The Decision interpreted the Clause in TR's Will broadly, giving the same reading the trial court did, *i.e.,* the Clause applies to challenges to the administration of the ***Estate***, not just challenges to the probate of the validity of the ***Will***. *See* Decision at 14.

Reconsideration motion, p. 12, App. A-49 hereto. The footnote in the motion explains that this is inconsistent with established Washington law, meeting the criteria of RAP 13.4(b)(2) and (4):

> This reading of the Clause in the Decision is necessarily a broad one. However, a broad reading of the language in such clauses overlooks the settled rule for judicial interpretation and application of such no contest clauses, which is done strictly and according to their actual terms after *de novo* review of the language in the clause, thus minimizing their application. *See* OB at pp. 18-22.[1] Those principles and cases, and in particular the most recent decision of *Kellar v. Estate of Kellar*, 172 Wn.App. 562, 291 P.3d 906 (2012), *rev. den.,* 178 Wn.2d 1025 (2013), were not addressed in the Decision.

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[1] The Opening Brief cited *Kellar; Boettcher v. Busse*, 45 Wn.2d 679, 277 P.2d 368 (1954); *In re Chappell's Estate*, 127 Wash. 638, 221 P. 336 (1923); *In re Kubick's Estate*, 9 Wn. App. 413, 513 P.2d 76, *rev. den.*, 83 Wn.2d. 1002 (1978); *In re Estate of Mumby*, 97 Wn. App. 385, 982 P.2d 1219 (1999); *In re Estate of Kessler,* 95 Wn.App. 358, 369-370, 977 P.2d 591 (1999); and Mark Reutlinger, WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION, Ch. 7, §B.2.c., (WASH. STATE BAR ASSOC. 3D ED. 2018) ("*Reutlinger"*), discussing "No-Contest Clauses."

Reconsideration motion, p. 12, fn. 8, App. A-49 hereto.

B. The Court of Appeals interpretation of the no contest clause to the administration of the Estate, rather than just to the probate of the will, is inconsistent with settled Washington law as set out below.

There also has not been a decision from this Court clarifying the distinction between the probate of a ***will***, and the probate of an ***estate***, as discussed in the reconsideration motion at pages 10-12, App. A-47 to A-49 hereto. Both are material and critical to the correct resolution of this case, and for parties going forward with their estate planning and administration. The Court of Appeals decision is inconsistent with this law as seen in the post-argument supplemental authorities at App. A-112 and A-116 hereto, and as also discussed in *Reutlinger, supra.* Review should be granted. RAP 13.4(1), (4).

C. The Court of Appeals refusal to consider as adequate Tom and Marie's challenge to the fee award which was integrated into their other arguments, and as to which error was assigned and an issue statement set out, is inconsistent with Washington law and appellate practice, including RAP 1.2(a) which counsels deciding issues when they are presented, and where there is no rule or decision requiring separate argument sections to challenge a fee order which depends on other rulings.

Tom and Marie raised the fee issue in detail in their reconsideration motion at pp. 5-10, App. A-42 to A-47 herein. The specific recitation of how the issue was raised in their appellate briefing is set out there and will not be repeated herein. Their argument on reconsideration still pertains, albeint with a stronger policy imperative since the Decision is published and is setting out a new requirement for challenging trial court fee awards that

did not exist before, either in case law or under the rules. Indeed, as Tom and Marie argued, it is inconsistent with the rules:

> Refusing to give effect to their challenge to the fee award is also contrary to RAP 1.2(a)'s mandate of reaching a just decision on the merits. It is effectively a sanction for a perceived technical failure under the appellate rules. Just this past December, the Supreme Court reminded the Bench and Bar of the importance and *requirement* under RAP 1.2(a) of a liberal interpretation of the appellate rules to avoid harsh or unjust results when applying the appellate rules. *See State v. Graham*, [194 Wn.2d 965], 454 P.3d 114, 116-117 (2019) (reviewing appellate decision imposing sanctions and, after applying the substantive law and court rules to the facts, vacating appellate sanctions for an abuse of discretion).
>
> *Graham* is wholly consistent with long-settled law under the appellate rules that, if the nature of a party's challenge to the trial court ruling is clear, it will be considered and addressed by the appellate court, notwithstanding claimed technical defects. *See, e.g., Daughtry v. Jet Aeration Co*., 91 Wn.2d 704, 710, 592 P.2d 631 (1979) (where nature of challenge is clear, issue will be addressed by appellate court, despite technical noncompliance with appellate rules).

Reconsideration Motion at 9, App. A-46 hereto. Review should be granted per RAP 13.4(b) because this ruling on fees is inconsistent with this Court's decisions and this Court's adoption and application of RAP 1.2(a), and is of substantial public interest since it addresses a core element of the appellate courts' error correction responsibilities, and thus the faith the public has in our courts which is of substantial public interest.

IV. CONCLUSION

Tom and Marie Gillespie respectfully ask the Court to consider this pleading and its appendices as a Petition for Review and, on the substance, grant review on all the issues raised in the Court of Appeals.

Respectfully submitted this 15th day of June, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By */S/ Gregory M. Miller*
Gregory M. Miller, WSBA No. 14459
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via court e-filing website, which sends notification of such filing to the following:

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DATED this 15th day of June, 2020.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, PLS
Legal Assistant/Paralegal to Gregory M. Miller

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NO. _____
(COA NO. 78932-5-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THOMAS GILLESPIE and MARIE GILLESPIE,

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW PER ORDER NO. 25700-B-611

Gregory M. Miller, WSBA No. 14459

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APPENDIX A

I. IDENTITY OF MOVING PARTIES AND RELIEF REQUESTED

Petitioners Thomas and Marie Gillespie ("Tom and Marie") seek an extension until May 22, 2020, to file a petition for review, pursuant to RAP 18.8(a) and the Court's recent Order No. 25700-B-611, suspending RAP 18.8(b) for petitions for review due on or after March 27, 2020. The petition in this case is due on or before April 9, 2020.

Alternatively, Petitioners request the Court to treat this pleading as their petition for review based on the arguments raised in their motion for reconsideration and reply at the Court of Appeals, in the appendix.

II. REASONS WHY RELIEF SHOULD BE GRANTED

The undersigned is principally responsible for this appeal. The Court is all too well aware of the state and national emergency stemming from the COVID-19 pandemic, graciously issuing Order No. 25700-B-611. To say the pandemic has disrupted working norms and schedules for counsel (and the courts) is an understatement. Because of that, and a series of filings and arguments, counsel had no opportunity to address a petition for review in this matter by the April 9 due date, and is still playing catch-up with earlier required filing deadlines. These include on March 6, (while Counsel was in Brooklyn meeting his newborn first grand-daughter) counsel received a ruling from this Court in No. 97232-0, which meant a motion and declarations were due to be filed March 16. In the meantime, counsel gave oral argument in Division III in Spokane on Thursday, March 12 (driving to Spokane and back to avoid crowds and airports, and also filed

a petition for review in No. 80095-7-I on March 16. Counsel then filed pleadings for a motion for discretionary review in Division II on March 18; an amicus brief in No. 98118-3 on March 30; an opening brief in No. 80910-5-I on March 31; a merits reply brief in 79904-5-I on April 1; a motion reply in 97232-0, and a revision due on April 10; reply briefing and declarations due in the discretionary review matter on April 13 in No 54601-9-II; and a merits reply brief due April 20 in No. 80609-2-I, among other professional obligations. Arguments are scheduled in this Court and Division II on April 30 and May 6, respectively.

Counsel also continues to address various family issues arising during the pandemic (as many people do), including close contact with his son and newborn in Brooklyn, one of the centers of the virus, and the recent news of his older brother and sister in law in Dallas contracting the virus.

Given these factors, and the far less efficient working environment at home since March 25, counsel believes a petition for review can be filed on or before May 22, 2020.

There is merit and importance to the issues that will be raised in any petition, including the points as to the proper judicial interpretation and application of the Will's *In Terrorem* or no contest clause (which this Court has not addressed since the 1950's), and the distinction between the probate of a will and the probate of an estate, as discussed in the reconsideration motion at pages 10-12.

Petitioners simply ask that in these extraordinary times where they have genuine issues that this Court should consider whether to review, that

they be given the time needed to file a proper petition for review that articulates those issues in the context of the current law and RAP 13.4.

III. CONCLUSION

Petitioners Tom and Marie Gillespie respectfully request an extension until May 22, 2020, to file their petition for review. Alternatively, they ask the Court to treat this pleading and its attachments as the petition, in which case they will submit the filing fee.

Respectfully submitted this 9th day of April, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By/*Gregory M. Miller*
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Kenneth W. Hart, WSBA No. 15511

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via court e-filing website, which sends notification of such filing to the following:

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DATED this 9th day of April, 2020.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, PLS
Legal Assistant/Paralegal to Gregory M. Miller

APPENDIX A

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FILED
2/3/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In re the Estate of: THOMAS R. GILLESPIE	)	No. 78932-5-I DIVISION ONE
THOMAS GILLESPIE and MARIE GILLESPIE, and the marital community composed thereof, Appellants, v. VALERIE GILLESPIE, an individual and co-personal representative of the ESTATE OF THOMAS R. GILLESPIE, and JAMES EECKHOUDT, an individual and co-personal representative of the ESTATE OF THOMAS R. GILLESPIE, Respondents.	)	PUBLISHED OPINION FILED: February 3, 2020

ANDRUS, J. — Tom and Marie Gillespie, beneficiaries of the Estate of T.R. Gillespie (Estate), appeal a trial court order concluding that they triggered an *in terrorem* clause in T.R.'s Last Will and Testament (Will) and forfeited their right to any inheritance from the Estate when they commenced a lawsuit challenging the personal representatives' management of the Estate.

We affirm the trial court's conclusion that the current suit fell within the scope of the *in terrorem* clause, but conclude that res judicata bars the personal

representatives from relitigating whether the *in terrorem* clause contains a good faith exception. We also reverse the trial court's finding that Tom and Marie failed to bring the lawsuit in good faith because the court did not apply the correct standard in making this determination. The trial court should, in the first instance, determine whether Tom and Marie made a full and fair disclosure of all material facts to their counsel and brought this lawsuit on that legal advice. If Tom and Marie make this prima facie showing, they are entitled to a rebuttable presumption of good faith, and the burden shifts to Val and Jim to overcome this presumption with evidence of bad faith. We otherwise affirm the rulings of the trial court.

FACTS

Thomas (T.R.) Gillespie died testate in 2011, and his Will was admitted to probate on July 14, 2011. At the time of his death, T.R. had two living children, Valerie (Val) and Thomas Jr. (Tom).[1] T.R.'s son, David, had predeceased him but was survived by his wife, Judy, and their children. T.R.'s estate included the estate of his wife, Marianne, who also had predeceased him (hereinafter collectively "Estate"). T.R.'s fourth and final codicil named Val and James (Jim) Eeckhoudt, Judy's brother, to serve as co-personal representatives. The Will contained an *in terrorem* clause, stating that any beneficiary who challenged the Will's probate forfeited his right to inherit from the Estate.

During their lifetimes, T.R. and Marianne created a number of trusts to hold various assets. The Gillespie Family Trust (Trust), created in 2000, named Val and Jim as co-trustees, and the beneficiaries of the Trust included every living

[1] Because the majority of the parties have the same last name, this opinion refers to them by their first names. We mean no disrespect.

descendant of T.R. and Marianne, as well as Judy, their deceased son's widow. Jim is neither a Trust beneficiary nor a beneficiary of T.R.'s Estate.

Around the same time, T.R. and Marianne formed Gillespie, LLC (the LLC), in which they each owned a 50 percent interest. In 2001, T.R. and Marianne conveyed the majority of their interest in the LLC to the Trust. As a result of this transfer, at the time of his death, T.R. held a 10 percent interest in the LLC, with the remaining 90 percent owned by the Trust. In return, the Trust agreed to pay T.R. and Marianne annual annuities until their deaths.

In November 2011, four months after Val and Jim opened the probate, John Andersen, Tom's then-attorney, e-mailed Charles Farrington, Val and Jim's attorney, a list of the Estate's assets. Andersen's list confirmed his understanding that the Estate owned a 10 percent interest in the LLC. In a separate e-mail on the same day, Andersen indicated to Farrington that the Trust had incurred a significant amount of debt, which could be alleviated by liquidating the LLC. Andersen sent Farrington his proposed liquidation plan, which reflected the Trust's receipt of 90 percent of the liquidation proceeds. In 2012, Val's personal attorney sent Andersen a Proposed Distribution Schedule for the Estate. This distribution schedule similarly indicated that the Estate would receive 10 percent of the liquidation proceeds.

In 2014, however, Tom and his wife, Marie, filed a petition in King County Superior Court seeking an accounting by Val and Jim, an inventory and appraisal of the Estate assets, and an order directing the Estate to pay the mortgage of an Idaho home in which Tom and Marie lived. Tom explicitly sought a judicial

declaration that T.R. had never effectively transferred any interest in the LLC to the Trust. He claimed that T.R. and Marianne maintained their full interest in the LLC until their deaths because the Trust failed to make the required annual annuity payments to them. Tom also challenged the Estate inventory that Val and Jim had prepared, claiming that assets identified as belonging to the Trust, including T.R.'s capital account in the LLC, were never properly transferred from the Estate and thus belonged to the Estate. Tom alleged that the LLC's 2011 tax return showed that T.R. "retained his entire original capital account in the LLC until his death." Consequently, Tom claimed that the entire LLC capital account belonged to the Estate and that the inventory designation showing a 10 percent ownership interest was erroneous.

Tom and Marie's claims proceeded to trial in September 2014 before now retired Judge Kimberly Prochnau. In her 34-page Findings of Fact, Conclusions of Law and Judgment (2014 Order), Judge Prochnau rejected the contention that the Estate held an interest in the LLC greater than 10 percent, and despite Tom's argument to the contrary, concluded that the Trust owned the remaining 90 percent interest. Judge Prochnau also found no breach of fiduciary duties by Val and Jim and denied the request for a forensic accounting. Judge Prochnau found that T.R. and Marianne had not paid taxes on the annuity income they had received from the Trust and authorized Val and Jim to withhold funds in the Estate to account for potential tax liabilities.

Judge Prochnau also concluded that Tom was barred, under the doctrines of waiver and laches, from challenging either the Trust's failure to make certain

annuity payments to T.R. and Marianne, or their transfer of a 90 percent interest in the LLC to the Trust. The court concluded that even though the record showed the payments had not been made as required, there was no evidence that T.R. requested payment or otherwise challenged a lack of payment. Judge Prochnau prohibited Tom from "trying to realign the assets in a manner which the various estate planning devices do not support."

Judge Prochnau also found that Tom had misled the probate court by filing a 2013 petition to probate the Will and misrepresented that he resided in the state of Washington, misstated that the Will appointed him as sole personal representative, and failed to identify himself as the largest debtor of the Estate, to which he owed $600,000. Judge Prochnau found that Tom owed the Estate $605,000, with interest accruing at 6 percent per annum, as of the date of trial, and she entered judgment against him in this amount. The court then credited Estate distributions owing to Tom from Marianne's Credit Shelter Trust toward this judgment, leaving a balance owed by Tom to the Estate of $261,557.86. Judge Prochnau ruled that additional cash advances made by the Estate to Tom and Marie would be deducted from the value of their respective shares in the final distributions made to them from the Estate.

As a result, Judge Prochnau ordered the personal representatives, Val and Jim, to distribute the 10 percent interest in the LLC to its three beneficiaries, Tom (2 percent), Marie (2 percent), and Val (6 percent). Before that could occur, Val was ordered to list for sale real estate the LLC owned in Hawaii and to distribute the net proceeds from the sale to the LLC.

Finally, Judge Prochnau also included a provision prohibiting Tom and Marie from suing Val and Jim again:

> All claims which Tom and/or Marie may have with regard to facts and circumstances known or reasonably known as of this date, now or at any time in the future, against either of the Estates, the Gillespie Family Trust, the Gillespie, LLC, or Cam Square, LLC, or against either of the Personal Representatives of T.R.'s and Marianne's Estates, Trustees and Managers of the LLCs are forever barred . . . .

Although Val and Jim sought to disinherit Tom and Marie under the *in terrorem* clause of the Will, arguing that the lawsuit they initiated fell within the scope of that clause, Judge Prochnau declined to do so, concluding:

> Article IX of TR's Will contained an in terrorem clause (Ex. 4) which provided that a beneficiary under such Will forfeits his or her interest in the Estate by becoming an adverse party in a proceeding for its probate. . . . A similar, but not identical, provision in a will was read broadly by our Court of Appeals to apply to requests to remove a PR. In re Kubick's Estate, 9 Wn. App. 413, 513 P.2d 76 (1973), rev. denied, 83 Wash.2d 1002 (1973) . . . . Although TR's in terrorem clause is similar in its breadth of coverage . . . , it differs from the Kubick will in that it does not explicitly except challenges made in good faith. Kubick noted, at least in dicta, that such a blanket prohibition might violate the policies inherent in RCW 11.28.020. . . . Given the specific statutory exceptions for good faith challenges and the policy concerns enunciated by Kubick and other cases, the court reads TR's will to except good faith challenges from the punitive aspects of the in terrorem clause.

Judge Prochnau found Tom and Marie had brought the lawsuit in good faith and thus had not triggered the *in terrorem* clause.

Tom and Marie were apparently not dissuaded from further litigation, despite the resounding defeat they suffered in 2014. In January 2016, John McGowan, an attorney in Idaho retained by Tom and Marie, sent Farrington a letter demanding information on the status of the LLC capital accounts, claiming

that Val and Jim had been withholding the LLC Schedule K-1s from 2012 through 2014 and as a result, the tax documents provided to Tom and Marie for their tax return did not explain why there had been a contribution to the LLC in excess of $2 million when there had been no distribution to the LLC members. McGowan demanded that Farrington provide the LLC tax information and delay any distributions from the LLC to the Trust and from the Trust to the beneficiaries.

In response, Farrington sent McGowan a copy of the 2014 Order and explained that the capital account adjustments reflected on the LLC documents were an effort to comply with the 2014 Order. He clearly stated that "[t]he capital account issue you reference was considered . . . and conclusively found by the Court to be inaccurate so your discussion of ownership, basis, capital accounts, and liquidating distributions of the Gillespie LLC is not supported by the Findings of Fact, Conclusions of Law and Judgment of the Superior Court."

Farrington arranged to have the Estate's K-1, Tom and Marie's individual K-1s, and the Estate's tax returns for 2012 through 2014 sent to McGowan, but he declined to delay any distributions, contending that Val and Jim had to make these distributions in order to comply with the 2014 Order. Farrington informed counsel that:

> [Y]ou are at least the ninth attorney to contact Val and Jim and their attorneys in this case over a period of five years. . . . We have provided extensive discovery and endured a 10-day trial. As each attorney retained by TJ has summarily dismissed TJ and/or Marie as their client, we have had to educate each new attorney as he/she/they appear in the case. Two of TJ's and Marie's former attorneys have filed attorney's fee liens against TJ's interest in the Estate of TR Gillespie. In addition, TJ owes the Estate of TR Gillespie in excess of $600,000.00. His current Washington attorney

> is representing TJ and Marie in the pending attorney's fees motion relating back to the 2014 court decision.

Farrington also informed McGowan of the provision of the 2014 Order prohibiting Tom and Marie from suing Val and Jim again.

Despite previously facing the risk of losing their inheritance based on the *in terrorem* clause in the Will and being ordered not to sue Val and Jim based on facts known to them at the time of the 2014 trial, on February 29, 2016, Tom and Marie filed a new complaint against Val and Jim in a Blaine County, Idaho district court. They claimed that the LLC's 2014 tax return and a balance sheet provided to them in 2015 indicated a "transfer of capital" of approximately $2.5 million from the Estate to the Trust. They alleged that Val and Jim had breached their fiduciary duties by effectuating this capital transfer. Tom and Marie asked the Idaho court to order an accounting and to find that Val and Jim had breached their fiduciary duties by stating an intent to dissolve and liquidate the LLC without the members' consent. They once again alleged that the Estate should receive 100 percent of any proceeds generated by the liquidation of the LLC's assets. They also asked for a temporary restraining order to prevent Val and Jim from distributing the LLC's assets. On March 31, 2016, the Idaho court dismissed Jim from the lawsuit based on a lack of personal jurisdiction. Shortly thereafter, Tom and Marie dismissed the complaint against the remaining defendant, Val, without prejudice.

In July 2016, Val and Jim sent the Trust beneficiaries, including Tom and Marie, a letter informing them of their intent to liquidate the LLC. They informed the Trust beneficiaries that, as a result of the liquidation, $1,991,139 would be transferred to the Trust's capital account and that $467,387 would be transferred

to the Estate's capital account, consistent with their respective ownership interests. It is undisputed that Tom received this letter.

On September 28, 2017, Tom and Marie filed a new petition in King County Superior Court, seeking an accounting from the Estate. They alleged that any proceeds from the LLC's liquidation should be distributed in proportion to the members' capital account balances, rather than in proportion to their membership interests. Tom and Marie claimed that the Estate, not the Trust, should receive most, if not all, of the liquidation proceeds.

In response, Val and Jim, in their capacity as the executors of the Estate, argued that the 2014 Order barred these claims because Judge Prochnau explicitly found that the Estate owned only 10 percent of the LLC and it was entitled to receive only 10 percent of the LLC's liquidated assets. They also argued that the 2014 Order barred Tom and Marie from suing Val and Jim because their claims were based on facts known to them in 2014.

Tom and Marie subsequently amended this petition to assert direct claims of breach of fiduciary duty against Val and Jim individually. In their amended complaint, Tom and Marie alleged that Val and Jim made an unauthorized transfer of capital when they adjusted T.R.'s LLC capital account to reflect his 10 percent ownership, an action T.R. and Marianne had failed to take when the majority of their interest transferred to the Trust in 2001. Tom and Marie conceded that per the 2014 Order, the Estate owned only 10 percent of the LLC and the Trust owned the remaining 90 percent, but they argued that Judge Prochnau did not make findings or conclusions as to the associated capital accounts and did not explicitly

permit a transfer of capital to reflect the ownership interests. They argued that because Judge Prochnau had not made express findings as to the capital accounts, the Estate was entitled to all of the liquidation proceeds, which were in excess of $2.5 million.

In response, Val and Jim testified that they simply had complied with the 2014 Order and had repeatedly informed Tom and Marie of their intent to comply with the court's ownership determinations. They denied initiating any "transfer of capital;" instead, they testified they merely fixed an accounting error required by the 2014 Order. They also asserted that Tom and Maries' claims were barred by res judicata and/or collateral estoppel. Val and Jim asserted a counterclaim against Tom and Marie, seeking an application of the *in terrorem* clause.

Val and Jim then moved for summary judgment dismissal of Tom and Marie's claims, raising the collateral estoppel and res judicata defenses and asking the court to conclude that Tom and Marie had triggered the *in terrorem* clause by filing the lawsuit.

Tom and Marie filed a cross motion for partial summary judgment, claiming they were entitled to judgment as a matter of law because Val and Jim were unjustified in making a "transfer of capital" and that in doing so, they had unlawfully converted Estate assets and breached their fiduciary duties. They asserted that Judge Prochnau's determination that the Trust owned 90 percent of the membership interest in the LLC did not mean that the Trust also owned 90 percent of the company's capital. They contended that Val and Jim were barred by res judicata from arguing that the LLC capital accounting was erroneous.

On June 11, 2018, the trial court granted Val and Jim's summary judgment motion and denied Tom and Marie's motion. The order entered by the trial court contained detailed factual findings and legal conclusions. First, the court determined that the 2014 Order "required the Gillespie LLC to make an adjustment to capital and did not require Val & Jim as Managers of Gillespie, LLC to 'transfer' any capital, and certainly not in their capacity as Co-PRs." Second, it found no evidence that Val and Jim had transferred any capital from the Estate to the Trust. Finally, it found that Tom and Marie were attempting to relitigate the same claims they had previously alleged against Val and Jim by "asserting that Val and Jim acted improperly to carry out Judge Prochnau's trial orders." While the trial court concluded that the filing of the petition violated Judge Prochnau's order and dismissed all of Tom and Marie's claims, it reserved ruling and asked for supplemental briefing on whether Tom and Marie had triggered the *in terrorem* clause and forfeited their right to inherit from the Estate.

After further briefing from the parties, the trial court concluded that Tom and Marie had become adverse parties in the proceeding for the Will's probate and had thus triggered the *in terrorem* clause and forfeited their rights to the Estate. It further concluded, contrary to the legal ruling made by Judge Prochnau, that the *in terrorem* clause did not contain either a "safe harbor" provision or a good faith exception. It further found that "[t]he Plaintiffs have not acted in good faith and cannot avoid the invocation of this clause simply because they commenced this litigation with the advice of counsel." The trial court subsequently entered judgment of attorney fees and costs against Tom and Marie in the amount of

$53,635 and ordered that Tom and Marie must disgorge any and all partial distributions, debt offsets, advances on distributions, and income they had received from the Estate.

Tom and Marie moved for reconsideration, arguing that Judge Prochnau's legal ruling that there was a good faith exception to the *in terrorem* clause was binding on the parties through the doctrine of collateral estoppel. The trial court denied the reconsideration motion.

Tom and Marie appeal the trial court's ruling that their lawsuit triggered the *in terrorem* clause, the order that they disgorge any inheritance they had already received, and the assessment of attorney fees against them.

STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. Summary judgment is warranted only when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. CR56(c). The facts and all reasonable inferences are viewed in the light most favorable to the nonmoving party. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); Northgate Ventures LLC v. Geoffrey H. Garrett PLLC, __ Wn. App. ___, 450 P.3d 1210 (2019).

ANALYSIS

1. Applicability of the *In Terrorem* Clause

Tom and Marie argue the trial court erred in concluding that the *in terrorem* clause applied to this case. They alternatively argue that even if this lawsuit invoked the clause, the trial court erred in failing to give preclusive effect to Judge

Prochnau's legal conclusion that the clause did not prohibit legal challenges made in good faith on the advice of counsel.

The *in terrorem* clause provides:

> Should any beneficiary under this Last Will become an adverse party in a proceeding for its probate, such beneficiary shall forfeit his entire interest hereunder and such interest shall pass as part of the residue of my estate; . . . This Article shall not be construed to limit the appearance by any beneficiary as a witness in any proceeding for the probate of this Last Will, nor to limit his appearance in any capacity in a proceeding for its construction.

Tom and Marie argue that the clause applies only to challenges to the Will's validity and not to claims relating to the administration of the Estate by its personal representatives.

This court reviews the trial court's interpretation of a will de novo. In re Estate of Burks, 124 Wn. App. 327, 331, 100 P.3d 328 (2004). "The primary duty of a court when interpreting a will is to determine the intent of the testator." In re Estate of Niehenke, 117 Wn.2d 631, 639, 818 P.2d 1324 (1991). "Such intention must, if possible, be ascertained from the language of the will itself and the will must be considered in its entirety and effect must be given every part thereof." In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985).

The language of the clause provides that a beneficiary forfeits his or her interest if he or she becomes an "adverse party in a proceeding for [the Will's] probate." Nothing in the plain language of the clause limits its application to will contests.

Tom and Marie contend that the word "probate" means the court's act of deeming a will valid and "admitting" it as the legally binding instrument of the

testator's intent. The Will does not define the term "probate." Nor does chapter 11 RCW. In such case, the court may use a dictionary definition to discern the plain meaning on an undefined term. In re Estate of Petelle, 8 Wn. App.2d 714, 718, 440 P.3d 1026 (2019). At the time of the Will's execution, the term "probate" was defined as:

> [The] Court procedure by which a will is proved to be valid or invalid; though in current usage this term has been expanded to generally refer to the legal process wherein the estate of a decedent is administered. Generally, the probate process involves collecting a decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs. These activities are carried out by the executor or administrator of the estate, usually under the supervision of the probate court or other court of appropriate jurisdiction.

BLACK'S LAW DICTIONARY 1202 (6th ed. 1990).[2] The dictionary definition demonstrates that the term "probate" has taken on a meaning beyond will contests to cover the administration of an estate.

The trial court did not err in concluding that Tom and Marie's lawsuit was an adversary proceeding relating to the probate of the Will. Their initial petition for an accounting invoked a probate statute, RCW 11.68.065.[3] This statute provides:

> A beneficiary whose interest in an estate has not been fully paid or distributed may petition the court for an order directing the personal representative to deliver a report of the affairs of the estate signed and verified by the personal representative. . . . Upon hearing of the petition after due notice as required in RCW 11.96A.110, the court may, for good cause shown, order the personal representative to deliver to the petitioner the report for any period not covered by a previous report.

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[2] T.R. executed his Will in 1996. "A testator is presumed to have known the law in force when the will was drafted and to have drafted the will in conformity with that law. Consequently, if a will [is] ambiguous, the law when the instrument was drafted is a circumstance to consider in determining the testator's intent." McDonald v. Moore, 57 Wn. App. 778, 780, 790 P.2d 213 (1990).

[3] Chapter 11.68 RCW sets out procedures for the settlement of estates in probate without court intervention. The Will granted nonintervention powers to T.R.'s personal representatives, and as a result, the probate proceeded under chapter 11.68 RCW.

They sought a report because they contended that Val and Jim were refusing to provide information to them or to explain discrepancies they believed existed in the LLC and Trust tax documents. Their position was clearly adversarial in nature, and they were directly challenging the manner in which Val and Jim were administering the Estate.

Their position became even clearer in their amended complaint, in which Tom and Marie accused Val and Jim of breach of fiduciary duty and conversion. They alleged that Val and Jim had wrongfully appropriated Estate property by transferring that property to the Trust. Tom and Marie alleged that Val and Jim's actions were taken "in the course of [their] administration and probate of the Estate of T.R. Gillespie" and the administration of the Trust. Their 2017 claims were not materially different from the 2014 claims that would have triggered the *in terrorem* clause but for the implied good faith exception that Judge Prochnau concluded exists. Tom and Marie invoked the *in terrorem* clause when they brought this suit.[4]

Tom and Marie next argue that even if their suit triggered the *in terrorem* clause, the court erred in concluding that there is no good faith exception to the clause. They maintain that Judge Prochnau's contrary legal conclusion is binding and that Val and Jim are precluded from now arguing that no such exception exists. We agree.

[4] Although the clause permits a beneficiary to ask the court to interpret the Will without forfeiting his inheritance, we conclude that none of Tom and Marie's challenges concerned the construction of the Will. Their breach of fiduciary duty and conversion claims were direct attacks on Val and Jim's administration of the Estate. Thus, Tom and Marie's claims did not fall under the exception to the clause.

Whether res judicata bars an action is a question of law and is subject to a de novo review. Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009). "The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again." Id. (internal quotation marks omitted) (quoting Marino Prop. Co. v. Port Comm'rs of Port of Seattle, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982)). "The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit." Id.

Judge Prochnau decided that under Estate of Kubick, 9 Wn. App. 413, 419, 513 P.2d 76 (1973), the lack of a good faith exception in an *in terrorem* clause might violate the policies inherent in RCW 11.28.020. Consequently, in the 2014 Order, Judge Prochnau concluded that "Given the specific statutory exceptions for good faith challenges and the policy concerns enunciated by Kubick and other cases, the court reads TR's Will to except good faith challenges from the punitive aspects of the in terrorem clause."

Val and Jim argue that the public policy discussion in Kubick is dicta and not the holding of the case. But that argument could have been made to Judge Prochnau, who ultimately concluded that the clause contained such an exception. Even if Judge Prochnau erred in concluding that there was a good faith exception to the *in terrorem* clause of the Will, Val and Jim did not appeal this legal conclusion and it became final and binding on the parties. The court erred in concluding

otherwise. Val and Jim are barred under the doctrine of res judicata from now asserting the absence of such an exception to the Will.

Tom and Marie next challenge the trial court's finding that they did not act in good faith in initiating this lawsuit. They contend that they are entitled to the conclusive presumption that they acted in good faith because they brought the lawsuit on the advice of fully informed counsel. We conclude that the party challenging the application of an *in terrorem* clause bears the burden of proving they initiated a lawsuit in good faith and on the advice of fully informed counsel. Once a petitioner has made a prima facie showing, there is a rebuttable presumption of good faith which the opposing party may overcome with evidence of the intentional violation of a court order, dishonesty, improper or sinister motive, the lack of any factual basis for the asserted claims, or the intentional withholding of material factual information from counsel. Because the trial court did not apply the correct standard, we reverse for entry of findings of fact in light of the test set out here.

In Kubick, this court adopted a presumption of good faith in the context of the applicability of an *in terrorem* clause, but it did not explicitly indicate whether the presumption was conclusive or rebuttable.[5] In that case, the decedent's daughter, Mary Lou Cathersal, sought to remove the executor of her father's estate. 9 Wn. App. at 414. The guardian ad litem, acting on behalf of the other

[5] A "conclusive presumption," or an "irrebuttable presumption," "cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute." BLACK'S LAW DICTIONARY 1435 (11th ed. 2019). A "rebuttable presumption," on the other hand, is "drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." BLACK'S LAW DICTIONARY 1436 (11th ed. 2019).

beneficiaries, argued that Cathersal's petition triggered the *in terrorem* clause in Kubick's will and that Cathersal's lawsuit had not been initiated in good faith. Id. At trial, the court dismissed Cathersal's case at the close of her case-in-chief but rejected the guardian's argument that Cathersal had forfeited her inheritance. Id. at 417. The court reasoned that Cathersal brought the case in good faith because she had consulted with an attorney before filing it. Id.

This court reversed the trial court's good faith finding. Id. at 419-20. Although the court noted that a suit brought on the advice of counsel is "persuasive of the bona fides of the suit," it could not determine whether Cathersal's suit had been brought in good faith because the guardian had not been afforded the opportunity to establish what facts were before counsel when counsel provided advice to Cathersal. Id. at 420.

The court stated, in dicta, that "if Mrs. Cathersal laid the facts fully and fairly before her attorney and acted on his advice in bringing the action, she must be deemed to have acted 'in good faith and for probable cause' as a matter of law." Id. And it did not set out a test for determining whether a petitioner had laid the facts "fully and fairly" before her attorney. The court remanded the matter to allow the petitioner to demonstrate that she had fully informed her counsel and to give the guardian the opportunity to present conflicting evidence. Id. at 420-21.

In Estate of Mumby, 97 Wn. App. 385, 387, 982 P.2d 1219 (1999), Darlene Wood petitioned to invalidate her deceased father's living trust on the grounds that the executor and beneficiary had exerted undue influence over him before his death. Id. at 388. The executor counterclaimed that the no-contest provision in

Mumby's will barred Wood from inheriting. Id. The trial court enforced the clause against Wood. Id. at 391. On appeal, Wood contended that because she consulted an attorney before filing suit, "she must be deemed to have acted in good faith." Id. at 393-94. The Mumby court determined that the record supported the trial court's conclusion that Wood had not fully and fairly disclosed all material facts to counsel. Id. at 394. As a result, it concluded Wood was not entitled to a presumption of good faith. Id.

The court then went on to analyze whether, in the absence of such a presumption, the trial court properly found that Wood acted in bad faith. Id. It defined "bad faith" as "actual or constructive fraud" or "neglect or refusal to fulfill some duty," or an act "not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Id. (internal quotation marks omitted) (quoting Bentzen v. Demmons, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993)). It affirmed the trial court's finding of bad faith because the record supported the conclusion that all independent witnesses testified that Wood's father was competent and exercised his own judgment until his death and his expressed intent was consistent from the date of his will to the date of his death. Id. at 395. In other words, there was no evidence to support any of Wood's allegations.

These cases suggest that any presumption of good faith that may arise after a litigant consults counsel may be rebutted by the party seeking to enforce an *in terrorem* or no-contest clause. The Kubick court hinted that any presumption of good faith is rebuttable by allowing the guardian to challenge the completeness or

fairness of the opposing party's disclosure to counsel. See 9 Wn. App. at 417. Similarly, in Mumby, the court rejected the argument that simply consulting with an attorney is sufficient to show good faith. Mumby, 97 Wn. App. at 394. Even though Wood's attorney in Mumby submitted a declaration to the court saying he was fully informed, the court identified several key facts that Wood had not disclosed to her counsel. Id.

In this case, Tom and Marie presented declarations from their attorneys, Christopher Wright and Kenneth Hart, who testified they were provided "all of the information and the limited documentation they had available to them concerning the transfer of capital between the members of the LLC," including the LLC's 2014 tax return, the 2014 Order, and the LLC's Operating Agreement. They concluded that they could not understand what had happened with the LLC's capital accounts. They retained a CPA expert, Gregory Porter, who consulted with them regarding capital accounting for LLCs and calculating "the magnitude of the loss to the Estate" when the capital account adjustment occurred. They advised Tom and Marie to bring the lawsuit.

The record before this court, however, lacks any declaration from Tom or Marie detailing what information they shared with their attorneys before they brought this lawsuit. And Charles Farrington, probate counsel for the personal representatives, testified that he repeatedly provided extensive documentation and explanations to Tom and Marie's attorneys to be transparent about what had occurred and why.

Val and Jim also presented evidence that Tom and Marie brought this lawsuit based on factual information known to them at the time of the 2014 trial, arguing that they violated the court's order prohibiting them from suing Val or Jim again. They also presented evidence that Tom and Marie had changed attorneys repeatedly and forum-shopped in an attempt to avoid the adverse consequences of the 2014 Order, despite knowing that they faced the risk that the *in terrorem* clause could be triggered. Farrington testified that every time Tom and Marie retain new counsel, he had to educate their new attorneys regarding the history of the litigation between the parties.

Additionally, Val and Jim presented evidence that the language of the LLC's Operating Agreement explicitly required them to make the capital account adjustment the Estate's CPA recommended that they make. Paragraph 8.5.3 of the LLC Operating Agreement provided:

> **Transfer of Capital Accounts**. Except as otherwise required by law, if any Membership Interest is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent that it relates to the transferred Membership Interest.

The trial court concluded that this language was legally dispositive of any claim that Val and Jim had made an improper asset transfer:

> 46. On lines 2b and 6b of Schedule M-2, the post-trial 2014 Gillespie, LLC 1065 Partnership Tax Return reported that Gillespie, LLC made a capital adjustment in the amount of $2,492,188 that year.
>
> 47. Such amount was simply a shift in the capital balance from one member (TR Estate) to another member (the Gillespie Family Trust).
>
> 48. No property or money changed hands as part of that $2,492,188; it was simply a paper transfer to match the capital accounts with support documents that occurred on 6/26/14.

. . . .

> 50. These capital adjustments were due to a change in ownership in a previous year that was not recorded properly in the year of the transaction. FOF 55; COL 3; Exh. A to Thomas J. Gillespie declaration, §8.5 and 8.5.3 (LLC Oper. Agmt.).

Val and Jim further presented evidence from Kenneth Pierce, the CPA who had prepared the LLC's tax returns from 2014 to 2017. He confirmed that when he became aware of the Trust's purchase of a capital interest in the LLC, it became apparent to him that the transfer had not been properly reflected in the capital accounts of the LLC members. He explained how the purchase of another member's ownership interest can affect an LLC member's capital account: "When a buyer purchases an [LLC] ownership interest for cash, it generally results in the transfer of the seller's capital account to the buyer." But T.R. and Marianne failed to have the LLC tax returns properly reflect the capital account transfers when they transferred their membership interest to the Trust in 2001. He stated:

> 13 years after the transaction occurred, Defendants Valerie Gillespie and James Eeckhoudt properly corrected this omission via a capital adjustment which they made, and properly reflected such adjustment in the 2014 tax return of the Gillespie LLC.
>
> The capital account adjustments made via the 2014 Gillespie LLC tax return did not affect the value of the underlying assets of the LLC.

Farrington also testified that the adjustment of the capital on the tax return did not affect the value of the Estate's interest in the LLC, a value to which Tom and his attorney had agreed as early as 2011.

Based on this record, we conclude the trial court should, in the first instance, determine whether Tom and Marie made a full and fair disclosure of all material facts to their counsel and brought this lawsuit on their advice. If the trial court

determines that Tom and Marie have made this prima facie showing, they are entitled to a rebuttable presumption of good faith, and the trial court should then determine if Val and Jim have overcome this presumption with evidence of bad faith—for example, evidence of the intentional violation of a court order, dishonesty, improper or sinister motive, the failure to have a factual basis for the asserted claims, or the intentional withholding of material factual information from counsel.[6]

2. Res judicata

Tom and Marie finally contend that the trial court erred in making extensive findings of fact in the order granting summary judgment. But the court dismissed Tom and Marie's claims based on the doctrine of res judicata. The standard of review of the application of res judicata is de novo. Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 834 n.7, 125 P.3d 202 (2005). Thus, any findings of fact are superfluous and are disregarded on appeal. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994). Because our review is de novo, it is immaterial that the trial court "found" that Tom and Marie sought to relitigate claims that Judge Prochnau resolved in her 2014 Order.[7]

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[6] The resolution of disputed facts as to Tom and Marie's good faith does not require an evidentiary hearing and may be based on affidavits. Tom and Marie's complaint was brought under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. Under TEDRA, a court may resolve any and all disputed issues of fact through affidavits; there is no requirement for it to hold any evidentiary hearings. RCW 11.96A.100(7); Foster v. Gilliam, 165 Wn. App. 33, 55, 268 P.3d 945 (2011) (under TEDRA, court need not hear oral testimony to make findings).

[7] The only other findings of fact that Tom and Marie challenge are paragraph 55, in which the court found that "Val and Jim have not transferred any capital," and paragraph 75, in which the court found that "Val & Jim have incurred significant attorney's fees and costs in defending" the claims in this suit. But they point to no evidence to demonstrate that Val and Jim did transfer any assets from the Estate to the Trust. And the finding in paragraph 75 was not a material issue of fact on summary judgment.

Tom and Marie contend their claims are not barred by res judicata or collateral estoppel because they were based on actions Val and Jim took in correcting the LLC capital accounts after the entry of the 2014 Order. But this characterization of their claims is superficial and misstates the relief they actually sought here. Tom alleged in 2014 that T.R.'s 100 percent ownership interest in the LLC "is reflected in the 2011 tax return of Gillespie LLC, which shows that [T.R.] retained his entire original capital account in the LLC until his death." In other words, Tom relied on the value of T.R.'s LLC capital account as reflected in the LLC tax returns as proof of the value of T.R.'s membership interest in the LLC. Judge Prochnau explicitly rejected this claim:

> 58. Tom argues, alternatively, that TR's estate should be allocated 100% of the proceeds from liquidation of the Gillespie LLC assets because . . . the tax returns and K-1s appear to indicate that the Gillespie LLC assets were still titled and in the control of TR or his estate. . . .
>
> 59. While the tax returns prepared at the direction of TR are of some interest, they were generally prepared by CPAs in the State of Hawaii who did not testify nor was it shown that they were conversant with TR's estate planning or working with TR's estate planning attorneys. The returns provide insufficient evidence to demonstrate that the court should (1) disregard the various entitles, (2) look behind the entities' legal framework and attempt to unwind the various transactions or (3) determine whether the various entities received their appropriate share of the assets during TR's lifetime.

The only conclusion one can draw from the argument Tom advanced in 2014 and this finding of fact is that the capital account reporting in the LLC tax returns were unreliable evidence of the Estate's ownership interest in the LLC. Judge Prochnau refused to credit the Estate with more than a 10 percent ownership interest in the LLC because to do otherwise would be contrary to T.R.'s intent.

Despite these findings, Tom and Marie alleged in their 2018 complaint:

> 2.7 Neither Washington law, nor any generally accepted account[ing] principal, nor any provision of the Operating Agreement of Gillespie LLC required that each member's percentage share of the total of the capital accounts of all members of the LLC match the member's percentage ownership of the units of the LLC, or prohibit a member from owning a larger percentage of the total of the capital accounts of all members than the member's percentage ownership of the LLC.
>
> . . . .
>
> 2.11 While the capital account balances of the members of Gillespie LLC were known at the time of trial to be disproportionate to each member's ownership interest in the LLC, Judge Prochnau made no findings or conclusions regarding the capital account balance of the Estate and did not enter any judgment regarding adjustments or modifications to the existing capital accounts of the Estate and the Trust as reflected in the company's records and contemporaneous tax filings.

Tom and Marie's contention that the Estate's 10 percent ownership interest can exceed in value the Trust's 90 percent ownership interest and should reflect the values attributed in the admittedly incorrect LLC tax filings is an argument that could have been litigated in 2014. While they point to Val and Jim's post-trial administrative activities in correcting the LLC tax returns as the basis for their claims, the claims are premised on legal and factual contentions that were at issue in the 2014 trial. While Judge Prochnau did not explicitly rule that the Estate's capital account balance had to reflect in value the membership percentage interest, Tom and Marie certainly could have asked for such a ruling.

Res judicata bars not just the relitigation of claims or issues that were litigated, but also the litigation of claims or issues that "might have been litigated, in a prior action." Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). For the doctrine to apply, a prior judgement must have concurrence

of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. Id.

There is a final and binding judgment between Tom and Marie, as beneficiaries, and Val and Jim, as personal representatives, of the Estate. The causes of action in 2014 are identical to the causes of action here: a request for an accounting by the personal representatives and breach of fiduciary duty. The legal and factual issues on which the current claims are based are identical to the legal and factual issues that were the subject of the 2014 litigation and which could have been fully litigated then. Thus, the trial court did not err in granting summary judgment based on res judicata.

3. Attorney fees on summary judgment

Finally, Tom and Marie challenge the July 31, 2018 order awarding attorney fees to Val and Jim.[8] Although Tom and Marie assigned error to the award of fees, they did not brief the issue. We thus decline to address this issue. See Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (appellate court will not consider inadequately briefed argument).

4. Attorney fees on appeal

Val and Jim request an award of attorney fees on appeal under RCW 11.96A.150. We refer this request for the trial court to decide on remand after determining whether Tom and Marie brought this lawsuit in good faith.

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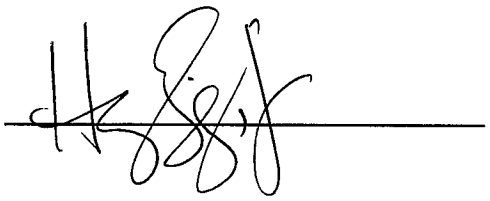
[8] Val and Jim sought and received an award of attorney fees and costs under RCW 11.96A.150 which provides:

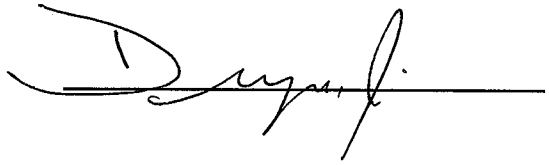
> (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including attorneys' fees, to be awarded to any party . . . that is the subject of the proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Andrus, J.

WE CONCUR:





No. 78932-5-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

THOMAS GILLESPIE and MARIE GILLESPIE,

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

APPELLANTS' MOTION FOR RECONSIDERATION

Gregory M. Miller, WSBA No. 14459
Kenneth W. Hart, WSBA No. 15511

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APPENDIX A

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I. RELIEF REQUESTED

Appellants Tom and Marie Gillespie ("Tom and Marie") request the Court reconsider and clarify its February 3, 2020, decision ("Decision") to state the legal consequence of reversing the rulings on the good faith exception: that the orders affected by those reversed rulings are vacated because it is fundamental that any order which has lost its legal or factual basis cannot stand.

II. INTRODUCTION AND SUMMARY

Tom and Marie request the Court revise or clarify the Decision to expressly vacate those orders which depend, in whole or in part, on the now-reversed good faith exception rulings because they have lost their legal or factual basis. The fee award and judgment must be vacated because they depend on the trial court's now-reversed rulings that there was no good faith exception to the *In Terrorem* Clause and Tom and Marie did not proceed in good faith.

Specifically, the revised Decision should vacate the order dated June 29, 2018, (filed July 2, 2018) ("June 29 Order"), which granted Respondents' counterclaim to impose the *In Terrorem* Clause (CP 1008), and the July 31, 2018, order awarding attorney's fees (CP

1010-1012), which necessarily includes substantial fees related to the *In Terrorem* Clause that cannot readily be segregated based on the fee application.[1] The revised Decision should also vacate the September 17, 2018, Judgment because it is premised on the validity of those two orders. It disinherited Tom and Marie on the basis of the *In Terrorem* Clause (CP 986), and entered judgment for attorney's fees based on the Clause (CP 984 ¶¶ 4, 6; CP 986).

Because Tom and Marie paid the $53,634.95 fee and cost award immediately in 2018 to avoid the potential 12% interest, the revised Decision should require that Respondents return that money immediately. It should also require they immediately make all Estate

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[1] *See* CP 790 (Respondents' motion for fees): "On July 2, 2018, this Court entered it [sic] Order Granting Defendants Motion to Invoke *In Terrorem* Clause. Val and Jim, therefore, have been successful on all the defenses and counterclaims they asserted in this case." The only entries in Respondents' fee application likely to be solely related to the Clause are for the post-summary judgment research and briefing on application of the *In Terrorem* Clause after the trial court at the June 11 summary judgment hearing deferred ruling pending additional briefing. *See* time entries at CP 819-821. But they are not all the entries related to the *In Terrorem* Clause.

The earlier fee entries at CP 800-819 give only general references to research and drafting of the answer and counterclaims, and briefing. But the pleadings show the *In Terrorem* Clause issue was woven into Respondents' work from the start. It was an integral part of their entire fee request and thus cannot be limited to the work from June 11 – 29. Despite the lack of reference to it in the billing statements, one can tell counsel were litigating the *In Terrorem* Clause because it was asserted in their responsive pleading, then in the summary judgment briefing. *See* CP 240 (counterclaim asserting application of *In Terrorem* Clause); CP 254, 259-60, 658 (allegations and arguments as to the *In Terrorem* Clause in Respondents' motion for summary judgment and reply).

payments or distributions they have withheld since September, 2018. *See* OB at 16, fn. 3. The interest Respondents should pay as restitution to make Tom and Marie whole can be determined on remand.[2]

III. FACTS RELEVANT TO ARGUMENT

The panel is familiar with the facts, which will be discussed in the course of the argument.

IV. REASONS WHY RECONSIDERATION SHOULD BE GRANTED

A. Reconsideration should be granted per RAP 12.4(c) where an appellate decision overlooks or misapprehends applicable law or operative facts.

RAP 12.4(c) instructs that motions for reconsideration should focus on the "points of law or fact which the moving party contends the court has overlooked or misapprehended," and thus states the standard for modifying or changing the initial decision. Our appellate courts grant reconsideration where warranted. Both the

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[2] *See, e.g., In re Estate of Langeland,* 195 Wn.App. 74, 87-94, 380 P.3d 573 (2016), *rev. den.,* 187 Wn.2d 1010 (2017) (abuse of discretion if trial court does not award restitution following successful appeal of the fees that opposing counsel had collected after trial court victory, noting that the underlying purpose of restitution is to avoid unjust enrichment). Tom and Marie suggest the revised Decision require the fees and withheld funds be returned within 10 days of the revised Decision to avoid more unjust enrichment.

Court of Appeals[3] and the Supreme Court[4] recognize the underlying goal of the appellate courts as stated in RAP 1.2 and the underlying civil rules, to reach the legally correct and just decision on the merits, rather than on the basis of compliance with the appellate rules. *See Keck v. Collins,* 184 Wn.2d 358, 369, 357 P.3d 1080 (2015) (referencing CR 1).

With respect, that applies here.

B. Reconsideration should be granted to make express the full relief embodied in the reversal of the trial court's ruling on the good faith exception to the *In Terrorem* Clause and of its finding of no good faith.

1. Orders must be vacated when the factual or legal basis for the order is held to be erroneous.

For an order or judgment to be valid, not only must the evidence before the court support the findings, but the findings of fact must support the conclusions of law and the conclusions of law must support the order and the judgment; an order or judgment that

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[3] *See, e.g., Behnke v. Ahrens,* 172 Wn.App. 281, 294 ¶¶30-31, 294 P.3d 729 (2012) (discussing grant of reconsideration to consider facts brought to the panel's attention on reconsideration); *State v. Rainey,* 180 Wn.App. 830, 327 P.3d 56 (2014), as noted at 319 P.3d 86 (2014); *State v. Bowen,* 157 Wn.App. 821, 239 P.3d 1114 (2010) (noting the decision was "on reconsideration").

[4] *See, e.g., Washington Water Jet Workers Ass'n v. Yarbrough,* 151 Wn.2d 470, 474, 90 P.3d 42 (2004) (*reversing* prior decision at 148 Wn.2d 403, 61 P.3d 309 (2003), after granting reconsideration and re-argument).

lacks the required factual or legal basis must be vacated.[5]

The Decision determined that the trial court erred in concluding the *In Terrorem* Clause did not have a good faith exception and that the trial court's finding that Tom and Marie did not proceed in good faith was not made pursuant to the correct legal test and thus could not stand. Decision at 2. These rulings undercut the later fee order and Judgment of forfeiture and for fees.

2. Tom and Marie challenged the fee award and judgment as part and parcel of their appeal attacking application of the *In Terrorem* Clause and the trial court's erroneous rejection of a good faith exception to application of the Clause. The issue should be addressed per RAP 1.2(a), or otherwise.

The Decision states that Tom and Marie did not challenge the fee award other than in their assignments of error and issues on

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[5] *American Nursery Products, Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.3d 477 (1990) (while substantial evidence supported findings of fact, "we do not agree these findings support the legal conclusion of unconscionability" of the contractual exclusionary clause, ***vacating*** the trial court's order that the exclusionary contract clause was unconscionable); *Clark v. Fowler*, 58 Wn.2d 435, 439-40, 363 P.2d 812 (1961) ("In this appeal, there is no statement of facts. We therefore accept these findings of fact as verities…The conclusions of law based upon these findings of fact do not support a judgment for the respondents," ***reversing the refusal to vacate the judgment.***); *Karanjah v. Department of Social and Health Services*, 199 Wn.App. 903, 916-923, 401 P.3d 381 (2017) (substantial evidence supported the agency's challenged findings of fact, but the findings did not support a conclusion of abuse of vulnerable adult so that the agency "erred in both its interpretation and application of the law," affirming trial court's ***reversal*** of the agency's determination). *Accord, Rohr v. Baker*, 53 Wn.2d 6, 8, 329 P.2d 848 (1958) ("we find it unnecessary to decide any of the other points because the order of default was ***improvidently entered without legal basis***, and, consequently, the court erred [in failing] to ***vacate the judgment***").

appeal – that they did not argue the fee award should be vacated. Decision at 26. This overlooks or misapprehends express arguments in the Opening Brief.

It also overlooks or misapprehends the structure of Tom and Marie's theories of the appeal (attacking any application of the *In Terrorem* Clause, and the trial court's refusal to recognize or correctly apply the good faith exception) and the logical interrelationship between those theories with their repeated argument that, if accepted, their positions require striking ***all*** the challenged orders, including the June 29 Order, the fee order, and the Judgment.

Tom and Marie argued in their introduction at OB p. 2 that "the associated fee rulings" and the Judgment must be vacated for the reasons stated in the prior three paragraphs at pages 1-2. They assigned error to the fee ruling and the ultimate judgment giving it effect in AOE 3 and 5. OB at 3. Their issue statement 4 challenges the fee award "because it is based in part on the erroneous *In Terrorem* Clause." OB at 4.

Under Tom and Marie's substantive arguments, the fee order necessarily had to fall if their primary theories about the *In Terrorem*

Clause were correct. In the argument that the Clause did not apply to these proceedings at all under its plain text, they argued:

> Consistent with any analysis of a will's provisions, Washington law requires the Court to take the same text-based approach here as in *Kellar* and *Boettcher* and first analyze the actual text of the no contest clause at issue, then construe the clause strictly to uphold the bequest and avoid forfeiture if consistent with the testator's intent. As seen by the text of the trial court's June 29, 2018 Order, that was not done below. **Reversal and vacation of the Order <u>and the later orders and judgment based on it</u> is required.**

OB at 21-22 (emphasis added). Later in the argument challenging any application of the *In Terrorem* Clause, Tom and Marie argued:

> As shown *supra,* the bolded provisions are inconsistent with the actual language used by TR. They impermissibly broaden the Clause's reach beyond the probate of the Will to include the probating of TR's ***Estate***, rather than just of his Will. A fair application of the plain terms of the Clause precludes its application to Tom and Marie in this case **and requires vacation of the June 29 Order <u>and the related orders and judgment.</u>**

OB at 27 (latter bold emphases added). The related orders include the fee award. The judgment embodies the fee award, so if it is vacated, that award is nullified.

In their alternative argument, that even if the *In Terrorem* Clause applied the trial court erred by ruling the good faith exception did not apply and also erred in ruling that they did not proceed in

good faith, Tom and Marie argued:

> The June 29 Order must be vacated **along with the later orders that depend on it**, particularly the September 17, 2018 judgment which embodies it, **and the fee award which is partly based on application of the clause**."

OB at 35 (emphasis added). *See also* OB at 35, fn. 6 (emphasis added), stating: "That Tom and Marie proceeded in good faith ***is also a proper basis to vacate the fee award,***" citing two cases vacating fee awards against parties who the appellate courts determined as a matter of law had proceeded in good faith. This is argument.

The Conclusion argues the fee award must be vacated because it "is premised at least in part on the June 29 order." OB at 46.

Dismissing Tom and Marie's challenge to the fee award and judgment awarding fees, which are set out in the assignments of error and issues then integrated into the arguments challenging the substantive basis underlying those orders as discussed *infra,* is contrary to the appellate courts' pleas to practitioners to keep briefs short and to the point, avoid repetition or unnecessary argument, and which is embodied in the strict page limits. The shorter the better, is the courts' mantra. That was kept in mind with Tom and Marie's efficient, integrated arguments.

Refusing to give effect to their challenge to the fee award is also contrary to RAP 1.2(a)'s mandate of reaching a just decision on the merits. It is effectively a sanction for a perceived technical failure under the appellate rules. Just this past December, the Supreme Court reminded the Bench and Bar of the importance and *requirement* under RAP 1.2(a) of a liberal interpretation of the appellate rules to avoid harsh or unjust results when applying the appellate rules. *See State v. Graham*, __ Wn.2d ___, 454 P.3d 114, 116-117 (2019) (reviewing appellate decision imposing sanctions and, after applying the substantive law and court rules to the facts, vacating appellate sanctions for an abuse of discretion).

Graham is wholly consistent with long-settled law under the appellate rules that, if the nature of a party's challenge to the trial court ruling is clear, it will be considered and addressed by the appellate court, notwithstanding claimed technical defects. *See, e.g., Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 710, 592 P.2d 631 (1979) (where nature of challenge is clear, issue will be addressed by appellate court, despite technical noncompliance with appellate rules). *See also,* for whatever persuasive authority the Court deems appropriate per GR 14.1, *Idris v. Genesis Chiropractic Group L.L.C.*,

9 Wn.App.2d 1085, 2019 WL 3555018 at *4-5 (2019) (unpublished) (per Andrus, J.) (citing *State v. Olson*, 126 Wn.2d 315, 318-24, 893 P.2d 629 (1995) for the proposition that the appellate court "can consider [an] issue on appeal, notwithstanding technical violation of procedural rules, when nature of challenge has been made clear without prejudice to opposing party," considering the issue presented by the appellant and reversing based on that issue).

There was no "hide the ball" by Tom and Marie. The nature of their challenge to the fee order and Judgment were clear. There was no mystery to the Court or the Respondents of what relief Tom and Marie requested in their appeal and why. Tom and Marie should not be penalized by ignoring their challenge to the fee order and Judgment when, as shown *supra,* their challenge was clear, made early and often and, as discussed *infra,* was integrated into the principle substantive arguments.

3. Tom and Marie sought vacation of the orders, including the fee award and the judgment awarding fees, under both of their primary theories on appeal.

Tom and Marie's first theory on appeal was that the *In Terrorem* Clause did not apply at all under its plain terms because it only addressed challenges brought to the probate of the ***Will***, not the

administration of the ***Estate*** after the Will had been probated and proved valid. Therefore, the good faith exception issue need not be reached. *See* OB, pp. 1-2; Issue 1 at OB 3-4; Arguments IV. B & C,[6] OB at 17-31.

But they also contended that, even if the Clause did apply in these proceedings regarding administration of the ***Estate***, the trial court erred as a matter of law by holding, contrary to Judge Prochnau's 2014 ruling, that there was no good faith exception to application of the Clause; and further, the trial court erred as a matter of law by determining that Tom and Marie did not proceed in good faith. *See* Argument IV. D.,[7] OB at 32-35.

Tom and Marie thus argued that, if they were correct on either theory, the September 17 Judgment and the June 29 and July 31 orders must be vacated. OB at 2, 3-4, 21-22, 27, 35 & fn. 6, and 46.

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[6] The title for argument IV. B is: "The Text Of TR's Will Demonstrates That It Does Not Apply To These Proceedings And That The Trial Court's Forfeiture Order Must Be Reversed."

Argument section IV. C's title is: "Tom's And Marie's Action Did Not Challenge The Probate Of TR's Will And Therefore Did Not Trigger TR's *In Terrorem* Clause, As A Matter Of Law."

[7] The title for argument IV. D. is: "Even if The *In Terrorem* Clause Applied, Which It Did Not, The Trial Court's June 29 Order Must Be Vacated For At Least Two Reasons: It Erred In Ignoring Judge Prochnau's Prior Determination The Clause Had An Implied Good Faith Exception, Consistent With Washington Law; And It Erred In Concluding That Tom And Marie Did Not Proceed In Good Faith When Under The Undisputed Facts They Are Deemed To Have Acted In Good Faith As A Matter Of Law."

The Decision interpreted the Clause in TR's Will broadly, giving the same reading the trial court did, *i.e.*, the Clause applies to challenges to the administration of the ***Estate***, not just challenges to the probate of the validity of the ***Will***. *See* Decision at 14.[8]

But the Decision then ruled, correctly, that the trial court erred as a matter of law when it determined there was no "good faith" exception to the *In Terrorem* Clause since Judge Prochnau already had ruled there was such an exception and the trial court was bound by that determination. Decision at 15. The Decision also determined that the trial court's finding that Tom and Marie did not proceed in good faith did not meet the legal standard for such findings, requiring remand for a new determination.[9] Decision at 2.

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[8] This reading of the Clause in the Decision is necessarily a broad one. However, a broad reading of the language in such clauses overlooks the settled rule for judicial interpretation and application of such no contest clauses, which is done strictly and according to their actual terms after *de novo* review of the language in the clause, thus minimizing their application. *See* OB at pp. 18-22. Those principles and cases, and in particular the most recent decision of *Kellar v. Estate of Kellar*, 172 Wn.App. 562, 291 P.3d 906 (2012), *rev. den.*, 178 Wn.2d 1025 (2013), were not addressed in the Decision.

[9] Tom and Marie acknowledge a disagreement over whether the determination of whether they proceeded in good faith is a pure "finding of fact." In the context here of determining applicability of the good faith exception to a no contest clause in probate-related proceedings, Tom and Marie suggest that the most recent statement of the legal test in *In re Estate of Mumby*, 97 Wn. App. 385, 393, 982 P.2d 1219 (1999), shows that it is a mixed finding of fact and conclusion of law, which requires a two-part analysis. *See, e.g., Tapper v. Employment Sec. Dep't,* 122 Wn.2d 397, 402–03, 858 P.2d 494 (1993) ("resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, then applying that law to the facts").

4. **Since the Decision orders a remand on whether Tom and Marie proceeded in good faith, the July 31 fee award and September 17 Judgment must be vacated because they have lost their factual and legal predicates. Consequently, there is no proper basis for Respondents to retain the fee award paid to them in 2018, or the Estate funds they have withheld since then. Tom and Marie are entitled to immediate return and payment of those funds.**

The Decision held that a remand hearing is required to determine – *afresh* – whether Tom and Marie met the good faith exception in bringing the 2017 suit and the 2018 amended complaint. Decision at 22-23. Consequently, whether they proceeded in good faith is an open question on remand. The predicates for the June 29 Order, the July 31 fee award, and the September 17 Judgment have been removed, requiring they be vacated.

Tom and Marie therefore respectfully request that the revised Decision require Respondents to immediately return the funds paid them in 2018 for fees, and to immediately pay all Estate distributions withheld since entry of the Judgment, within 10 days of the revised Decision. *See In re Estate of Langeland, supra,* 195 Wn.App. at 87-94 (requiring repayment of fees when underlying fee award collected by trial attorneys during the appeal was vacated); OB at 16, fn. 3.

V. CONCLUSION

Tom and Marie Gillespie respectfully ask the Court to reconsider and clarify its February 3, 2020, Decision to give effect to its reversal of the trial court's good faith rulings. They request the Court issue a revised Decision that: 1) vacates the June 29 Order; 2) vacates the July 31 fee award; 3) vacates the September 17 Judgment; and 4) requires immediate return of the fees paid and funds withheld since entry of the 2018 judgment.

Respectfully submitted this 24th day of February, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By *[signature]*
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via court e-filing website, which sends notification of such filing to the following:

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DATED this 24th day of February, 2020.

/s/ Lana Ramsey
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APPENDIX A

Page(s)

FILED
2/3/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

In re the Estate of: THOMAS R. GILLESPIE	)	No. 78932-5-I DIVISION ONE
THOMAS GILLESPIE and MARIE GILLESPIE, and the marital community composed thereof, Appellants, v. VALERIE GILLESPIE, an individual and co-personal representative of the ESTATE OF THOMAS R. GILLESPIE, and JAMES EECKHOUDT, an individual and co-personal representative of the ESTATE OF THOMAS R. GILLESPIE, Respondents.	)	PUBLISHED OPINION FILED: February 3, 2020

ANDRUS, J. — Tom and Marie Gillespie, beneficiaries of the Estate of T.R. Gillespie (Estate), appeal a trial court order concluding that they triggered an *in terrorem* clause in T.R.'s Last Will and Testament (Will) and forfeited their right to any inheritance from the Estate when they commenced a lawsuit challenging the personal representatives' management of the Estate.

We affirm the trial court's conclusion that the current suit fell within the scope of the *in terrorem* clause, but conclude that res judicata bars the personal

representatives from relitigating whether the *in terrorem* clause contains a good faith exception. We also reverse the trial court's finding that Tom and Marie failed to bring the lawsuit in good faith because the court did not apply the correct standard in making this determination. The trial court should, in the first instance, determine whether Tom and Marie made a full and fair disclosure of all material facts to their counsel and brought this lawsuit on that legal advice. If Tom and Marie make this prima facie showing, they are entitled to a rebuttable presumption of good faith, and the burden shifts to Val and Jim to overcome this presumption with evidence of bad faith. We otherwise affirm the rulings of the trial court.

FACTS

Thomas (T.R.) Gillespie died testate in 2011, and his Will was admitted to probate on July 14, 2011. At the time of his death, T.R. had two living children, Valerie (Val) and Thomas Jr. (Tom).[1] T.R.'s son, David, had predeceased him but was survived by his wife, Judy, and their children. T.R.'s estate included the estate of his wife, Marianne, who also had predeceased him (hereinafter collectively "Estate"). T.R.'s fourth and final codicil named Val and James (Jim) Eeckhoudt, Judy's brother, to serve as co-personal representatives. The Will contained an *in terrorem* clause, stating that any beneficiary who challenged the Will's probate forfeited his right to inherit from the Estate.

During their lifetimes, T.R. and Marianne created a number of trusts to hold various assets. The Gillespie Family Trust (Trust), created in 2000, named Val and Jim as co-trustees, and the beneficiaries of the Trust included every living

[1] Because the majority of the parties have the same last name, this opinion refers to them by their first names. We mean no disrespect.

descendant of T.R. and Marianne, as well as Judy, their deceased son's widow. Jim is neither a Trust beneficiary nor a beneficiary of T.R.'s Estate.

Around the same time, T.R. and Marianne formed Gillespie, LLC (the LLC), in which they each owned a 50 percent interest. In 2001, T.R. and Marianne conveyed the majority of their interest in the LLC to the Trust. As a result of this transfer, at the time of his death, T.R. held a 10 percent interest in the LLC, with the remaining 90 percent owned by the Trust. In return, the Trust agreed to pay T.R. and Marianne annual annuities until their deaths.

In November 2011, four months after Val and Jim opened the probate, John Andersen, Tom's then-attorney, e-mailed Charles Farrington, Val and Jim's attorney, a list of the Estate's assets. Andersen's list confirmed his understanding that the Estate owned a 10 percent interest in the LLC. In a separate e-mail on the same day, Andersen indicated to Farrington that the Trust had incurred a significant amount of debt, which could be alleviated by liquidating the LLC. Andersen sent Farrington his proposed liquidation plan, which reflected the Trust's receipt of 90 percent of the liquidation proceeds. In 2012, Val's personal attorney sent Andersen a Proposed Distribution Schedule for the Estate. This distribution schedule similarly indicated that the Estate would receive 10 percent of the liquidation proceeds.

In 2014, however, Tom and his wife, Marie, filed a petition in King County Superior Court seeking an accounting by Val and Jim, an inventory and appraisal of the Estate assets, and an order directing the Estate to pay the mortgage of an Idaho home in which Tom and Marie lived. Tom explicitly sought a judicial

declaration that T.R. had never effectively transferred any interest in the LLC to the Trust. He claimed that T.R. and Marianne maintained their full interest in the LLC until their deaths because the Trust failed to make the required annual annuity payments to them. Tom also challenged the Estate inventory that Val and Jim had prepared, claiming that assets identified as belonging to the Trust, including T.R.'s capital account in the LLC, were never properly transferred from the Estate and thus belonged to the Estate. Tom alleged that the LLC's 2011 tax return showed that T.R. "retained his entire original capital account in the LLC until his death." Consequently, Tom claimed that the entire LLC capital account belonged to the Estate and that the inventory designation showing a 10 percent ownership interest was erroneous.

Tom and Marie's claims proceeded to trial in September 2014 before now retired Judge Kimberly Prochnau. In her 34-page Findings of Fact, Conclusions of Law and Judgment (2014 Order), Judge Prochnau rejected the contention that the Estate held an interest in the LLC greater than 10 percent, and despite Tom's argument to the contrary, concluded that the Trust owned the remaining 90 percent interest. Judge Prochnau also found no breach of fiduciary duties by Val and Jim and denied the request for a forensic accounting. Judge Prochnau found that T.R. and Marianne had not paid taxes on the annuity income they had received from the Trust and authorized Val and Jim to withhold funds in the Estate to account for potential tax liabilities.

Judge Prochnau also concluded that Tom was barred, under the doctrines of waiver and laches, from challenging either the Trust's failure to make certain

annuity payments to T.R. and Marianne, or their transfer of a 90 percent interest in the LLC to the Trust. The court concluded that even though the record showed the payments had not been made as required, there was no evidence that T.R. requested payment or otherwise challenged a lack of payment. Judge Prochnau prohibited Tom from "trying to realign the assets in a manner which the various estate planning devices do not support."

Judge Prochnau also found that Tom had misled the probate court by filing a 2013 petition to probate the Will and misrepresented that he resided in the state of Washington, misstated that the Will appointed him as sole personal representative, and failed to identify himself as the largest debtor of the Estate, to which he owed $600,000. Judge Prochnau found that Tom owed the Estate $605,000, with interest accruing at 6 percent per annum, as of the date of trial, and she entered judgment against him in this amount. The court then credited Estate distributions owing to Tom from Marianne's Credit Shelter Trust toward this judgment, leaving a balance owed by Tom to the Estate of $261,557.86. Judge Prochnau ruled that additional cash advances made by the Estate to Tom and Marie would be deducted from the value of their respective shares in the final distributions made to them from the Estate.

As a result, Judge Prochnau ordered the personal representatives, Val and Jim, to distribute the 10 percent interest in the LLC to its three beneficiaries, Tom (2 percent), Marie (2 percent), and Val (6 percent). Before that could occur, Val was ordered to list for sale real estate the LLC owned in Hawaii and to distribute the net proceeds from the sale to the LLC.

Finally, Judge Prochnau also included a provision prohibiting Tom and Marie from suing Val and Jim again:

> All claims which Tom and/or Marie may have with regard to facts and circumstances known or reasonably known as of this date, now or at any time in the future, against either of the Estates, the Gillespie Family Trust, the Gillespie, LLC, or Cam Square, LLC, or against either of the Personal Representatives of T.R.'s and Marianne's Estates, Trustees and Managers of the LLCs are forever barred . . . .

Although Val and Jim sought to disinherit Tom and Marie under the *in terrorem* clause of the Will, arguing that the lawsuit they initiated fell within the scope of that clause, Judge Prochnau declined to do so, concluding:

> Article IX of TR's Will contained an in terrorem clause (Ex. 4) which provided that a beneficiary under such Will forfeits his or her interest in the Estate by becoming an adverse party in a proceeding for its probate. . . . A similar, but not identical, provision in a will was read broadly by our Court of Appeals to apply to requests to remove a PR. In re Kubick's Estate, 9 Wn. App. 413, 513 P.2d 76 (1973), rev. denied, 83 Wash.2d 1002 (1973) . . . . Although TR's in terrorem clause is similar in its breadth of coverage . . . , it differs from the Kubick will in that it does not explicitly except challenges made in good faith. Kubick noted, at least in dicta, that such a blanket prohibition might violate the policies inherent in RCW 11.28.020. . . . Given the specific statutory exceptions for good faith challenges and the policy concerns enunciated by Kubick and other cases, the court reads TR's will to except good faith challenges from the punitive aspects of the in terrorem clause.

Judge Prochnau found Tom and Marie had brought the lawsuit in good faith and thus had not triggered the *in terrorem* clause.

Tom and Marie were apparently not dissuaded from further litigation, despite the resounding defeat they suffered in 2014. In January 2016, John McGowan, an attorney in Idaho retained by Tom and Marie, sent Farrington a letter demanding information on the status of the LLC capital accounts, claiming

that Val and Jim had been withholding the LLC Schedule K-1s from 2012 through 2014 and as a result, the tax documents provided to Tom and Marie for their tax return did not explain why there had been a contribution to the LLC in excess of $2 million when there had been no distribution to the LLC members. McGowan demanded that Farrington provide the LLC tax information and delay any distributions from the LLC to the Trust and from the Trust to the beneficiaries.

In response, Farrington sent McGowan a copy of the 2014 Order and explained that the capital account adjustments reflected on the LLC documents were an effort to comply with the 2014 Order. He clearly stated that "[t]he capital account issue you reference was considered . . . and conclusively found by the Court to be inaccurate so your discussion of ownership, basis, capital accounts, and liquidating distributions of the Gillespie LLC is not supported by the Findings of Fact, Conclusions of Law and Judgment of the Superior Court."

Farrington arranged to have the Estate's K-1, Tom and Marie's individual K-1s, and the Estate's tax returns for 2012 through 2014 sent to McGowan, but he declined to delay any distributions, contending that Val and Jim had to make these distributions in order to comply with the 2014 Order. Farrington informed counsel that:

> [Y]ou are at least the ninth attorney to contact Val and Jim and their attorneys in this case over a period of five years. . . . We have provided extensive discovery and endured a 10-day trial. As each attorney retained by TJ has summarily dismissed TJ and/or Marie as their client, we have had to educate each new attorney as he/she/they appear in the case. Two of TJ's and Marie's former attorneys have filed attorney's fee liens against TJ's interest in the Estate of TR Gillespie. In addition, TJ owes the Estate of TR Gillespie in excess of $600,000.00. His current Washington attorney

> is representing TJ and Marie in the pending attorney's fees motion relating back to the 2014 court decision.

Farrington also informed McGowan of the provision of the 2014 Order prohibiting Tom and Marie from suing Val and Jim again.

Despite previously facing the risk of losing their inheritance based on the *in terrorem* clause in the Will and being ordered not to sue Val and Jim based on facts known to them at the time of the 2014 trial, on February 29, 2016, Tom and Marie filed a new complaint against Val and Jim in a Blaine County, Idaho district court. They claimed that the LLC's 2014 tax return and a balance sheet provided to them in 2015 indicated a "transfer of capital" of approximately $2.5 million from the Estate to the Trust. They alleged that Val and Jim had breached their fiduciary duties by effectuating this capital transfer. Tom and Marie asked the Idaho court to order an accounting and to find that Val and Jim had breached their fiduciary duties by stating an intent to dissolve and liquidate the LLC without the members' consent. They once again alleged that the Estate should receive 100 percent of any proceeds generated by the liquidation of the LLC's assets. They also asked for a temporary restraining order to prevent Val and Jim from distributing the LLC's assets. On March 31, 2016, the Idaho court dismissed Jim from the lawsuit based on a lack of personal jurisdiction. Shortly thereafter, Tom and Marie dismissed the complaint against the remaining defendant, Val, without prejudice.

In July 2016, Val and Jim sent the Trust beneficiaries, including Tom and Marie, a letter informing them of their intent to liquidate the LLC. They informed the Trust beneficiaries that, as a result of the liquidation, $1,991,139 would be transferred to the Trust's capital account and that $467,387 would be transferred

to the Estate's capital account, consistent with their respective ownership interests. It is undisputed that Tom received this letter.

On September 28, 2017, Tom and Marie filed a new petition in King County Superior Court, seeking an accounting from the Estate. They alleged that any proceeds from the LLC's liquidation should be distributed in proportion to the members' capital account balances, rather than in proportion to their membership interests. Tom and Marie claimed that the Estate, not the Trust, should receive most, if not all, of the liquidation proceeds.

In response, Val and Jim, in their capacity as the executors of the Estate, argued that the 2014 Order barred these claims because Judge Prochnau explicitly found that the Estate owned only 10 percent of the LLC and it was entitled to receive only 10 percent of the LLC's liquidated assets. They also argued that the 2014 Order barred Tom and Marie from suing Val and Jim because their claims were based on facts known to them in 2014.

Tom and Marie subsequently amended this petition to assert direct claims of breach of fiduciary duty against Val and Jim individually. In their amended complaint, Tom and Marie alleged that Val and Jim made an unauthorized transfer of capital when they adjusted T.R.'s LLC capital account to reflect his 10 percent ownership, an action T.R. and Marianne had failed to take when the majority of their interest transferred to the Trust in 2001. Tom and Marie conceded that per the 2014 Order, the Estate owned only 10 percent of the LLC and the Trust owned the remaining 90 percent, but they argued that Judge Prochnau did not make findings or conclusions as to the associated capital accounts and did not explicitly

permit a transfer of capital to reflect the ownership interests. They argued that because Judge Prochnau had not made express findings as to the capital accounts, the Estate was entitled to all of the liquidation proceeds, which were in excess of $2.5 million.

In response, Val and Jim testified that they simply had complied with the 2014 Order and had repeatedly informed Tom and Marie of their intent to comply with the court's ownership determinations. They denied initiating any "transfer of capital;" instead, they testified they merely fixed an accounting error required by the 2014 Order. They also asserted that Tom and Maries' claims were barred by res judicata and/or collateral estoppel. Val and Jim asserted a counterclaim against Tom and Marie, seeking an application of the *in terrorem* clause.

Val and Jim then moved for summary judgment dismissal of Tom and Marie's claims, raising the collateral estoppel and res judicata defenses and asking the court to conclude that Tom and Marie had triggered the *in terrorem* clause by filing the lawsuit.

Tom and Marie filed a cross motion for partial summary judgment, claiming they were entitled to judgment as a matter of law because Val and Jim were unjustified in making a "transfer of capital" and that in doing so, they had unlawfully converted Estate assets and breached their fiduciary duties. They asserted that Judge Prochnau's determination that the Trust owned 90 percent of the membership interest in the LLC did not mean that the Trust also owned 90 percent of the company's capital. They contended that Val and Jim were barred by res judicata from arguing that the LLC capital accounting was erroneous.

On June 11, 2018, the trial court granted Val and Jim's summary judgment motion and denied Tom and Marie's motion. The order entered by the trial court contained detailed factual findings and legal conclusions. First, the court determined that the 2014 Order "required the Gillespie LLC to make an adjustment to capital and did not require Val & Jim as Managers of Gillespie, LLC to 'transfer' any capital, and certainly not in their capacity as Co-PRs." Second, it found no evidence that Val and Jim had transferred any capital from the Estate to the Trust. Finally, it found that Tom and Marie were attempting to relitigate the same claims they had previously alleged against Val and Jim by "asserting that Val and Jim acted improperly to carry out Judge Prochnau's trial orders." While the trial court concluded that the filing of the petition violated Judge Prochnau's order and dismissed all of Tom and Marie's claims, it reserved ruling and asked for supplemental briefing on whether Tom and Marie had triggered the *in terrorem* clause and forfeited their right to inherit from the Estate.

After further briefing from the parties, the trial court concluded that Tom and Marie had become adverse parties in the proceeding for the Will's probate and had thus triggered the *in terrorem* clause and forfeited their rights to the Estate. It further concluded, contrary to the legal ruling made by Judge Prochnau, that the *in terrorem* clause did not contain either a "safe harbor" provision or a good faith exception. It further found that "[t]he Plaintiffs have not acted in good faith and cannot avoid the invocation of this clause simply because they commenced this litigation with the advice of counsel." The trial court subsequently entered judgment of attorney fees and costs against Tom and Marie in the amount of

$53,635 and ordered that Tom and Marie must disgorge any and all partial distributions, debt offsets, advances on distributions, and income they had received from the Estate.

Tom and Marie moved for reconsideration, arguing that Judge Prochnau's legal ruling that there was a good faith exception to the *in terrorem* clause was binding on the parties through the doctrine of collateral estoppel. The trial court denied the reconsideration motion.

Tom and Marie appeal the trial court's ruling that their lawsuit triggered the *in terrorem* clause, the order that they disgorge any inheritance they had already received, and the assessment of attorney fees against them.

STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. Summary judgment is warranted only when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. CR56(c). The facts and all reasonable inferences are viewed in the light most favorable to the nonmoving party. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989); Northgate Ventures LLC v. Geoffrey H. Garrett PLLC, __ Wn. App. ___, 450 P.3d 1210 (2019).

ANALYSIS

1. Applicability of the *In Terrorem* Clause

Tom and Marie argue the trial court erred in concluding that the *in terrorem* clause applied to this case. They alternatively argue that even if this lawsuit invoked the clause, the trial court erred in failing to give preclusive effect to Judge

Prochnau's legal conclusion that the clause did not prohibit legal challenges made in good faith on the advice of counsel.

The *in terrorem* clause provides:

> Should any beneficiary under this Last Will become an adverse party in a proceeding for its probate, such beneficiary shall forfeit his entire interest hereunder and such interest shall pass as part of the residue of my estate; . . . This Article shall not be construed to limit the appearance by any beneficiary as a witness in any proceeding for the probate of this Last Will, nor to limit his appearance in any capacity in a proceeding for its construction.

Tom and Marie argue that the clause applies only to challenges to the Will's validity and not to claims relating to the administration of the Estate by its personal representatives.

This court reviews the trial court's interpretation of a will de novo. In re Estate of Burks, 124 Wn. App. 327, 331, 100 P.3d 328 (2004). "The primary duty of a court when interpreting a will is to determine the intent of the testator." In re Estate of Niehenke, 117 Wn.2d 631, 639, 818 P.2d 1324 (1991). "Such intention must, if possible, be ascertained from the language of the will itself and the will must be considered in its entirety and effect must be given every part thereof." In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985).

The language of the clause provides that a beneficiary forfeits his or her interest if he or she becomes an "adverse party in a proceeding for [the Will's] probate." Nothing in the plain language of the clause limits its application to will contests.

Tom and Marie contend that the word "probate" means the court's act of deeming a will valid and "admitting" it as the legally binding instrument of the

testator's intent. The Will does not define the term "probate." Nor does chapter 11 RCW. In such case, the court may use a dictionary definition to discern the plain meaning on an undefined term. In re Estate of Petelle, 8 Wn. App.2d 714, 718, 440 P.3d 1026 (2019). At the time of the Will's execution, the term "probate" was defined as:

> [The] Court procedure by which a will is proved to be valid or invalid; though in current usage this term has been expanded to generally refer to the legal process wherein the estate of a decedent is administered. Generally, the probate process involves collecting a decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs. These activities are carried out by the executor or administrator of the estate, usually under the supervision of the probate court or other court of appropriate jurisdiction.

BLACK'S LAW DICTIONARY 1202 (6th ed. 1990).[2] The dictionary definition demonstrates that the term "probate" has taken on a meaning beyond will contests to cover the administration of an estate.

The trial court did not err in concluding that Tom and Marie's lawsuit was an adversary proceeding relating to the probate of the Will. Their initial petition for an accounting invoked a probate statute, RCW 11.68.065.[3] This statute provides:

> A beneficiary whose interest in an estate has not been fully paid or distributed may petition the court for an order directing the personal representative to deliver a report of the affairs of the estate signed and verified by the personal representative. . . . Upon hearing of the petition after due notice as required in RCW 11.96A.110, the court may, for good cause shown, order the personal representative to deliver to the petitioner the report for any period not covered by a previous report.

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[2] T.R. executed his Will in 1996. "A testator is presumed to have known the law in force when the will was drafted and to have drafted the will in conformity with that law. Consequently, if a will [is] ambiguous, the law when the instrument was drafted is a circumstance to consider in determining the testator's intent." McDonald v. Moore, 57 Wn. App. 778, 780, 790 P.2d 213 (1990).

[3] Chapter 11.68 RCW sets out procedures for the settlement of estates in probate without court intervention. The Will granted nonintervention powers to T.R.'s personal representatives, and as a result, the probate proceeded under chapter 11.68 RCW.

They sought a report because they contended that Val and Jim were refusing to provide information to them or to explain discrepancies they believed existed in the LLC and Trust tax documents. Their position was clearly adversarial in nature, and they were directly challenging the manner in which Val and Jim were administering the Estate.

Their position became even clearer in their amended complaint, in which Tom and Marie accused Val and Jim of breach of fiduciary duty and conversion. They alleged that Val and Jim had wrongfully appropriated Estate property by transferring that property to the Trust. Tom and Marie alleged that Val and Jim's actions were taken "in the course of [their] administration and probate of the Estate of T.R. Gillespie" and the administration of the Trust. Their 2017 claims were not materially different from the 2014 claims that would have triggered the *in terrorem* clause but for the implied good faith exception that Judge Prochnau concluded exists. Tom and Marie invoked the *in terrorem* clause when they brought this suit.[4]

Tom and Marie next argue that even if their suit triggered the *in terrorem* clause, the court erred in concluding that there is no good faith exception to the clause. They maintain that Judge Prochnau's contrary legal conclusion is binding and that Val and Jim are precluded from now arguing that no such exception exists. We agree.

[4] Although the clause permits a beneficiary to ask the court to interpret the Will without forfeiting his inheritance, we conclude that none of Tom and Marie's challenges concerned the construction of the Will. Their breach of fiduciary duty and conversion claims were direct attacks on Val and Jim's administration of the Estate. Thus, Tom and Marie's claims did not fall under the exception to the clause.

Whether res judicata bars an action is a question of law and is subject to a de novo review. Ensley v. Pitcher, 152 Wn. App. 891, 899, 222 P.3d 99 (2009). "The doctrine of *res judicata* rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again." Id. (internal quotation marks omitted) (quoting Marino Prop. Co. v. Port Comm'rs of Port of Seattle, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982)). "The threshold requirement of res judicata is a valid and final judgment on the merits in a prior suit." Id.

Judge Prochnau decided that under Estate of Kubick, 9 Wn. App. 413, 419, 513 P.2d 76 (1973), the lack of a good faith exception in an *in terrorem* clause might violate the policies inherent in RCW 11.28.020. Consequently, in the 2014 Order, Judge Prochnau concluded that "Given the specific statutory exceptions for good faith challenges and the policy concerns enunciated by Kubick and other cases, the court reads TR's Will to except good faith challenges from the punitive aspects of the in terrorem clause."

Val and Jim argue that the public policy discussion in Kubick is dicta and not the holding of the case. But that argument could have been made to Judge Prochnau, who ultimately concluded that the clause contained such an exception. Even if Judge Prochnau erred in concluding that there was a good faith exception to the *in terrorem* clause of the Will, Val and Jim did not appeal this legal conclusion and it became final and binding on the parties. The court erred in concluding

otherwise. Val and Jim are barred under the doctrine of res judicata from now asserting the absence of such an exception to the Will.

Tom and Marie next challenge the trial court's finding that they did not act in good faith in initiating this lawsuit. They contend that they are entitled to the conclusive presumption that they acted in good faith because they brought the lawsuit on the advice of fully informed counsel. We conclude that the party challenging the application of an *in terrorem* clause bears the burden of proving they initiated a lawsuit in good faith and on the advice of fully informed counsel. Once a petitioner has made a prima facie showing, there is a rebuttable presumption of good faith which the opposing party may overcome with evidence of the intentional violation of a court order, dishonesty, improper or sinister motive, the lack of any factual basis for the asserted claims, or the intentional withholding of material factual information from counsel. Because the trial court did not apply the correct standard, we reverse for entry of findings of fact in light of the test set out here.

In Kubick, this court adopted a presumption of good faith in the context of the applicability of an *in terrorem* clause, but it did not explicitly indicate whether the presumption was conclusive or rebuttable.[5] In that case, the decedent's daughter, Mary Lou Cathersal, sought to remove the executor of her father's estate. 9 Wn. App. at 414. The guardian ad litem, acting on behalf of the other

[5] A "conclusive presumption," or an "irrebuttable presumption," "cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute." BLACK'S LAW DICTIONARY 1435 (11th ed. 2019). A "rebuttable presumption," on the other hand, is "drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence." BLACK'S LAW DICTIONARY 1436 (11th ed. 2019).

beneficiaries, argued that Cathersal's petition triggered the *in terrorem* clause in Kubick's will and that Cathersal's lawsuit had not been initiated in good faith. Id. At trial, the court dismissed Cathersal's case at the close of her case-in-chief but rejected the guardian's argument that Cathersal had forfeited her inheritance. Id. at 417. The court reasoned that Cathersal brought the case in good faith because she had consulted with an attorney before filing it. Id.

This court reversed the trial court's good faith finding. Id. at 419-20. Although the court noted that a suit brought on the advice of counsel is "persuasive of the bona fides of the suit," it could not determine whether Cathersal's suit had been brought in good faith because the guardian had not been afforded the opportunity to establish what facts were before counsel when counsel provided advice to Cathersal. Id. at 420.

The court stated, in dicta, that "if Mrs. Cathersal laid the facts fully and fairly before her attorney and acted on his advice in bringing the action, she must be deemed to have acted 'in good faith and for probable cause' as a matter of law." Id. And it did not set out a test for determining whether a petitioner had laid the facts "fully and fairly" before her attorney. The court remanded the matter to allow the petitioner to demonstrate that she had fully informed her counsel and to give the guardian the opportunity to present conflicting evidence. Id. at 420-21.

In Estate of Mumby, 97 Wn. App. 385, 387, 982 P.2d 1219 (1999), Darlene Wood petitioned to invalidate her deceased father's living trust on the grounds that the executor and beneficiary had exerted undue influence over him before his death. Id. at 388. The executor counterclaimed that the no-contest provision in

Mumby's will barred Wood from inheriting. Id. The trial court enforced the clause against Wood. Id. at 391. On appeal, Wood contended that because she consulted an attorney before filing suit, "she must be deemed to have acted in good faith." Id. at 393-94. The Mumby court determined that the record supported the trial court's conclusion that Wood had not fully and fairly disclosed all material facts to counsel. Id. at 394. As a result, it concluded Wood was not entitled to a presumption of good faith. Id.

The court then went on to analyze whether, in the absence of such a presumption, the trial court properly found that Wood acted in bad faith. Id. It defined "bad faith" as "actual or constructive fraud" or "neglect or refusal to fulfill some duty," or an act "not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Id. (internal quotation marks omitted) (quoting Bentzen v. Demmons, 68 Wn. App. 339, 349 n.8, 842 P.2d 1015 (1993)). It affirmed the trial court's finding of bad faith because the record supported the conclusion that all independent witnesses testified that Wood's father was competent and exercised his own judgment until his death and his expressed intent was consistent from the date of his will to the date of his death. Id. at 395. In other words, there was no evidence to support any of Wood's allegations.

These cases suggest that any presumption of good faith that may arise after a litigant consults counsel may be rebutted by the party seeking to enforce an *in terrorem* or no-contest clause. The Kubick court hinted that any presumption of good faith is rebuttable by allowing the guardian to challenge the completeness or

fairness of the opposing party's disclosure to counsel. See 9 Wn. App. at 417. Similarly, in Mumby, the court rejected the argument that simply consulting with an attorney is sufficient to show good faith. Mumby, 97 Wn. App. at 394. Even though Wood's attorney in Mumby submitted a declaration to the court saying he was fully informed, the court identified several key facts that Wood had not disclosed to her counsel. Id.

In this case, Tom and Marie presented declarations from their attorneys, Christopher Wright and Kenneth Hart, who testified they were provided "all of the information and the limited documentation they had available to them concerning the transfer of capital between the members of the LLC," including the LLC's 2014 tax return, the 2014 Order, and the LLC's Operating Agreement. They concluded that they could not understand what had happened with the LLC's capital accounts. They retained a CPA expert, Gregory Porter, who consulted with them regarding capital accounting for LLCs and calculating "the magnitude of the loss to the Estate" when the capital account adjustment occurred. They advised Tom and Marie to bring the lawsuit.

The record before this court, however, lacks any declaration from Tom or Marie detailing what information they shared with their attorneys before they brought this lawsuit. And Charles Farrington, probate counsel for the personal representatives, testified that he repeatedly provided extensive documentation and explanations to Tom and Marie's attorneys to be transparent about what had occurred and why.

Val and Jim also presented evidence that Tom and Marie brought this lawsuit based on factual information known to them at the time of the 2014 trial, arguing that they violated the court's order prohibiting them from suing Val or Jim again. They also presented evidence that Tom and Marie had changed attorneys repeatedly and forum-shopped in an attempt to avoid the adverse consequences of the 2014 Order, despite knowing that they faced the risk that the *in terrorem* clause could be triggered. Farrington testified that every time Tom and Marie retain new counsel, he had to educate their new attorneys regarding the history of the litigation between the parties.

Additionally, Val and Jim presented evidence that the language of the LLC's Operating Agreement explicitly required them to make the capital account adjustment the Estate's CPA recommended that they make. Paragraph 8.5.3 of the LLC Operating Agreement provided:

> **Transfer of Capital Accounts**. Except as otherwise required by law, if any Membership Interest is transferred in accordance with the terms of this Agreement, the transferee shall succeed to the Capital Account of the transferor to the extent that it relates to the transferred Membership Interest.

The trial court concluded that this language was legally dispositive of any claim that Val and Jim had made an improper asset transfer:

> 46. On lines 2b and 6b of Schedule M-2, the post-trial 2014 Gillespie, LLC 1065 Partnership Tax Return reported that Gillespie, LLC made a capital adjustment in the amount of $2,492,188 that year.
>
> 47. Such amount was simply a shift in the capital balance from one member (TR Estate) to another member (the Gillespie Family Trust).
>
> 48. No property or money changed hands as part of that $2,492,188; it was simply a paper transfer to match the capital accounts with support documents that occurred on 6/26/14.

. . . .

> 50. These capital adjustments were due to a change in ownership in a previous year that was not recorded properly in the year of the transaction. FOF 55; COL 3; Exh. A to Thomas J. Gillespie declaration, §8.5 and 8.5.3 (LLC Oper. Agmt.).

Val and Jim further presented evidence from Kenneth Pierce, the CPA who had prepared the LLC's tax returns from 2014 to 2017. He confirmed that when he became aware of the Trust's purchase of a capital interest in the LLC, it became apparent to him that the transfer had not been properly reflected in the capital accounts of the LLC members. He explained how the purchase of another member's ownership interest can affect an LLC member's capital account: "When a buyer purchases an [LLC] ownership interest for cash, it generally results in the transfer of the seller's capital account to the buyer." But T.R. and Marianne failed to have the LLC tax returns properly reflect the capital account transfers when they transferred their membership interest to the Trust in 2001. He stated:

> 13 years after the transaction occurred, Defendants Valerie Gillespie and James Eeckhoudt properly corrected this omission via a capital adjustment which they made, and properly reflected such adjustment in the 2014 tax return of the Gillespie LLC.
>
> The capital account adjustments made via the 2014 Gillespie LLC tax return did not affect the value of the underlying assets of the LLC.

Farrington also testified that the adjustment of the capital on the tax return did not affect the value of the Estate's interest in the LLC, a value to which Tom and his attorney had agreed as early as 2011.

Based on this record, we conclude the trial court should, in the first instance, determine whether Tom and Marie made a full and fair disclosure of all material facts to their counsel and brought this lawsuit on their advice. If the trial court

determines that Tom and Marie have made this prima facie showing, they are entitled to a rebuttable presumption of good faith, and the trial court should then determine if Val and Jim have overcome this presumption with evidence of bad faith—for example, evidence of the intentional violation of a court order, dishonesty, improper or sinister motive, the failure to have a factual basis for the asserted claims, or the intentional withholding of material factual information from counsel.[6]

2. Res judicata

Tom and Marie finally contend that the trial court erred in making extensive findings of fact in the order granting summary judgment. But the court dismissed Tom and Marie's claims based on the doctrine of res judicata. The standard of review of the application of res judicata is de novo. Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 834 n.7, 125 P.3d 202 (2005). Thus, any findings of fact are superfluous and are disregarded on appeal. Redding v. Virginia Mason Med. Ctr., 75 Wn. App. 424, 426, 878 P.2d 483 (1994). Because our review is de novo, it is immaterial that the trial court "found" that Tom and Marie sought to relitigate claims that Judge Prochnau resolved in her 2014 Order.[7]

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[6] The resolution of disputed facts as to Tom and Marie's good faith does not require an evidentiary hearing and may be based on affidavits. Tom and Marie's complaint was brought under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. Under TEDRA, a court may resolve any and all disputed issues of fact through affidavits; there is no requirement for it to hold any evidentiary hearings. RCW 11.96A.100(7); Foster v. Gilliam, 165 Wn. App. 33, 55, 268 P.3d 945 (2011) (under TEDRA, court need not hear oral testimony to make findings).

[7] The only other findings of fact that Tom and Marie challenge are paragraph 55, in which the court found that "Val and Jim have not transferred any capital," and paragraph 75, in which the court found that "Val & Jim have incurred significant attorney's fees and costs in defending" the claims in this suit. But they point to no evidence to demonstrate that Val and Jim did transfer any assets from the Estate to the Trust. And the finding in paragraph 75 was not a material issue of fact on summary judgment.

Tom and Marie contend their claims are not barred by res judicata or collateral estoppel because they were based on actions Val and Jim took in correcting the LLC capital accounts after the entry of the 2014 Order. But this characterization of their claims is superficial and misstates the relief they actually sought here. Tom alleged in 2014 that T.R.'s 100 percent ownership interest in the LLC "is reflected in the 2011 tax return of Gillespie LLC, which shows that [T.R.] retained his entire original capital account in the LLC until his death." In other words, Tom relied on the value of T.R.'s LLC capital account as reflected in the LLC tax returns as proof of the value of T.R.'s membership interest in the LLC. Judge Prochnau explicitly rejected this claim:

> 58. Tom argues, alternatively, that TR's estate should be allocated 100% of the proceeds from liquidation of the Gillespie LLC assets because . . . the tax returns and K-1s appear to indicate that the Gillespie LLC assets were still titled and in the control of TR or his estate. . . .
>
> 59. While the tax returns prepared at the direction of TR are of some interest, they were generally prepared by CPAs in the State of Hawaii who did not testify nor was it shown that they were conversant with TR's estate planning or working with TR's estate planning attorneys. The returns provide insufficient evidence to demonstrate that the court should (1) disregard the various entitles, (2) look behind the entities' legal framework and attempt to unwind the various transactions or (3) determine whether the various entities received their appropriate share of the assets during TR's lifetime.

The only conclusion one can draw from the argument Tom advanced in 2014 and this finding of fact is that the capital account reporting in the LLC tax returns were unreliable evidence of the Estate's ownership interest in the LLC. Judge Prochnau refused to credit the Estate with more than a 10 percent ownership interest in the LLC because to do otherwise would be contrary to T.R.'s intent.

Despite these findings, Tom and Marie alleged in their 2018 complaint:

> 2.7 Neither Washington law, nor any generally accepted account[ing] principal, nor any provision of the Operating Agreement of Gillespie LLC required that each member's percentage share of the total of the capital accounts of all members of the LLC match the member's percentage ownership of the units of the LLC, or prohibit a member from owning a larger percentage of the total of the capital accounts of all members than the member's percentage ownership of the LLC.
>
> . . . .
>
> 2.11 While the capital account balances of the members of Gillespie LLC were known at the time of trial to be disproportionate to each member's ownership interest in the LLC, Judge Prochnau made no findings or conclusions regarding the capital account balance of the Estate and did not enter any judgment regarding adjustments or modifications to the existing capital accounts of the Estate and the Trust as reflected in the company's records and contemporaneous tax filings.

Tom and Marie's contention that the Estate's 10 percent ownership interest can exceed in value the Trust's 90 percent ownership interest and should reflect the values attributed in the admittedly incorrect LLC tax filings is an argument that could have been litigated in 2014. While they point to Val and Jim's post-trial administrative activities in correcting the LLC tax returns as the basis for their claims, the claims are premised on legal and factual contentions that were at issue in the 2014 trial. While Judge Prochnau did not explicitly rule that the Estate's capital account balance had to reflect in value the membership percentage interest, Tom and Marie certainly could have asked for such a ruling.

Res judicata bars not just the relitigation of claims or issues that were litigated, but also the litigation of claims or issues that "might have been litigated, in a prior action." Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). For the doctrine to apply, a prior judgement must have concurrence

of identity in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made. Id.

There is a final and binding judgment between Tom and Marie, as beneficiaries, and Val and Jim, as personal representatives, of the Estate. The causes of action in 2014 are identical to the causes of action here: a request for an accounting by the personal representatives and breach of fiduciary duty. The legal and factual issues on which the current claims are based are identical to the legal and factual issues that were the subject of the 2014 litigation and which could have been fully litigated then. Thus, the trial court did not err in granting summary judgment based on res judicata.

3. Attorney fees on summary judgment

Finally, Tom and Marie challenge the July 31, 2018 order awarding attorney fees to Val and Jim.[8] Although Tom and Marie assigned error to the award of fees, they did not brief the issue. We thus decline to address this issue. See Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011) (appellate court will not consider inadequately briefed argument).

4. Attorney fees on appeal

Val and Jim request an award of attorney fees on appeal under RCW 11.96A.150. We refer this request for the trial court to decide on remand after determining whether Tom and Marie brought this lawsuit in good faith.

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[8] Val and Jim sought and received an award of attorney fees and costs under RCW 11.96A.150 which provides:

> (1) Either the superior court or any court on an appeal may, in its discretion, order costs, including attorneys' fees, to be awarded to any party . . . that is the subject of the proceedings.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

Andrus, J.

WE CONCUR:

CARNEY BADLEY SPELLMAN

February 24, 2020 - 1:51 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78932-5
Appellate Court Case Title:	Thomas & Marie Gillespie, Appellants v. Valerie Gillespie & James Eeckhoudt, Respondents

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

In re the Estate of: THOMAS R. GILLESPIE	No. 78932-5-I ORDER DENYING MOTION FOR RECONSIDERATION
THOMAS GILLESPIE and MARIE GILLESPIE, and the marital community composed thereof, Appellants, v. VALERIE GILLESPIE, an individual and co-personal representative of the ESTATE OF THOMAS R. GILLESPIE, and JAMES EECKHOUDT, an individual and co-personal representative of the ESTATE OF THOMAS R. GILLESPIE, Respondents.	

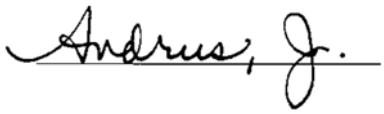
Appellants, Thomas Gillespie and Marie Gillespie, filed a motion for reconsideration of the opinion that was filed on February 3, 2020. Respondents, Valerie Gillespie and James Eeckhoudt, filed a response. Appellants then filed a motion to permit a reply on reconsideration.

A majority of the panel has determined that the motion to permit a reply on reconsideration and the motion for reconsideration should both be denied.

Now, therefore, it is hereby

ORDERED that Appellants' motion for reconsideration and motion to permit a reply on reconsideration are denied.

FOR THE COURT:



No. 78932-5-I

WASHINGTON STATE COURT OF APPEALS, DIVISION I

THOMAS GILLESPIE and MARIE GILLESPIE,

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

APPELLANTS' REPLY IN SUPPORT OF RECONSIDERATION

Gregory M. Miller, WSBA No. 14459
Kenneth W. Hart, WSBA No. 15511

CARNEY BADLEY SPELLMAN, P.S.
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Attorneys for Appellants

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I. REPLY ARGUMENT

Respondents' Answer cannot directly challenge the fundamental point of Tom and Marie Gillespie's Reconsideration Motion: that reversal of the trial court's rulings by which it applied the *In Terrorem* Clause to disinherit Tom and Marie requires vacation of ***both*** the September 2018 Judgment ***and*** the fee award, as both were premised on legal and factual elements that were reversed.

To try to save the fee award, the Answer invents a new narrative of how Respondents litigated: that the *In Terrorem* Clause was more of an afterthought than the critical, wholly interwoven tactic it actually was to Respondents' efforts from the outset. But in Respondent Val's effort to not only maintain control over the Estate but to take it all for herself, what could possibly be more important than the silver bullet: getting application of a disqualification clause to not only cut off Tom and Marie from future distributions, but require disgorgement of prior payments? For these Respondents to assert their efforts on the *in Terrorem* Clause were minor in any way is inaccurate and disingenuous at best.

Respondents' counsel have unfortunately engaged in inaccurate[1] *ad hominem* attacks, to which Tom and Marie will not respond in kind. But the inaccuracies of the Answer bear a short response, to demonstrate why the Answer as a whole does not assist the Court in addressing the substance of the reconsideration motion.

As one example, the Answer claims that Tom and Marie failed to argue the fee award should be reversed and vacated. Nonsense. As with much of the Answer, this ignores what the reconsideration motion stated and what the record shows – that Tom and Marie argued the fee award had to be vacated as part and parcel of their other substantive arguments, and these arguments were made throughout the opening brief.

---

[1] One example is the false assertion that the timely filed reconsideration motion was "after the fact" or "out of time." This is wrong. Had there been anything wrong with it, the Court would not have called for an answer.

A second is another claim against counsel personally for delay, particularly the oral argument. First, the reasons for additional time on the opening brief are stated in the extension motions that the Court granted. The brief was timely. Second, the oral argument was scheduled for a September date. Counsel had written the Clerk in July, before the calendar was set, asking that this case not be set on that date because he would be unavailable due to the oral argument in the Supreme Court. The Clerk's office did not act on that information, for which Mr. Johnson apologized. Given the fact the September 2018 Judgment cut off distributions to Tom and Marie (also compromising their ability to file the optional reply brief for lack of funds), neither they nor counsel wanted to delay the matter, but were frustrated by the delay in oral argument over which they had no control.

This unfortunately inaccurate and unprofessional approach shows why the Court should look at all parts of the Answer with a sharp, skeptical eye.

More to the point, the reconsideration motion seeks to have this Court's opinion give full effect to its Decision reversing the trial court's rulings on the good faith exception to the *in Terrorem* Clause, for which the Answer really has no genuine rejoinder. After all, the Answer admits on page 6 that:

> It is abundantly clear that this Court has reversed and remanded Judge Linde's ruling on the forfeiture of the bequests from the Gillespie Estate. Reconsideration is not warranted to reiterate that ruling.

What the Answer apparently seeks to avoid is an express ruling vacating that Judgment and ordering restitution of the funds that have been wrongfully kept and withheld, which is the logical consequence of the February 3 Decision. But a clear direction in a revised Decision will ensure that Respondents return the fees and the withheld money without delay. As the reconsideration motion points out, the restitutionary interest can be determined on remand.

Finally, Tom and Marie ask only what the law promises and requires: that it be applied fairly based on the facts, which all litigants are entitled to, whether in civil cases, criminal cases, family law cases, or even in acrimonious estate administration cases, no matter how nastily the opposing side attempts to vilify them or their

counsel. Especially on appeal, this Court knows that resolution is not based on who threw the most mud, or who ends up looking most sympathetic – but how the law is correctly applied to the facts and circumstances.

II. CONCLUSION

Tom and Marie Gillespie respectfully ask the Court to re-consider and clarify its February 3, 2020, Decision to give effect to its reversal of the trial court's good faith rulings, per their Motion.

Respectfully submitted this 6th day of March, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Gregory M. Miller*
Gregory M. Miller, WSBA No. 14459
Kenneth W. Hart, WSBA No. 15511
701 Fifth Avenue, Suite 3600
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Telephone: (206) 622-8020
Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via court e-filing website, which sends notification of such filing to the following:

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DATED this 6th day of March, 2020.

/s/ Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, PLS, Legal Assistant/Paralegal to Gregory M. Miller

CARNEY BADLEY SPELLMAN

March 06, 2020 - 3:08 PM

Transmittal Information

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Appellate Court Case Number:	78932-5
Appellate Court Case Title:	Thomas & Marie Gillespie, Appellants v. Valerie Gillespie & James Eeckhoudt, Respondents

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CARNEY BADLEY SPELLMAN

April 09, 2020 - 5:25 PM

Filing Motion for Discretionary Review of Court of Appeals

Transmittal Information

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Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Thomas & Marie Gillespie, Appellants v. Valerie Gillespie & James Eeckhoudt, Respondents (789325)

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Note: The Filing Id is 20200409172359SC415721

NO. 98399-2
(COA NO. 78932-5-I)

IN THE WASHINGTON STATE SUPREME COURT

THOMAS GILLESPIE and MARIE GILLESPIE,

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Hon. Barbara Linde

SECOND MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW PER ORDER NO. 25700-B-611

Gregory M. Miller, WSBA No. 14459

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APPENDIX A

I. IDENTITY OF MOVING PARTIES AND RELIEF REQUESTED

Petitioners Thomas and Marie Gillespie ("Tom and Marie") seek a further extension until June 15, 2020, to file a petition for review, pursuant to RAP 18.8(a) and the Court's recent Order No. 25700-B-611, suspending RAP 18.8(b) for petitions for review due on or after March 27, 2020. The petition is currently due on May 22, 2020. A copy of the check for the filing fee which was placed in the mail today is being filed with this motion. This will provide time for a proper petition and allow for the participation of Sidney C. Tribe of this office.

Alternatively, Petitioners request the Court to treat this pleading and the earlier extension motion and reconsideration filings in the Court of Appeals as their petition for review based on the arguments raised therein, which are in the appendix to the earlier extension motion. If so treated and granted, Ms. Tribe will participate in proceedings in this Court.

II. FACTS RELEVANT TO MOTION

The material facts supporting this motion are set forth below in the subjoined Declaration of Gregory M. Miller.

DECLARATION OF Gregory M. Miller

I, Gregory M. Miller, declare under penalty of perjury, under the laws of the State of Washington, that the following is true and correct.

1. I am a partner in the law firm Carney Badley Spellman, P.S., and counsel for Petitioners Thomas and Marie Gillespie ("Tom and Marie"). I am over the age of 18 years, am competent to testify to the

matters set forth in this declaration, and make it based on my personal knowledge and the records of my office.

2. I have had intervening matters arise since the original extension request was made, including related to internet and computer failures which have caused delays (some a result of the working at home orders from the pandemic) and prevented work on filing a proper petition for review until this afternoon. Just as important, for the reasons stated *infra,* the Petitioners have been unable to arrange financing for their legal work, and I have had to tend to the requirements of other clients who can and have immediate deadlines, including fee applications filed in Nos. 79512-1-I (5/22) and 80609-2-I (5/14); giving zoom oral argument on 5/13/20 for discretionary review in No. 54601-9-II; filing a motion to publish and preparing to answer a motion for reconsideration in No. 36393-7-III, among other professional obligations including employment contract matters with numerous physicians.

3. These factors meant that I have been unable to devote the time and attention necessary to complete a normal petition for review by the requested extension date of May 22, 2020. Assuming the Court wants a more traditional form petition for review, Petitioners request until June 15 so that they can complete the financing necessary to proceed and have Ms. Tribe participate in preparing that petition.

4. The trial court orders entered in summer and fall of 2018 resulted in cutting off various payments and assets to my clients since entry of judgment in September, 2018 based on application of a no contest clause

in the Will of Tom's father T.R. Gillespie "TR"), as an offensive weapon in the litigation. TR is also the father of the Estate administrator, Valerie Gillespie ("Val").

5. The no contest clause was called an "*In Terrorem* clause" in the Will and litigation, but it is in line with the general category of no contest or forfeiture clauses of various forms that Washington courts have addressed since the early 1900's. However, this Court has not addressed how those clauses are to be interpreted and applied (*i.e.,* strictly or liberally, to further inheritance or exclusion) for over 65 years, since *Boettcher v. Busse*, 45 Wn.2d 579, 277 P.2d 368 (1954). As noted in Tom and Marie's reconsideration papers to the Court of Appeals, the February 3, 2020, decision they ask to have reviewed interpreted the no contest clause in TR's Will broadly, contrary to established Washington law and which was a necessary predicate to it being wielded as a sword. *See, e.g.,* Reconsideration Motion at pp. 12 and fn. 8.

6. The assets controlled by Val have all been withheld by her since the final judgment in September, 2018, so that Tom and Marie have no income or asset base from which to readily pay legal fees. They were able to pay for an opening brief and some of the cost of oral argument Court of Appeals, but now have a substantial AR. Their ability to finance further litigation is compromised and dependent on getting loans. Nevertheless, because of the nature of the orders that were entered cutting off their funds, the need to get all of them vacated which the Court of Appeals did not do, and Val's refusal to accede to Court of Appeals ruling which she admitted

"reversed and remanded Judge Linde's ruling on the forfeiture of the bequests from the Gillespie Estate" (*see* March 11, 2020 letter to Val's counsel quoting part of her reconsideration response in the Court of Appeals, attached hereto as App. A-85), they are forced to continue so that they will have the income stream intended by TR into the foreseeable future.

7. These facts bring into sharp focus the importance of a definitive statement from this Court on how such forfeiture clauses are interpreted and applied because here it matters immediately and tremendously. Estate issues such as this are increasingly important as the post-WWII generation ages, and as the COVID pandemic continues.

Dated this 22nd day of May, 2020 at Seattle, Washington.

/*S/Gregory M. Miller*
Gregory M. Miller

III. REASONS WHY RELIEF SHOULD BE GRANTED

A. The extension request is reasonable given the circumstances.

The undersigned is principally responsible for this appeal. The Court is fully aware of the state and national emergency stemming from the COVID-19 pandemic with Order No. 25700-B-611. Under these circumstances the facts set out in the declaration of counsel above are a proper basis for this requested extension. The time is needed for Petitioners to complete their acquisition of the necessary minimum funding to proceed, and for undersigned and his colleague Ms. Tribe to prepare the normal form of a petition for review.

B. The extension is also reasonable because the case raises issues which meet RAP 13.4 criteria.

In addition, there is merit and importance to the issues that will be raised, particularly as to the proper judicial interpretation and application of the Will's *In Terrorem* or no contest clause.

1. The Court of Appeals decision's interpretation and application of the no contest clause conflicts with established Washington law which requires a strict construction and limited application.

As noted *supra* in the declaration of counsel, this Court has not addressed how to interpret or apply such clauses since the *Boettcher* decision in 1954. However, the Court of Appeals has applied such clauses and consistently given strict construction and limited applications, but as explained in the Reconsideration Motion at p. 12, the February 3 Decision conflicts with that rule":

> The Decision interpreted the Clause in TR's Will broadly, giving the same reading the trial court did, *i.e.,* the Clause applies to challenges to the administration of the ***Estate***, not just challenges to the probate of the validity of the ***Will***. *See* Decision at 14.

Reconsideration motion, p. 12. The footnote in the motion explains that this is inconsistent with established Washington law, meeting the criteria of RAP 13.4(b)(2) and (4):

> This reading of the Clause in the Decision is necessarily a broad one. However, a broad reading of the language in such clauses overlooks the settled rule for judicial interpretation and application of such no contest clauses, which is done strictly and according to their actual terms after *de novo* review of the language in the clause,

> thus minimizing their application. *See* OB at pp. 18-22.[1] Those principles and cases, and in particular the most recent decision of *Kellar v. Estate of Kellar*, 172 Wn.App. 562, 291 P.3d 906 (2012), *rev. den.,* 178 Wn.2d 1025 (2013), were not addressed in the Decision.

Reconsideration motion, p. 12, fn. 8.

2. The Court of Appeals interpretation of the no contest clause to the administration of the Estate, rather than just to the probate of the will, is inconsistent with settled Washington law as set out below.

There also has not been a decision from this Court clarifying the distinction between the probate of a ***will***, and the probate of an ***estate***, as discussed in the reconsideration motion at pages 10-12. Both are material and critical to the correct resolution of this case, and for parties going forward with their estate planning and administration. The Court of Appeals decision is inconsistent with this law as also discussed in *Reutlinger.*

IV. CONCLUSION

Petitioners Tom and Marie Gillespie respectfully request an extension until June 15, 2020, to file their petition for review. Alternatively, they ask the Court to treat this pleading and its attachments as the petition and grant review of the Court of Appeals decision.

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[1] The Opening Brief cited *Kellar; Boettcher v. Busse*, 45 Wn.2d 679, 277 P.2d 368 (1954); *In re Chappell's Estate*, 127 Wash. 638, 221 P. 336 (1923); *In re Kubick's Estate*, 9 Wn. App. 413, 513 P.2d 76, *rev. den.*, 83 Wn.2d. 1002 (1978); *In re Estate of Mumby*, 97 Wn. App. 385, 982 P.2d 1219 (1999); *In re Estate of Kessler,* 95 Wn.App. 358, 369-370, 977 P.2d 591 (1999); and Mark Reutlinger, WASHINGTON LAW OF WILLS AND INTESTATE SUCCESSION, Ch. 7, §B.2.c., (WASH. STATE BAR ASSOC. 3D ED. 2018) ("*Reutlinger"*), discussing "No-Contest Clauses."

Respectfully submitted this 22h day of May, 2020.

CARNEY BADLEY SPELLMAN, P.S.

By/*Gregory M. Miller*
Gregory M. Miller, WSBA No. 14459

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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theo@vjbk.com

DATED this 22nd day of May, 2020.

/s/s Elizabeth C. Fuhrmann
Elizabeth C. Fuhrmann, PLS
Legal Assistant/Paralegal to Gregory M. Miller

APPENDIX A

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Gregory M. Miller
Shareholder

March 11, 2020

W. Theodore Vander Wel
Vander Wel, Jacobson & Kim, PLLC
1540 140th Ave NE Ste 200
Bellevue WA 98005

Via email & U.S. Mail

Re: Estate of T.R. Gillespie: *Gillespie v. Gillespie,* COA No. 78932-5-I

Dear Mr. Vander Wel:

You acknowledged in the response you filed in the Court of Appeals last week that

> It is abundantly clear that this Court has reversed and remanded Judge Linde's ruling on the forfeiture of the bequests from the Gillespie Estate. Reconsideration is not warranted to reiterate that ruling.

Since as you stated the forfeiture ruling has been reversed, you also know there is no longer a legal basis for your clients to continue to withhold the bequests which they have retained since September, 2018. You know that, as fiduciaries, they have a heightened obligation to follow the law and distribute bequests they have no legal basis to withhold. Further, they have always claimed to have followed the law and made distributions as required. That now includes releasing distributions held under the now-reversed orders. We expect the funds to be transmitted to our office immediately to show their compliance with the Court of Appeals ruling, now over a month old. Please direct the funds to our firm trust account so we can be sure all withheld money is restored.

The same applies to the fee award. Whatever you may think was the relatively minor amount of legal effort that went into *In Terrorem* Clause issue, the fee application you submitted to superior court does not purport to segregate those fees from the remainder. The entire fee award therefore cannot stand and your clients should also immediately return the entire amount my clients tendered in the fall of 2018. Should any part of the fee award be reinstated, you have the example of my clients' immediate payment of the fee award in 2018 as assurance that any such proper amount, once determined, would be promptly paid.

We look forward to your clients' prompt payment per their continuing fiduciary obligations.

Very truly yours,

CARNEY BADLEY SPELLMAN, P.S.

Gregory M. Miller

Cc: Clients
Kenneth W. Hart

CARNEY BADLEY SPELLMAN

May 22, 2020 - 4:55 PM

Transmittal Information

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Appellate Court Case Number:	98399-2
Appellate Court Case Title:	Thomas and Marie Gillespie v. Valerie Gillespie and James Eeckhoudt

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November 15, 2019

Richard Johnson, Clerk/Administrator
Washington Court of Appeals, Div. I
600 University St
Seattle WA 98101-4170

ATTN: JacQualine Harvey

Re: No. 78932-5-I, *Thomas & Marie Gillespie v. Valerie Gillespie & James Eeckhoudt*, Argued Nov. 14, 2019

Dear Mr. Johnson:

This letter provides responses to several questions raised at oral argument, which I promised to address after checking the record. Please pass this on to the panel.

First, Judge Andrus asked whether the case was a TEDRA case or subject to the civil rules and Rule 56. The record is a bit obscure on this point without an explanation. The case began with the filing by Appellants of a petition for an accounting by the "Co-Executors of the Estate" per RCW 11.68.065 on September 28, 2017. CP 1-8. The Petition specified only TR's Estate in the caption and did not name any "parties". *Id.* It was accompanied by a declaration of Tom's and Marie's counsel explaining their efforts to vet the potential issues from the two co-counsel for the Co-Executors, which included letter and email exchanges. *See* CP 9-20. As explained in a later declaration of counsel for Appellants, Mr. Wright, the Respondents' response to the petition for an accounting acknowledged that they had "transferred 90% of the Estate's capital account in Gillespie LLC to the Gillespie Family Trust, before then distributing substantially all the LLC's assets to the members in 2016…" and stated their reliance on Judge Prochnau's 2014 ruling "as their authority for the transfer of capital"; those transfers, thus, necessarily occurred after the 2014 ruling. CP 690, ¶ 10.

After receipt of this information from Respondents counsel indicating that the Estate funds were now gone, and further due diligence investigation, Appellants Tom and Marie moved to amend, which was granted. *See* CP 690-691, ¶¶ 11-15 (Wright Dec.); CP 207-210 (motion to amend, esp. CP 208); CP 210-219 (proposed amended complaint); and CP 220 (order). The amended complaint named only Val and Jim as defendants and was served on each with a summons (CP 1115-1117 – Jim; CP 118-1120 – Val), which service was accepted by their counsel. CP 1121. The amended complaint alleges claims against Val and Jim personally for breach of fiduciary duty, conversion, and for an accounting. *See* CP 222-229. The Amended Complaint was filed on April 3, 2018 (CP 222), answered by Respondents on April 23, 2018 (CP 230), and was the operative pleading before the court on the summary judgment motions.

Respondents' summary judgment motion was filed May 11, 2018 (CP 242) and Appellants' partial summary judgment motion was also filed on May 11, 2018. CP 509-526. Respondents responded to Appellants' motion on May 29, 2018 (CP 610). Their response invokes Rule 56 at page 7. CP 616. *See also* CP 683:1-8 (Appellants' opposition to application of the *in terrorem* clause, asserting the claims in the amended complaint do not represent "an attack on or challenge to the Will.")

Second, Judges Andrus and Dwyer wanted to know about the evidence of Tom's and Marie's good faith in bringing the suit in 2017 and the information provided to counsel. In terms of the diligence in examining into whether a claim was proper, *see* CP 687-693 (Wright declaration, *esp.* ¶ 14 at CP 691 that the actions Appellants challenged occurred after the 2014 probate trial) and CP 9-20 and 694-760 (Hart declarations and attachments documenting that, before the 2017 litigation was filed, Hart and Wright took the facts provided by Tom and Marie and checked their bona fides with opposing counsel).

Third, the cases and statutes mentioned in argument are specified in the accompanying Statement of Additional Authorities.

I will be happy to address any additional questions or provide information the panel may want.

Very truly yours,

CARNEY BADLEY SPELLMAN, P.S.

Gregory M. Miller

Enclosure

cc: Counsel of record
Clients

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 15th day of November, 2019.

Elizabeth C. Fuhrmann, PLS, Legal Assistant/
Paralegal to Gregory M. Miller

CARNEY BADLEY SPELLMAN

November 15, 2019 - 3:32 PM

Transmittal Information

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No. 78932-5-I

DIVISION I
OF THE STATE OF WASHINGTON

THOMAS GILLESPIE and MARIE GILLESPIE,

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

APPELLANTS' STATEMENT OF ADDITIONAL AUTHORITIES

Gregory M. Miller, WSBA No. 14459

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Appellants Thomas and Marie Gillespie

Pursuant to RAP 10.8 and the comments at oral argument, Appellants Tom and Marie Gillespie submit the below additional authorities as to the specified issues:

On the issue of the trial court's probate jurisdiction and the distinction between the probate of Wills and the probate of an Estate, *see* (emphasis added):

1. **11.96A.040 (1), (3)** – Original jurisdiction in probate and trust matters – Powers of court distinguishes probate of will and administration of estates:

   (1) The superior court of every county has original subject matter jurisdiction over the probate of wills ***and*** the administration of estates..."

   (3) The superior courts may: **Probate or refuse to probate wills**, appoint personal representatives, **administer and settle the** affairs and the **estates of** incapacitated, missing, or **deceased individuals** including but not limited to decedents' nonprobate assets; administer and settle matters that relate to nonprobate assets and arise under chapter 11.18 or 11.42 RCW;

2. "Probate of a will should be distinguished from the administration of the testator's ...estate." Reutlinger, "Washington Law of Wills and Intestate Succession" (3rd ed. 2018), at Chapter 9, Section A.1.a. (2), pg. 368.

On the issue of the boundaries of a superior court's general jurisdiction and TEDRA as to seeking an accounting or holding a personal representative accountable, *see*:

RCW 11.28.020, .160, & .250 (objection to appointment, cancellation of letters testamentary, revocation of letters); RCW 11.68.065 (accountings by PRs, including annually); RCW 11.68.050, .060, and .070 (non-intervention provisions for objecting, removing PRs).

In re Estate of Jones, 152 Wn.2d 1, 9-12, 100 P.3d 805 (2004) (superior court authority to remove misbehaving PR in non-intervention probates, there per RCW 11.68.070).

In re Estate of Rathbone, 190 Wn.2d 332, 342, 412 P.3d 1283 (2018)

Respectfully submitted this 15th day of November, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Gregory M. Miller, WSBA No. 14459
Attorneys for Respondents Thomas and Marie Gillespie

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via court e-filing website, which sends notification of such filing to the following:

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Tel: (425) 462-7070
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theo@vjbk.com

DATED this 15th day of November, 2019.

Elizabeth C. Fuhrmann, PLS, Legal Assistant/Paralegal to Gregory M. Miller

CARNEY BADLEY SPELLMAN

November 15, 2019 - 3:32 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78932-5
Appellate Court Case Title:	Thomas & Marie Gillespie v. Valerie Gillespie & James Eeckhoudt, Respondents

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No. 78932-5-I

DIVISION I
OF THE STATE OF WASHINGTON

THOMAS GILLESPIE and MARIE GILLESPIE,

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

APPELLANTS' STATEMENT OF ADDITIONAL AUTHORITIES

Gregory M. Miller, WSBA No. 14459

CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
(206) 622-8020
Attorneys for Appellants Thomas and Marie Gillespie

Pursuant to RAP 10.8 and the comments at oral argument, Appellants Tom and Marie *Gillespie submit the below additional authority as to the reference in oral argument to BLACK'S LAW DICTIONARY, the definition of "probate" as a noun and as a verb:

> **probate** (**proh**-bayt), n. **1.** The judicial procedure by which a testamentary document is established to be a valid will; *the proving of a will to the satisfaction of the court.* • Unless set aside, the probate of a will is conclusive upon the parties to the proceedings (and others who had notice of them) on all questions testamentary capacity, the absence of fraud or undue influence, and due execution of the will. *But probate does not include inquiry into the validity of the will's provisions or on their proper construction or legal effect.* – Also termed *proof of will.*
>
> # # #
>
> **Probate,** vb. **1.** *To admit (a will) to proof.*

BLACK'S LAW DICTIONARY, pp. 1219-1220 (7th Ed., 1999) (underlined italics added). A copy of the cited pages is attached.

Respectfully submitted this 26th day of November, 2019.

CARNEY BADLEY SPELLMAN, P.S.

By _____
Gregory M. Miller, WSBA No. 14459
Attorneys for Respondents Thomas and Marie Gillespie

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 26th day of November, 2019.

Elizabeth C. Fuhrmann, PLS, Legal Assistant/Paralegal to Gregory M. Miller

Black's Law Dictionary®

Seventh Edition

Bryan A. Garner
Editor in Chief

ST. PAUL, MINN., 1999

ters as the rights of captors and the distribution of the proceeds.

prize money. **1.** A dividend from the proceeds of a captured vessel, paid to the captors. **2.** Money offered as an award.

PRO. *abbr.* PEER-REVIEW ORGANIZATION.

pro (proh). [Latin] For.

proamita (proh-**am**-ə-tə). [Latin] *Roman & civil law.* A great-great aunt; the sister of one's great-grandfather.

proamita magna (proh-**am**-ə-tə **mag**-nə). [Latin] *Civil law.* A great-great-great-aunt.

proavia (proh-**ay**-vee-ə). [Latin] *Roman & civil law.* A great-grandmother.

proavunculus (proh-ə-**vəngk**-yə-ləs). [Latin] *Civil law.* A great-grandmother's brother.

probabilis causa (prə-**bay**-bə-lis **kaw**-zə). [Latin] Probable cause.

probable cause. A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. • Under the Fourth Amendment, probable cause — which amounts to more than a bare suspicion but less than evidence that would justify a conviction — must be shown before an arrest warrant or search warrant may be issued. — Also termed *reasonable cause*; *sufficient cause*; *reasonable grounds*. Cf. REASONABLE SUSPICION.

> "Probable cause may not be established simply by showing that the officer who made the challenged arrest or search subjectively believed he had grounds for his action. As emphasized in *Beck v. Ohio* [379 U.S. 89, 85 S.Ct. 223 (1964)]: 'If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police.' The probable cause test, then, is an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man." Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.3, at 140 (2d ed. 1992).

probable-cause hearing. See PRELIMINARY HEARING.

probable consequence. An effect or result that is more likely to follow its supposed cause than not to follow it.

probable-desistance test. *Criminal law.* A common-law test for the crime of attempt, focusing on whether the defendant has exhibited dangerous behavior indicating a likelihood of committing the crime. See ATTEMPT (2).

probable evidence. See *presumptive evidence* under EVIDENCE.

probandum (proh-**ban**-dəm), *n.* A fact to be proved. Pl. **probanda.** See *fact in issue* under FACT.

probata (proh-**bay**-tə). [Latin] *pl.* PROBATUM.

probate (**proh**-bayt), *n.* **1.** The judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court. • Unless set aside, the probate of a will is conclusive upon the parties to the proceedings (and others who had notice of them) on all questions of testamentary capacity, the absence of fraud or undue influence, and due execution of the will. But probate does not preclude inquiry into the validity of the will's provisions or on their proper construction or legal effect. — Also termed *proof of will*.

informal probate. Probate designed to operate with minimal involvement of the probate court. • Most modern probate codes encourage this type of administration, with an independent personal representative. — Also termed *independent probate*.

probate in common form. *Hist.* Probate granted in the registry, without any formal procedure in court, on the executor's ex parte application. • This type of probate is revocable.

probate in solemn form. *Hist.* Probate granted in open court, as a final decree, when all interested parties have been given notice. • This type of probate is irrevocable for all parties who have had notice of the proceeding, unless a later will is discovered.

small-estate probate. An informal procedure for administering small estates, less structured than the normal process and usu. not requiring the assistance of an attorney.

2. Loosely, a personal representative's actions in handling a decedent's estate. **3.** Loosely, all the subjects over which probate courts have jurisdiction. **4.** *Archaic.* A nonresident plaintiff's proof of a debt by swearing before a notary public or other officer that the debt is correct, just, and due, and by having the notary attach a jurat.

probate, *vb.* **1.** To admit (a will) to proof. **2.** To administer (a decedent's estate). **3.** To grant probation to (a criminal); to reduce (a sentence) by means of probation.

probate asset. See *legal asset* under ASSET.

probate bond. See BOND (2).

probate code. A collection of statutes setting forth the law (substantive and procedural) of decedents' estates and trusts.

probate court. See COURT.

probate distribution. See DISTRIBUTION.

probate duty. See DUTY (4).

probate estate. A decedent's property subject to administration by a personal representative. See *decedent's estate* under ESTATE.

probate homestead. A homestead, exempt from creditors' claims, set apart for use by a decedent's surviving spouse and minor children. See HOMESTEAD.

probate in common form. See PROBATE.

probate in solemn form. See PROBATE.

probate judge. See JUDGE.

probate jurisdiction. See JURISDICTION.

probate register. See REGISTER.

probatio (prə-**bay**-shee-oh). [Latin] *Roman & civil law.* Proof.

plena probatio. See *probatio plena.*

probatio mortua (prə-**bay**-shee-oh **mor**-choo-ə). [Latin] Dead proof; proof by an inanimate object such as a deed or other instrument.

probatio plena (prə-**bay**-shee-oh **plee**-nə). [Latin] *Civil law.* Full proof; proof by two witnesses or a public instrument. — Also termed *plena probatio.*

probatio semi-plena (prə-**bay**-shee-oh sem-ɪ-**plee**-nə). [Latin] *Civil law.* Half-full proof; half-proof; proof by one witness or a private instrument.

probatio viva (prə-**bay**-shee-oh **vɪ**-və). [Latin] Living proof; that is, proof by the mouth of a witness.

probation. 1. A court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison. Cf. PAROLE.

shock probation. Probation that is granted after a brief stay in jail or prison. • Shock probation is intended to awaken the defendant to the reality of confinement for failure to abide by the conditions of probation. This type of probation is discretionary with the sentencing judge and is usu. granted within 180 days of the original sentence. Cf. *shock incarceration* under INCARCERATION.

2. The act of judicially proving a will. See PROBATE.

probation before judgment. See *deferred judgment* under JUDGMENT.

probationer. A convicted criminal who is on probation.

probation officer. A government officer who supervises the conduct of a probationer.

probation without judgment. See *deferred judgment* under JUDGMENT.

probatio plena. See PROBATIO.

probatio semi-plena. See PROBATIO.

probatio viva. See PROBATIO.

probative (**proh**-bə-tiv), *adj.* Tending to prove or disprove. • Courts can exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. — **probativeness,** *n.*

probative evidence. See EVIDENCE.

probative fact. See FACT.

probator (proh-**bay**-tər), *n. Hist.* An accused person who confesses to a crime but asserts that another also participated in the crime. • The probator had to undertake to prove the supposed accomplice's guilt.

probatum (proh-**bay**-təm), *n.* [Latin] Something conclusively established or proved; proof. Pl. ***probata.*** Cf. ALLEGATUM.

pro bono (proh **boh**-noh), *adv. & adj.* [Latin *pro bono publico* "for the public good"] Being or

CARNEY BADLEY SPELLMAN

November 26, 2019 - 3:08 PM

Transmittal Information

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