No. 340511

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

In the Matter of the Estate of:

Kathryn Joyce Rathbone

ESTATE OF KATHRYN JOYCE RATHBONE, TODD RATHBONE,
Personal Representative,

Appellants,

VS.

GLEN L. RATHBONE

Respondent.

APPELLANTS' OPENING BRIEF

Jerry J. Moberg WSBA No. 5282
Dalton Lee Pence, WSBA No. 30339
Jerry Moberg & Associates
Attorney for Appellants
124 3rd Ave SW
P.O. Box 130
Ephrata, WA 98823
(509) 754 2356

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

This appeal involves the question of what jurisdiction the lower court has to intervene and interpret a Will in non-intervention probate proceedings in the Estate of Kathryn Joyce Rathbone in direct contravention of the wishes of the Decedent.

Kathryn Joyce Rathbone's died testate and left her estate to her three surviving sons Todd Rathbone, Glen Rathbone, and Douglas Rathbone[1], and two grandchildren Lisa Holloway and Sheila Holloway. One of her major concerns was to not burden her Estate with litigation. In that regard she specifically set forth in her Will the following provision:

> "5.4 NO CONTEST PROVISION. My Personal Representative and Trustee shall have the authority to construe this Will and trusts and to resolve all matters pertaining to disputed issues or controverted claims. I do not want to burden my Estate or any trust with the cost of a litigated proceeding to resolve questions of law or fact. (Emphasis added)

Todd is the designated representative, and was appointed to serve without court intervention. Despite the non-intervention status of the probate and the prohibition against contesting the Will, Respondent (and Petitioner below), Glen L. Rathbone ("GLEN") brought on a Petition under the Trusts and Estates Dispute Resolution Act ("TEDRA"), asking the trial court to construe the Will.

In direct contravention of his mother's directive in the Will, GLEN brought a TEDRA action seeking to have the trial court "construe" the Will. GLEN did not claim he was bringing this action under the recognized exceptions to "non-intervention" powers, to wit allegations that the Personal Representative failed to faithfully carry out his duties (RCW 11.68.070), or that the Personal Representative committed waste, embezzlement or mismanagement (RCW 11.28.250).[2] Nor was he challenging the accounting or award of attorney fees approved by the Personal Representative (RCW 11.68.110). Instead he makes the novel argument that the TEDRA statute, it and of itself, confers jurisdiction upon the court to intervene and decide any disputed issues in a non-intervention probate. In fact, TEDRA is merely the procedural vehicle by which otherwise authorized probate actions may be resolved. TEDRA does not confer any new jurisdiction upon the court. The probate court accepted GLEN's novel argument and erroneously decided that TEDRA conferred additional jurisdiction upon the court in non-intervention cases and then construed the Will. The Personal Representative is asking this Honorable Court to correct the trial court's error and hold that TEDRA

[1] For clarity sake Appellant will refer to the sons by their first names.

does not confer any new jurisdiction upon the trial court in non-intervention proceedings.

II. ASSIGNMENTS OF ERROR

A. The Superior Court committed reversible error by exceeding its limited authority to assert jurisdiction in nonintervention probate proceedings.

1. The Court erred when it asserted jurisdiction pursuant to RCW 11.68.070;
2. The Court erred when it asserted jurisdiction pursuant to RCW 11.96, et seq.;
3. The Court erred by allowing provisions set out in the Trust and Estate Dispute Resolution Act (TEDRA) to supersede applicable provisions and procedures contained in Title 11 RCW.;
4. The Court erred by failing to enforce statutory provisions set out in RCW 11.68.110.
5. The Court erred when it construed the Will in this case.

III. STATEMENT OF THE CASE

---

[2] In these limited instances the only authority of the court is to remove the Personal Representative. The court is not conferred with any authority to construe the Will.

Kathryn Joyce Rathbone executed her Will on December 27, 2010, and died on January 31, 2013. The Will designates her "Family" as three surviving children (Todd Rathbone, Glen Rathbone, and Douglas Rathbone), and two grandchildren (Lisa Holloway and Sheila Holloway). Todd Rathbone is the personal representative of the Decedent's estate, and was appointed to serve without court intervention. CP 24 (¶2).

The four corners of the Will, when read as a whole, illustrate the testator's turbulent relationship with GLEN and her intent to make special provisions that conditioned or limited GLEN's rights to inheritance. CP 24 (¶3). She required that GLEN sell his interest in the family business to his two brothers or risk being disinherited. CP 24 (¶4 & ¶6). She made it clear that GLEN was purposely eliminated from the estate administration process. CP 24 (¶7). Article IV of the Will addresses disposition of property, both real and personal. Section 4.1.1 provides that the decedent's personal effects (less motor vehicles and boats) be divided between her sons, Todd, Doug and Glen, "in as nearly equal shares as may be practicable. . . ." However, GLEN's status as a beneficiary is conditional and addressed separately: "Glen shall not receive a share of my person effects if he does not satisfy the condition in Section 1.3.2." CP 24 (¶8); CP 25(¶1).

She made very specific provisions about GLEN's right to inherent the real property that included two parcels collectively referred to as the "Road K Property. CP 25 (¶2). Section 4.1.3. of the Will provides, in pertinent part:

> Provided that he satisfies the conditions set forth in Section 1.3.2., I leave the Road K Property to Glen, *subject however to an option in favor of Todd to purchase the same from my estate for the sum of $350,000 in cash*, or for a portion of his share of the estate of equal value, paid at closing." * * * (Emphasis added). CP 25 (¶4).

Section 4.1.3. continues:

> In the event Glen does not satisfy the conditions of Section 1.3.2. (for any reason, including his having predeceased me), then the Road K Property shall pass with the residue of my estate. At Todd's option, it shall be allocated to his share of the residue, provided at a deemed value of $350,000 it exceeds his share of the residue, he shall pay the estate the amount of such excess in cash upon conveyance of the property to him." CP 25 (¶5).

Todd Rathbone exercised the purchase option. CP 25 (¶6). GLEN responded by initiating a (TEDRA) Petition for "Order Construing Will" pursuant to "RCW 11.96A et seq., RCW 11.12.230, this Petition, and the files and records herein." CP 3 (¶1). In his TEDRA action, GLEN asks the court to construe the non-intervention Will despite the Testator's clear intent to leave the construction of the Will up to the Personal Representative. GLEN's TEDRA petition (including appended exhibits) does not reference or rely upon any provisions set out in chapters

11.68.110, 11.68.070 or 11.28.250 RCW that specially confer limited jurisdiction to the lower court in a non-intervention probate. CP 3-21.

Ignoring the jurisdictional restrictions, GLEN's TEDRA petition simply addresses his view of the proper construction of the Will. CP 5 (¶5). He continues on with reasons why the court should engage in Will construction and accept his version of "specific circumstances" which he alleges would support of his viewpoint on the construction of the Will. CP 6 (¶3). However, GLEN fails to address the jurisdictional restrictions to his petition. Furthermore, GLEN did not petition for the removal of the Personal Representative or ask that his powers be restricted which is the only remedy that the jurisdictional statutes confer on the probate court in a non-intervention probate. CP 7 (¶3, 4, 5); CP 8(¶1).

The Estate timely objected and opposed GLEN's petition. CP 22 (¶1). The Estate challenged jurisdiction and underscored the court's limited authority to assert jurisdiction in nonintervention probate proceedings.[3] CP 26 (¶3). In its objection and response in opposition, the

[3] Without conceding jurisdiction, the Estate also asserted that GLEN's petition was, in fact, a petition to contest provisions of the will and his failure to comply with RCW 11.24.020 would require dismissal of the petition. CP 29 (¶1-2). The Estate's objection and opposition also set out issues involving potential questions of fact that would have to be resolved by a hearing and not at oral argument of the

Estate, *inter alia*, countered that TEDRA provisions clearly do convey any specific substantive jurisdiction on the probate court that was not otherwise created by probate statutes, but TEDRA merely supplement otherwise applicable provisions and procedures under Title 11 RCWA and provided the procedural process to resolve those claims. CP 28 (¶1).

THE HEARING

At the time of hearing, GLEN made clear he was seeking relief exclusively under the "TEDRA statute." The probate judge immediately questioned the nature of the proceeding and raised the jurisdictional issue. VRP, Page 5, Lines 4-19. The Court interrupted GLEN's invitation to engage in Will construction by moving "straight to jurisdiction". VRP, Page 6, Lines 23-24. The Court asked if this was a TEDRA action "challenging fees and for requesting an accounting" according to provisions set out in RCW 11.68.110, an area where the legislature has conferred limited jurisdiction on the probate court in a non-intervention probate. VRP, Page 7, Lines 14-17. GLEN represented that an accounting had been requested (but was not part of this TEDRA proceedings). He argued that the jurisdictional statutory provisions under

---

motion to dismiss the TEDRA action. CP 29 (¶3-4); CP 30 (¶1-5); CP 31 (¶1-2); CP 35 (¶3-6; CP 36 (¶1).

RCW 11.68.110 amount to nothing more than a "technicality". VRP, Page 7, Lines 23-24. Instead, ignoring TEDRA's supplemental status, GLEN argued that the Court had jurisdiction conferred to it by the TEDRA statute to construe a Will in a non-intervention probate. VRP, Page 8, Lines 3-4.

The Court responded by acknowledging that the subject matter of GLEN's petition did not involve any request for an accounting nor did it concern a fee challenge. VRP, Page 8, Lines 5-8. The Court admitted confusion by stating that it "was trying to figure out" if RCW 11.68.110 even applied. VRP, Page 8, Lines 12-13. The Court concluded properly that "[RCW 11.68.110] doesn't appear to [apply], based on the issue that's being raised, which is the interpretation of section 4.1.3." VRP, Page 8, Lines 13-15.

GLEN reiterated the basis for his requested relief: "We're looking for a construction of the Will. * * * Petition to construe the Will, here's what the Will means." VRP, Page 9, Lines 13-17. He did not point the probate court to any legal authority that would confer jurisdiction on the court to construe a Will in a non-intervention probate.

Surprisingly, despite the fact that GLEN's TEDRA petition was not seeking to remove the Personal Representative pursuant to RCW 11.68.070, and without (1) any notice or a hearing pursuant to RCW

11.68.070 or (2) any evidence of a breach of a fiduciary duty of the part the Personal Representative, the probate court transformed the TEDRA petition into a proceedings to determine whether a personal representative is recreant or subject to removal under RCW 11.68.070. The probate court noted GLEN's arguments:

> [B]asically say Todd's actions constitute self-dealing and a breach of his fiduciary duties as the estate's personal representative. That sounds like it fits within 11.68.070. Because under that statute – the claim under that statute usually is the PR has failed to, quote, execute his or her trust faithfully. And it sounds like that's what you're arguing at this point.

VRP, Page 10, Lines 3-5. GLEN agreed with the probate court's erroneous conclusion despite the fact that the TEDRA petition never alleged that is was brought under RCW 11.68.070 and sought no relief under that statute. VRP, Page 10, Line 11-16.

The probate court, although admittedly confused, seem to recognize the distinction between the statutes that conferred jurisdiction on the court in a non-intervention probate and the supplemental status of TEDRA as merely the procedural process to hear those issues when it stated:

> "So I'm trying to figure out if there's this other applicable provision, which is why I'm asking you, does it fit under 11.68.110 [related to accounting for fees paid in the probate] or 11.68.070 [procedure to remove recreant personal representative]? Because if it fits under one of those two, then

those are the otherwise applicable provisions first, and then we get to TEDRA afterwards." VRP, Page 11, Lines 2-7.

Nevertheless, despite the fact that this TEDRA petition was not seeking any accounting, GLEN had not met the procedural requirements set out in RCW 11.68.110(2), and GLEN's TEDRA petition did not appear "to really argue that it's part of that statute" [RCW 11.68.110], the probate court partly based its jurisdiction to "construe the Will" on RCW 11.68.110. VRP, Page 12, Lines 20-25; VRP, Page 13, Lines 1-5.

At the time of hearing, the Estate raised lack of jurisdiction at its very first opportunity. VRP 27, Lines 6. The Estate stressed that a challenge of accounting was not before the Court, and that such a challenge does not occur within a TEDRA action. VRP 29, Lines 12-17. Further, the Estate reminded the Court that GLEN's TEDRA action was for "the specific purpose of asking this court to interpret the Will." VRP 29, Lines 18-19. The Estate correctly argued that the court's jurisdiction to intervene in a non-intervention probate under RCW 11.68.070 and RCW 11.28.250 exists only if there's an action to remove the personal representative under 11.68.070. GLEN had not filed an action seeking to remove the personal representative. VRP 29, Lines 24-25; VRP 30, Lines 1-2. VRP 30, Lines 3-10. Furthermore, GLEN had not produced any

evidence of mismanagement or clear fraud which is required to invoke jurisdiction under these statutes. VRP 32, Lines 12-14.

The court admitted that GLEN's petition "doesn't quite in and of itself say that it's being brought under 11.68.070". However, the probate court shoehorned this TEDRA petition into RCW 11.68.070 by concluding that "the claim, in my opinion, appears to be indicating that it is in fact brought under that section or that statute." VRP 43, Lines 14-17. The court admitted that "under 11.68.070, that has to make – be a claim of embezzlement or fraud or mismanagement" but reasoned that under the broader language of the statute " it talks about has wrongfully neglected the estate or has neglected to perform any acts as such personal representative – of such personal representative." VRP 43, Lines 22-25; VRP 44, Lines 1-3. The court went on to state, "[S]o I do believe the court does have jurisdiction as provided under 11.68.070." VRP 44, Lines 12-13.

In an effort to justify is jurisdiction in this case, the probate court compounded its error that it had jurisdiction under RCW 11.68.110 and RCW 11.68.070 by adopting GLEN's argument that "Regardless of the other statutes that were implicated in this, TEDRA grants the court very broad and wide latitude. And by – and jurisdiction exists under TEDRA." VRP Page 15, Lines 5-8. The court reasoned, "[A]nd in the alternative,

even if this was not a case of having neglected to perform any acts under the Will or as personal representative, **I do find that TEDRA would confer jurisdiction in the alternative if 11.68.070 did not apply**" VRP 44, Lines 13-18. (Emphasis added)

IV. ARGUMENT

A. STANDARD OF REVIEW

This Court is asked to review the probate court's ruling as a matter of law and on jurisdictional grounds. Where the issue is legal, not factual, the standard of review is the error of law standard and is reviewed *de novo*. *Grier v. Washington State Employment Sec. Dep't*, 43 Wn. App. 92, 95, 715 P.2d 534 (1986). With respect to subject matter jurisdiction, the proper standard of review is de novo. "Whether a court has subject matter jurisdiction is a question of law reviewed de novo." *Dougherty v. Dep't of Labor & Indus.,* 150 Wn.2d 310, 314, 76 P.3d 1183 (2003) (citing *Crosby v. Spokane County,* 137 Wn.2d 296, 301, 971 P.2d 32 (1999)). See also, *ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n*, 173 Wn.2d 608, 624, 268 P.3d 929, (2012), *as corrected* (Mar. 20, 2012); *Young v. Clark,* 149 Wn.2d 130, 132, 65 P.3d 1192 (2003).

B. NONINTERVENTION STATUTES LIMIT THE SUPERIOR COURT'S ABILITY TO ASSERT JURISDICTION.

The entire purpose of the nonintervention statutes is to ensure the wishes of the Decedent in this case; to avoid costly and often painful litigation and prevent court intervention in the probate of an estate. The legislature carried out this laudable purpose by specifically restricting the "jurisdiction" of the Superior Court in nonintervention probates. RCW 11.68, et seq., governs "Settlement of Estates without Administration." It has long been the law in Washington that "Superior court jurisdiction over nonintervention probate is statutorily limited." See *In re Estate of Jones*, 152 Wn.2d 1, 9, 193 P.3d. 147 (2004). See also, *In re Estate of Bobbitt*, 60 Wn.App. 630, 632, 806 P.2d 254 (1991)("Plainly, the Superior Court's jurisdiction over nonintervention probate proceedings depends wholly on the legislative scheme.")

"[O]nce the decedent dies, the personal representative applies for an order of solvency, and the court has jurisdiction to grant or deny the order. However, once an order of solvency is entered the court loses jurisdiction. The court may regain jurisdiction only if the executor or another person with statutorily conferred authority invokes jurisdiction." *In re the Estate of Jones*, 152 Wn.2d at 9 (citing I*n re Coates' Estate,* 55 Wn.2d 250, 347 P.2d 875 (1959)(Emphasis added)

In re Peabody's Estate, 169 Wash. 65, 13 P.2d 431 (1932) explained the process with charming simplicity:

> To make this clear, let us illustrate: (a) Mr. Peabody in his lifetime made a nonintervention will, but no court then had jurisdiction of his estate. (b) Mr. Peabody died. Still no court had jurisdiction of his estate until, after his death, by proper petition setting up the jurisdictional facts, filed in the superior court of the proper county, that court, by reason of that application to it, obtained jurisdiction of the estate. (c) When the order of solvency was properly entered, the further administration of the estate was by the statute relegated exclusively to the executors, and the probate court, which had before had jurisdiction, then lost its jurisdiction of the estate. (d) *Thereafter, in order for the court to regain jurisdiction of the estate, its jurisdiction must be again invoked by a proper application* made by someone authorized by the statute so to do...(Emphasis added)

Quoted *In re the Estate of Bobbitt*, 60 Wn.App at 632

Once the court loses jurisdiction, its authority is limited to removal and appointment of a successor or restriction or the executor's nonintervention powers and prospective supervision of the estate's administration in limited circumstances. *Matter of Estate of Hookom*, 52. Wn.App. 800, 805, 764 P.2d 1001 (1988) (quoting *In re Estate of Aaberg*, 25 Wn.App. 336, 344, 607 P.2d 1227 (1980)). Indeed, GLEN does not argue with this longstanding jurisdictional rule in nonintervention probates. He simply argues that somehow TEDRA magically expands jurisdiction in nonintervention probates. It does not.

Here, GLEN did not properly invoke the jurisdiction of the Superior Court. His TEDRA petition did not even involve RCW 11.68.070, RCW 11.28.250 or RCW 11.68.110. Likewise, GLEN did not

present any evidence in support of any statutory grounds that would confer jurisdiction to the court in this nonintervention probate. The trial court breached the legislative scheme by intervening and assuming jurisdiction without any proper statutory authority to do so.

C. THE SUPERIOR COURT IS WITHOUT ANY GROUNDS TO INTERVENE UNDER CHAPTERS 11.68.070 OR 11.28.250 RCW.

One of the traditional ways for the probate court to regain jurisdiction in a nonintervention probate is set forth in RCW 11.68.070; that is when a personal representative fails to execute his or her duties faithfully:

> If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of any * * * devisee, legatee, or of any person on behalf of any incompetent heir, devisee, or legatee, such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, the court shall cite such personal representative to appear before it, and if, upon hearing of the petition it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, then, in the discretion of the court the powers of the personal representative may be restricted or the personal representative may be removed and a successor appointed.

The process of restricting the powers of a personal representative begins with a "petition being supported by affidavit which makes a prima

facie showing of cause for removal or restriction of powers. . . ." RCW 11.68.070. See also *In re the Estate of Bobbitt, supra.* "[C]ause" for restriction and the court's intervention is based upon "any reason specified in RCW 11.28.250", to wit:

> Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his or her charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters.

However, GLEN did not claim a violation of these statutes in his TEDRA petition. Even if he had, the TEDRA petition does not set out sufficient facts to justify court intervention under these statutes.

The probate court, in a strained attempt to find jurisdiction in this TEDRA petition, utilized these statutes, even though the court admitted that GLEN's petition "doesn't quite in and of itself say that it's being brought under 11.68.070". At oral argument the court stated that it found "the claim, in my opinion, appears to be indicating that it is in fact brought under that section or that statute." VRP 43, Lines 14-17. The court erred when it made such a finding absent a "prima facie showing for cause" in

the petition. GLEN did not, nor was he intending to invoke these statutes as a reason to "construe the Will."

Nevertheless, the probate court egregiously misconstrued RCW 11.28.250 in an effort to "find" jurisdiction. The probate court justified its claim of jurisdiction by relying upon the general language of RCW 11.28.250. The statute specifies a number of valid reasons for the probate court to assume jurisdiction, including waste, embezzlement, mismanagement, fraud, incompetency, and neglect. It then provides "for any other cause or reason which to the court appears necessary." The probate court erroneously interpreted this general language as a "catch all" permitting intervention. VRP 3, Lines 10-12.

In discussing provisions necessary to support personal representative restriction set out in 11.28.250, (waste, embezzlement, or mismanagement, fraud, incompetence, neglect, permanent removal from the state, or "any other cause or reason which to the court appears necessary"), the Estate brought to the court's attention the *ejusdem generis* rule.[4] VRP Page 31, Lines 2-9. The court rejected the *ejusdem generis* rule and supported its position by simply reiterating "Or for any other cause which the court believes – it says, 'for any other cause or reason

which to the court appears necessary.'" VRP 3, Lines 10-12. When the Estate again pointed out that the court's "limited jurisdiction in a nonintervention will is to remove or limit Todd's authority only if there's mismanagement, waste, embezzlement or fraud", the court assigned individual meaning to a specific term in a manner which renders nonintervention meaningless: "Or has wrongfully neglected the estate of has neglected to perform any acts." VRP 32, Lines 5-6. It is important to note that not only did the court misinterpret the statute to find a basis for intervention; it did so without any evidence of neglect or failure to perform an act on the part of the personal representative.

The rule of "ejusdem generis" was discussed, explained and applied within the context of RCW 11.28.250 in *In re Estate of Jones, supra.* In *Jones,* beneficiaries of nonintervention estate filed petitions in probate proceedings to receive interim accounting and final accounting, and to remove personal representative and appoint new personal representative. Jurisdiction was a threshold issue. The superior court removed the personal representative and the appellate court reversed. In reversing the appellate court, the *Jones* court determined the superior court had the jurisdiction to decide if the personal representative "discharged his

---

[4]The *ejusdem generis* rule states that "specific terms modify or restrict the application of general terms where both are used in sequence." See *City of Seattle*

duties pursuant to RCW 11.68.070 and 11.28.250." *In re the Estate of Jones*, 152 Wn.2d at 9.

> One basis for the appellate court's holding was a narrow construction of RCW 11.68.070 and 11.28.250. It held that RCW 11.28.250's catchall phrase "for any other cause or reason which to the court appears necessary" could not be incorporated into RCW 11.68.070 because that statute allows removal only for unfaithful conduct or "reasons *specified* in RCW 11.28.250." *Id.* at 363, 67 P.3d 1113. *11 The court concluded that the catchall phrase was not a "reason specified" and therefore could not be a basis for removal of a nonintervention personal representative. *Id.* The court then found that Russell's actions did not constitute specified grounds listed in the statutes and his removal was improper. *Id.* at 364, 372, 67 P.3d 1113.

In re the Estate of Jones, 152 Wn.2d at 10.

Here, the trial court made the same mistake. Clearly, the court believed that "the any other cause" phrase functions independently of the specific terms contained in RCW 11.28.250: i.e., waste, embezzlement, or mismanagement, fraud, incompetence, neglect, permanent removal from the state. "The rule of *ejusdem generis* states that when general terms are in a sequence with specific terms, the general term is restricted to items similar to the specific terms." *Id.* at 11 (citing *Dean v. McFarland,* 81 Wn.2d 215, 221, 500 P.2d 1244 (1972)). Specifically, "[T]he court may remove a personal representative under the 'for any other cause' provision **only if the conduct is similar to the other grounds listed in the**

---

v. State, 136 Wn.2d 693, 699, 965 P.2d 619 (1998).

statute." *Id.* at 11. [Emphasis added.] "The *ejusdem generis* rule requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms." See *City of Seattle v. State,* 136 Wn.2d 693, 699, 965 P.2d 619 (1998). "[T]he catchall phrase does not mean that the court may remove a representative on a whim." *In re the Estate of Jones*, 152 Wn.2d at 11. The "catchall phrase" is dependent upon the specific terms and basis for restriction set out in RCW 11.28.250. The trial court was in error when it failed to apply the phrase to the specific terms supporting restriction.

The trial court also admitted that "under 11.68.070, that has to make – be a claim of embezzlement or fraud or mismanagement. But also in that statute it talks about has wrongfully neglected the estate or has neglected to perform any acts as such personal representative – of such personal representative." VRP 43, Lines 22-25; VRP 44, Lines 1-3. As a direct result, the court made a finding of jurisdiction "as provided under 11.68.070." VRP 44, Lines 12-13. Here, the trial court erred again.

"The superior court must have valid grounds for removal and these grounds must be supported in the record." *In re the Estate of Jones*, 152 Wn.2d at 10 (citing *In re Estate of Beard,* 60 Wn.2d 127, 132, 372 P.2d 530 (1962); *In re Estate of Aaberg,* 25 Wn.App. 336, 339, 607 P.2d 1227

(1980)). In *Jones*, the beneficiaries filed "several petitions during the probate proceedings to receive an interim accounting, a final accounting, remove Russell as personal representative, and appoint a new personal representative." *In re the Estate of Jones*, 152 Wn.2d at 7. In finding the trial court had jurisdiction to intervene and remove the personal representative, the *Jones* court noted that "Russell committed several egregious breaches of his fiduciary duty **which are supported by the record**. . . ." *Id.* at 21. GLEN made no such showing in this case.

The issue of valid grounds for removal or restriction has been addressed by this Court. *In re the Estate of Lowe*, 191 Wn.App. 216, 361 P.3d 789 (2015), a testator's son brought action seeking an accounting of all of estate's assets and an order removing personal representative. The testator's son cited *Jones*, and the *Lowe* court found it distinguishable based upon evidence contained in the record:

> There, the personal representative was removed because the record established he was living in a house that belonged to the estate before the estate was closed; he failed to use the fair market value of the house in distribution; he failed to pay rent, utilities, or property taxes while living in the house; he commingled estate funds; and he refused to disclose financial information, including estate records, valuation of the estate, and information relating to estate property. 152 Wash.2d at 7, 21–22, 93 P.3d 147. Additionally, there was evidence that the executor commingled his personal funds with estate funds. *Id.* at 16, 93 P.3d 147.

In re the Estate of Lowe, 191 Wn.App. at 229.

The *Lowe* court noted that the son "made a number of accusations during his testimony at trial. Yet he failed to establish that there was any estate property unaccounted for or that Lonnie breached any of his duties as personal representative." *Id.*. at 229. Evidence of neglect or failure to perform an act all begins by following provisions contained in RCW 11.68.070. Failure to follow the statutory process means there is no evidence before the trial court to consider. The very purpose of the petition and affidavit is to give notice to the personal representative notice of the allegations to which he/she must respond and to give the trial court and some evidentiary basis for taking action. Allegations in a pleading, unsupported by an affidavit, do not constitute a basis for factual findings. See *State v. Ford,* 137 Wn.2d 472, 483, 973 P.2d 452 (1999).

In the instant case, the trial court intervened because it somehow believed, "on a whim", that the personal representative "wrongfully neglected the estate or has neglected to perform any acts as such personal representative." VRP 43, Lines 22-25; VRP 44, Lines 1-3. There is no evidence in the record which supports any claim of misconduct on the part of the personal representative. Here, the trial court construed a Will without jurisdiction to do so. Even if the probate court had jurisdiction under this statute, its only available remedy would be to remove and

replace the personal representative. It would not have any authority to construe the Will under the guise of enforcing this statute.

GLEN never intended to claim or argue that the Personal Representative had committed misconduct. He only wanted the probate court to intervene and "construe the Will." This is made obvious by the fact that GLEN did not follow the requisite procedure for removing a personal representative. The party seeking removal or restriction must file a petition. The petition must be supported by affidavit making a prima facie showing of cause for removal or restriction. Then, after making a preliminary finding, the court must issue a citation to have the personal representative to appear before it. RCW 11.68.070.

GLEN did not file such a petition nor did he provide any affidavit in support of a prima facie showing of cause for restriction of the personal representative's powers. GLEN initiated a "(TEDRA) Petition for Order Construing Will pursuant to "RCW 11.96A et seq., RCW 11.12.230, this Petition, and the files and records herein." CP 3 (¶1). No notice or a hearing pursuant to RCW 11.68.070 ever occurred, and GLEN failed to satisfy the requirements of RCW 11.28.250. The relief sought by GLEN did not fit under any exception set out in RCW 11.68.070 and RCW 11.28.250. VRP Page 36, Lines 19-20. In response, the court *sua sponte* opined that GLEN was "arguably asking for under 11.68.070 for

jurisdiction. . . ." RP 36, Lines 23-25. The court's reasoning is flawed; GLEN's petition clearly seeks Will construction and nothing else. GLEN did not follow any of the procedures mandated in RCW 11.68.070, nor did make a prima facie showing of cause for removal or restriction of powers of the personal representative and citation issuance. He simply makes an unsupported accusation in his petition. Plainly stated, the probate court lacked jurisdiction under RCW 11.68.070 or 11.28.250 to hear the TEDRA petition to construe the Will.

D. THE SUPERIOR COURT ERRED WHEN IT ASSERTED JURISDICTION PURSUANT TO RCW 11.96.A, ET SEQ.

Although TEDRA's jurisdiction provision is broad, the Washington Court of Appeals recently affirmed that the legislature enacted TEDRA to provide for nonjudicial dispute resolution methods for probate matters. TEDRA provisions "'shall not supersede, but shall supplement, any otherwise applicable provisions and procedures' " under Title 11 RCW. RCW 11.96A.080(2)." See *In re Estate of Harder,* 185 Wn.App. 378, 384, 341 P.3d 342 (2015).

TEDRA's supplemental status to applicable provisions and procedures under Title 11 RCW is illustrated in the case of *In re Estate of Kordon,* 157 Wn.2d 206, 137 P.3d 16 (2006). In *Kordon*, our Supreme Court addressed the issue of whether TEDRA trumped the need to file and

serve a citation required by RCW 11.24.020 to invoke the Superior Court's jurisdiction. There, the trial court "issued an order admitting the Will to probate, declaring the estate solvent, and appointing [the] personal representative to act without intervention of the court." *Id* at 208. One of the heirs initiated a will contest under chapter 11.24 RCW. However, the heir neglected to issue a "citation" (then) required by RCW 11.24.020. Instead, the heir simply served her petition on the personal representative. Two years later, the personal representative filed a motion to dismiss as a result of the heir's failure to issue a citation. The heir responded by filing an untimely citation. The trial court dismissed that action for lack of jurisdiction.

At the time of appeal, the heir argued that "the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, eliminates the requirement to issue a citation to parties to an existing probate proceeding." *Id.* at 211. The *Kordon* court determined that "TEDRA expressly supplements chapter 11.24 RCW governing Will contests. *See* RCW 11.96A.080(2)." *Id.* at 211. However, the Supreme Court upheld the trial court's dismissal for lack of jurisdiction: "[T]he plain language of TEDRA indicates that RCW 11.96A.100(2) does not affect the RCW 11.24.020 citation requirement." *Id.* at 211. "While TEDRA applies to Will contests, it 'shall not supersede, but shall supplement, any otherwise

applicable provisions and procedures contained in this title,' including chapter 11.24 RCW. RCW 11.96A.080(2). A statute supersedes another statute by replacing it and supplements another statute by adding to it." *Id.* at 212. In other words, the *Kordon* court reasoned that TEDRA would supersede RCW 11.24.020 if the court did not enforce the citation requirement.

The trial court's finding in the instant case is exactly contrary to controlling law. By finding that "the Court has jurisdiction in this matter pursuant to 11.96A., et seq.", the trial court has decided RCW 11.96A.080(2) supersedes all other statutes in Title 11 RCW, and replaces procedures and requirements contained therein. The probate court effectively ignored the longstanding jurisdictional limitations in nonintervention probates and superseded those requirements by "finding" jurisdiction within the TEDRA statute. This is clear error and the ruling should be reversed.

E. THE SUPERIOR COURT ERRED WHEN IT DETERMINED GLEN SATISFIED REQUIREMENTS SET OUT IN RCW 11.68.110.

In an effort to overcome the obvious jurisdictional limitations of the TEDRA petition to construe the Will, GLEN argued for the first time at the TEDRA hearing that the probate court obtained jurisdiction to hear

his TEDRA petition by virtue of RCW 11.68.110. [5] The TEDRA petition does not allege that it is based on this statute. The TEDRA petition was "based upon RCW 11.96A et.seq., [and] RCW 11.12.230." RCW 11.96A is the TEDRA statute. RCW 11.12.230 is a statute that provides:

> All courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them.

GLEN admits he was put on notice of the Declaration of Completion filed by the Estate. CP 40 (¶3,4). Instead of filing a petition for an accounting and fee challenge as set in RCW 11.68.110, GLEN filed a (TEDRA) Petition for Order Construing the Will. His petition did not seek an approval of any fees nor did it seek any accounting of the proceeds. Instead, he seeks the exclusive remedy of Will construction through a TEDRA petition. The TEDRA petition itself makes no mention of RCW 11.68.110. The TEDRA petition was never intended as an "11.68.110" petition.

---

[5] Actually this argument was first raised by the probate judge at the time of hearing on the TEDRA petition. The probate judge was searching for some jurisdictional basis to construe the Will and he erroneously decided that GLEN's petition to construe the Will amounted to a request for accounting and/or a fee challenge under RCW 11.68.110. VRP, Page 12, Lines 20-25; Page 13, Lines 3-5.

"Once an order of solvency is entered and court has granted nonintervention powers, the personal representative is entitled to administer and close an estate without further court intervention." See *In re Estate of Ardell*, 96 Wn.App. 708, 715-16, 980 P.2d 771 (1999). When the personal representative completes administration, a "Declaration of Completion" is filed pursuant to RCW 11.68.110. Unless the court's jurisdiction is properly invoked, the filing has the effect of closing the estate and discharging the personal representative. RCW 11.68.110. "Under RCW 11.68.110, a nonintervention estate is closed and the personal representative discharged automatically upon the filing of the declaration of completion unless an heir, devisee or legatee has petitioned the court to **approve fees or for an accounting**." *Id.* at 714. {Emphasis added.] GLEN has never filed a petition to approve fees or for an accounting.

This case is very similar to *In re Estate of Harder, supra*. In *Harder* one of the heirs filed a "Notice of Mediation" under RCW 11.96A.300 (TEDRA) within 30 days after receiving notice of the filing of a Declaration of Completion. The Notice of Mediation sought to resolve the dispute over the fees paid to the Personal Representative. It did not seek an accounting nor any approval of the probate court of the fees paid. The beneficiaries in *Harder* argued, as GLEN does here, that the Notice

for Mediation was sufficient under TEDRA to invoke the probate court's jurisdiction under RCW 11.68.110. The Court of Appeals soundly rejected that argument. The Court determined that the notice failed to invoke the jurisdiction of the superior court because none of the four heirs filed a petition as required under RCW 11.68.110(3)." *Id.* at 384. In finding the facts analogous to those in *Kordon* where a TEDRA petition was filed but the beneficiaries failed to file a citation challenging the Will as then required by statute the *Harder* court noted that the heir "filed a notice of mediation under TEDRA, but she did not comply with the requirement under RCW 11.68.110(2) by filing a petition for an accounting to challenge Phillip's fees." *Id.* at 385. The *Harder* court wrote:

> The facts here are analogous [to Kordon]. Janet filed a notice of mediation under TEDRA, but she did not comply with the requirement under RCW 11.68.110(2) by filing a petition for an accounting to challenge Phillip's fees. Chris and David now argue that the superior court's decision favored "form over substance" because the notice of mediation was the functional equivalent of a petition for an accounting. Br. of Appellant at 5. We disagree. The notice of mediation failed to petition the superior court to take any action and TEDRA does not affect the requirements in chapter 11.68 RCW. We note that reading both applicable provisions of chapters 11.68 and 11.96A RCW together, so that chapter 11.96A RCW supplements chapter 11.68 RCW, requires a party who gives notice of mediation in order to resolve a fee dispute under chapter 11.96A RCW to also file a petition to invoke the superior court's jurisdiction under chapter 11.68 RCW. " 'Plain language does not require construction.' " *Kordon,* 157 Wash.2d at 212, 137 P.3d 16

> (quoting *State v. Wilson,* 125 Wash.2d 212, 217, 883 P.2d 320 (1994)). The superior court properly ruled that it lacked jurisdiction to review the reasonableness of Phillip's personal representative fees.

In re Estate of Harder, 185 Wn. App. at 378.

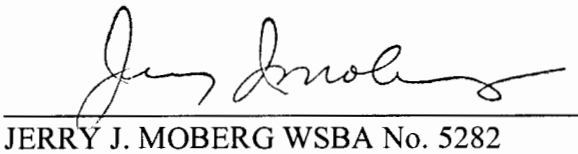
The same can be said about GLEN's TEDRA petition. It does not notify the Estate of any claim or concern about payment of fees. It does not seek an accounting. It was never intended to be an RCW 11.68.110 petition. The only purpose of the TEDRA petition was to attempt to have the probate court interpret the Will in a manner different then the Personal Representative. The probate court had no jurisdiction to interpret the Will. This court should set aside the probate court's ruling for lack of jurisdiction and, as a matter of law, dismiss the TEDRA petition.

V. CONCLUSION

All of the foregoing reasons and controlling law make clear the trial court in this case should have declined to intervene to interpret this Will in a nonintervention probate. GLEN did not provide the trial court with any basis to assert jurisdiction and the probate court had none. This Court should set aside the probate court's ruling and dismiss the TEDRA petition. The case should then be remanded to complete the probate with nonintervention.

RESPECTFULLY SUBMITTED May 9, 2016.

JERRY MOBERG & ASSOCIATES



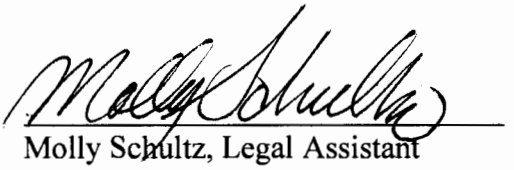
JERRY J. MOBERG WSBA No. 5282
DALTON LEE PENCE, WSBA No. 30339
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the document to which this is affixed by legal messenger, postage prepaid, to:

Dwayne C. Fowles
Larson Fowles, PLLC
821 E Broadway Ave, Ste 8
Moses Lake, WA 98837

DATED May 9, 2016 at Ephrata, Washington



Molly Schultz, Legal Assistant