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DIVISION III
STATE OF WASHINGTON
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No. 340511

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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.

BRIEF OF RESPONDENT

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I. ISSUE PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR

Whether the trial court has the jurisdiction to construe the decedent's will and determine the decedent's testamentary intent in a nonintervention probate when the personal representative has filed a declaration of completion and has indicated how the personal representative intends to administer the decedent's estate, and a beneficiary files a petition for an accounting pursuant to RCW 11.68.110 and a petition pursuant to RCW 11.96A ("TEDRA") to challenge the personal representative's construction of the decedent's will.

II. STATEMENT OF THE CASE

Kathryn Joyce Rathbone executed a will on December 27, 2010 (CP 51) and died on January 31, 2013. The will named Ms. Rathbone's son, Todd Rathbone, the Appellant herein, as personal representative. On February 20, 2013, the superior court issued an order admitting the will to probate and appointing Todd as personal representative to act without intervention of the court.

The beneficiaries named in Ms. Rathbone's will were her three surviving children, Todd, Douglas Rathbone, and Glen Rathbone (the Respondent in this case), and two of her

grandchildren, Lisa Holloway and Sheila Holloway, who were the children of Ms. Rathbone's deceased daughter, Anne Holloway.

Section 4.1.3 of Ms. Rathbone's will provides as follows:

4.1.3 Real Property — Road K NE. I own approximately 1.88 acres of land which includes a home at 4982 Road K NE, Moses Lake, Washington. In addition, there is an contiguous parcel of pasture with a barn, which is approximately 38 acres. These two parcels together shall be referred to herein as the Road K Property. 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. Said option must be exercised no later than nine months after the date of my death, and the resulting purchase closed, no later than twenty four months after the date of my death.

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 that if 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 54.¹

¹ As a condition to receiving his inheritance under the will, Section 1.3.2 of the will required Glen to sell all of his shares of stock in the family corporation within ninety days of Ms. Rathbone's death. CP 51-52. Glen sold his shares of stock pursuant to this provision and completely satisfied this condition. CP 6.

Todd, who was also then acting as personal representative, exercised his option to purchase the Road K Property. However, instead of allocating the \$350,000 sale proceeds to Glen's share of the estate, Todd added the \$350,000 to the residue of the estate, which is to be divided equally between Ms. Rathbone's three sons, Glen, Todd, and Douglas, thereby nullifying Ms. Rathbone's bequest to Glen of either the Road K Property or \$350,000. So, instead of receiving a gift in the amount of \$350,000 as intended by his mother pursuant to Section 4.1.3 of her will, Glen would only have received one-third of this amount as part of his share of the estate's residue. This would have reduced Glen's share of the estate by \$233,333, to the benefit of his brothers, including the personal representative. Todd's proposed distribution of the estate contradicted Ms. Rathbone's intent, and it constituted self-dealing and a breach of Todd's fiduciary duty as the estate's personal representative.

Glen, through his attorney, made inquiries to Todd's attorney regarding Todd's exercise of the option to purchase the Road K Property and sought to confirm that Glen would receive the \$350,000 sale proceeds, in addition to Glen's equal share of the residue of the estate, pursuant to the terms of the will. CP 14. In

response, Todd, through his attorney, threatened Glen with complete disinheritance if Glen dared to question Todd's perceived authority to unilaterally interpret their mother's will in any way that Todd chose. CP 16-17.

On December 23, 2014, Todd filed a Declaration of Completion of Probate (CP 107) and a Notice of Declaration of Completion of Probate (CP 111). The letter from Todd's attorney accompanying the Notice of Declaration of Completion of Probate indicated that Todd had allocated the \$350,000 from his purchase of the Road K Property to the residue of the estate, thereby reducing the amount that Glen was to receive from the estate. CP 20.

Todd's Declaration of Completion included the following statement:

... I [Todd] intend to make final distribution from the Decedent's estate to Decedent's remaining beneficiary Glen L. Rathbone within five (5) business days after the final date on which a beneficiary could file a *Petition* with this Court requesting it to approve fees or to require an estate accounting.

The Will specifically provides that if any beneficiary contests the distribution in any manner, that such contesting beneficiary will be disinherited. If this occurs then an additional distribution will likely be made to the beneficiaries whom have previously provided a Receipt and Waiver.

CP 109. The Notice of Declaration of Completion of Probate filed by Todd also threatened that the "Personal Representative will consider any objection to the *Completion of Probate* as a 'contest' of the Will ..." CP 112-13. In addition, the letter from Todd's attorney which accompanied the Notice of Declaration of Completion of Probate adds the specific threat that the "Personal Representative will consider any objection to the Completion of Probate as a 'contest' of the Will as provided above and will distribute Glen's portion of the estate to the remaining beneficiaries." CP 20.

On January 20, 2015, Glen filed a Petition for Order (1) Approving the Reasonableness of Fees and (2) Requiring an Accounting pursuant to RCW 11.68.110. CP 115. On January 22, 2015, Glen filed a Summons and Petition for Order Construing Will, seeking the proper construction of the will and the enforcement of Ms. Rathbone's intent as expressed in her will. CP 1, 3.

Glen's Petition for Order Construing Will recited the above facts, including Todd's intentional misconstruction of the will to increase Todd's own share of the estate, thereby reducing Glen's share of the estate by \$233,333, and Todd's use of threats and intimidation to prevent Glen from challenging Todd's self-dealing

and violation of his fiduciary duties as the estate's personal representative.

After a hearing on Glen's Petition for Order Construing Will, the court concluded that Todd's proposed interpretation of Section 4.1.3 of the will with regard to the disposition of the proceeds from the sale of the Road K Property was inconsistent with Ms. Rathbone's intent. RP 45-47. The court also made the following findings of fact, to which Todd did not assign error, and which are therefore verities on appeal (*In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004)):

1. It was the intent of the decedent, Kathryn Joyce Rathbone, in the event that Todd Rathbone elected to purchase the "Road K Property" pursuant to Section 4.1.3 of the decedent's Will, that Todd Rathbone would pay \$350,000.00 in cash or give up a portion of Todd Rathbone's share of the estate having a value of \$350,000.00. CP 104.
2. It was the intent of the decedent, in the event that Todd Rathbone elected to purchase the "Road K Property" pursuant to Section 4.1.3 of the decedent's Will, that Glen Rathbone would receive \$350,000.00 in cash or a portion of Todd Rathbone's share of the estate having a value of \$350,000.00. CP 104.
3. The decedent did not intend for the proceeds from Todd Rathbone's purchase of the Road K Property pursuant to Section 4.1.3 of the Will to pass as part of the residue of the decedent's estate. CP 104.

Todd brought this appeal challenging the court's jurisdiction and authority to construe Ms. Rathbone's will and to require him to administer the decedent's will consistent with Ms. Rathbone's testamentary intent.

III. ARGUMENT

A. Standard of Review.

Todd assigns error to the trial court's assertion of jurisdiction to construe the decedent's will. Appellant's Brief, p. 3. The trial court's rulings regarding jurisdiction concern statutory interpretation, which is a question of law and subject to *de novo* review. *In re Estate of Jones* at 8-9.

In reviewing the trial court's decisions with regard to its jurisdiction in this case, the appellate court is not limited to the reasoning and bases for jurisdiction cited and relied upon below by Glen or by the trial court. This Court may affirm the trial court on any grounds established by the pleadings and proof, even if not considered by the trial court. RAP 2.5(a); *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 32, 864 P.2d 921 (1993).

B. The Jurisdiction of the Court was Properly Invoked Pursuant to TEDRA.

Once the court enters an order of solvency and grants nonintervention powers to the personal representative, the court no longer has jurisdiction in the matter, and jurisdiction can be again invoked only by a party authorized by statute to do so. *In re Estate of Jones* at 9. As this rule indicates, the court's jurisdiction over nonintervention probate proceedings is statutory, and it depends wholly on the legislative scheme. *In re Estate of Bobbitt*, 60 Wn. App. 630, 632, 806 P.2d 254 (1991). Therefore, one must consider the entire statutory scheme which applies to the specific case.

In his opening brief, Todd refers to the Trust and Estate Dispute Resolution Act (RCW 11.96A, referred to as "TEDRA"), but quickly concludes, without actually considering or analyzing the language of the statute, that TEDRA does not provide a basis for invoking the court's jurisdiction in a nonintervention probate. Appellant's Brief, p. 14. In addition to the other applicable probate statutes, the court's jurisdiction can be invoked in a nonintervention probate by an authorized person pursuant to statutory provisions in TEDRA.

The provisions of TEDRA do not supersede, but supplement any otherwise applicable provisions and procedures contained elsewhere in Washington's probate statute. See RCW 11.96A.080(2). Therefore, TEDRA is supplemental to the rest of the probate statute, and it explicitly provides additional procedures by which an authorized party may invoke the court's jurisdiction in a probate matter.

In this regard, TEDRA specifically, and unambiguously, provides that "any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter ..."

RCW 11.96A.080(1). A "matter" as referred to in RCW 11.96A.080(1) includes:

... any issue, question, or dispute involving ... (b) ***The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity;*** [and] (c) ***The determination of any question arising in the administration of an estate*** or trust, or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: (i) ***The construction of wills,*** trusts, community property agreements, and other writings; (ii) a change of personal representative or trustee; (iii) a change of the situs of a trust; (iv) ***an accounting from a personal representative*** or trustee; or (v) the determination of fees for a personal representative or trustee; ...

RCW 11.96A.030(2) (emphasis added). Glen's TEDRA petition in this case sought the proper construction of his mother's will and to require the personal representative to carry out his mother's testamentary intent, which clearly falls within the scope of TEDRA.

TEDRA also makes it clear that, contrary to Todd's assertion, the court is not limited to a single course of action (*e.g.*, removing the personal representative) to resolve probate disputes:

The court may make, issue, and cause to be filed or served, any and all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers given or intended to be given by this title.

RCW 11.96A.060.

This broad and flexible authority is consistent with the objective of TEDRA to facilitate "the prompt and early resolution of disputes in trust, estate, and nonprobate matters." See RCW 11.96A.260. For example, in this case, according to Todd's position, Glen's only course of action would be to seek the removal of the personal representative, even though a less drastic and less disruptive remedy might effectively resolve the matter. Under TEDRA, parties and the court are provided with more flexibility and

authority to efficiently resolve disputes in the best interests of the parties.

The broad and expansive nature of TEDRA is further explained in RCW 11.96A.020(2):

If this title should in any case or under any circumstance be inapplicable, insufficient, or doubtful with reference to the administration and settlement of the matters listed in subsection (1) of this section [11.96A.020(1)], the court nevertheless has full power and authority to proceed with such administration and settlement in any manner and way that to the court seems right and proper, all to the end that the matters be expeditiously administered and settled by the court.

TEDRA was inapplicable to the probate proceedings in *In re Estate of Jones*. However, in that case, our Supreme Court said this about TEDRA and, specifically, RCW 11.96A.080:

... Further it should be noted that statutes subsequently enacted, but inapplicable to this case based on the date of decedent's death, afford beneficiaries the same protection as former RCW 11.96.070 and ***allow a beneficiary to petition the court for an accounting under a nonintervention will***. See RCW 11.68.065, ***11.96A.080***, .030; Laws of 1997, ch. 252, §§ 64, 89; Laws of 1998, ch. 292, § 205; Laws of 1999, ch. 42, §§ 104, 301, 703.

In re Estate of Jones at 17 n. 11 (emphasis added). This statement by the Supreme Court simply confirms that TEDRA means what it says: any party may have a judicial proceeding for the declaration

of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030. See RCW 11.96A.080.

As an authorized party, Glen successfully and properly invoked the jurisdiction of the court with regard to the estate pursuant to TEDRA, and he has presented issues that fall squarely within the court's jurisdiction and power to adjudicate.

C. Glen's Petition for a Formal Accounting Pursuant to RCW 11.68.110 was Sufficient to Invoke the Jurisdiction of the Court.

An additional, and independent basis for invoking the court's jurisdiction in a nonintervention probate proceeding is set forth in RCW 11.68.110. This statute relevantly provides:

Subject to the requirement of notice as provided in this section, unless an heir ... of a decedent petitions the court either for an order requiring the personal representative to obtain court approval of the amount of fees paid ..., or for an order requiring an accounting, or both, within thirty days from the date of filing a declaration of completion of probate, the personal representative will be automatically discharged without further order of the court and the representative's powers will cease thirty days after the filing of the declaration of completion of probate, and the declaration of completion of probate shall, at that time, be the equivalent of the entry of a decree of distribution in accordance with chapter 11.76 RCW for all legal intents and purposes.

RCW 11.68.110(2). This statute clearly authorizes interested parties to invoke the court's jurisdiction with regard to matters

relating to the administration of the estate. See *In re Estate of Bobbitt*. In addition, RCW 11.68.110 does not require a petitioner to demonstrate any special circumstances to invoke the court's jurisdiction. *Id.* at 634.

Throughout his opening brief, Todd blatantly misrepresents to this Court that Glen did not file a petition seeking a review of fees and for an accounting pursuant to RCW 11.68.110. Todd states that “[i]nstead 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” (Appellant’s Brief, p. 27), and “GLEN has never filed a petition to approve fees or for an accounting” (Appellant’s Brief, p. 28).

In fact, on January 20, 2015, within thirty days of Todd’s filing the Declaration of Completion of Probate, Glen filed a Petition for Order (1) Approving the Reasonableness of Fees and (2) Requiring an Accounting pursuant to RCW 11.68.110. CP 115.

Todd also tells this Court that 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” (Appellant’s Brief, p. 26-27), and that “[a]ctually, this argument was first raised by the probate judge at the time of hearing on the TEDRA petition”

(Appellant's Brief, p. 27, n. 5). These statements are also blatantly false, as indicated by the record. Glen explicitly recited and relied upon RCW 11.68.110 in his briefing in support of his TEDRA petition, prior to the court hearing, as a basis for invoking the court's jurisdiction. CP 44.

Relying upon his own erroneous statements to this Court, Todd appears to concede that if Glen had filed a petition to approve fees and/or for a formal accounting pursuant to RCW 11.68.110, then the jurisdiction of the trial court would have been properly invoked. Since Glen did, in fact, file a petition to approve fees and for a formal accounting pursuant to RCW 11.68.110, the jurisdiction of the court was properly invoked in this case.

Todd relies upon *In re Estate of Harder*, 185 Wn. App. 378, 341 P.3d 342 (2015), to support his position (albeit based on Todd's misstatement of the record in this case). When viewed in light of the actual record in this case, *Harder* supports Glen's position that the jurisdiction of the trial court was properly invoked with regard to his TEDRA petition.

Harder illustrates the interplay between TEDRA and the other provisions of the probate statute, and it shows that TEDRA provides an additional, independent basis for a beneficiary to

invoke the court's jurisdiction in a probate matter. *Harder* involved a nonintervention probate in which the personal representative had filed a declaration of completion pursuant to RCW 11.68.110 to initiate the closing of the probate proceedings. One of the heirs filed a notice of mediation in the matter within thirty days of the filing of the declaration of completion, requesting that the personal representative's fees be resolved by mediation under TEDRA (RCW 11.96A.300). The notice of mediation did not petition or otherwise ask the court to take any action.

The court held that the heir's notice of mediation was ineffective because the heir failed to comply with the statutory requirements of TEDRA that governed the required notice, and because none of the heirs had filed a petition pursuant to RCW 11.68.110 within thirty days of the filing of the declaration of completion asking the court to approve the fees. This holding illustrates that TEDRA supplements, and does not replace the requirements of otherwise applicable statutes (in this case, the necessity of filing a petition pursuant to RCW 11.68.110 to prevent the closing of the probate), and that TEDRA provides additional statutory recourse for the heirs of an estate. Had the heirs in *Harder* filed a petition pursuant to RCW 11.68.110, then the estate would

not have closed, and they could have relied upon the provisions of TEDRA to seek mediation of the matter (provided that they had also properly complied with the notice requirements under the applicable TEDRA statute).

The *Harder* court wrote:

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.

In re Estate of Harder at 385.

In the present case, Glen not only properly petitioned the superior court to take action pursuant to TEDRA, but he also filed a petition pursuant to RCW 11.68.110, thereby preventing the closure of the probate proceedings and invoking the court's jurisdiction regarding the estate. As illustrated by the holding in *Harder*, these two statutory provisions operate separately and independently of each other (although, as occurred in *Harder*, the failure to comply with one of the statutes might preclude the applicability of the

other), and Glen is authorized to invoke the court's jurisdiction pursuant to either or both of them.

Since Glen has filed a petition pursuant to RCW 11.68.110, the onus is now on Todd, as personal representative, to provide the requested accounting. In response to that accounting, Glen will be able to raise his objections regarding Todd's administration of the estate, including Todd's allocation of the proceeds from the sale of the Road K Property to the residue of the estate, which is the basis of Glen's TEDRA petition. The court's jurisdiction to consider Glen's objections at that time would clearly be within the scope of RCW 11.68.110.

To conclude that the court has no jurisdiction to consider the issue now in the context of Glen's TEDRA petition, but that the court will have the jurisdiction to consider the same issue after Todd has provided the requested accounting would be to improperly elevate form over substance, and it would directly undermine one of the objectives of TEDRA to facilitate "the prompt and early resolution of disputes in trust, estate, and nonprobate matters." RCW 11.96A.260.

Todd has already indicated that he has allocated, or intends to allocate, the proceeds from the sale of the Road K Property to

the estate's residue, instead of allocating it to Glen. CP 20.

Therefore, the issue is already before the court, and the court has the jurisdiction to resolve the matter.

Glen's Petition for a formal accounting pursuant to RCW 11.68.110 was sufficient to invoke the jurisdiction of the court with regard to the personal representative's administration of the estate, including the proper construction of the decedent's will.

D. The Jurisdiction of the Court was Properly Invoked Pursuant to RCW 11.68.070.

Having properly invoked the court's jurisdiction pursuant to either RCW 11.96A (TEDRA) or RCW 11.68.110, or both, no additional basis for jurisdiction is necessary. However, Glen's TEDRA petition also invoked the court's jurisdiction pursuant to RCW 11.68.070, which provides yet another independent basis for authorizing a party other than the personal representative to invoke the jurisdiction of the court in a nonintervention probate.

In his opening brief, Todd focuses much attention on RCW 11.68.070, but Todd erroneously concludes that "[e]ven if the probate court had jurisdiction under this statute [RCW 11.68.070], its only available remedy would be to remove and replace the personal representative." Appellant's Brief, p. 22-23.

In fact, the plain language of the statute provides that RCW 11.68.070 applies to a personal representative who “fails to execute his or her trust faithfully *or* is subject to removal for any reason specified in RCW 11.28.250 ...” RCW 11.68.070 (emphasis added). In addition, the statute provides that the “personal representative may be restricted *or* the personal representative may be removed and a successor appointed.” *Id.* (emphasis added).

As indicated by the plain language of the statute, RCW 11.68.070 is not restricted only to cases in which it can be established that the personal representative is subject to removal for the reasons specified in RCW 11.28.250. The statute also applies to cases where the personal representative has failed to execute his or her trust faithfully, and in such cases, the court has the authority and the flexibility to restrict the powers of the personal representative. In this case, such a restriction of the personal representative’s powers would include requiring Todd to properly construe his mother’s will and to administer the will accordingly.

A petition brought pursuant to RCW 11.68.070 must be “supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers ...” RCW 11.68.070. As set forth herein above, Glen’s TEDRA petition set forth numerous facts

demonstrating Todd's failure to faithfully execute his trust, thereby satisfying the requirement of making a prima facie showing of cause for the restriction of Todd's powers as personal representative. Todd, as the estate's personal representative, was intentionally misconstruing his mother's will in his own favor – to the detriment of another beneficiary to whom he owed a fiduciary duty – and then seeking to enforce his self-dealing and breach of fiduciary duty with intimidation and threats of disinheritance.

In fact, Todd was not at all subtle in the abuse of his authority as personal representative. In his Declaration of Completion of Probate, and in the Notice of Declaration of Completion of Probate, one of the purposes of which is to inform the estate's heirs of their statutory right to request court approval of administrative fees or an accounting, or both, Todd warned that he would consider any objection to the Declaration of Completion as a contest to the will, which would result in the disinheritance of the objector. CP 109; 112-13. As previously indicated, this threat was specifically targeted at Glen. Glen's TEDRA petition made it very clear that Todd had failed to execute his trust faithfully.

Glen's TEDRA petition also satisfied the requirement that it be supported by an affidavit because Glen verified the petition

pursuant to the requirements set forth in RCW 9A.72.085, giving it the same effect as an affidavit. CP 12.

RCW 11.68.070 also refers to a citation issued by the court, citing the personal representative to appear before it. RCW 11.68.070. In this case, a citation was not issued by the court, but Todd was served with a summons in connection with the TEDRA petition (CP 1), and a citation is equivalent to a civil summons. *Estate of Kordon*, 157 Wn.2d 206, 210, 137 P.3d 16 (2006). The summons was sufficient to confer personal jurisdiction over Todd pursuant to RCW 11.68.070. In addition, Glen's TEDRA petition did not seek Todd's removal as the estate's personal representative, so a citation issued by the court should not be required.

Glen's TEDRA petition satisfied the requirements of RCW 11.68.070 and properly invoked the court's jurisdiction with regard to Todd's administration of the estate.

E. Glen is Entitled to Attorneys' Fees on Appeal.

Glen respectfully requests an award of attorneys' fees in defending this appeal. RAP 18.1.

RCW 11.96A.150 grants broad discretion to courts to award attorneys' fees "in such manner as the court determines to be equitable" in "all proceedings governed by this title," *i.e.* under

Title 11 RCW. *Sloans v. Berry*, 189 Wn. App. 368, 379, 358 P.3d 426 (2015). RCW 11.96A.150 is set forth herein in its entirety for the Court's reference:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

(2) This section applies to all proceedings governed by this title, including but not limited to proceedings involving trusts, decedent's estates and properties, and guardianship matters. This section shall not be construed as being limited by any other specific statutory provision providing for the payment of costs, including RCW 11.68.070 and 11.24.050, unless such statute specifically provides otherwise. This section shall apply to matters involving guardians and guardians ad litem and shall not be limited or controlled by the provisions of RCW 11.88.090(10).

In this case, Todd, as the estate's personal representative, was misconstruing the decedent's will in a manner that increased Todd's own share of the estate and reduced Glen's share by more than \$230,000. Glen attempted to persuade Todd to carry out their mother's intent as expressed in her will without resorting to

litigation. Todd responded by threatening Glen with complete disinheritance if Glen dared to question or challenge Todd's perceived authority to unilaterally construe the will in any manner that Todd chose.

Glen's only recourse was to file a petition asking the court to force Todd to properly carry out their mother's wishes. It would be inequitable to require Glen to personally bear the cost incurred in connection with these proceedings, which were only necessitated because Todd, as personal representative, refused to carry out the decedent's intent.

The trial court specifically found that Glen brought his TEDRA petition in good faith and with probable cause. CP 104. In contrast, Todd has not raised any reasonable or good faith arguments to justify his misconstruction of the will in a way that increased his own share of the estate at the expense of Glen, to whom he owes a fiduciary duty. In addition, Todd's actions with regard to the estate constituted blatant self-dealing and a breach of his fiduciary duties.

The trial court awarded Glen his attorneys' fees with regard to his TEDRA petition, to be paid by the estate. CP 105.

RCW 11.96A.150 gives the Court the discretion to award costs and fees “to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. ...” RCW 11.96A.150(1). In exercising its discretion under RCW 11.96A.150, “the court may consider any and all factors that it deems to be relevant and appropriate. ...” *Id.*

Where the court finds a party acted in bad faith, it generally will award fees against that party. *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 183 P.3d 317 (2008). In addition, where litigation is necessitated by the fiduciary’s own breaches of his fiduciary duty, the court may order him to personally pay the other party’s fees and costs. *In re Estate of Jones* at 20-21. Even absent a specific finding of bad faith or self-dealing, the court can assess fees against a fiduciary where, but for breach of fiduciary duty, beneficiaries would not have need to incur the fees. *Gillespie v. Seattle-First Nat. Bank*, 70 Wn. App. 150, 178, 855 P.2d 680 (1993). In this case, but for Todd’s decision to misconstrue the will for his own benefit, there would have been no need for Glen to incur the attorneys’ fees and costs.

If the estate is required to reimburse Glen for his attorneys' fees, as opposed to requiring Todd, personally, to reimburse Glen for his attorneys' fees, then Glen, as one of the estate's residual beneficiaries, would still be required to bear a portion of the expenses for defending this appeal. Requiring the estate to reimburse Glen for his attorneys' fees might be justified if these proceedings involved matters that would benefit the estate. However, Todd's actions would only have benefitted him and his brother, Douglas Rathbone, and there was no potential benefit to the estate. Therefore, it would be equitable and appropriate for the Court to require Todd, individually, to reimburse Glen for Glen's attorneys' fees and costs incurred in connection with defending this appeal.

Thus, the Respondent, Glen Rathbone, requests an award of attorneys' fees and costs on appeal, as against the Appellant, Todd Rathbone, individually, or in such other manner as the Court deems just and equitable. If awarded, Glen will submit the appropriate Affidavit of Fees in accordance with RAP 18.1(d)

IV. CONCLUSION

Glen properly invoked the jurisdiction of the court pursuant to RCW 11.96A (TEDRA), RCW 11.68.110, and/or RCW 11.68.070,

and the court had the requisite authority to construe the decedent's will and to determine the decedent's testamentary intent. Furthermore, the court had the authority to require the estate's personal representative to administer the decedent's will in accordance with the decedent's testamentary intent. The court's Order Construing Will should therefore be affirmed.

RESPECTFULLY SUBMITTED this 12th day of July, 2016.

LARSON FOWLES, PLLC

By: 

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury under the laws of the State of Washington, that on the 12th day of July, 2016, I caused to be mailed a true and correct copy of the foregoing *Brief of Respondent* to Jerry J. Moberg, attorney for Appellants, via U.S. first class mail, postage prepaid, as follows:

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