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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

NO. 70210-6-I

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ESTATE OF CALVIN EVANS, SR.

Appellant,

vs.

SHARON EADEN, VICKI SANSING, KENNETH EVANS, LINDSEY  
EVANS, CORY EVANS, JESSE EVANS, AND CALVIN EVANS, III,

Respondents.

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REPLY BRIEF OF RESPONDENTS/CROSS-  
APPELLANTS SANSING IN RESPONSE TO REPLY BRIEFS  
OF THE ESTATE OF EVANS  
AND OF THE EVANS CHILDREN

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## ARGUMENT

- I. THE ESTATE'S APPEAL SHOULD BE DISMISSED BECAUSE THE ESTATE IS SUBJECT TO, BUT CANNOT, BY REASON OF ITS DUTY OF IMPARTIALITY AS BETWEEN ALL BENEFICIARIES, BE AGGRIEVED WITHIN THE MEANING OF RAP 3.1.

The Estate opposes the motion to dismiss its appeal on two bases. It claims exemption from the application of RAP 3.1, *see* App. 1, based upon general notions of justice. It further asserts that it meets the test of the rule in any event because the trial court's order to pay fees from the Estate constitutes the imposition of a burden sufficient to confer standing. Both contentions are without merit.

The Estate cites State v. Watson, 155 Wn.2d 574, 122 P.3d 903 (2005), for the proposition that the Rules of Appellate Procedure should be liberally interpreted to "promote justice and facilitate the decision of cases on the merits". Brief of Appellant at 3. The Estate fails to include, however, the balance of the cited paragraph. The court there more fully stated that "[r]eview is appropriate in this rare situation where an incorrect holding will have sweeping implications but does not actually render a party 'aggrieved' within RAP 3.1". *Id.* at 578. Watson involved a criminal appeal that was decided by the Court of Appeals in favor of the prosecution. *Id.* at 576. The court also determined, *sua sponte*, that a memo sent to the trial judge by the

prosecuting attorney regarding general sentencing procedures was an *ex parte* communication, albeit harmless to the defendant there. *Id.* at 576. The prosecuting attorney appealed from the latter determination, and the issue arose whether the prosecutor had standing. *Id.* at 577.

The Supreme Court acknowledged that the prosecutor was not a party "aggrieved" by the decision of the Court of Appeals. *Id.* The issue whether such a communication was *ex parte*, however, was one likely to recur. *Id.* at 578. Further, it was one of substantial public interest. *Id.* On that basis the court granted the State's petition for discretionary review although the test of RAP 3.1 had not been met. *Id.*

The issue of propriety of the award of attorneys' fees in this case, in contrast, will not recur and is not one of substantial public interest. Indeed it is not even contested as between the beneficiaries here: both sides oppose the Estate's appeal of the attorneys' fee award. *See, generally*, Brief of Respondents Lindsey Evans, Cory Evans, Jesse Evans, and Calvin Evans III In Response to Brief of Appellants. There is no justification for relieving the Estate from the requirement of RAP 3.1 in this case.

Nor is there a basis for otherwise finding the Estate to be "aggrieved" in this case within the meaning of the Rules of Appellate Procedure. In an effort to create some right or interest that would constitute it an "aggrieved

party" within the meaning of RAP 3.1, *see* App. 1, the Estate generically asserts that it has "certain duties and responsibilities. . . ." Brief of Appellant at 2. It then cites State v. G.A.H., 133 Wn. App. 567, 137 P.3d 66 (2006), *see* Brief of Appellant at 3, for the proposition that the "imposition on a party of a burden or obligation", G.A.H. at 574, renders that party "aggrieved". Brief of Appellant at 3. That case involved the Juvenile Court Act, RCW 13.04, however, *see* G.A.H. at 574, and the court's discussion pertained to statutory grants of standing. *Id.* There is no statute here on which the Estate can rely for such a purpose.

The Appellant also cites Mestrovac v. Department of Labor & Industries, 142 Wn. App. 693, 176 P.3d 536 (2008), for the proposition that the imposition of a burden can create standing in a non-party. *See* Brief of Appellants at 3. Mestrovac involved an appeal by the Board of Industrial Insurance. *Id.* at 698. The Board sought review of orders of the Superior Court that required the Board to pay the interpreter and attorneys' fees of a non-English-speaking claimant. *Id.* at 698-99.

The court acknowledged that the Board was a quasi-judicial agency not ordinarily permitted to appeal adverse court decisions. *Id.* at 704. However, in requiring the Board to alter its procedures so as to provide for the mandated services, the Superior Court's order had impacted the integrity

of the Board's decision-making processes. *Id.* On that basis, the Board was permitted to appeal. *Id.* The Court of Appeals also found that the Board was an aggrieved party within the meaning of RAP 3.1 because the superior court orders held it liable for the interpreter and attorneys' fees. *Id.*

Mestrovac is distinguishable from the case at bar. First, it involved a quasi-judicial body, not a fiduciary. Second, while the court found that the Board in Mestrovac was aggrieved, it did so based on the imposition of a burden that fell outside the normal realm of the Board's procedures. *Id.* at 705. Just as important, the Board was the only party capable of representing the interest of the State in not paying (through the Board), the interpreter and attorneys' fees.

Here the court's order did not impose a new duty that would diminish the Estate as to its only interested persons: the beneficiaries. In fact the personal representative has a positive duty to quickly administer the estate on behalf of beneficiaries, *see* RCW 11.48.010 (amended 1994). *See* App. 4. Further, he must do so while complying with his fiduciary duty of impartiality toward all beneficiaries. In re of Estate of Larson, 103 Wn.2d 517, 521, 694 P.2d 1091 (1985). That duty expressly prohibits the personal representative from taking sides as between the beneficiaries. Thompson v. Weiner, 1 Wn.2d 145, 150, 95 P.2d 772 (1939).

The Estate's repeated citation to Estate of Kvande v. Olsen, 74 Wn. App. 65, 871 P.2d 669 (1994), *see* Brief of Appellant at 4, is also unavailing. While the court there stated that the personal representative is "obliged to present his position in a probate matter where there is a dispute as to distribution", *id.* at 72, the Estate fails to discuss the fact that Kvande involved a dispute between distributees under the will who were not named beneficiaries. *Id.* at 72. The representative owes beneficiaries particular a duty of fair dealing. Larson, 103 Wn.2d at 521.

The Estate cannot perform its duty to all beneficiaries while appealing from a decision that will impact all of, and only, the beneficiaries. Those beneficiaries are capable here of representing their own interests with respect to the attorneys' fee award, and none of them have appealed. The Estate nevertheless consumes the resources of the parties in pursuing this appeal without benefit to the only persons concerned. The Estate's appeal should be dismissed.

II. THE TRIAL COURT WAS NOT REQUIRED TO FIND A BENEFIT TO THE ESTATE IN MAKING ITS ATTORNEY FEE AWARD, AND PROPERLY MADE THAT AWARD FROM THE ESTATE TO BOTH SIDES OF OPPOSING BENEFICIARIES WHERE ALL ARGUMENTS WERE ASSERTED IN GOOD FAITH AND THE DECISION RESOLVED AN ISSUE NECESSARY TO THE ADMINISTRATION OF THE ESTATE.

The Estate urges, without citation to relevant authority, that the trial

court erred as a matter of law in neglecting to apply a "prevailing party" standard to the attorneys' fee award here. *See* Rebuttal Brief of Estate at 6-7. It also argues that it was an abuse of discretion to award fees based on what it terms the incidental benefit of the resolution of adverse claims. *Id.* at 8-9. The Estate has ignored the 2007 amendment to the TEDRA attorneys' fee statute, RCW 11.96A.150, and the discretion conferred to the trial court thereunder.

The attorneys' fee statute under the Trust and Estates Dispute Resolution Act makes no mention of a "prevailing party", *see* RCW 11.96A.150 (amended 2007), App. 9, and instead grants wide discretion over fee awards to the trial court. *Id.* As a result of a 2007 amendment, the statute now provides that "the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved." RCW 11.96A.150. It would be difficult to articulate a clearer and broader grant of discretion than is found in this statute. The trial court is authorized not only to apply the factors; it is also authorized to determine which factors will be employed in any particular case. *Id.*

The authorities relied upon by the Estate in support of its argument that an award must benefit the Estate predate the 2007 amendment to the

TEDRA fee statute. In re Estate of Niehenke, 117 Wn.2d 631, 818 P.2d 1324 (1999), *see* Rebuttal Brief of Appellant at 8-9, for example, was decided the same year that the original TEDRA statute was first adopted. *See* App. 9. The other case relied upon by Appellant, In re Estate of Moi, 136 Wn. App. 823, 151 P.3d 995 (2006), was decided a year before the amendment took effect. *See* App. 9. Neither of these decisions therefore impairs the statutory discretion granted by that amendment to award fees to both sides of this dispute between beneficiaries.

Although the Estate was in fact benefitted here by the resolution of the anti-lapse issues which existed between all beneficiaries, *see In re Estate of Watlack*, 88 Wash. App. 603, 612, 945 P.2d 1154 (1997), (resolution of an issue confers a benefit), the trial court was not required to make such a finding. The trial court here properly awarded attorneys' fees to both sides of the dispute, and the Estate's appeal should be denied.

III. THE COURT ACTS WITHIN ITS PROPER PURVIEW IN DETERMINING WHETHER THE ANTI-LAPSE STATUTE WAS INTENDED, AS A MATTER OF LAW, TO APPLY IN ALL CASES OF FINANCIAL ABUSE OF A DECEDENT, AND SHOULD DECIDE THAT THE STATUTE HAS NO APPLICATION HERE WHERE SUCH APPLICATION WOULD NEITHER FURTHER THE POLICIES BEHIND THE FINANCIAL ABUSE AND ANTI-LAPSE STATUTES NOR THE TESTAMENTARY INTENT OF CAL, EVANS, SR.

Both the Estate and Cal, Jr.'s children argue that the interplay between the financial abuse statutes and the anti-lapse statute is "clear". Reply Brief

of Appellant at 12; Brief of Respondents at 7. Cal, Jr.'s children also argue that the refusal to "award Calvin, Jr.'s inheritance to his children directly would extinguish their rights under the Will and . . . punish them for their father's behavior", Brief of Respondents at 9, while application of the anti-lapse statute would result in only an indeterminate benefit to their father. *Id.* at 8. With respect to the clarity of the statute, Cal, Jr.'s children also urge that absent a mandatory application of the anti-lapse statute, estate planning would be "difficult and unpredictable." *Id.* at 7. The Estate asserts that Sansing asks this court to create an "exception", *see* Reply Brief of Appellant at 9, to the anti-lapse statute, *id.*, thereby creating "new law", *id.* at 10, in violation of the separation of powers doctrine. *Id.* at 10-11. It urges that any clarification should be left to the legislature. *Id.* at 12. All of these arguments ignore the actual intent of the statutes at issue. They further disregard both the court's authority and obligation to interpret the law, *see State v. Williams*, 85 Wn.2d 29, 34, 530 P.2d 225 (1975) ("legislators shall enact the laws and judges shall interpret, apply and enforce them"), and the court's equitable jurisdiction. *See* Wa. Const. Art. IV, § 1, App. 11 (no distinction between legal and equitable jurisdiction). Just as important they ignore the language of Calvin, Sr.'s Will.

The first necessary question here is whether the anti-lapse statute was enacted with a legislative intent broad enough to regard the nature and

consequences of financial abuse, such that the anti-lapse statute applies as a matter of law in all such cases. If not, a second question arises as to what considerations will govern the statute's application in any particular case. The first question must be answered here in the negative. The second question, given the sometimes extraordinary circumstances of financial abuse, must be answered by reference to relevant statutory policies, the testator's general intent, and the effect of the financial abuse on the decedent's testamentary scheme. When those considerations are applied to the facts of this case, it is apparent that neither the legislature nor Calvin Evans, Sr., would have intended that the anti-lapse statute apply.

Respondents rely upon In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 10 P.3d 1034 (2000), for the proposition that, where a statute is "clear and unequivocal", *see* Brief of Respondents at 8, citing Pearsall-Stipek at 767, the courts will "apply the statute as written". *Id.* In Pearsall-Stipek, for example, the court found that the recall statute, RCW 29.82.010, was clear in its application because the interpretation offered by the Respondent there would have rendered portions of the statute redundant. *Id.* at 769. Such a result would have been intolerable because the legislature "does not engage in . . . meaningless acts. . . ." *Id.*, quoting John H. Sellen Constr. Co. v. Dept. of Revenue, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976). Here, however, the question is not one of redundancy, but rather one of legislative intent as to the

scope of the statute. That scope with respect to financial abuse cannot reasonably be determined solely by a mechanical reference to the words of the statute.

It is undeniably the competence of the courts to construe statutes so as "to give effect to the meaning of legislation." City of Federal Way v. Koenig, 167 Wn.2d 341, 352, 217 P.3d 1172 (2009). Courts do so by promoting the purpose and intent of statute at issue. Newby v. Gerry, 38 Wn. App. 812, 814, 690 P.2d 603 (1984), citing Condit v. Lewis Refrigeration Co., 101 Wn.2d 106, 110, 676 P.2d 466 (1984). With respect to the financial abuse statutes, the intent is to preclude "any benefit", RCW 11.84.020, *see* App. 5, from accruing to the abuser.

A prohibited benefit is evidenced here in the fact that Cal, Jr.'s children will, through anti-lapse, inherit a ranch as to which Cal, Jr., was disinherited, *see* Amended Judgment at ¶ 4, CP Vol. I at 101, and one on which they continue to permit him to reside and to operate a business. *See* Second Annual Report of Executor, App. 10 to Brief of Respondent/Cross Appellant at A-12 through A-13, ll. 21-25 and 1-4. This is precisely the type of benefit sought to be barred by operation of the financial abuse statutes.

In further response, Cal, Jr.'s children contend that they have a "right", Brief of Respondents at 9, to receive their father's inheritance, *id.*, in that their grandfather "clearly anticipated that each of his children would

eventually die and pass along their property to their children." *Id.* at 6. They argue that they "should not be punished for their parent's wrong-doing." *Id.* Cal, Jr.'s children have no vested right, however, to inherit from their grandfather through a devise or bequest to Cal, Jr. A "vested right is more than a mere expectation", In re Estate of Haviland, 177 Wn.2d 68, 79, 301 P.3d 31 (2013), and Cal, Jr.'s interest in the ranch was only an expectation unless and until the completion of the probate of his father's estate confirmed an interest. *Id.*

In Haviland the Supreme Court was tasked with determining the effective date of the amendment adding financial abuse to the slayer statutes. The abuse by the decedent's wife, *id.* at 71-73, had occurred, *id.*, and the will had been executed, *id.* at 72, prior to the 2007 amendment that added financial abuse to the slayer statutes. *Id.* at 74. The wife argued that application of the statute would have impermissible retroactive effect because it would impair her vested right to inherit under the will. *Id.* at 78.

In deciding the question, the court looked to rulings both in other states and in Washington on the question whether a slayer had acquired rights as to which he or she was being divested by operation of a slayer's statute.

Even in the context of the slayer statute, several jurisdictions have noted that a slayer is not divested of property already acquired when he is prevented from inheriting from his victim. See *In re Estate of Blodgett*, 147 P.3d 702, 710 (Alaska 2006) (citing Mary Louise Fellows, *The Slayer Rule*:

*Not Solely a Matter of Equity*, 71 Iowa L. Rev. 489, 540 n.160 (1986). . . . The conclusion that a slayer is not deprived of property was also expressed by this court when a slayer sought property in lieu of a homestead award, prior to the enactment of the slayer statute. *In re Estate of Tyler*, 140 Wash. 679, 691, 250 P. 456 (1926) (saying that “[t]his property was not his, and he is not being deprived of it. He has sought to acquire it because of the crime he committed for the purpose of acquiring it. He had no vested right or interest in it”).

*Id.* at 80-81. The court rejected the argument, finding that the widow had acquired no vested right except as established through the completion of probate. *Id.* at 79-80. The case was remanded for further proceedings on the petition to have the widow declared to have been a financial abuser. *Id.* at 82.

It follows from the holding in Haviland that Calvin Evans, Jr., did not acquire any vested rights in the bequests to him under his father's Will. He was divested of those expectations by his financial abuse of his father. *See* Amended Judgment at par. 4, CP Vol. I at 101. Cal, Jr.'s children cannot therefore be said to have acquired any "rights under the Will", Brief of Respondents at 9, as to the bequests to their father, the deprivation of which would constitute a punishment under the slayer/abuser statutes.

Nor is there any evidence in the record that Mr. Evans, Sr., "clearly anticipated that each of his children would eventually die and pass along their property to their children." *Id.* at 6. On the contrary, the face of the Will shows that Mr. Evans relied only upon himself to guarantee an expectation

of inheritance in his grandchildren. He did so by making them trust beneficiaries in their own respective rights. *See* Will at Art. VIII, CP Vol. I at 132.

With respect to the anti-lapse statute, the Cross-Respondents do not dispute that it is intended to prevent the disinheritance of an entire branch of the testator's family. *See* Estate of Kvande v. Olsen, 74 Wn. App. at 70, cited in Brief of Respondents at 4. They agree that such intent is premised on the assumption that testator would not intend the disinheritance of those for whom he or she would be supposed to have a natural and instinctive concern. Brief of Respondents at 4, citing In re Estate of Rehwinkel, 71 Wn. App. 827, 829-30, 862 P.2d 639 (1993). They insist, however, that application of the statute is mandatory, *see* Brief of Appellant at 12; Brief of Respondents at 8, unless the language of the Will itself states a contrary intent. Brief of Respondents at 5.

In promoting the purpose and intent behind the anti-lapse statute, however, our courts have found that it is not so concrete in application. As the Respondents acknowledge, *id.* at 4, the Supreme Court in In re Estate of Niehenke, 117 Wn.2d 631, 818 P.2d 1324 (1991), recognized that assumption underlying the anti-lapse statute would not be valid in cases where the testator clearly indicated that the statute should not apply. *Id.* at 640. More recently, the court in Kvande found that the statute did not apply to a special

purpose trust, Kvande, 74 Wn. App. at 70, because the testator intended that the trust beneficiary survive him. *Id.* at 69. This result followed even though the predeceased trust beneficiary left a son who was alive at the time of the testator's death. *Id.* at 67. In so holding, the court acknowledged the presumption outlined in Niehenke, *see* Kvande at 69, but it did not require that the testator have expressly disavowed the anti-lapse statute. *Id.* Instead the court looked to the testamentary plan set forth in the Will in determining that the anti-lapse statute would not apply. *Id.* In In re Estate of Rehwinkel, 71 Wn. App. 827, 862 P.2d 639 (1993), the court again found sufficient evidence of an intent to disavow the statute. The evidence there consisted of a bequest "to those of the following who are living at the time of my death." *Id.* at 831. Once again no express disavowal of the statute was required.

Significantly, the Washington State legislature did not amend the anti-lapse statute after the Niehenke, Kvande and Rehwinkel decisions to provide that the statute would apply in every instance in which a consanguineous beneficiary predeceases a testator. "The legislature is presumed to be aware of judicial interpretations of its enactments and that its failure to amend a statute following a judicial decision interpreting it indicates legislative acquiescence in that decision." Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 327, 971 P.2d 500, 504 (1999). Moreover, the legislature has demonstrated that it will specifically incorporate the anti-lapse statute in an

instance where it wishes to mandate the application of that statute. *See, e.g.*, RCW 11.12.120(2) (amended 2005), App. 3 (stating that the share of a residuary beneficiary who predeceases the testator will, subject to RCW 11.12.110, pass to the remaining residuary beneficiaries). It is therefore apparent that our courts have correctly understood that the anti-lapse statute will not automatically apply in every instance in which a consanguineous beneficiary predeceases the testator.

Questions remain, then, whether the statute applies in all cases where the predeceasement of a consanguineous beneficiary occurs by operation of law under the financial abuse statute, and, if not, how application of the anti-lapse statute will be determined. With respect to the first question, neither the Estate nor the Evans children have contested Sansing's description of the policies underlying the financial abuse and anti-lapse statutes. *See, e.g.*, Brief of Respondent at 22-23. Nor have they explained how the policy behind the financial abuse statutes would be satisfied here where the evidence establishes that Cal, Jr., continues, by reason of the trial court's application of the anti-lapse statute, to enjoy and to benefit from the devise of the ranch, *see* Second Annual Report of Executor attached as Appendix 10 to Brief of Respondent/Cross-Appellant, as to which he was expressly disinherited. *See* Amended Judgment at ¶ 4, CP. Vol. I at 101. They also have not acknowledged the fact that they will indeed inherit even if the anti-lapse

statute is not applied. *See* Will at Art. VIII, CP. Vol. I at 132. Moreover, no rebuttal is attempted as to Sansing's arguments that Cal Evans, Sr., lacked the mental capacity at the time of making his Will to appreciate the consequences of financial abuse for his testamentary plan. *See* Brief of Respondent/Cross-Appellant at pp. 49-50 (discussing Cal, Sr.'s cognitive deficits). Consequently the Cross-Respondents have not met Sansing's argument that the application of the Niehenke presumption of application of the anti-lapse statute here is unreasonable because it does not in any manner further the purpose of either the financial abuse or the anti-lapse statutes.

The Estate and Cal, Jr.'s children do argue that it should be up to the legislature to create an exception for financial abuse cases, Brief of Appellant at 12; Brief of Respondents at 8, and that it would lead to uncertainty in estate planning if the statute were not to have mandatory application. Brief of Respondents at 7. It is always the function of the courts to determine a testator's intent, however, In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985); *see also* In re Estate of Niehenke, 117 Wn.2d at 639, n. 15, and resort to the legislature is not indicated here. Financial abuse is by its very nature unpredictable and difficult to anticipate. The legislature cannot foresee the facts and circumstances that will arise in all cases of financial abuse and therefore cannot be expected to create an appropriate rule for the application of the anti-lapse statute in all such instances. It is indeed the

courts that are best positioned to make a determination that the policy behind the statute will be furthered or damaged in any particular case.

There are undoubtedly instances where application of the statute in the event of financial abuse is appropriate. For example, avoidance of the total disinheritance of an entire branch of the testator's family could be furthered through application of the statute in a situation where the financial abuser's children were not named beneficiaries, residuary or otherwise. In this case, in contrast, the opposite effect would occur from application of the anti-lapse statute: the children of the abuser, Cal, Jr., would receive all that they were guaranteed under the Will, together with a windfall in the form of the enhanced ranch, and their father's share of the residuary trust. They would thus receive more than they were guaranteed under the Will, while other named beneficiaries would suffer by reason of the abuse, such as through the loss of their testamentary devises, and be left with a trust corpus reduced by that abuse. Legislative prohibitions simply cannot be effective to address these types of variations in the fact patterns of financial abuse. Instead the court in its equitable jurisdiction is uniquely suited to consider the equitable origins of the statutes at issue in light of the intent of the testator at hand.

The slayer/financial abuser statutes are indeed founded in equity. Estate of Haviland, 177 Wn.2d 68, 82, 255 P.3d 854 (2011). Moreover,

while there is no legislative history as to the adoption of the anti-lapse statute in Washington, the purpose of preventing the inadvertent disinheritance of an entire branch of the testator's family, Kvande at 70, is clearly equitable in nature. While equitable principles "may not be asserted in derogation of a statutory mandate", Norlin v. Montgomery, 59 Wn.2d 268, 273, 367 P.2d 621 (1961), the anti-lapse statute is not absolute in application. *See, e.g., Niehenke* at 640; Kvande at 69.

Given the legislature's acquiescence in judicial constructions of the anti-lapse statute and the equities indicated by a decedent's testamentary plan, the court should perform its legitimate functions of statutory construction and of the determination of the intent of the testator as to anti-lapse. It should do so by evaluating whether application of the statute in each case would advance the purposes of the financial abuse and anti-lapse statutes and would best execute the testamentary plan of the decedent.

Application of the anti-lapse statute here would not, as discussed above, further the applicable statutory policies. It would, however, injure the overall testamentary intent of Cal Evans, Sr. Nothing in the Will indicates that he intended the ranch to be enhanced by financial abuse and then passed on for the benefit of certain of his grandchildren. *See, generally*, Last Will, CP Vol. I at 131-134. In particular nothing in the Will expresses a desire that the children of Cal, Jr., should inherit the ranch as well as his interest in the

LLC and their father's share under the residuary trust, where the ranch was enhanced, and the assets available to fund the trust corpus were depleted, by financial abuse that occurred at the direct expense of other beneficiaries. *See, e.g.*, F of F No. 100, CP Vol. I at 115 (properties to be left to Vicki Sansing and Ken Evans consumed in order to provide the care for Cal, Sr.); F of F Nos. 178 and 179, CP Vol. I at 124 (Cal, Jr., converted cash and other assets of the estate and failed to account for proceeds, thereby diminishing the cash assets of the Estate).

In addition, the trust corpus was, because of the financial abuse, the only remaining source of inheritance (other than a share of household goods, *see* Will at Art. III, CP Vo. I at 131), for Vicki Sansing and Kenneth Evans. The devises of real property to them having been adeemed as the result of financial abuse, *see* F of F No. 100, CP Vol. I at 115, they have a material remaining interest under the Will only in the residuary trust. *See, generally*, Will, CP Vol. I at 131-34. Even that interest would be further diminished if the children of Cal, Jr., are permitted to take, through anti-lapse, in addition to their own respective shares, the share that their father would have inherited, *see* Will at Art. VIII, CP Vol. I at 132, but for the financial abuse.

Given the satisfaction of the statutory policies without application of the anti-lapse statute, and the equities raised by the damage caused by the financial abuse to the testamentary plan of Calvin Evans, Sr., *see, e.g.*, F of

F No. 100, CP Vol. I at 115 (properties left to Vicki and Ken had to be sold to care for Sr.); F of F No. 165, CP Vol. I at 122 (ranch left to Jr. in exchange for caring for Senior on the ranch); F of F Nos. 178 and 179, CP Vol. I at 124 (Jr. consumed cash belonging to his father), there is only one tenable manner in which the court can satisfy, as far as is still possible, the objects sought to be obtained by Cal, Sr. Those objects are established by the residuary trust provisions and the general trend of his benevolences. In re Estate of Bergau, 103 Wn.2d 431, 436, 693 P.2d 703 (1985). The court should determine that the bequests to Calvin Evans, Jr., including his residuary trust share, will lapse into the residuary trust corpus, such that all remaining beneficiaries will benefit in a manner proportionate to the shares expressly provided for in Calvin Evans, Sr.'s Will.

The Respondents also devote a section of their Brief to the refutation of an argument made at the trial court level that language within the residuary clause of Mr. Evans, Sr.'s Will demonstrated an intent to avoid application of the anti-lapse statute. *See* Brief of Respondents at 5-6. They request that the trial court's ruling, *see* Order Denying Petition for Declaration of Rights at ¶ 5, CP Vol. I at 4, rejecting that argument be affirmed. *See* Respondents' Brief at 6. That request is unnecessary, for Sansing did not appeal from that particular determination of the trial court. *See* Notice of Appeal, CP Vol. I at 1-2.

IV. NO REMAND FOR FURTHER PROCEEDINGS TO DETERMINE THE INTENT OF THE DECEDENT AS TO THE CHILDREN OF HIS SON, CALVIN EVANS, JR., IS NECESSARY WHERE SANSING SEEKS ONLY TO BEST PRESERVE THE TESTATOR'S INTENT BY ALLOCATING THE LOSS CAUSED BY THE FINANCIAL ABUSE IN A MANNER CONSISTENT WITH CALVIN EVANS, SR.'S OVERALL TESTAMENTARY PLAN.

Cal, Jr.'s children assert that the court cannot "impose an equitable remedy without remand to the trial court to develop a factual record." Brief of Respondents at 10. They do so without any offer of proof as to what evidence they would seek to develop following a remand, and without any indication of how that evidence would be relevant to the court's inquiry here. *Id.* Extrinsic evidence of the testator's intent as to his grandchildren would be inadmissible in any event. Further, three of Cal, Jr.'s children were present for and testified in the financial abuse trial of their father. Most important, all four were served and/or appeared in the two TEDRA proceedings regarding the application of the anti-lapse statute. They did not, however, insist on upon their statutory right to a trial on the issue of the testator's intent regarding anti-lapse. Nor did they appeal from the trial court's reliance on the findings of fact from the financial abuse trial, or from the court's order striking the deposition of Lindsey Evans. They cannot now be heard to complain that an additional evidentiary hearing is required.

Respondents Lindsey Evans, Cory Evans and Calvin Evans III, all

testified on behalf of their father in the trial on the issue of financial abuse. RP 2-6 (showing that all three testified at the financial abuse trial). Given that attendance, they waived any objection to the financial abuse proceedings, *see* RCW 11.96A.140, App. 8, and are bound by the Amended Findings of Fact and Conclusions of Law in that TEDRA proceeding. Even more important, all four were either served with the TEDRA petitions regarding the anti-lapse statute, *see, e.g.*, Amended Declaration of Service of Petition for Declaration of Rights of Beneficiaries on Calvin Evans III, CP Vol. VIII at 632-33, or appeared and participated in the hearings by counsel. *See* Notice of Appearance of counsel on behalf of Lindsey Evans, Cory Evans, and Jesse Evans (filed on November 6, 2012, in response to Petition for Declaration of Rights of Beneficiaries filed on September 12, 2012), CP Vol. VIII at 637-39. *See also* Response to Petition for Instructions, filed April 4, 2013, CP Vol. VIII at 625-27, on behalf of beneficiaries Lindsey Evans, Cory Evans, Jesse Evans and Calvin Evans III. *Id.* In neither of those proceedings did these Respondents request a trial on any issues of fact respecting Mr. Evans, Sr.'s testamentary intent.

Subsection 8 of RCW 11.96A.100 provides that "[u]nless requested otherwise by a party in a petition or an answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law. . . ." RCW 11.96A.100(8) (amended 2001). *See* App. 7. The TEDRA statute also

provides that testimony of witnesses may simply be "by affidavit. . . ." RCW 11.96A.100(7) (amended 2001). A party may, however, request a trial in lieu of the hearing, and may even seek a jury trial on contested issues. *See also* RCW 11.96A.170 (1999), (referencing potential right to jury trial). *See* App. 10. Rather than request a trial, Cal, Jr.'s children chose to take advantage of the statutory provision for testimony by affidavit. They submitted the Declaration of Lindsey Evans, which purported to relate the intent of Cal, Sr., as to the children of Cal, Jr. *See, e.g.*, Declaration of Lindsey Evans at ll. 4-7, CP Vol. VIII at 636 ("I believe his intent was that his grandchildren wouldn't stand to inherit equally through his four children"). However, those and other portions of the Declaration were stricken. *See* Motion to Strike at par. 1.5, CP Vol. VIII at 629. *See also* Order Denying Petition for Declaration of Rights of Beneficiaries at ¶ 2, CP Vol. I at 4. Nor did the Respondents appeal from the trial court's reliance on the Findings of Fact and Conclusions of Law from the financial abuse trial. *See* Order Denying Petition for Declaration of Rights at ll. 24-25, CP Vol. I at 3 (indicating that the court was considering the Amended Findings of Fact and Conclusions of Law filed in the case on May 31, 2012). They are bound by the evidence that was submitted in the TEDRA proceedings below.

There is in any event, no need for further fact-finding in order for the court to determine the issues presented. The equities to be applied are only

those apparent from Mr. Evans, Sr.'s testamentary plan. The issues here pertain not to any subjective intent of the testator relative to his various grandchildren, for testamentary intent is to be determined, if possible, from the face of the Will. In re Estate of Bergau, 103 Wn.2d 431, 435-36, 693 P.2d 703 (1985). Mr. Evan's testamentary intent as to his children and all of his grandchildren is set forth squarely and unequivocally on the face of his Will. See Will at Art. VIII, CP Vol. I at 133, and to resort to extrinsic evidence would be improper.

#### V. CONCLUSION

RCW 11.12.110, Washington's anti-lapse statute, does not have mandatory application in cases of financial abuse. It should not be held to apply here where the abuser would benefit by such application; where no branch of the testator's family will be disinherited in the absence of its application; and where further damage to Mr. Evans, Sr.'s testamentary plan may be avoided through non-application. The trial court's rulings applying the anti-lapse statute to the devise of the ranch and to the bequests of interests in the LLC and in the residuary trust should be reversed, and this court should order that those bequests lapse and fall into the residue of the Estate to contribute to the corpus of the residuary trust. The trial court's order granting fees to all beneficiaries should be upheld, and appellants Sansing should further have an award of their reasonable attorneys' fees and costs on appeal

as requested in their opening brief.

Respectfully submitted this 27<sup>th</sup> day of December, 2013.

NEWTON ♦ KIGHT L.L.P.

By: 

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## **APPENDIX 1**

RAP 3.1

### **WHO MAY SEEK REVIEW**

Only an aggrieved party may seek review by the appellate court.

**APPENDIX 1**

**A-1**

RAP 3.1

## APPENDIX 2

### RCW 11.12.110

#### Death of grandparent's issue before grantor.

Unless otherwise provided, when any property shall be given under a will, or under a trust of which the decedent is a grantor and which by its terms becomes irrevocable upon or before the grantor's death, to any issue of a grandparent of the decedent and that issue dies before the decedent, or dies before that issue's interest is no longer subject to a contingency, leaving descendants who survive the decedent, those descendants shall take that property as the predeceased issue would have done if the predeceased issue had survived the decedent. If those descendants are all in the same degree of kinship to the predeceased issue they shall take equally or, if of unequal degree, then those of more remote degree shall take by representation with respect to the predeceased issue.

## APPENDIX 2

### A-2

RCW 11.12.110 (amended 2005)

## **APPENDIX 3**

RCW 11.12.120(2)

Lapsed gift — Procedure and proof.

(2) If the will gives the residue to two or more persons, the share of a person who does not survive the testator passes, unless otherwise provided, and subject to RCW 11.12.110, to the other person or persons receiving the residue, in proportion to the interest of each in the remaining part of the residue.

**APPENDIX 3**

**A-3**

RCW 11.12.120(2) (amended 1999)

## **APPENDIX 4**

RCW 11.48.010

### **General powers and duties.**

It shall be the duty of every personal representative to settle the estate, including the administration of any nonprobate assets within control of the personal representative under RCW 11.18.200, in his or her hands as rapidly and as quickly as possible, without sacrifice to the probate or nonprobate estate. The personal representative shall collect all debts due the deceased and pay all debts as hereinafter provided. The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.

**APPENDIX 4**  
**A-4**

RCW 11.48.010 (amended 1994)

## **APPENDIX 5**

RCW 11.84.020

Slayer or abuser not to benefit from death.

No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.

**APPENDIX 5**

**A-5**

RCW 11.84.020 (amended 2009) (prior: 1965)

## **APPENDIX 6**

RCW 11.96A.100(7)

Procedural rules.

Unless rules of court require or this title provides otherwise, or unless a court orders otherwise:

...

(7) Testimony of witnesses may be by affidavit;

**APPENDIX 6**

**A-6**

RCW 11.96A.100(7) (amended 2001)

## **APPENDIX 7**

RCW 11.96A.100(8)

Procedural rules.

Unless rules of court require or this title provides otherwise, or unless a court orders otherwise:

...

(8) Unless requested otherwise by a party in a petition or answer, the initial hearing must be a hearing on the merits to resolve all issues of fact and all issues of law;

**APPENDIX 7**

**A-7**

RCW 11.96A.100(8) (amended 2001)

## **APPENDIX 8**

RCW 11.96A.140

### **Waiver of Notice**

Notwithstanding any other provision of this title, notice of a hearing does not need to be given to a legally competent person who has waived in writing notice of the hearing in person or by attorney, or who has appeared at the hearing without objecting to the lack of proper notice or personal jurisdiction. The waiver of notice may apply either to a specific hearing or to any and all hearings and proceedings to be held, in which event the waiver of notice is of continuing effect unless subsequently revoked by the filing of a written notice of revocation of the waiver and the mailing of a copy of the notice of revocation of the waiver to the other parties. Unless notice of a hearing is required to be given by publication, if all persons entitled to notice of the hearing waive the notice or appear at the hearing without objecting to the lack of proper notice or personal jurisdiction, the court may hear the matter immediately. A guardian of the estate or a guardian ad litem may make the waivers on behalf of the incapacitated person, and a trustee may make the waivers on behalf of any competent or incapacitated beneficiary of the trust. A consul or other representative of a foreign government, whose appearance has been entered as provided by law on behalf of any person residing in a foreign country, may make the waiver of notice on behalf of the person.

**APPENDIX 8**  
**A-8**

RCW 11.96A.140

## **APPENDIX 9**

### **RCW 11.96A.150(1)**

(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.

## **APPENDIX 9**

### **A-9**

RCW 11.96A.150(1) (amended 2007)

## **APPENDIX 10**

RCW 11.96A.170

### **Trial by Jury**

If a party is entitled to a trial by jury and a jury is demanded, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice, shall settle and frame the issues to be tried. If a jury is not demanded, the court shall try the issues, and sign and file its findings and decision in writing, as provided for in civil actions.

**APPENDIX 10**

**A-10**

RCW 11.96A.170 (1999)

## **APPENDIX 11**

### **WASHINGTON STATE CONSTITUTION**

#### **ARTICLE IV THE JUDICIARY**

**SECTION 1 JUDICIAL POWER, WHERE VESTED.** The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide.

**APPENDIX 11  
A-11**

COURT OF APPEALS, DIVISION 1  
SEATTLE, WASHINGTON

ESTATE OF CALVIN H. EVANS, )  
SR., )

Appellant )

vs. )

SHARON EADEN, VICKI )  
SANSING, KENNETH EVANS, )  
LINDSEY EVANS, CORY )  
EVANS, JESSE EVANS, )  
AND CALVIN EVANS, III, )

Respondents. )  
\_\_\_\_\_ )

NO. 70210-6-I

CERTIFICATE OF  
SERVICE BY MAIL

STATE OF WASHINGTON )  
 ) SS.  
COUNTY OF SNOHOMISH )

2013 DEC 31 PM 2:07

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

VALETA G. KING, being first duly sworn on oath, deposes and  
states:

I am over the age of twenty-one years and a resident of the County of  
Snohomish, State of Washington.

CERTIFICATE OF SERVICE BY MAIL - 1.  
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12/27/13

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On December 30, 2013, I caused the Reply Brief of Respondents/Cross-Appellants Sansing dated December 27, 2013, to be served on Appellant, ESTATE OF CALVIN EVANS, SR. and Respondents, LINDSEY EVANS, CORY EVANS, JESSE EVANS, and CALVIN EVANS, III, by depositing in the United States mail at Everett, Washington, an envelope with first-class postage prepaid, by regular mail, addressed to the following:

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Valeta G. King  
VALETA G. KING

SUBSCRIBED AND SWORN TO before me this 30<sup>th</sup> day of December, 2013.



Lisa A. Burkhardt  
LISA A. BURKHARDT, NOTARY  
PUBLIC in and for the  
State of Washington.  
My appointment expires: 5/3/2016

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