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No. 74336-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANNA PASCUA,

Appellant,

v.

SCOTT COLLINS and JOHN GREENWAY,
Co-Personal Representatives of the Estate of Donald Sirkin

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Respondents herein, Scott Collins (“Collins”) and John Greenway (“Greenway”), are the co-personal representatives of the Estate of Donald Sirkin. Appellant Anna Pascua, is a beneficiary of the Estate and Sirkin’s adult daughter who now alleges that Sirkin sexually abused her in her childhood 50 years ago. Ms. Pascua did not assert her Creditor’s Claim (the “Claim”) for childhood sexual abuse within four months of the published Notice to Creditors so that her Claim, and its ensuing lawsuit, is forever barred. Ms. Pascua now argues that her Claim should not be barred because her childhood sexual abuse was reasonably ascertainable and because Collins did not act with reasonable diligence in investigating a potential claim of childhood sexual abuse, so that she is entitled to a longer period in which to assert her Creditor’s Claim.

In actuality, Collins and Greenway complied with their statutory duties, and are thus entitled to statutory presumptions that they acted with reasonable diligence and that the Claim was not reasonably ascertainable. Such presumption can be rebutted only with clear, cogent and convincing evidence. Ms. Pascua has not presented such evidence and the four month bar period must apply. This Court should uphold the decision of the Hon. Samuel Chung dismissing this matter.

II. ASSIGNMENTS OF ERROR

Collins and Greenway assign no error to the lower court's decision. However, the issues presented by the lower court's ruling are more properly stated as follows:

1. Do alleged disclosures about an unhappy childhood present clear, cogent and convincing evidence of a readily ascertainable claim of childhood sexual abuse?
2. Does unsupported speculation about what might have been revealed in proposed interviews constitute clear, cogent and convincing evidence to rebut a presumption of reasonable diligence?

III. STATEMENT OF THE CASE

Ms. Pascua seeks to enlarge the time in which to provide a Notice of Creditor's Claim against her father's estate. CP 74. Because the co-personal representatives Collins and Greenway followed the statutory requirements set forth in Washington law in administering the estate, they are entitled to the appropriate evidentiary presumptions that vitiate against such an enlargement of time. These presumptions can only be rebutted through clear, cogent and convincing evidence. Ms. Pascua did not produce such evidence at summary judgment, or now, and thus this appeal must fail.

A. The co-representatives of the Estate, Collins and Greenway complied with the requirements of Washington law.

Donald Sirkin died testate on May 2, 2014. CP 38. At the time of his death, Sirkin was a resident of King County. CP 38. Ms. Pascua was a

beneficiary of the Estate, Sirkin having devised the amount of \$250,000 to Pascua in his will. CP 39.

On May 9, 2014, Commissioner Carlos Y. Velategui signed an order admitting Sirkin's will to probate and appointing respondents Scott Collins and John Greenway as co-personal representatives of the Estate. CP 39. On May 19, 2014, Collins mailed the Notice of Appointment and Pendency of Probate to Pascua. CP 39.

As part of the duties of co-personal representatives of the Estate, Collins and Greenway engaged in a review of Sirkin's correspondence, including correspondence received after death, personal financial statements, loan documents, bank statements and income tax returns. CP 39. Nothing therein revealed Ms. Pascua as a potential creditor of the Estate. CP 39. Further, Collins caused a Notice to Creditors of the Estate of Donald Sirkin to be published in the Daily Journal of Commerce on May 12, 2014, on May 19, 2014 and on May 27, 2014. CP 39, CP 63-64.

On April 16, 2014, or more than nine months subsequent to the first publication of the Notice, Collins received a Creditor's Claim on behalf of Anna Pascua. CP 66. The Claim set forth that:

This claim is based upon the following facts and circumstances: The Decedent sexually, physically, and emotionally abused claimant since the age of four throughout her adolescent years.

CP 66.

Because the Claim was received more than four months after the initial publication of the Notice to Creditors, Collins rejected the Creditor's Claim. CP 39, CP 95.

B. Ms. Pascua filed a Complaint after her Creditor's Claim was rejected as being untimely.

On May 15, 2015, Ms. Pascua filed the Complaint in this matter, alleging that Sirkin has "sexually touched and physically and emotionally abused" her in the 1960s. CP 2-5. Ms. Pascua alleged abuse as follows in the Complaint:

- Sirkin punched her in the face when she was four and committed other acts of physical violence against her and family members in the 1960s.
- Sirkin was highly manipulative and isolated the family from relatives.
- Mrs. Pascua would hide from Sirkin when she was a child, and he would break in and hit her.
- Sirkin would "sexually touch" her into her teens.

CP 2-3.

There are no other, more specific, allegations of childhood sexual abuse in the Complaint, in the Creditor's Claim, or anywhere else in the record. CP 66, CP 90-92. This is the most detailed recounting anywhere of the allegations of any abuse, including childhood sexual abuse.

Consistent with the rejection of the Claim as untimely, Collins and Greenway moved for summary judgment dismissal of the Complaint as being “forever barred” under the laws of Washington. CP 26-35.

C. Ms. Pascua never disclosed any allegations of childhood sexual abuse or sexual touching to Collins or Greenway before presenting her Creditor’s Claim.

Collins and Greenway moved for dismissal of the Complaint as a matter of law, because Ms. Pascua had presented it to the Estate more than four months after the Notice to Creditors was published. CP 26-35. In opposition to the Motion, Ms. Pascua filed a Declaration in which she recounted many of conversations and meetings with Scott Collins between May and July of 2014, during the pendency of the probate. CP 90-93. While Collins disputes the amount of contact alleged and disputes that the recounted disclosures were actually made, he concedes that such a dispute is an issue of fact and addresses the allegations disclosed in the Declaration as if they did occur and are true. CP 100.

In the Declaration, Ms. Pascua testified that throughout this period of May, June and July of 2014, she spoke to Collins approximately two or more times per week, or approximately twenty-four discussions, about the Estate and her father. CP 90, lines 23-25.

In these twenty-four discussions, Ms. Pascua disclosed several instances of bad parenting from her childhood in the 1960s. CP 91. She

told Collins that she “would like to take Mr. Collins out to dinner” and tell him more about her father. CP 91, lines 20-23. Collins declined the dinner invitations. CP 91, line 26.

In none of these alleged conversations did she disclose that she had been sexually abused, that her father had sexually abused any child ever, or that he had ever been accused or suspected of child sexual abuse. CP 90-93.

She does recall disclosing to Mr. Collins that:

- Her father engaged in domestic violence for some period in her childhood 50 years earlier; and
- Her father said cruel things to her in her childhood; and
- Her father neglected her care on a trip to New York 50 years ago.

CP 91.

In sum, Collins and Ms. Pascua had approximately twenty-four discussions wherein no sexual misconduct was mentioned whatsoever. CP 91. However, Ms. Pascua did testify that she would have told Collins about being sexually abused as a child if he went out to dinner with her. CP 91, lines 21-22.

As noted above, Collins declined the invitation to have dinner with Ms. Pascua, and although she had many other opportunities to disclose any allegations of childhood sexual abuse to Collins, she did not do so. She provides no testimony or explanation as to why she could not simply make

an appointment with Collins in his office to disclose the allegations. CP 90-93.

Ms. Pascua also testified that she informed Collins that she believes that her brother and mother were witnesses to her abuse. CP 92. However, she has offered no evidence from either of these purported witnesses as to what they in fact observed or know about any abuse, sexual or otherwise, or what they would have stated if they had been interviewed by Collins. No such evidence appears in the record.

IV. ARGUMENT

Washington law establishes the method by which a personal representative of a decedent's estate may give notice to potential creditors that a personal representative has been appointed and that claims against the estate must be presented to the personal representative within a proscribed period of time. RCW 11.40.020. Ms. Pascua did not present her Claim within the proscribed time period, but now argues that she is entitled to enlarge that period of time as provided in an exception under RCW 11.40.051. However, the exceptions for enlarging the period of time in which to present a claim do not apply in this matter.

Further, the facts establish that Collins and Greenway fully complied with the provisions of RCW 11.40.040, and by having done so, they are entitled to statutory presumptions that can only be rebutted through

clear, cogent and convincing evidence. None of the factual material presented to the trial court accomplishes this.

A. This Court must perform a *de novo* review under the standard of clear, cogent and convincing evidence.

On appeal from summary judgment, the appellate court decides the matter on a *de novo* basis, engaging in the same analysis as the trial court. *Camica v. Howard S. Wright Const. Co.*, 179 Wn.2d 684, 693, 317 P.3d 982 (2014).

However, as Ms. Pascua conceded on summary judgment (CP 78), the Court must view the evidence through the prism of the evidentiary burden in the case. *Woody v. Stapp*, 146 Wn. App. 16, 22-23, 189 P.3d 807 (2008). When the party with the evidentiary burden at trial of proving an issue with “clear, cogent and convincing evidence”, the Court “must determine whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported his or her claim with clear, cogent and convincing evidence.” *Id.* citing *In re Depend. Of C.B.*, 61 Wn. App, 280, 285, 810 P.2d 518 (1991).

In the present matter, and as argued in more detail below, by complying with RCW 11.40.040, Collins and Greenway are entitled to statutory presumptions regarding their reasonable diligence and the reasonable ascertainability of the claims at issue, presumptions that can only

be rebutted through clear, cogent and convincing evidence. Such quantum of evidence is required at summary judgment to defeat that motion, and at appeal, to obtain reversal of the trial court. *Woody v. Stapp*, 146 Wash. App. At 23. Such evidence is not presented.

B. Washington provides clear direction to personal representatives regarding claims against an estate.

Under Washington law, creditors must be provided notice of the appointment of a personal representative of an estate, and given opportunity to file claims against the estate. RCW 11.40.020. These matters are governed under Chapter 11.40 RCW.

The manner of providing and the content of such notice is set forth in RCW 11.40.020, which provides in relevant part:

[a] personal representative may give notice to the creditors of the decedent, in substantially the form set forth in RCW 11.40.030, announcing the personal representative's appointment and requiring that persons having claims against the decedent present their claims within the time specified in RCW 11.40.051 or be forever barred as to claims against the decedent's probate and nonprobate assets.

As set forth below, Collins and Greenway provided notice within the time specified in RCW 11.40.051.

1. Collins and Greenway complied with the established means and methods of notice.

The personal representative of an estate is charged with preparing the notice to creditors on behalf of the estate. The two means of giving

notice are by notice by publication or by actual notice. Notice by publication is effected by causing the proper notice to be published once each week for three successive weeks in a legal newspaper in the county in which the estate is administered. RCW 11.40.020(1)(b). Actual notice is achieved through personal service or by mail. RCW 11.40.020(1)(c).

Creditors or potential creditors against the estate must then present a creditor's claim against the estate within the appropriate time frame as defined by statute. The relevant time limits for presenting a claim at risk of being "forever barred" are set forth under RCW 11.40.051 and are strictly construed. *Young v. Estate of Snell*, 134, Wash, 2d 267, 272, 948 P.2d 1291 (1998) (footnote omitted). The provisions regarding claims against an estate are "mandatory, not subject to enlargement by interpretation, and cannot be waived." *Judson v. Associated Meats & Seafoods*, 32 Wash. App. 794, 798, 651 P.2d 222 (1982). "Equitable considerations may not mitigate the strict requirements of the statute where a timely claim has not been filed by the creditor [.]" *In re Estate of Wilson*, 8 Wash.App. 519, 525, 507 P.2d 902 (1973).

To be clear, the parties agree that Ms. Pascua did not receive actual notice as defined by the statute; notice was by publication. Neither party asserts that the published notice was defective. Neither party disputes that Pascua presented her Claim more than four months, and less than twenty-

four months, after Collins caused notice by publication.

However, the parties do dispute which of the two limitations periods for presenting claims against the estate apply.

2. Washington law sets forth the applicable time periods for presenting a creditor's claim.

As established above, the relevant time periods in which a creditor may make a claim against a decedent's estate, or be forever barred, are set forth in RCW 11.40.051(1)(b)(i)&(ii). The statute sets forth the two differing time periods which are at issue here, and the conditions under which they are applied. The relevant provisions read as follows:

(b) If the personal representative provided notice under RCW 11.40.020 and the creditor was not given actual notice as provided in RCW 11.40.20(1)(c):

(i) If the creditor was not reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within four months after the date of first publication;

(ii) If the creditor was reasonably ascertainable, as defined in RCW 11.40.040, the creditor must present the claim within twenty-four months after the decedent's date of death.

RCW 11.40.051(b)(i) and (ii).

Collins asserts that Pascua's claim was not "reasonably ascertainable", so that the four month limit in RCW 11.40.051(1)(b)(i) applies, and her claim is barred by operation of law.

However, Pascua asserts that her claim was "reasonably

ascertainable” and that Collins and Greenway failed to employ “reasonable diligence” to discover it, so that the twenty-four month period of RCW 11.40.051(1) (b) (ii) applies, and so that her claim may proceed.

3. Collins and Greenway conducted a reasonably diligent search to find reasonably ascertainable creditors as defined by statute.

Washington provides clear definitions as to what constitutes a “reasonably ascertainable” claim in order to determine which of the two possible time limit in RCW 11.40.051 should apply.

These definitions are found in RCW 11.40.040.

- (1) For purposes of RCW 11.40.051, a “reasonably ascertainable” creditor of the decedent is one that the personal representative would discover upon exercise of reasonable diligence. The personal representative is deemed to have exercised reasonable diligence upon conducting a reasonable review of the decedent’s correspondence, including correspondence received after the date of death, and financial records, including personal financial statements, loan documents, checkbooks, bank statements, and income tax returns that are in the possession of or reasonably available to the personal representative.”

Collins testified that he and Greenway performed this function in accord with the statute. Specifically, Collins testified that he and Greenway “conducted a review of Donald Sirkin’s correspondence, including correspondence after death, personal financial statements, loan documents, bank statement and income tax returns. This review did not reveal Anna Pascua as a potential creditor of the decedent.” As such, Collins and

Greenway are deemed to have exercised reasonable diligence.

4. Ms. Pascua offers a faulty reading of the statute to avoid dealing with the rebuttable presumptions.

Because applying the rebuttable presumptions of reasonable diligence and for identifying a reasonably ascertainable claim are devastating to her position, Ms. Pascua attempts to assert a new reading and new obligations into the statutory language. This attempt to rewrite the statute should be rejected.

Ms. Pascua presents no facts that would void the statutory language that imparts the statutory presumptions. Ms. Pascua does not argue that the statutory review did not take place, or that there were materials in the document review that could have alerted the personal representatives to her claim of childhood sexual abuse.

Instead, Ms. Pascua argues, for the first time on review, that the statute actually requires that the personal representative review “all evidence” that is reasonably available to the personal representative and therefore Collins and Greenway did not comply with the statute.

This is incorrect. The statute makes no mention of “all evidence.” Indeed, no evidence other than documents are identified as requiring review in order to impart the statutory presumptions. Instead, the statute requires review of all the enumerated *documents* that are in the possession of the

personal representative or are reasonably available to the personal representative. The items to be reviewed are clearly enumerated as:

The decedent's correspondence, including correspondence received after the date of death, and financial records, including personal financial statements, loan documents, checkbooks, bank statements, and income tax returns, that are in the possession of or reasonably available to the personal representative.

RCW 11.40.040(1).

Ms. Pascua cannot simply insert a requirement into the statute that is not there. If a statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007).

Collins and Greenway complied with the statutory duties as written. This does not prevent Ms. Pascua from establishing that her claim was reasonably ascertainable, but it does provide the evidentiary frame under which she must establish it, that is, clear, cogent and convincing evidence rebutting these presumptions.

5. Because they complied with their statutory duties, Collins and Greenway are entitled to rebuttable presumptions.

It is uncontroverted that Collins and Greenway conducted the document review defined in RCW 11.40.051. By conducting such review, they are entitled to a rebuttable presumption that they exercised reasonable diligence, and that any claim not revealed therefrom is presumed to not be

reasonably ascertainable.

- (2) If the personal representative conducts the review, the personal representative is presumed to have exercised reasonable diligence to ascertain creditors of the decedent and any creditor not ascertained in the review is presumed no reasonably ascertainable with the meaning of RCW 11.40.051. These presumptions may be rebutted only by clear, cogent and convincing evidence.

RCW 11.40.040(2).

Ms. Pascua has not and cannot present such clear, cogent and convincing evidence to rebut the presumptions of a reasonably diligent search or that her claim of childhood sexual abuse was not reasonably ascertainable.

To rebut these presumptions, Ms. Pascua maintains that her alleged disclosures to Collins render her childhood sexual abuse claim readily ascertainable on the face of the disclosures, or, alternatively, that the alleged disclosures require further investigation in order to exercise reasonable diligence, which would then have rendered her claim readily ascertainable.

As discussed below, none of these arguments are supported by clear, cogent and convincing evidence, even when viewed in the light most favorable to Ms. Pascua. As such, the trial court should be upheld.

C. Ms. Pascua's alleged disclosures do not comprise an ascertainable claim.

As noted above, Ms. Pascua maintains that her claim for childhood

sexual abuse was reasonably ascertainable based on the alleged disclosures she made to Collins. However, her Declaration in opposition to the motion for summary judgment is insufficient to meet the burden of establishing a reasonably ascertainable claim by clear, cogent and convincing evidence.

Indeed, Ms. Pascua's disclosures of emotional and physical abuse by her father in her childhood, while distressing, do not comprise any kind of cognizable claim on their own substance, and Ms. Pascua does not allege having actually disclosed any sexual conduct or childhood sexual abuse to Collins or to Greenway at all. Therefore, the existence of any litigable claim based on the disclosures Ms. Pascua made to Collins is merely conjectural.

1. Conjectural claims are not reasonably ascertainable claims.

The United States Supreme Court has addressed the due process issues that are implicated when there is a potential claim against a decedent's estate, and those circumstances wherein a potential creditor is entitled to actual notice of a pending estate.

The Supreme Court has made clear that being a creditor against a decedent's estate necessarily rests on some evidence of an actual litigable claim; not everyone who may conceivably have a claim is properly considered a creditor entitled to actual notice. *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 490, 108 S.Ct. 1350, 99 L.Ed.2d 565 (1988). Indeed, actual notice is not required where claims are merely

conjectural. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 317, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

Washington has not defined what constitutes a conjectural claim, however, Webster's New Third International Dictionary defines "conjecture" as an inference from defective or presumptive guesswork; a conclusion deduced by surmise or guesswork. *See, i.e., In re Estate of Austin*, 389 S.W.3d 168, 173 (Mo. 2013).

Employing this guidance in reviewing Ms. Pascua's disclosures, it is clear that these disclosures do not rise to the level of a reasonably ascertainable claim, and that any conceivable claim would only be conjectural, and not requiring actual notice of the pending estate.

2. Ms. Pascua did not disclose an actual litigable claim.

Ms. Pascua's disclosures to Collins, while relating unfortunate events from her childhood, do not rise to the level of a litigable claim, and thus, no claim thereupon would be reasonably ascertainable.

First, what Ms. Pascua disclosed to Collins were restricted to allegations of bad parenting that occurred in the 1960s. She told Collins that her father hit her, that he exercised neglect on a trip to New York when she was four, and that he said cruel things to her. These are sad and unfortunate events. But they do not comprise litigable claims.

Ms. Pascua presents no authority from any jurisdiction that supports

a cause of action for bad parenting, be it in the form of cruel words, neglectful supervision on airplanes and trips, or even physical violence. It would be pure conjecture and guesswork to ascertain that Ms. Pascua had a claim for childhood emotional or physical abuse against her parent, because no such cause of action has been recognized in Washington, nor has Ms. Pascua presented authority that one exists elsewhere.

Second, while it is true that childhood sexual abuse is most certainly litigable, Ms. Pascua revealed *nothing* about childhood sexual abuse to Collins. Again, it would be pure conjecture and guesswork on Collins' part to leap from the disclosed allegations regarding Sirkin to surmise that there might be a claim for undisclosed childhood sexual abuse. Again, Ms. Pascua presents no authority that indicates such a level of deduction is reasonable under any circumstances, much less for the personal representative of an estate. Any claim for childhood sexual abuse cannot be deemed a reasonably ascertainable claim on the basis of Ms. Pascua's disclosures to Collins.

D. Collins acted with reasonable diligence in his interactions with Ms. Pascua.

Because her claim for childhood sexual abuse is not reasonably ascertainable on the face of her alleged disclosures to Collins, Ms. Pascua further argues that her childhood sexual abuse claims *would have been*

reasonably ascertainable if he had exercised reasonable diligence in response to the disclosures. However, this argument also fails because the alleged disclosures do not trigger any further investigation. Moreover, even if the disclosures could be read to trigger reasonable diligence, there is simply no evidence that such investigation would have actually resulted in an ascertainable claim of childhood sexual abuse.

1. Disclosures of bad parenting do not trigger an investigation of undisclosed childhood sexual abuse.

Ms. Pascua cites two cases for the proposition that she disclosed sufficient facts regarding her father's bad parenting to trigger an investigation of potential, but undisclosed, childhood sexual abuse in the exercise of reasonable diligence. However, the cited authority does not support this proposition.

First, Ms. Pascua asserts that *In re Estate of Austin*, 389 S.W. 3d 168 (Mo. 2013), supports the contention that Ms. Pascua's disclosures to Mr. Collins should have triggered further investigation of her potential childhood sexual abuse claims. But the facts herein are vastly different in *Estate of Austin*. Indeed, this is why the trial court cited *Estate of Austin* as supporting the court's decision to *dismiss* Ms. Pascua's Complaint.

Estate of Austin involved the claims of two children who had been sexually abused by the decedent, and who did not receive actual notice of

the pending estate or the need to present their claims to the estate. *Estate of Austin*, 389 S.W. 2d at 169. The court in that matter ruled that the children's claims were readily ascertainable and that the personal representative was required to provide actual notice of the pending estate to the children's guardian. *Id.* at 169-170.

However, *Estate of Austin* rests on substantially different facts than this matter. In *Estate of Austin*, the child victims had actually reported sexual abuse to the Division of Family Services, which then investigated and substantiated that the abuse had occurred. *Id.* at 169-170. The personal representative knew who the victims were, and knew about the sexual abuse investigation and findings. *Id.* The personal representative then conducted her own interviews, and based thereupon, concluded there was no creditor's claim for childhood sexual abuse. *Id.* The court held that based on that specific and detailed degree of knowledge, the claim of childhood sexual abuse was reasonably ascertainable and that the personal representative should not have made an independent conclusion that the claims were not litigable. *Id.* at 172.

So this is quite different than the case in hand. In this matter, Ms. Pascua disclosed cruel remarks, inattention and neglect, and physical violence, but nothing regarding sexual conduct. In *Estate of Austin*, the childhood sexual abuse was known and substantiated before the decedent

perpetrator passed away; the personal representative simply concluded that in her own opinion, for unstated reasons, that there was no colorable claim. *Estate of Austin* has no bearing here because there were no disclosed allegation of childhood sexual abuse.

Further, the Missouri statutory scheme, unlike that of Washington, does not provide a definition of reasonable diligence by which to measure the personal representative's actions, and does not provide for a rebuttable presumption. RCW 11.40.051. Therefore, not only are the facts substantially different, but the analytical framework is radically different as well.

Ms. Pascua goes on to argue that the facts herein are analogous to *American Home Assurance Co. v. Gaylor*, 894 So.2d 656 (Ala.2004). They are not.

In *Gaylor*, the estate administratrix had actual knowledge of a specific potentially tortious occurrence, that being an auto accident wherein three persons were killed, an event through which the claimant was injured. *Gaylor*, 894 So.2d at 657. The administratrix asserted she had no duty to give actual notice to the claimant regarding the pending estate because she did not know that the claimant had been injured in the accident. *Id.* The court found that knowledge that the accident was serious enough to kill three persons, and that there was another person involved in the accident,

was sufficient to render a claim reasonably ascertainable, even if the administratrix did not specifically know that the claimant had been injured. *Id.* at 660.

Again, this is not analogous to the matter herein, because Collins had no knowledge that a potentially tortious act had occurred. Perhaps if Ms. Pascua had disclosed, or if Collins or Greenway had awareness through other means, that Sirkin had ever been accused of any childhood sexual abuse of anyone, such knowledge could then trigger a duty for further investigation. But there is no such disclosure or any evidence that such information exists.

Instead, Ms. Pascua's theory is that because she disclosed bad or abusive parenting, Collins is then obliged to investigate the possibility of undisclosed childhood sexual abuse. This is not reasonable, and is not the appropriate reading of *Gaylor*. Indeed, under Ms. Pascua's proposed interpretation, a personal representative who is told that the deceased is a bad driver is then tasked with researching and investigating if there were any accidents in the entirety of the decedent's life and then determine if there may potential creditor resulting therefrom.

Clearly it is not the intent of Washington law and policy to impose such a burden on that level of knowledge as stated in the clear language of RCW 11.40.040 (search of decedent's personal documents is sufficient to

create rebuttable presumption of reasonable diligence). No cited authority support the proposition that disclosures about bad parenting trigger an investigation of childhood sexual abuse. The court should decline the invitation to create law based on cases not applicable to the matter at hand.

2. The proposed additional investigation would not have revealed a reasonably ascertainable claim of childhood sexual abuse.

Even if the court could find that the alleged disclosures of bad parenting would require some other investigation in the exercise of reasonable diligence, this Court must still uphold the trial court. Ms. Pascua bears the burden of providing clear, cogent and convincing evidence of that the purported investigation would have revealed an ascertainable claim, triggering the requirement of actual notice. However, she provides no evidence of what her proposed investigation would actually reveal.

The two investigatory steps that Ms. Pascua argues were required were to: a) discuss the allegations further with her; and b) to interview her brother and mother regarding the allegations. But there is no clear, cogent and convincing evidence that these steps would have revealed anything more than is known now.

a. Collins met any requirement of “reasonable diligence” in meeting with Ms. Pascua twenty-four times regarding Sirkin and the estate.

Ms. Pascua asserts that Collins had a duty to conduct further

discussions with her. Indeed, she extended several dinner invitations to him to do so, whereupon she asserts she would have told him about years of sexual and emotional abuse.

But Collins spoke with Ms. Pascua regarding her father and the estate some twenty-four times in three months and she disclosed nothing about childhood sexual abuse. Reasonable diligence does not require a twenty fifth interview. Reasonable diligence does not require Collins to meet socially at dinner with Ms. Pascua.

Further, Ms. Pascua's assertion that she would have told Collins about childhood sexual abuse if he went out to dinner with her, or if he had just spoken with her one more time, is just not creditable. What might have happened at the twenty fifth discussion as opposed to the previous twenty-four discussions is speculation at best, and speculation does not create an issue of fact. *Petcu v. State*, 121 Wn. App. 36, 55, 86 P.3d 1234 (2003). The court does not have to accept Ms. Pascua's subjective intent about what might have happened if Collins had accepted her invitation to dinner, or if he had discussed Sirkin with her one additional time.

Even now Ms. Pascua no clear evidence as to what she would have disclosed if there had been one more discussion. Ms. Pascua references sexual abuse exactly one time in her Declaration addressing what she "would have" told Collins if he went out to dinner with her.

I had a standing invitation that I would like to take Mr. Collins out to dinner and tell him the complete story of my father. The complete story would have included the years of sexual and emotional abuse I endured.

CP 91, lines 21-23.

This minimal assertion does not establish clear, cogent and convincing evidence that even if Collins were required to go out to dinner with her, or partake in some other discussion for the twenty fifth time, that what would have been disclosed would have actually been a reasonably ascertainable claim.

Finally, Ms. Pascua appears to argue that the manner in which Collins talked about Sirkin improperly inhibited her from speaking about the sexual abuse. There is no citation to support imposing such a duty and this issue should been given no merit.

b. No evidence indicates that any of that interviewing Eric and Harriet Sirkin would have revealed anything at all.

Finally, Ms. Pascua asserts that her allegations should have caused Collins to conduct further interviews because “I believe that my mother, Harriet Sirkin, and my brother, Eric Sirkin were witnesses to the abuse that I endured and are competent to testify at trial.” The proposed inference appears to be that reasonable diligence required interviewing Harriet and Eric, at which point they would have disclosed information rendering the

childhood sexual abuse claim reasonably ascertainable.

Again, Collins had no such duty based on the substance of the actual disclosures. Assuming, as we must, that Ms. Pascua did make the alleged disclosures about bad parenting and physical abuse and that they were in fact true, they do not comprise a litigable claim. There was no need to interview Harriet and Eric to determine their truth or falsity, because they are not actionable.

To the extent Ms. Pascua posits that Collins should have interviewed Eric and Harriet specifically about childhood sexual abuse, she never disclosed any childhood sexual abuse, so why would he interview them about childhood sexual abuse?

And most importantly, there is no evidence whatsoever about what information Eric and Harriet would have provided about childhood sexual abuse or any subject at all if they had been interviewed. In order to determine that the proposed reasonable due diligence would have revealed an ascertainable claim, we at least have to have some indication of what would have been said to reveal such a claim. But there is nothing, merely a single line that says that Harriet and Eric “were witnesses to the abuse”. We know nothing of what that testimony might entail.

This is not clear, cogent and convincing evidence of a reasonably ascertainable claim. Ms. Pascua even now does not tell us what they

purportedly knew, she only “believes” that they were witnesses to “abuse”, not even mentioning any knowledge they might have about the alleged sexual abuse.

All of this is insufficient to establish that further “reasonable diligence” would have revealed an “ascertainable claim” by Ms. Pascua. Again, the trial court should be upheld.

V. CONCLUSION

Ms. Pascua reveals some unhappy memories from her childhood. While unfortunate, these do not comprise a reasonably ascertainable claim regardless of whether any additional “reasonable diligence” was required. Ms. Pascua has a high burden of providing clear, cogent and convincing evidence that Collins and Greenway failed in their statutory duties. She has not met this burden, she was not entitled to actual notice, her Creditor’s Claim was untimely, and the Court must uphold the trial court.

DATED this 1st day of June, 2016.



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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury of the laws of the state of Washington that on the 1st day of June, 2016, she caused to be served via electronic mail and hand-delivery, a true and correct copy of the foregoing document to which this declaration is attached on the following individuals:

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EXECUTED this 1st day of June, 2016.



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