

NO. 39804-4-II

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

IN RE THE ESTATE OF:

JACQUELYN BUSSLER,

Deceased

KATHLEEN BUSSLER,

Appellant

v.

KAREN BUSSLER,

Respondent

THE HONORABLE JUDGE ROBERT HARRIS
JUDGE OF THE SUPERIOR COURT
OF CLARK COUNTY, STATE OF WASHINGTON

APPELLANT'S BRIEF

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01-1-10

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I. ASSIGNMENTS OF ERROR

A. Assignment of Error Number One : The trial court erred in entering Finding of Fact Number 5.

B. Assignment of Error Number Two: The trial court erred in entering Finding of Fact Number 8.

C. Assignment of Error Number Three: The trial court erred in entering Finding of Fact Number 9.

D. Assignment of Error Number Four: The trial court erred in entering Finding of Fact Number 10.

E. Assignment of Error Number Five: The trial court erred in entering Finding of Fact Number 11.

F. Assignment of Error Number Six: The trial court erred in entering Finding of Fact Number 12.

G. Assignment of Error Number Seven: The trial court erred in entering Finding of Fact Number 13.

H. Assignment of Error Number Eight: The trial court erred in entering Finding of Fact Number 14.

I. Assignment of Error Number Nine: The trial court erred in entering Conclusion of Law Number 1.

J. Assignment of Error Number Ten: The trial court erred in entering Conclusion of Law Number 2.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did Jacquelyn have the requisite testamentary capacity to execute a valid will on March 14, 2009?

B. Was the March 14, 2009 will the product of undue influence?

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Jacquelyn Bussler executed a will on March 14, 2009 which left her entire estate to her daughter, Karen Bussler. (Exhibit-20) Her previous will executed in 1997 divided her estate evenly between her two daughters, Karen and Kathleen Bussler. (Exhibit-18, RP-131) For ease of reference, parties sharing a common surname will be referred to by the first name hereinafter.

Jacquelyn died on March 22, 2009 at the age of 62 after a protracted battle with Chronic Obstructive Pulmonary Disease (COPD). (Exhibit-10)

Gil Kleweno served as Jacquelyn's attorney for a number of years and prepared wills for her in 1995 and 1997. (RP-7 to 8) Kleweno became acquainted with Jacquelyn through her late husband. (RP-11) On April 2, 2009 Kleweno gave the original 1997 will and a 2000 codicil to that will to Kathleen for filing with the court. (RP-12)

Karen contacted the law firm of William Miles to arrange for the preparation of a new will for Jacquelyn prior to March 14, 2009. (RP-41) Marlis Cameron, legal assistant to attorney William Miles went to Jacquelyn's residence on March 14, 2009 for the purpose of executing a new will. (RP-38) Prior to arranging for the new will, Cameron had no contact with either Karen or Jacquelyn. (RP-41 to 42)

Cameron testified that she went over the will with Jacquelyn at her residence and Jacquelyn did not indicate any disagreement with the will, nor did Jacquelyn ask any questions regarding the will. (RP-38) Cameron indicated that she and Jacquelyn were alone during that time, but that Scott Davison would enter the room briefly to check on Jacquelyn. (RP-39) Karen entered the room when Cameron told her to bring in the witnesses to witness the will. (RP-39)

Karen sat on Jacquelyn's right side and Davison entered the room and stood while Barbara and Michael Meyer witnessed Jacquelyn sign the will. (RP-40) Both Karen and Cameron had to point out to Jacquelyn the places for her signature on the will. (RP-40)

Karen requested the Meyers come over and witness Jacquelyn's will. (RP23 to 24) Barbara Meyer and her husband Michael lived across the street from Jacquelyn. (RP-14) Barbara testified that Jacquelyn appeared anxious and ready to go lay down and that her contact with Jacquelyn was very brief and there was no conversation.. (RP-14) She recalls someone physically pointing out to Jacquelyn where to place her signature on the document. (RP-16)

Michael Meyer testified that Jacquelyn appeared to be dying on the day he witnessed her will based on the fact that she was shaky, deteriorating and needed to have the place to sign pointed out by Cameron. (RP-23) He testified that the witnesses had no discussion with Jacquelyn before she signed the will regarding terms of the will or her competence to sign the will. (RP-24 to 25) No mention was ever made of disinheriting Kathleen. (RP-18)

Kathleen testified that she had a close loving relationship with her mother, maintaining telephonic contact at least one time per week. (RP-114) After her mother's condition deteriorated on December, 2008 she called her mother every few days. (RP-115)

Kathleen visited with her mother in Vancouver for the entire month of November, 2008. (RP-115) Kathleen made numerous phone calls to her mother after she returned home to Idaho on December 1, 2008. (RP-120 to 123, Exhibit-1) On February 8, 2009 Kathleen received a text message from Karen stating that she was not welcome at her mother's house and that she was not to call. (RP-124) Kathleen's subsequent telephone calls went unanswered and she enlisted the aid of one of Jacquelyn's elderly neighbors to check on Jacquelyn on March 13, 2009. (RP-124 to 125) Kathleen had no indication that her mother was angry with her. (RP-125)

Karen notified Kathleen of their mother's death after Jacquelyn passed away. (RP-126) Karen refused to let Kathleen participate in any of the funeral arrangements. (RP-127) Kathleen eventually viewed her mother's body three

days after her death after convincing the mortician that her sister was not an only child as Karen had told the mortician. (RP-128)

Kathleen was unable to enter her mother's house because Karen had changed the locks. When Karen answered the door she pushed Kathleen backwards and a heated argument ensued. (RP-129)

Kathleen became aware of the March 14, 2009 will on the day her mother died when Karen told her about it. (RP-133)

Karen denied that she told the funeral home that Kathleen could not see their mother. (RP-150) Karen claims she sent Kathleen a text message asking if she wanted to talk to Jacqueline. (RP-152)

Raeann McGahuey and her family rented a home from Jacquelyn for four years just prior to her death. (RP-50) For the first three and a half years she and her husband would go deliver the rent to Jacquelyn and sit and visit with her for an hour to an hour and a half. (RP-51) Raeann indicated that Jacquelyn seemed to love both daughters and she seemed to be very proud of them. (RP-52) Jacquelyn never spoke negatively of Kathleen in her presence. (RP-52) Jacquelyn expressed concerns that Karen and Kathleen did not get along with each other. (RP-53)

Mark McGahuey testified that his wife stopped going with him to deliver the rent when Karen moved in with her mother. (RP-62) Jacquelyn expressed to him that she feared her daughters would fight after she passed away. (RP-63) He last saw Jacquelyn in early March, 2009 and noted that her health was progressively declining. (RP-64)

B. STATEMENT OF PROCEDURAL HISTORY

Kathleen file a petition to admit Jacquelyn's 1997 will to probate on April 10, 2009. (CP-1) On April 21, 2009 Karen filed a petition to invalidate, revoke or annul the 1997 will. (CP-21) At a hearing held on April 24, 2009 the Honorable John Wulle ordered restraint of all transfer or liquidation of any of Jacquelyn's assets owned prior to her death.(CP-51)

This matter went to trial before the Honorable Robert Harris on July 8, 2009. The court issued a Memorandum of Decision on July 16, 2009. (CP-55)The court entered findings of fact and conclusions of law on August 21,, 2009. (CP-59) From the entry of findings of fact conclusions of law and judgement, this appeal timely follows.

IV. ARGUMENT

A. STANDARD OF REVIEW

After a full evidentiary trial, the reviewing court limits itself to reviewing the findings of fact to determine whether substantial evidence in the record supports the findings. Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). On review, the trial court's findings of fact will be upheld if substantial evidence in the record supports them. In re Estate of Kessler, 95 Wn. App. 358, 369, 977 P.2d 591 (1999).

"Substantial evidence' exists when there is a sufficient quantum of proof to support the trial court's findings of fact.' Organization to Preserve Agr. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996) (citation omitted).

B. JACQUELYN LACKED THE REQUISITE TESTAMENTARY CAPACITY TO EXECUTE A VALID WILL ON MARCH 14, 2009.

RCW 11.12.010 requires that a person be of sound mind to devise her estate by will. Testamentary capacity is a factual determination made by the trial court. In re Estate of Kessler, supra. Testamentary capacity requires that the testator have sufficient mind and memory to understand the transaction in which she is then engaged, that the testator be able to comprehend generally the nature and extent of the property which constitutes her estate and of which she is contemplating disposition, and that she be able to recollect the objects of her bounty. In re Estate of Kessler, supra at 371.

The trial court found:

8. Ms. Cameron, a long-time employee of Miles & Miles, sat with decedent and discussed the terms of the Will and the Warranty Deed with her, which were executed at the same time. Ms. Cameron reviewed the Will page-by-page with the decedent determining it to be as decedent requested.

...

12. That Jacquelyn Bussler in executing her Last Will and Testament as referenced above and based upon the testimony of witnesses and despite ill health, the court gave great weight to the time that went into explanation of the second Will and that decedent did understand her testamentary act.

14. The Court finds the Will of decedent signed on March 14, 2009 shall be considered the Last Will and Testament to be accepted for probate.

(CP-59)

These findings appear to be based on the testimony of Marlis Cameron, a legal assistant employed by attorney William Miles. (RP-37 to 38) Karen contacted Cameron's firm to arrange for the preparation of a new will and deed. (RP-41 to 42) Cameron met Jacquelyn for the first time the day she went to Jacquelyn's home to serve as notary for the execution of the will. (RP-42) Cameron had minimal conversation with Jacquelyn and Cameron tried to expedite the signing of the will because Jacquelyn was ill. (RP-44 to 45)

Cameron observed Jacquelyn was wheelchair bound and appeared to have lost most of her hair from some type of treatment. (RP-45) Cameron did not know if Jacquelyn was on any medication. (RP-46) Cameron asked Jacquelyn if everything was typed how she wanted it and if she wanted to sign the document. (RP-39) Both Karen and Cameron assisted Jackie in pointing out where she needed to sign. (RP-40) No witnesses were present when Cameron had Jacquelyn initial and date places on the will. (RP-44) Cameron estimated she spent approximately an hour with Jacquelyn prior to the signing of the will. (RP-47) During that time Cameron believed Jacquelyn was listening to her and alert. (RP-47)

Nothing in Cameron's testimony seems to indicate she had anything more than "yes" or "no" answers to her questions, nor does it appear that Cameron engaged in any conversation with Jacquelyn.

Jacquelyn signed the will and warranty deed on March 14, 2009, a mere eight days before her death from COPD. (Exhibits-6,10, and 20)

In Finding of Fact Number 13 wherein the court found:

13. The court could not find the use of Durable Power of Attorney as evidence of decedent's lack of cognitive ability to manage her own affairs as grounds to set aside the Will decedent signed on March 14, 2009. (CP-59)

Karen began using the Durable Power of Attorney to execute documents in December, 2008 and continued through March 11, 2009. (RP-74 to 90) Although she denies that her mother was incompetent, she does not explain what physical disability prevented her mother from executing these documents. (RP-99)

While hospitalized in early February, 2009 the chart notes indicate that Jacquelyn's cognitive function was impaired in that she could not name the current or past presidents; she could come up with the correct year, but she did not know the current month; that her calculations were mildly impaired and her memory was grossly impaired. (Exhibit-7)

Although Jacquelyn started receiving hospice care well before the execution of the new will on March 14, 2009, the trial court found:

5. After reviewing the exhibits presented to the court at trial, it found it was clear from on or about 19th of March the decedent would not have much longer to live. (CP-59)

The evidence admitted at trial indicates that Jacquelyn's condition deteriorated much earlier and that her death was imminent. The hospice medical records admitted at trial indicate that Jacquelyn began receiving hospice care 11 days before her death. (Exhibit-11)

The hospice records indicate that when Jacquelyn was admitted to the emergency room on March 9, 2009 she had been admitted three times within one week to the emergency department. (Exhibit-7) At that time she was near syncope and hypertensive. (Exhibit-7) On March 12, 2009, the hospice provider characterizes Jacquelyn as forgetful and lethargic. (Exhibit-7)

When hospice came in and started providing care on March 11, 2009 Jacquelyn was taking two different narcotics, including twice daily doses of morphine; two different psycho stimulants and antidepressants. (Exhibit-7)

Davison and Karen both testified that Jacquelyn took a significant fall on March 15, 2009 and Jacquelyn had fallen on March 8, 2009 and March 12, 2009. (RP-115) The chart notes indicated that Jacquelyn was forgetful, experiencing fatigue on March 16, 2009 (Exhibit-7) and demonstrating poor vision on March 15, 2009. (Exhibit-7) The care giver noted in a March 11, 2009 chart note that Jacquelyn had declined rapidly, had no endurance and that she had napped for half of the hospice worker's visit. (Exhibit-7)

The hospice chart notes indicate that Jacquelyn was unable to verbalize on March 19, 2009. (Exhibit-7)

Although testamentary capacity is determined as of the time the will is made, evidence relating to the testator's mental condition during a reasonable

time before and after the making of the will is relevant and admissible even if remoteness affects its weight. See In re Estate of Gwinn, 36 Wn.2d 583, 591, 219 P.2d 591 (1950).

"[A] a radical departure from a prior testamentary scheme supports an inference that the later will is the product of an unsound mind." Kessler, supra at 372, see also In re Estate of Landgren, 189 Wn. 33, 38, 63 P.2d 438 (1936) ("In considering testamentary capacity at any particular date, it is proper to consider the previously expressed wish of the alleged testator.")

The medical evidence presented at trial and outlined above, together with the lack of conversation between Cameron and Jacquelyn at the time she reviewed the documents, the radical effect of the new will disinheriting Kathleen clearly establish that the trial court's Findings of Fact as identified herein lack substantial evidence in the record to support them. In re Estate of Kessler, supra at 369. Jacquelyn lacked the necessary testamentary capacity to execute a valid will on March 14, 2009 and the trial court should not have admitted that will to probate.

C. THE MARCH 14, 2009 WILL AND DEED ARE THE PRODUCT OF UNDUE INFLUENCE.

A will is the product of undue influence when a party interferes with the testator's free will, preventing the testator from exercising his own judgment and choice. In re Estate of Smith, 68 Wn.2d 145, 153, 411 P.2d 879 (1966). The March 14, 2009 will may be set aside upon a showing that Karen exercised undue influence over Jacquelyn.

Kathleen bore the burden of proving the invalidity of the March 15, 2009 will by clear, cogent, and convincing evidence. In re Estate of Reilly, 78 Wn.2d 623, 649, 479 P.2d 1 (1970)

To meet the clear, cogent and convincing standard, the ultimate fact in issue must be shown by the evidence to be "highly probable". In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973)

The influence must something that "at the time of the testamentary act, controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice. . . . influence tantamount to force or fear which destroys the testator's free agency and constrains him to do what is against his will." In re Estate of Bottger, 14 Wn.2d 676, 700, 129 P.2d 518 (1942)

The factors to be considered in determining whether undue influence was exerted were set forth in Dean v. Jordan, 194 Wn. 661, 672, 79 P.2d 331 (1938):

The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other

considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will.

The evidence in the case at bar overwhelmingly supports a finding of undue influence.

In Finding of Fact Number 14, trial court found:

The Court finds the Will of the decedent signed on March 14, 2009 is the valid and Last Will and Testament to be accepted for probate. (CP-59)

No specific findings were made as to undue influence, though Karen's trial counsel both briefed and argued the issue at hearing. (RP-163 to 168) Based on the findings of fact entered, the trial court entered Conclusions of Law 1 and 2:

1. The Last Will and Testament of Jacquelyn Bussler signed on March 14, 2009 shall be considered the last Will of decedent to be used for probate in this cause of action.
2. Kathleen Bussler is not the Personal Representative of the estate of Jacquelyn Bussler. (CP-59)

None of the other Findings of Fact appear to specifically and directly address the undue influence claim. In Finding of Fact Number 11 the trial court indicated:

11. Using the Durable Power of Attorney, Karen Bussler transferred the real property to herself without authority and after receiving information that the transfer would not be beneficial to her mother, transferred the property back to decedent. Karen and her significant other had been residing with decedent caring for her for a period of time until her death. The demands of personal care increased after Christmas as decedent fell repeatedly, was not eating, needed constant care, needed assistance in walking and was wheelchair bound the last several weeks of her life. (CP-59)

While Kathleen challenges the motivations for transferring the property and in fact the trial judge indicated in his Memorandum of Decision referred to the use of the Durable Power of Attorney to transfer the property as "exhibiting some signs of greed." (CP-60), this finding establishes that Jacquelyn was in extremely poor health in the weeks prior to her death and dependent on Karen for care, thus vulnerable and susceptible to the exertion of undue influence by Karen to change her will.

Jacquelyn relied on Karen for care after Karen moved in to Jacquelyn's residence in April, 2008. (RP-82) She served as Jacquelyn's primary care giver and was paid by DSHS for providing Jacquelyn's care. (RP-84) Jacquelyn executed a Durable Power of Attorney in December 7, 2003 appointing Karen Jacquelyn's attorney in fact upon Jacquelyn becoming incompetent or disabled. (RP-74, Exhibit-17) While Karen argued that her mother was not incompetent (RP-99), there was no evidence of a physical disability that would require Karen to execute documents under the Durable Power of Attorney.

On December 12, 2008 Karen prepared a quitclaim deed transferring Jacquelyn's residence to her and signed it herself pursuant to the power of attorney. (RP-76, Exhibit-4) Karen signed an election for hospice services, a Medicare form, and a physician order for life sustaining treatment utilizing the power of attorney on March 11, 2009. (RP-79, Exhibit-10) Karen contacted attorney William Miles to prepare a new will for her mother. (RP-89 to 90) The new will changed greatly benefitted Karen by making her Jacquelyn's Personal Representative and completely disinheriting Kathleen.

(Exhibits- 18 and 20) This evidence in the record strongly supports Karen's undue influence claim.

Additionally, the evidence cited in Section B of this brief, supra regarding Jacquelyn's mental and physical health during the months leading up to her death further confirm her dependence on Karen and Jacquelyn's susceptibility to undue influence due to her dependence and isolation and the trust she placed in Karen.

Kathleen also challenges Findings of Fact Numbers 9 and 10, wherein the court found:

9. The medical records that were filed with the court indicated in February that decedent's cognitive abilities were "mildly impaired". On the Cognistat test, it indicated decedent was incorrect on the month and unable to indicate the current and immediate past presidents. Hospice records would indicate that decedent was alert to time, place and person. The records also pointed out family discord and it could raise emotional issues.

10. Records indicated decedent was also estranged from her daughter, Kathleen Bussler as [sic] various times. At other times it would seem Kathleen was alienated from her mother, they would then reconcile and then decedent become alienated again from Kathleen. Prior to Christmas 2008 it was observed decedent established a reasonable relationship when Kathleen visited from Hayden Lake, Idaho. (CP-59)

Kathleen testified that she had a close loving relationship with her mother., maintaining telephonic contact at least one time per week. (RP-114) After her mothers condition deteriorated on December,2008 she would have telephone contact with her mother every few days. (RP-115) Kathleen visited with her mother in Vancouver for the entire month of November, 2008. (RP-115) Kathleen made numerous phone calls to her mother after she returned home to Idaho on December 1, 2008. (RP-120 to 123, Exhibit-1) On February 8, 2009

Kathleen received a text message from Karen stating that she was not welcome at her mother's house and that she was not to call. (RP-124) Kathleen subsequent telephone calls went unanswered and she enlisted the aid of one Jacquelyn's elderly neighbors to check on Jacquelyn on March 13, 2009. (RP-124 to 125) Kathleen had no indication that her mother was angry with her. (RP-125)

Karen notified Kathleen of their mother's death after Jacquelyn passed away. (RP-126) Karen refused to let Kathleen participate in any of the funeral arrangements. (RP-127) Kathleen eventually viewed her mother's body three days after her death after convincing the mortician that her sister was not an only child as Karen had told the mortician. (RP-128)

Kathleen was unable to enter her mother's house because Karen had changed the locks. When Karen answered the door she pushed Kathleen backwards and a heated argument ensued. (RP-129)

Kathleen became aware of the March 14, 2009 will on the day her mother died when Karen told her about it. (RP-133)

Karen denied that she told the funeral home that Kathleen could not see their mother. (RP-150) Karen claims she sent Kathleen a text message asking if she wanted to talk to Jacqueline. (RP-152) Karen never denied cutting her sister off from contact with her mother.

The hospice records contain a reference to there being some discord between Jacquelyn and Kathleen, but fail to identify who made the reference. (Exhibit-11)

Raeann McGahuey and her family rented a home from Jacquelyn for four years just prior to her death. (RP-50) For the first three and a half years she and her husband would go deliver the rent to Jacquelyn and sit and visit with her for an hour to an hour and a half. (RP-51) Raeann indicated that Jacquelyn seemed to love both daughters and she seemed to be very proud of them. (RP-52) Jacquelyn never spoke negatively of Kathleen in her presence. (RP-52) Jacquelyn expressed concerns that Karen and Kathleen did not get along with each other. (RP-53)

Mark McGahuey testified that his wife stopped going with him to deliver the rent when Karen moved in with her mother. (RP-62) Jacquelyn expressed to him that she feared her daughters would fight after she passed away. (RP-63) He last saw Jacquelyn in early March, 2009 and noted that her health was progressively declining. (RP-64)

In Estate of Lint, 135 Wn.2d 518, 537, 957 P.2d 755 (1998) the Supreme Court upheld the trial court's finding of undue influence. The factors it considered included the near-constant presence of the person alleged to have unduly influenced the testator, the exclusion of friends and family, and the fact that the individual in question enlisted the assistance of a new attorney and fired the testator's prior estate-planning attorney. In re Estate of Lint, supra at 537 All of these factors are present in the case at bar.

All of the factors set forth in Dean v. Jordan, supra are present in the case at bar. As Jacquelyn's daughter, caregiver and holder of her Durable Power of Attorney, Karen held a fiduciary relationship to Jacquelyn. (RP-74 to 90) Karen

actively participated in the procurement of the will by arranging for the preparation of the new will and actively procured the witnesses to the execution of the will. (RP-90 and 44) Karen received an unnaturally large portion of the estate in that the March 14, 2009 made her the sole beneficiary. (Exhibits-18 and 20) Additionally, Jacquelyn was in frail mental and physical health and taking substantial medications as outlined above and Karen actively isolated Jacquelyn from Kathleen. The March 14, 2009 will was clearly a product of undue influence and the trial court erred in finding it valid. (CP-59)

D. ATTORNEY FEES

Pursuant to RCW 11.24.050, the Appellant requests an award of reasonable attorney fees for pursuing this appeal.

V. CONCLUSION

For the reasons stated above, the Appellant respectfully requests that the court reverse the findings of the trial court and order the 1997 Will and 2000 Codicil be admitted to probate in this matter.

Respectfully submitted this 30th day of January, 2010.



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Attorney for the Appellant

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7 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
8 DIVISION II

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10 KAREN ELIZABETH BUSSLER,

Petitioner,

11 vs.

12 The Estate of:

13 JACQUELYN BUSSLER,

14 Deceased.

No. 39804-4-II

Clark County Cause No. 09-4-00292-5

DECLARATION OF MAILING

15
16 I, Judy Adams declare:

17 That I am a citizen of the United States of America; that I am over the age of 21 years, not a
18 party to the above-entitled action and competent to be a witness therein; that on the 1st day of February,
19 2010 declarant deposited in the mails of the United States of America properly stamped and addressed
20 envelopes directed to the following named individuals, to-wit:

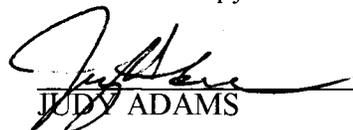
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27 said envelope containing a copy of this declaration and a copy of the APPELLANT'S BRIEF.
28


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