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I. RESPONSE TO CROSS ASSIGNMENT OF ERROR

RCW 11.24.050 states:

If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.

The appellate court will not interfere with a trial court's fee determination unless "there are facts and circumstances clearly showing an abuse of the trial court's discretion." In re Estate of Larson, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985) Karen has failed to prove an abuse of discretion.

Case law interprets the good faith and probable cause standard to mean that, a good faith presentation of a prima facie case precludes the award of attorney fees in a will contest. See In re Estate of Chapman, 133 Wash. 318, 322, 233 P. 657 (1925); In re Estate of Kessler, 95 Wn. App. 358, 370, 977 P.2d 591 (1999). When it appears that a petitioner acts with probable cause and in good faith in contesting the will, the trial court lacks the discretion to award attorney fees to the opposing party. See In re Estate of Starkel, 134 Wn. App. 364, 375, 134 P.3d 1197 (2006).

II. CONCLUSION

Karen fails to establish that Kathleen acted in bad faith or that she failed to establish a prima facie case. The Washington Supreme Court held that

where a case involves a close question of fact, "it clearly should not fall within [RCW 11.24.050]." In re Estate of Hastings, 4 Wn. App. 649, 653, 484 P.2d 442 (1971). The trial court should have awarded attorney fees against Karen pursuant to the statute and the arguments contained within Kathleen's brief.

This court should grant all relief requested by Kathleen in this appeal.

Respectfully submitted this 7th day of June, 2010.



SUZAN L. CLARK, WSBA #17476
Attorney for the Appellant

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STATE OF WASHINGTON

BY _____
CLERK

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

KAREN ELIZABETH BUSSLER,

No. 39804-4-II

Petitioner,

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

vs.

DECLARATION OF MAILING

The Estate of:

JACQUELYN BUSSLER,

Deceased.

I, Judy Adams declare:

That I am a citizen of the United States of America; that I am over the age of 21 years, not a party to the above-entitled action and competent to be a witness therein; that on the 7th day of June, 2010 declarant deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the following named individuals, to-wit:

Mr. David Ponzoha
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Ms. Kathleen Bussler
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said envelope containing a copy of this declaration and a copy of the APPELLANT'S BRIEF RESPONDING TO CROSS APPEAL.



JUDY ADAMS

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