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Division II
State of Washington
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NO. 52402-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RUDOLPH WACKER,

Appellant,

v.

KAREN WACKER and JOHN WACKER,

Respondents.

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

This case presents a simple and settled question of whether an intestate heir, in his individual capacity, has standing to assert claims that, by statute, belong to the personal representative of a decedent's estate. Appellant Rudolf Wacker ("Appellant") is not and has never been the personal representative of decedent Herta Williams's ("Herta")¹ Estate. Appellant sued Respondents² in his individual capacity as intestate heir of Herta's Estate alleging breach of fiduciary duties, fraud, and other claims to recover the value of certain Estate property, including the value of real property. By statute, these claims belong to the Personal Representative of Herta's Estate. Respondents successfully moved for dismissal of Appellant's claims, arguing that he lacked standing and dismissal was appropriate under CR 12(b)(6) and CR 12(b)(1). Respondents ask that this Court hold that Appellant lacked standing to assert these claims in his individual capacity as intestate beneficiary and affirm the trial court's Order Granting Dismissal.

¹ For clarity, this brief refers to the parties by their first names and intends no disrespect.

² Only Respondents Karen Wacker and John Wacker are before this Court as Appellant did not serve Richard Wacker during the pendency of the case. *See* Supplemental Clerk's Papers ("Supp. CP") at 70.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. When this Court's review is de novo and the record is sufficient to review the assigned error, may the Court overlook the Appellant's failure to perfect his record and consider the issue on appeal?

Yes.

2. A party who is not the personal representative lacks standing to bring claims against a power of attorney for actions taken while serving as power of attorney. Should this Court hold that Appellant failed to state a claim on which relief may be granted where Appellant is not the Personal Representative of Herta's Estate and has sued based on actions taken under a power of attorney and to recover Estate assets in his individual capacity?

Yes.

III. FACTS

Decedent Herta was the mother of Appellant Rudolf Wacker and grandmother of John Wacker and Richard Wacker, Appellant's sons.³ On September 26, 2014, Herta executed a Durable Power of Attorney ("DPOA") in favor of Karen Wacker, John's then-wife, and Richard.⁴ On April 15, 2015, Karen executed on behalf of Herta a Transfer on Death Deed ("Deed").⁵

³ Clerk's Papers ("CP") at 2.

⁴ CP at 3.

⁵ CP at 2.

Herta passed away in Arizona on September 9, 2016.⁶ On October 19, 2017, Appellant sued Karen, John, and Richard in his individual capacity alleging that the Deed was a gift not authorized by the DPOA and thus a breach of trust by Karen.⁷ Appellant also alleged that Defendants committed fraud.⁸ Appellant served only Karen Wacker and John Wacker during the pendency of the lawsuit.⁹

Respondents filed a Motion to Dismiss pursuant to CR 12(b)(1) and CR 12(b)(6), arguing that Appellant lacked standing to bring his claims because he was not the Personal Representative of Herta's Estate,¹⁰ and he was alleging claims based on actions taken under a DPOA and to recover Estate assets.¹¹ Appellant submitted a response brief, but did not include any sworn declaration by Appellant or his counsel, nor did he submit any admissible evidence to provide facts to the Court outside the Complaint.¹² Appellant provided three "exhibits" to his Response, the DPOA, the Deed, and a printout of an unpublished appellate case.¹³ Appellant admitted that his claims needed

⁶ CP at 3.

⁷ CP at 3.

⁸ CP at 3.

⁹ Supp. CP at 70.

¹⁰ It is believed that due to Appellant's criminal history, he is not eligible to serve as Personal Representative. RCW 11.36.010(1).

¹¹ CP at 12 – 17.

¹² CP at 18 – 37.

¹³ CP at 23 – 37. To the extent that Appellant continues to argue facts related to any probate that may have been opened, Respondents ask that this Court disregard and strike such evidence as not properly admissible.

to be brought by the Personal Representative of Herta's Estate and that he was not the Personal Representative.¹⁴

The trial court granted Respondents' Motion to Dismiss.¹⁵ Appellant filed a Motion for Reconsideration, attaching new inadmissible evidence, again unsupported by declaration and without explanation for why they could not have been provided with Appellant's Response.¹⁶ Appellant's Motion for Reconsideration was not considered because he failed to confirm the motion as required by local court rule.¹⁷

Appellant appealed.¹⁸

IV. ANALYSIS

Appellant failed to preserve his assigned error by not offering reasoned argument or citation to authority and his assignments of error have been waived. If the Court reaches Appellant's arguments, the trial court did not err in dismissing Appellant's claims as Appellant lacks standing to assert the claims he has alleged against Respondents.

¹⁴ CP at 20 ("Under RCW 11.48.010 only the personal representative has the power to prosecute actions on behalf of the estate").

¹⁵ CP at 42 – 43. Appellant has failed to provide a verbatim report of proceedings for this hearing.

¹⁶ CP at 44 – 62.

¹⁷ CP at 44 – 62; PCLR 7(a)(9).

¹⁸ CP at 63.

A. Standard of Review.

Civil Rule 12(b)(6) permits dismissal for “failure to state a claim upon which relief can be granted.”¹⁹ A party has “failed to state a claim” when there is no possible set of facts that could be established to support the allegations in the complaint.²⁰ A court must grant a motion to dismiss under CR 12(b)(6) when, presuming all facts in the complaint to be true, there is no set of facts that would justify recovery.²¹ Civil Rule 12(b)(1) motion to dismiss challenges the court’s subject matter jurisdiction over the case. Without subject matter jurisdiction, a court may do nothing other than enter an order of dismissal.²² Once challenged, the party asserting subject matter jurisdiction bears the burden of proof on its existence.²³ The Court of Appeals reviews de novo an order of dismissal under CR 12(b)(6) and CR 12(b)(1).²⁴

B. Appellant waived Assignment of Error No. 1, failed to perfect his record, and has waived Assignment of Error No. 1.

In Assignment of Error No. 1, Appellant argues that the trial court erroneously gave no reason for its Order Granting Dismissal.²⁵ However,

¹⁹ CR 12(b)(6).

²⁰ *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978).

²¹ *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717, 189 P.3d 168 (2008).

²² *Inland Foundry Co., Inc. v. Spokane Cnty. Air Pollution Control Auth.*, 98 Wn. App. 121, 123 – 24, 989 P.2d 102 (1999).

²³ *Outsource Svcs. Mgmt., LLC v. Nooksack Business Corp.*, 172 Wn. App. 799, 807, 292 P.3d 147 (2013).

²⁴ *Berst v. Snohomish Cnty.*, 114 Wn. App. 245, 257, 57 P.3d 273 (2002); *In re Estate of Peterson*, 102 Wn. App. 456, 462, 9 P.3d 845 (2000), *rev. denied*, 142 Wn.2d 1021 (2001).

²⁵ Appellant’s Brief at 2 – 3.

Appellant failed to provide any argument or authority for this assignment of error and has waived the argument.²⁶ Additionally, the trial court's oral ruling is not before this Court because Appellant incorrectly stated that there were no hearings to transcribe in this matter.²⁷ Appellant has the duty to perfect his record, including providing the Court with the records necessary to conduct its review.²⁸ This Court's review is de novo so the trial court's reasoning for granting the Motion to Dismiss is "superfluous"²⁹ and the record is sufficient for the Court to conduct review.³⁰ However, Appellant's failure to properly perfect the record should not also serve as a basis for overturning the trial court's Order. Should this Court hold that any error arises because of a lack of reasoning from the trial court in the record, this Court should hold that such error is Appellant's failing and affirm.³¹

²⁶ Appellant does not include any argument or authority that the trial court had to enter findings of fact or conclusions of law when granting a CR 12(b) motion that is reviewed de novo, and this Court should decline to reach this argument on this basis. RAP 10.3(a)(6); *West v. Thurston Cnty.*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration).

²⁷ See Spindle, Statement of Arrangements, dated March 26, 2019.

²⁸ RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012).

²⁹ *Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 884, 391 P.3d 582 (2017) ("Because de novo review [of an order granting a CR 12(b) motion to dismiss] is based on the complaint and hypothetical facts, findings of fact by the trial court are superfluous"). See also CR 52(a)(5)(b) (findings of fact and conclusions of law are not necessary on decisions under CR 12).

³⁰ *Sisouvanh*, 175 Wn.2d at 619 (holding that, among other remedies, the appellate court may "simply affirm the challenged decision if the incomplete record before [the court] is sufficient to support the decision").

³¹ *Sisouvanh*, 175 Wn.2d at 619 (holding that, among other remedies, the appellate court may "decline to address a claimed error when faced with a material omission in the record.").

C. Appellant lacked standing to bring the claims alleged in his Complaint and the trial court's order should be affirmed.

1. *Appellant waived Assignment of Error No. 2 by failing to provide argument or authority on the issue.*

In Assignment of Error No. 2, Appellant argues that the trial court erroneously granted the Motion to Dismiss because of conflict of interest John Wacker would have serving as Personal Representative of Herta's Estate in Arizona.³² However, Appellant failed to provide any argument, authority, or citation to the factual record for this assignment of error and has waived this argument.³³

2. *Appellant is not the Personal Representative of Herta's Estate and lacked standing to assert claims belonging to her Estate.*

If this Court reaches Appellant's second assignment of error, this Court should affirm the Order Granting Dismissal as Appellant lacked standing to bring claims that should have been brought by a Personal Representative of Herta's Estate. Appellant is not the Personal Representative of Herta's Estate and brought his claims in his individual capacity as an intestate heir. Appellant lacks standing, which rendered the trial court powerless to pass on the merits of the controversy before it, and the trial court properly dismissed his claims.

³² Appellant's Brief at 3 – 4.

³³ RAP 10.3(a)(5), (6); *West*, 168 Wn. App. at 187 (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration).

The general rule of standing requires that the plaintiff demonstrate an injury to a legally protected right.³⁴ To have standing, a party must show a real interest in the subject matter of the lawsuit, that is, a present, substantial interest, as distinguished from a mere expectancy, or future, contingent interest, and the party must show that a benefit will accrue it by the relief granted.³⁵ It is improper for a plaintiff lacking standing to assert the rights of other parties or nonparties; the plaintiff's claims fail on account of its lack of standing.³⁶ When a plaintiff lacks standing, the court is powerless to pass on the merits of the claims before it.³⁷

Actions involving claims belonging to a decedent must be brought by the decedent's personal representative:

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.³⁸

Additionally,

[i]f any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person,

³⁴ *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 176 n.2, 982 P.2d 1202 (1999).

³⁵ *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992).

³⁶ *Ullery v. Fulleton*, 162 Wn. App. 596, 604, 256 P.3d 406 (2011).

³⁷ *Ullery*, 162 Wn. App. at 604 – 605; *Postema v. Snohomish County*, 83 Wn. App. 574, 579, 922 P.2d 176 (1996); *Contra, DeWeese v. City of Port Townsend*, 39 Wn. App. 369, 372, 693 P.2d 726 (1984) (although the question of standing is substantive, it should nevertheless be addressed as jurisdictional in the interests of an orderly proceeding).

³⁸ RCW 11.48.010.

he or she shall stand chargeable, and be liable to the personal representative of the estate, in the value of the property so embezzled or alienated, together with any damage occasioned thereby, to be recovered for the benefit of the estate.

Finally, “[a]ctions for the recovery of any property or for the possession thereof, and all actions founded upon contracts, may be maintained by and against personal representatives in all cases in which the same might have been maintained by and against the respective testators and intestates.”³⁹

Estate beneficiaries lack standing to assert claims in their individual capacity against an attorney-in-fact because such claims belong to the estate and must be brought by the personal representative.⁴⁰ In *Young*, the estate’s heirs, who were not appointed personal representatives, brought claims for conversion and breach of fiduciary duty against their brother for actions taken while he served as attorney-in-fact for their mother. The heirs sued in their individual capacity as beneficiaries of the estate. The trial court dismissed their claims for lack of standing, finding that under Title 11 RCW, only the personal representative has standing to bring such claims. On appeal, the Court of Appeals noted that “[u]nder

³⁹ RCW 11.48.090.

⁴⁰ *Young v. Boatman*, 192 Wn. App. 1034, 2016 WL 513293 (2016). Pursuant to GR 14.1(a), unpublished Court of Appeals cases issued after March 1, 2013, may be cited as nonbinding authority if identified as such by the citing party, and may be accorded such persuasive value as the Court deems appropriate. A copy of *Young* is attached as **Appendix A** to this Respondents’ Brief.

RCW 11.48.010, only the personal representative has the authority to “maintain and prosecute” actions on behalf of the estate.”⁴¹ The Court also relied on RCW 11.48.060, holding it “also expressly gives the personal representative the right to bring an action against an attorney-in-fact for conversion.”⁴² “Accordingly, [the Court] affirm[ed] the determination that the beneficiaries do not have standing to bring claims against [the defendant] for breach of fiduciary duty and conversion while acting as the attorney-in-fact.”⁴³

Here, as in *Young*, Appellant is not the Personal Representative of Herta’s Estate and has sued in his individual capacity as an intestate heir. Appellant’s claims relating to actions taken under the DPOA lies with Herta’s Personal Representative,⁴⁴ not Appellant in his individual capacity. The same is true for his claim to recover the Estate’s alleged property or the value thereof.⁴⁵

In Appellant’s Assignment of Error No. 2, he suggests without argument or authority that it was error to grant the Motion to Dismiss because a conflict of interest existed as to John’s alleged appointment as

⁴¹ *Young v. Boatman*, 192 Wn. App. 1034, 2016 WL 513293 (2016).

⁴² *Young v. Boatman*, 192 Wn. App. 1034, 2016 WL 513293 (2016).

⁴³ *Young v. Boatman*, 192 Wn. App. 1034, 2016 WL 513293 (2016).

⁴⁴ RCW 11.48.010.

⁴⁵ RCW 11.48.090.

Personal Representative of Herta's Estate in Arizona.⁴⁶ In *Young*, the trial court had denied the beneficiaries' motion to remove the personal representative, who was also the defendant in their lawsuit, due to a conflict of interest.⁴⁷ The Court of Appeals held that (1) there was an undisputed conflict of interest, and (2) the trial court erred in dismissing the petition to remove the personal representative for purposes of investigating and determining whether to bring an action for breach of fiduciary duty on behalf of the estate.⁴⁸

Unlike the beneficiaries in *Young*, Appellant made no motion to remove the Personal Representative. Additionally, no party opened probate for Herta's Estate in Washington, and no party is before the Court in a representative capacity. The *Young* court's analysis on conflict of interest is therefore inapplicable.

Furthermore, any alleged conflict of interest to serve as personal representative of an estate opened in a different state has no bearing on whether Appellant has standing to bring his claims. The *Young* court's analysis of whether the beneficiaries had standing was independent of its

⁴⁶ Appellant's Brief at 2 – 3. Appellant fails to support this argument with citation to authority, and his argument should not be considered. RAP 10.3(a)(6); *West*, 168 Wn. App. at 187 (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration). Additionally, this argument relies on inadmissible evidence and provides no citation to the record. RAP 10.3(a)(3)(5).

⁴⁷ *Young v. Boatman*, 192 Wn. App. 1034, 2016 WL 513293 (2016).

⁴⁸ *Young v. Boatman*, 192 Wn. App. 1034, 2016 WL 513293 (2016).

analysis of the beneficiaries' standing to petition to remove the personal representative. While the *Young* beneficiaries lacked standing to bring claims on behalf of the estate, they had standing to petition for the personal representative's removal. Appellant made no motion to remove the personal representative, so the *Young* court's analysis is not applicable. Again, there could not be such a motion as there is no probate and no Personal Representative before this Court.⁴⁹ Respondents are before the Court as individuals who have objected to Appellant's individual assertion of claims that belong to Herta's Estate. Moreover, to the extent Appellant has objections about any probate that might be administered in Arizona, this Court has no jurisdiction over that probate.⁵⁰

Respondents ask that this Court hold that Appellant lacks standing and affirm the trial court's Order Granting Dismissal.

Appellant argues that the trial court should not have granted dismissal because his Complaint alleged sufficient facts to demonstrate a *prima facie* case of fraud.⁵¹ This argument misapprehends the basis for

⁴⁹ There was no evidence before the trial court that John was appointed as Personal Representative in Arizona and the document attached to the unconsidered Motion for Reconsideration is inadmissible. CP at 60 – 62. Respondents ask that this Court strike and disregard the unsworn, inadmissible document.

⁵⁰ ARS 14-1302 (granting Arizona courts subject matter jurisdiction over estates of decedents); WASH. CONST., art. IV, § 6 (“The superior court shall [] have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court”).

⁵¹ Appellant's Brief at 4 – 5 (citing *Collins v. Lomas & Nettleton Co.*, 29 Wn. App. 415, 628 P.2d 853 (1981); *Bravo v. Dolson Co.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995)).

Respondents' Motion to Dismiss. *Collins* is cited for the proposition that “[m]otions to dismiss pursuant to CR 12(b)(6) are sparingly granted; it must appear beyond doubt that the plaintiffs can prove no set of facts consistent with the complaint which would entitle them to relief.”⁵² *Bravo* is cited for the proposition that the court must consider “any hypothetical situation conceivably raised by the complaint defeats a CR 12(b)(6) motion if it is legally sufficient to support plaintiff’s claim.”⁵³ This authority is not relevant to the issues before this Court. Respondents did not allege that Appellant failed to establish a prima facie case of fraud or any other claim. Rather, Respondents successfully argued that Appellant lacked standing to bring the claims alleged because he was not the Personal Representative of Herta’s Estate and the claims he alleged could be brought only by her Personal Representative. There is no hypothetical possible where Appellant had standing to bring the claims he alleged in his personal capacity and because Appellant lacked standing,⁵⁴ the trial court could not reach his substantive claims.⁵⁵

This argument is the only argument for which Appellant offers argument and citation to authority and is, therefore, the only issue that this Court should reach. RAP 10.3(a)(6).

⁵² *Collins*, 29 Wn. App. at 419.

⁵³ Appellant’s Brief at 5 (citing *Bravo*, 125 Wn.2d at 750).

⁵⁴ It should be noted that even if the substantive claims were relevant to the Motion to Dismiss, Defendants, for purposes of the Motion only, treated as true the allegations in the Complaint as required by CR 12(b). CP at 13, n.4.

⁵⁵ *Ullery*, 162 Wn. App. at 604 – 605.

Finally, Appellant's reliance on RCW 11.84.900 is misplaced. That section applies to chapter 11.84 RCW, the Slayer Statute. Appellant has no claims under that statute.⁵⁶

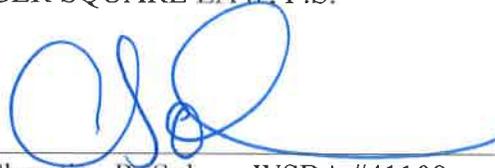
Respondents ask that this Court hold that Appellant lacked standing to assert the claims alleged in his Complaint and affirm the trial court's Order Granting Dismissal.

V. CONCLUSION

Respondents respectfully ask that this Court affirm the trial court's Order Granting Dismissal. Appellant is not the Personal Representative of Herta's Estate and lacks standing to assert the claims alleged in his Complaint, which can be brought only by her Personal Representative.

RESPECTFULLY SUBMITTED this 31st day of July, 2019.

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⁵⁶ CP at 1 – 3.

APPENDIX A

Young v. Boatman, Not Reported in P.3d (2016)

192 Wash App. 1034, 2016 WL 513293

192 Wash.App. 1034

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R.GEN GR 14.1

Court of Appeals of Washington,
Division 1.

Beverly YOUNG, Blake Boatman Bradley Boatman,
Brent Boatman, and William Boatman, Appellants,

v.

Brian BOATMAN, individually and as Attorney-
in Fact for Bojilina H. Boatman; and The
Estate of Bojilina H. Boatman, Respondents.

No. 72643-9-I.

|

Feb. 8, 2016.

Appeal from Whatcom County Superior Court; Hon. Michael
E. Rickert, J.

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Law Attorneys.

UNPUBLISHED OPINION

SCHENDLER, J.

*1 The beneficiaries of the Estate of Bojilina H. Boatman (Estate) appeal summary judgment dismissal of their Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, petition. Because only the personal representative can bring a claim on behalf of the Estate for the actions of the attorney-in-fact for Bojilina, we affirm the determination that the beneficiaries do not have standing to bring a TEDRA action against the attorney-in-fact on behalf of the Estate for

breach of fiduciary duty and conversion. However, because the undisputed facts establish a conflict of interest, we reverse dismissal of the TEDRA petition to remove the personal representative. On remand, the court shall appoint an interim personal representative to determine whether to pursue a claim on behalf of the Estate against the attorney-in-fact for breach of fiduciary duty and conversion. Accordingly, we reverse in part, affirm in part, and remand.

FACTS

On October 3, 2005, Bojilina H. Boatman executed a will and a durable power of attorney. The power of attorney designates her son Brian Boatman as the attorney-in-fact. The power of attorney gives Brian¹ "the power to do all things with respect to the assets and liabilities ... as the principal could do if present and competent, including but not limited to the following:

- a. To make, amend, alter or revoke any of the principal's wills or codicils; and
- b. To make, amend, alter or revoke any of the principal's life insurance beneficiary designations; and
- c. To make, amend, alter or revoke any of the principal's employee benefit plan beneficiary designations; and
- d. To make, amend, alter or revoke any of the principal's trust agreements; and
- e. To make, amend, alter or revoke any of the principal's community property agreements; and
- f. To make gifts of any property owned by the principal; and
- g. To make transfers of any of the principal's property to any trust, whether or not the principal is a beneficiary thereof.
- h. To sell, transfer, convey, encumber, mortgage, lease, and purchase, any property, real or personal.

Further, the attorney-in-fact shall have the full power to provide for the support, maintenance and health of the incompetent principal, including provide informed consent for health care decisions on the principal's behalf.

The power of attorney states that it shall take effect upon receipt of a written statement by a doctor that Bojilina cannot "manage her property and affairs for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, or disappearance."

In her will, Bojilina leaves the majority of the Estate in equal shares to each of her six adult children: Bradley Boatman, Beverly Young, Brian Boatman, Brent Boatman, Blake Boatman, and William Boatman. Bojilina designates her son Brian as the personal representative of the Estate.

Bojilina started living with Brian in early 2007. Brian assumed primary responsibility for her care. On July 12, 2007, Dr. Carletta Vanderbilt diagnosed Bojilina with dementia and Alzheimer's disease. Dr. Vanderbilt signed a written statement that Bojilina is "incompetent to make decisions affecting health or financial issues." Under the terms of the durable power of attorney, Brian assumed responsibility as the attorney-in-fact for his mother. Brian acted as the attorney-in-fact for Bojilina from July 12, 2007 until she died on May 18, 2013.

*2 On June 7, 2013, the court admitted the will into probate and appointed Brian as the personal representative of the Estate with nonintervention powers and without bond.

On September 5, 2013, Brian filed an inventory of the Estate. The inventory identifies \$44,636.23 in probate assets and \$298,497.65 in nonprobate assets.

On December 20, 2013, Bradley Boatman, Beverly Young, Brent Boatman, Blake Boatman, and William Boatman (collectively the beneficiaries) filed a TEDRA petition against Brian "individually and as the Attorney-in Fact for Bojilina H. Boatman" and against "the Estate of Bojilina H. Boatman." The beneficiaries also served a request for production of financial documents.

The petition alleged Brian owed a fiduciary duty as attorney-in-fact to Bojilina "while she was alive." The petition alleged that "[w]hile Brian served as Decedent's attorney-in-fact, Decedent's resources dramatically dissipated, resulting in a loss of approximately \$555,000-\$575,000 in ultimate probate assets." The beneficiaries alleged that "without permission, justification, or authorization, Brian transferred substantial assets of Decedent to himself," and as a result, "Brian is liable to the Estate for all of Decedent's assets converted by him."

The beneficiaries alleged that as the personal representative of the Estate, "Brian owes a fiduciary duty to the Estate," and requested the court remove Brian as the personal representative, revoke "the Letters Testamentary," and appoint the "alternative representative as specified in the Will." The petition alleged, in pertinent part:

Petitioners are asserting claims personally against Brian for conversion, breach of fiduciary duties and for an accounting relating to and arising out of Brian's conduct as attorney-in-fact for Decedent, as well as seeking revocation of letter testamentary issued to Brian with respect to the Estate in the Probate.

The Estate and Brian filed an answer to the TEDRA petition. The answer asserts Brian "managed his mother's assets under a valid power of attorney which specifically allowed paying for her support, maintenance, and health as well as gifting." The answer also asserts Brian "did not improperly divert any of Bojilina's assets;" "all payments ... made from Bojilina's assets were authorized and reasonable;" and "Brian did not make himself a loan, so it was proper that no loan appeared on the inventory of the estate."

The answer asserts the Estate "only includes assets that existed as of the date of [Bojilina's] death, not for the seven years prior to her death." Brian asserts the duties he owed to Bojilina "as attorney-in-fact are different from the duties he owes the estate and his siblings as beneficiaries and do not directly continue and transfer from one to the other."

Brian denied he had a duty to provide an accounting or produce documents but states he had produced approximately 4,200 pages of financial records including bank statements, check registers, and receipts. The answer states, in pertinent part:

*3 During Bojilina's life, Petitioners did not make a demand for an accounting or file a petition under RCW 11.94.090 alleging that court

intervention was necessary. Petitioners did inquire about the general status of Bojilina's money on occasion when they requested that Brian give them gifts from her accounts. Although Brian denies any duty to do so, he has provided Petitioners with copies of check registers, bank statements and other important financial and care information regarding Bojilina.

Brian and the Estate asserted a number of affirmative defenses including failure to state a claim upon which relief can be granted, the beneficiaries "have suffered no damages in that they have or will have received all assets to which they have a right as beneficiaries of the Estate of Bojilina Boatman," and the beneficiaries "lack standing to assert the claims set forth in its Petition." The Estate and Brian asserted a counterclaim for attorney fees and costs.

After retaining separate counsel, Brian filed an amended answer "in his individual capacity." The answer incorporates by reference the previously filed answer.

Brian filed a CR 12(b)(6) motion to dismiss the TEDRA petition for failure to state a claim upon which relief can be granted. Brian argued that as the attorney-in-fact, he only owed a duty to Bojilina. Brian argued the beneficiaries did not have standing to bring claims on behalf of the Estate for breach of fiduciary duty or conversion against him as the attorney-in-fact and any alleged conversion of funds while acting as the attorney-in-fact was barred by the statute of limitations.

Petitioners are not the person or party whom any fiduciary duty was owed prior to Bojilina Boatman's death, and thus the establishment of her estate. Further, they are not representatives of the Estate. They are not the party in interest, they are not a representative of the party in interest, and have no standing to bring claims for breach of fiduciary duty or conversion prior to death.

The beneficiaries filed a response and declarations in opposition to the CR 12(b)(6) motion. The beneficiaries argued the financial records Brian produced showed he misappropriated \$428,864.27. The beneficiaries also argued the court should remove Brian as the personal representative of the Estate because he breached his fiduciary duty to the Estate by failing to pursue a claim for conversion.

At the beginning of the hearing on the CR 12(b)(6) motion to dismiss, the parties agreed the court should treat the motion as a motion for summary judgment.² The court stated the threshold question was standing. The court requested supplemental briefing on whether the beneficiaries had standing to pursue the claims against Brian as attorney-in-fact for breach of fiduciary duty and conversion on behalf of the Estate.

Just on that issue alone, I think we need to get through that and see Because if you're, if you get through the standing issue, then, yeah, you've got issues of fact everywhere, no question about that. I think [Brian's attorney] would agree with that.

²4 In supplemental briefing, the beneficiaries argued they had standing to assert claims on behalf of the Estate against Brian while acting as the attorney-in-fact from 2007 until Bojilina died in 2013. The beneficiaries also requested removal of Brian as the personal representative of the Estate for breach of fiduciary duty. Specifically, "for failing to take actions necessary to recover Estate assets appropriated" by Brian while acting as the attorney-in-fact.

Brian argued that as a matter of law, any claim against him as the attorney-in-fact belonged to Bojilina, and that after her death, only the personal representative had the statutory right to bring an action on behalf of the Estate against Brian as the attorney-in-fact.

The court dismissed the TEDRA petition. The court ruled the beneficiaries did not have standing to bring a TEDRA action on behalf of the Estate against Brian as the attorney-in-fact. The court ruled, "Petitioners have no standing to bring any action for damages on behalf of the Estate. Any such cause of action belongs, as a matter of law, to the Court appointed Personal Representative."

The court denied the request to remove Brian as the personal representative. The court ruled, "Petitioners have not

provided sufficient evidence to persuade this Court that Brian Boatman should be removed as the Personal Representative in this matter." The court dismissed the TEDRA petition for "Conversion, Breach of Fiduciary Duties, for an Accounting and Damages, and to Revoke Letters Testamentary."

The beneficiaries appeal. The Washington Academy of Elder Law Attorneys filed an amicus brief arguing the beneficiaries have standing under TEDRA. Brian filed a response brief. The Estate adopts the facts and arguments set forth in Brian's brief. The Estate filed a brief in response to the amicus.³

ANALYSIS

The beneficiaries challenge summary judgment dismissal of the TEDRA petition. The beneficiaries assert the court erred (1) in ruling they did not have standing to bring claims on behalf of the Estate to recover assets from Brian as the attorney-in-fact and (2) in denying their TEDRA petition to remove Brian as the personal representative of the Estate.

We review summary judgment dismissal de novo. *Korshund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Under CR 56(c), summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Standing is a threshold issue that we also review de novo. *In re Estate of Bocker*, 177 Wn.2d 242, 246, 298 P.3d 720 (2013). Where a party lacks standing, we refrain from reaching the merits of that claim. *Org. to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 896, 913 P.2d 793 (1996).

Whether the beneficiaries have standing under TEDRA to bring claims on behalf of the Estate against the attorney-in-fact is a question of statutory interpretation. We review questions of statutory interpretation de novo. *In re Estate of Haviland*, 177 Wn.2d 68, 75, 301 P.3d 31 (2013); *In re Estate of Stover*, 178 Wn.App. 550, 556, 315 P.3d 579 (2013).

³ When interpreting a statutory provision, our primary objective is to ascertain the intent of the legislature. *Haviland*, 177 Wn.2d at 75-76; *Stover*, 178 Wn.App. at 556. Where a statute is unambiguous, we give effect to the plain language of the statute as an expression of legislative intent. *Haviland*, 177 Wn.2d at 75-76; *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004). We discern the plain meaning of a statutory provision based on the meaning of the language, the context of the statute, related provisions, and the statutory

scheme as a whole. *Stover*, 178 Wn.App. at 556. An interpretation that reads language in isolation is too limited and fails to apply this rule. *Jongswind v. BNSF Ry.*, 174 Wn.2d 586, 595, 278 P.3d 157 (2012). We must "harmonize statutes pertaining to the subject matter and maintain the integrity of the statutes within the overall statutory scheme." *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004); see also *In re Estate of Evans*, 181 Wn.App. 436, 442-48, 326 P.3d 755 (2014) (we must harmonize TEDRA with related statutes).

The beneficiaries rely on RCW 11.96A.080 to argue they have standing to bring claims on behalf of the Estate against Brian as the attorney-in-fact for breach of fiduciary duty and conversion.⁴

RCW 11.96A.080(1) states, in pertinent part, "[A]ny party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter, as defined by RCW 11.96A.030."

RCW 11.96A.030 states, "The definitions in this section apply throughout this chapter unless the context clearly requires otherwise." The definition of a "party" includes a beneficiary. RCW 11.96 A.030(5) defines a "party" as "each of the following persons who has an interest in the subject of the particular proceeding ... (e) A beneficiary."

Although the definition of "matter" does not include the right of the beneficiaries to bring an action on behalf of the Estate, RCW 11.96A.030(2) broadly defines "matter." Former RCW 11.96A.030(2) states, in pertinent part:

"Matter" includes any issue, question, or dispute involving:

- (a) The determination of any class of creditors, devisees, legatees, heirs, next of kin, or other persons interested in an estate, ... nonprobate asset, or with respect to any other asset or property interest passing at death;
- (b) The direction of a personal representative or trustee to do or to abstain from doing any act in a fiduciary capacity, [and]
- (c) The determination of any question arising in the administration of an estate ..., or with respect to any nonprobate asset, or with respect to any other asset or property interest passing at death, that may include, without limitation, questions relating to: ... (i) a change of personal representative or trustee; (ii) a change of the situs of a

trust; (iv) an accounting from a personal representative or trustee; or (v) the determination of fees for a personal representative or trustee.⁵

⁶ The purpose of TEDRA is "to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under Title 11 RCW." RCW 11.96A.010. TEDRA makes clear that it does not supersede other provisions in Title 11 RCW. RCW 11.96A.080(2) expressly states that the provisions of TEDRA "shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title, including without limitation those contained in chapter 11.20, 11.24, 11.28, 11.40, 11.42, or 11.56 RCW." See also *In re Estate of Kordon*, 157 Wn.2d 206, 212, 137 P.3d 16 (2006) (TEDRA does not supersede but instead shall supplement the other provisions of Title 11 RCW).

Under RCW 11.48.010, only the personal representative has the authority to "maintain and prosecute" actions on behalf of the estate. RCW 11.48.010 states, in pertinent part:

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.

RCW 11.48.060 also expressly gives the personal representative the right to bring an action against an attorney-in-fact for conversion. RCW 11.48.060 states:

If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he or she shall stand chargeable, and be liable to the

personal representative of the estate, in the value of the property so embezzled or alienated, together with any damage occasioned thereby, to be recovered for the benefit of the estate. (6)

The cases the beneficiaries cite, *Drain v. Wilson*, 117 Wash. 34, 200 P. 581 (1921), and *In re the Estate of Wheeler*, 71 Wn.2d 789, 431 P.2d 608 (1967), are inapposite. Neither *Drain* nor *Wheeler* address whether beneficiaries have standing to bring an action on behalf of an estate against an attorney-in-fact. In *Drain* and *Wheeler*, the court held that when an action augments a fund for the benefit of the beneficiaries under a will, attorney fees are warranted. *Drain*, 117 Wash. at 37-39; *Wheeler*, 71 Wn.2d at 796-98; see also *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 541-42, 585 P.2d 71 (1978).

The out-of-state cases relied on by the beneficiaries, *Siegel v. Novak*, 920 So.2d 89 (Fla. Dist. Ct. App. 2006), and *Priestly v. Priestly*, 949 S.W.2d 594 (Ky. 1997), interpret different statutory language and are inapposite. In *Siegel*, the Florida District Court of Appeals allowed beneficiaries of a revocable trust to pursue a claim against the trustee for improper distributions from the trust that occurred during the settlor's lifetime. *Siegel*, 920 So.2d at 96. In *Priestly*, the Kentucky Supreme Court interpreted a Kentucky statute to allow claims against the administrator of an estate for actions the administrator took before the decedent's death. *Priestly*, 949 S.W.2d at 597-98.

⁷ We hold that under the plain and unambiguous language of Title 11 RCW, only the personal representative has the authority to bring claims for breach of fiduciary duty and conversion on behalf of the Estate against Brian while acting as the attorney-in-fact. Accordingly, we affirm the determination that the beneficiaries do not have standing to bring claims against Brian for breach of fiduciary duty and conversion while acting as the attorney-in-fact.⁷

Next, the beneficiaries contend the court erred in denying their TEDRA petition to remove Brian as the personal representative of the Estate. The beneficiaries argue the conflict of interest between maximizing the Estate while trying to avoid personal liability "mandates Brian's removal as personal representative." Because the undisputed record establishes a conflict of interest, we hold the court erred

in dismissing the request to remove Brian as the personal representative for purposes of investigating and determining whether to bring claims against Brian as the attorney-in-fact for breach of fiduciary duty and conversion.

The personal representative owes the beneficiary of an estate a fiduciary duty to act in the best interest of the estate. *In re Estate of Larson*, 103 Wn.2d 517, 520-21, 694 P.2d 1051 (1985). “[A]n estate beneficiary can protect his or her interest in the estate by having the personal representative removed if the personal representative breaches a fiduciary duty to the estate” under RCW 11.68.070 and 11.28.250. *Trask v. Butler*, 123 Wn.2d 835, 843-44, 872 P.2d 1080 (1994). RCW 11.68.070 provides, in pertinent part:

If any personal representative who has been granted nonintervention powers fails to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, upon petition of ... any heir, devisee, [or] legatee, ... such petition being supported by affidavit which makes a prima facie showing of cause for removal or restriction of powers, ... and if ... it appears that said personal representative has not faithfully discharged said trust or is subject to removal for any reason specified in RCW 11.28.250 as now or hereafter amended, then, in the discretion of the court the powers of the personal representative may be restricted or the personal representative may be removed and a successor appointed.

RCW 11.28.250 provides:

Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his or her charge, or has

committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which to the court appears necessary, it shall have power and authority, after notice and hearing to revoke such letters. The manner of the notice and of the service of the same and of the time of hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such personal representative shall at once cease, and it shall be the duty of the court to immediately appoint some other personal representative, as in this title provided.

*8 Consistent with the provisions in RCW 11.68.070 and 11.28.250, the plain and unambiguous language of the TEDRA statute gives a beneficiary standing to file a petition to remove the personal representative. Specifically, a “beneficiary” has standing to “have a judicial proceeding” to determine “any question arising in the administration of an estate,” including questions relating to “a change of personal representative.” RCW 11.96A.030(5)(e), .080(1), .030(2)(c) (ii).

Because the undisputed record establishes a conflict of interest, the court erred in dismissing the TEDRA petition to remove Brian as the personal representative for purposes of investigating and determining whether to bring an action for breach of fiduciary duty and conversion on behalf of the Estate. On remand, the court shall appoint an interim personal representative to determine whether to pursue an action on behalf of the Estate against Brian as the attorney-in-fact for Bojilina from 2007 until her death in 2013. *See Jones*, 152 Wn.2d at 19.

We affirm in part, reverse in part, and remand.⁵

WE CONCUR: VERELLEN, and APPELWICK, JJ

All Citations

Not Reported in P.3d, 192 Wash.App. 1034, 2016 WL 513293

Footnotes

- 1 We use first names for purposes of clarity.
- 2 Because the court considered material outside the pleadings, a CR 12(b)(6) motion to dismiss is treated as motion for summary judgment under CR 56. *Sea-Pac Co. v. United Food & Commercial Workers Local Union 44*, 103 Wn 2d 800, 802, 699 P.2d 217 (1985).
- 3 In the reply brief, the beneficiaries move to strike the portions of the response brief that address the merits of the claims for breach of fiduciary duty and conversion. The beneficiaries argue the court did not reach the merits of the claims. Because the record establishes the court addressed only the threshold issue of standing, we do not consider the arguments on the merits. RAP 2.4(a).
- 4 In addition to arguing the beneficiaries have standing under TEDRA, the Washington Academy of Elder Law Attorneys argue the beneficiaries have standing under the slayer statute, chapter 11.84 RCW. The definition of "matter" under TEDRA includes claims under the slayer statute. RCW 11.96A.030(2)(e). However, because this argument is raised for the first time on appeal, we granted the motion to strike this argument.
- 5 The legislature amended RCW 11.96A.030(2)(c) in 2015 to add subsection (vi) to include the determination of any question relating to "the powers and duties of a statutory trust advisor or directed trustee of a directed trust under chapter 11.98A RCW." Laws of 2015, ch. 115, § 1.
- 6 RCW 4.20.046(1) also provides that "[a]ll causes of action by a person ... shall survive to the personal representative."
- 7 Accordingly, the court did not err in ruling the beneficiaries did not have standing to demand discovery or an accounting. Nonetheless, as noted, Brian produced approximately 4,200 pages of financial records and an accounting.
- 8 Both parties request attorney fees under RCW 11.96A.150(1) and RAP 18.1. We decline to award attorney fees.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 31st day of July 2019, at Tacoma, Washington.


Amy Jean Shackelford, PP, PLS
Legal Assistant to Chrystina R. Solum

LEDGER SQUARE LAW, P.S.

July 31, 2019 - 2:00 PM

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