

**FILED**

JAN 27 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

In the Matter of the Estate of:

MARIA PRIMIANI,

Deceased.

FRANK PRIMIANI,

Petitioner,

v.

ESTATE OF MARIA PRIMIANI,  
Deceased, and ANNA ILIAKIS as  
Personal Representative and ANNA and  
MICHAEL ILIAKIS,

Respondents.

Appeals Case No. 342000

Superior Court Case No. 15-4-00097-9

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**AMENDED APPELLANT'S REPLY**

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Appellant submits the following Brief in Reply to Response Brief.

Appellant reserves the right to amend and supplement this Brief pending resolution of the Motion to Strike Respondent's Brief

### **ENFORCEMENT OF NO CONTEST CLAUSE**

Appellant argues that the No Contest Clause in the Will, which gave Appellant a \$1.00 inheritance, could not be enforced without the Trial court finding bad faith and lack of probable cause. It is not disputed that the Trial court made no such findings with regard to the Motion to Dismiss Will Contest, within which the No Contest Clause was enforced.

Two separate motions were filed by Respondent. The Motion for Permanent Protective Order and Motion for Order Dismissing Will Contest and Enforcing No Contest Clause. (CP 77) The second Motion correctly argues that the No Contest Clause should be enforced only if the Court finds bad faith and lack of probable cause. (CP 88 line 14 to pg. 89 line 9) Respondent argues that Appellant presented no evidence relevant to undue influence, and that this, in itself constitutes bad faith and lack of probable cause. (Id.)

These evidentiary issues are discussed in Appellant's Brief and below, but nowhere does Respondent discuss the standard of proof required to show probable cause, a *prima facie* showing. If the contestant

makes a *prima facie* case that, if proven, would invalidate the Will, there is probable cause and good faith, *In re Riley's Estate*, 78 Wn.2d 623 (1970.)

The " requisite degree of proof necessary to establish a prima facie case ... is minimal and does not even need to rise to the level of a preponderance of the evidence." *Fulton v. State, Dept. of Social & Health Services*, 169 Wn.App. 137, (2012)

### **BAD FAITH AND PROBABLE CAUSE**

Counsel for Respondent veers toward intentional misrepresentation to the Court by repeating a number of times that the Trial court found bad faith regarding the Will Contest, under the heading of "The Court did not Err in Enforcing the No Contest Clause of the Will."

Respondent's Brief, page 16 - 20 he states: "The no contest or forfeiture clause is only enforceable and applicable when the Will Contest is brought in bad faith without probable cause"

The very next sentence states: "Bad faith by the Petitioner was found by the Court. In the Court's Order on Motions entered on March 10<sup>th</sup>, 2016, the Court made a specific finding of bad faith against Petitioner."

Only in the next sentence does counsel mention that the Court's finding had to do with obtaining "decedents records" and appeared in the

Court's "Temporary Protective Order" regarding the same medical records.

Mr. Stevens then argues, without authority, that a lack of evidence constituting 'probable cause' *in itself* amounts to bad faith, and therefore, even without findings by the Court, the enforcement of the no contest clause is correct.

The existence of evidence sufficient to establish probable cause, in effect an offer of proof, is ignored by Respondent. Fully examined in Appellant's Brief, the standard for probable cause and good faith is only a *prima facie* showing. If the contestant makes a *prima facie* case that, if proven, would invalidate the Will, there is probable cause and good faith.

Based on Washington law, the No Contest Provision contained in the Will, and the bringing of the Will Contest in bad faith, without any evidence supporting the Will Contest for Undue Influence, the Court properly and lawfully enforced the No Contest Clause. . ."

Respondent's Brief, page 19

This affirmatively argues that a Trial court may enforce a No Contest Clause 'properly and lawfully' without making findings of bad faith and lack of probable cause. There is no basis in current law for this argument nor a good faith argument for a change in current law. The proffered facts *were* however, sufficient, if proven, to establish a

presumption of undue influence, *prima facie*. *In re Estate of Kessler*, 95

Wn.App. 358, at 377 faith, *In re Riley's Estate*, 78 Wn.2d 623 (1970.)

Certain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. 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 the unnaturalness of the will[.] *In re Estate of Kessler*, 95 Wn.App. 358, 977 P.2d 591 (1999)

Counsel mainly argues that evidence of the decedent's treatment or state of mind at the time of the execution of the Will, including statements made before or after that execution, cannot be relevant to a claim of undue influence. The evidence described the decedent's belief in a pattern of mistreatment over many years and her misunderstanding of the effect of the Quit Claim Deed and the Will. This included the evidence related to the VNA social worker, Maureen Benson, which was excluded by the Protective Order.

In addition, the evidence was offered to prove the decedent's status as a vulnerable adult who had suffered financial exploitation under

the Vulnerable Adult Act and Inheritance Rights of Slayers and Abusers ( RCW 74.34, RCW 11.84, discussed fully in Appellant's Brief.

Then, "in the Alternative" Respondent concedes the lack of findings by asking this Court to remand so that the Trial court can make findings. (Respondent's Brief page 19) Also on page 19, Counsel states: "There are multiple findings of bad faith against Petitioner, however, the findings of bad faith are not expressly specific to the Will Contest." There, finally, is the truth stated clearly.

There are, however, findings 'expressly specific' to the Motion for Protective Order regarding medical records.

The Estate incurred expenses for filing and serving the Motion for Protection Order on behalf of the Estate. The Court granted a temporary order, but found at the hearing Frank Primiani had already received the medical records even after the PR's objection was known. The Court finds that the Motion for Attorney's fees should be granted based on bad faith on behalf of the contestant. The attorney for the PR made it known to Frank Primiani's attorney that the Estate was objecting and was noting it for a protective order. CP 186

The Court then expressly discussed the dismissal of the Will Contest, did not award attorney fees regarding that Motion and did not make any findings of bad faith. In the Court's Conclusion, she again makes the distinction and finds bad faith only regarding the protective order:

The Court finds bad faith in this case when the attorney moved forward to obtain the decedent's records even after objection was given by the estate. (CP 187)

The Trial court has made a fatal error of law. Not only does the Court not make the required findings, if she had found bad faith and lack of probable cause those findings would have failed because the burden of a *prima facie* showing had been met.

Although this Court may remand for findings, it can also decide that Appellant made sufficient *prima facie* showing to overcome any such findings. In that case, this Court should not remand but overturn the Trial court's Order enforcing the No Contest Clause.

#### **STANDING WAS NOT RELEVANT TO THE HEARING ON THE WILL CONTEST**

At the time of the hearings on the Motion for Protective Order, and the Dismissal of the Will Contest a cause of action for removal of the PR was included in the Petition (CP 1-4) However, the standard of proof required to maintain the Will Contest was only a *prima facie* showing. All claims were included in the Petition but any decision based on standing was premature. The cause of action under the Slayers and Abusers Statute RCW 11.24 is a stand-alone claim which incorporates the definitions of the financial exploitation of a vulnerable adult. That cause of action was

not dismissed and is still pending. Even on Summary Judgment regarding that cause of action, if brought, the standard of proof for the initial showing on all elements of the claim would be a *prima facie* showing. In addition however, a finding of a violation of these statutes would certainly be relevant to the removal of the PR *and* to the issue of undue influence. These in turn are relevant to the probable cause requirement of the No Contest decision.

Relative to the Standing issue, Defendant's Amended Response Brief states at Page 3:

“The Petitioner did not once request a hearing on the removal of the PR in this case (RP 42 - 24 - 25, 43:1) (sic)”

The cite to pages 42 and 43 of the VRP is the beginning of a discussion with the Judge about whether mediation *must* precede a hearing under TEDRA. TEDRA procedure allows a Notice of Mediation to be sent with or without a hearing being set. RCW 11.96A.300 states in pertinent part, as follows:

Any party may object to a notice of mediation under subsection (1)(a) of this section by filing a petition with the superior court and serving the petition on all parties or the parties' virtual representatives. The party objecting to notice of mediation under subsection (1)(a) of this section must file and serve the petition objecting to mediation no later than twenty days after receipt of the written notice of mediation. The petition may include a request for determination of matters subject to judicial resolution under

RCW 11.96A.080 through 11.96A.200, and may also request that the matters in issue be decided at the hearing.

(c) The hearing on the petition objecting to mediation must be heard no later than twenty days after the filing of that petition.

(d) The party objecting to mediation must give notice of the hearing to all other parties at least ten days before the hearing and must include a copy of the petition.

At the hearing, the court shall order that mediation proceed except for good cause shown. Such order shall not be subject to appeal or revision. If the court determines that the matter should not be subject to mediation, the court shall dispose of the matter by:

(i) Deciding the matter at that hearing, but only if the petition objecting to mediation contains a request for that relief,

(ii) requiring arbitration, or

(iii) directing other judicial proceedings.

#### RCW 11.96A.300 - Mediation procedure

Respondent's incomplete cite to the VRP implies that a hearing on

removal of the Personal Representative would have been the proper

procedure at that point in the case. This is erroneous as the purpose of

TEDRA is to provide procedures for non-judicial resolution of disputes:

The overall purpose of this chapter 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. The provisions are intended to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement.

The [This] chapter also provides for judicial resolution of disputes if other methods are unsuccessful. RCW

11.96A.010 - Purpose

As can be seen in the full excerpt, the Court erroneously opined that mediation is not appropriate if there is a dispute:

THE COURT: Have you actually set that for a formal motion, though? That was one of your issues that you put in the petition, but you never formally moved.

MR. SCHNEIDER: We requested mediation.

THE COURT: Right. But in order -- you can put them all in there, but your first duty would be to set a hearing on that and have the Court make a decision on that and then address all your other claims.

MR. SCHNEIDER: I think the TEDRA says take it all to mediation first. That's the whole point of TEDRA. If she's going to be removed and there's a claim she should be removed because of conflict of interest or she can't serve, that goes to mediation. The whole point of TEDRA is to -- it is to kind of short circuit some of these things so it can all be handled at once.

So yeah, I could have filed first a motion for removal then another motion, another motion, but the first thing I did was file a notice for mediation that the Court granted an order, and everybody agreed to. So I don't think that is necessarily proper to bring that before the Court now under mediation we're trying to schedule.

THE COURT: Why would you go to mediation if you're saying there was undue influence, the will is not valid, the PR isn't following any of the rules basically and is self-serving? Why would you even ask for the mediation and not move forward on the claim?

MR. SCHNEIDER: I asked for mediation because people settle for lots of different reasons because it might be agreeable to have a neutral third-party be the personal representative, might

be agreeable to settle all those claims based on some monetary settlement. That's what mediation does.

If you say well, these people have a dispute. So, therefore, they can't mediate, again, that's absurd. That's why you go to mediation. That's why it's there. . . .

So can we mediate something like that? I think that's the intent of the statute. You're never going to have a probate that's like a contract mediation, which is even contract mediations emotions are high. You're never got to be a probate without emotions, family dynamics, long-held issues. So if that would disqualify people to mediate, there would be no use to have TEDRA. No, I don't think that means they can't go to mediation at all. I plan on going to mediation. We want all issues on the table at that time.

VRP page 42, line 2 - page 45, line 8

To imply that mediation on removal of the Personal Representative, and therefore standing cannot occur because there is a dispute violates the legislative intent and stated purpose of TEDRA.

### **IMPROPER USE OF THE MEDICAL RECORDS PRIVILEGE**

Both the trial court and the Personal Representative appear to claim that there is an absolute right exercised only by the PR to maintain the medical records privilege established by statute. This has never been true and the medical records statute does not so provide.

A personal representative of a deceased patient may exercise all of the deceased patient's rights under this chapter. If there is no personal representative, or upon discharge of the personal representative, a deceased patient's rights under this chapter may be exercised by persons who would have been authorized to make health

care decisions for the deceased patient when the patient was living under RCW 7.70.065. RCW 70.02.140

The Personal Representative *may* exercise the decedent's rights. The issue of the removal of the Personal Representative was a subject of the Petition. If the Personal Representative is discharged, then the privilege may be exercised by persons who would have been authorized to make health care decisions for the deceased patient. That person would have been Frank Primiani who was his mother's attorney-in-fact under a Durable Power of Attorney when she died. (VRP 20 ll 20-24)

The records requested, in fact, were generated while Frank Primiani was attorney in fact. In that capacity, he was present at discussions with the social worker, Maureen Benson about his mother's condition and statements of past treatment by Anna and Mikael Illiakis. This is why he already knew what the records contained. The Medical Records statute and physician patient privilege was therefore, in fact, waived before the decedent died by someone in with the power to do so, Frank Primiani. (Contrary to Respondent's argument at page 32 of the Response, the status of Frank Primiani as Attorney in fact was before the Trial court at hearing and in briefs. (CP 277-279)

The Medical Records Act has a purpose identical with the Physician Patient privilege codified in RCW 5.60.060 i.e to protect the

patient's interest in privacy and to allow the Physician to make records for the benefit of the patient without fear of disclosure that might chill interactions necessary for diagnosis and treatment or otherwise harm patient's interest.

These privileges and restrictions are not however, absolute. Further, the privilege cannot be invoked against the patient's interest whether by a sitting Personal Representative or any other party. In the following case, the physician patient privilege is discussed along with the attorney client privilege as equivalents. The subject matter is on point, i.e. a Will Contest between a devisee in a Will and an heir at law.

In a contest between a stranger and an heir, devisee, or personal representative, the latter might waive the privilege and examine the attorney concerning the confidential communications, though the stranger was not permitted to do so; and, in a controversy between heirs at law, devisees, and personal representatives, the claim that the communication was privileged could not be urged, because, in such a case, the proceedings were not adverse to the estate, and the interest of the deceased as well as of the estate was that the truth be ascertained (*internal citations omitted*) Then, after noticing the decisions holding to the contrary, Justice Ladd further said: 'The particular vice in the reasoning in these cases, in making the distinction between the heir at law and devisee, is the assumption that the paper in dispute is the will of the deceased. The statutes are for the benefit of the patient while living and of his estate when dead. The very purpose of the contest is to determine whether the deceased in fact made a will, who shall be his representative, and who entitled to his estate? If he did not have testamentary capacity, then the paper was not his will, and it is not the policy of the law to maintain

such an instrument. It is undoubtedly the policy of the law to uphold the testamentary disposition of property, but not until it is ascertained whether such a disposition has been made.' *In re Thomas' Estate*, 165 Wash. 42, (1931)

The *Thomas* case is on point. Under common law, privileges and statutes in derogation of the common law, the privilege cannot be used to the detriment of one heir, or a Will contestant in a matter where one invokes the decedent's rights against the other.

The bottom line is that the subject medical records described herein contain the Decedent's description of exploitation and abuse by the Personal Representative. No privilege can be invoked *against* the rights of the person holding the privilege or against an heir or devisee if the validity of a Will is at issue.

In Respondent's Amended Response Brief Page 5-6 the Estate cites to "RP 16:21-22; 17:13-22"

These cites imply that counsel was less than truthful about whether or not copies of medical records have been provided to Frank Primiani.

MR. SCHNEIDER: Your Honor, I'd like to clear one thing up and restate my answer to your question because I did --when I got the records, I did e-mail them to my client. My client had provided me with some of the records prior that he had obtained earlier. To my understanding of that was that he had already obtained the records probably last summer. So not to misrepresent anything to the Court, I received the records, and we -- and I sent them to my client, and I believe he already had seen them last summer. He was the -- or earlier. He was the Power of Attorney for

his mother when the records were made. So I did not have them in my possession until I got them from VNA. My understanding is that my client did have them earlier.

THE COURT: Well, when you told the Court earlier you didn't provide them to your client, you just now said oh, yeah, I did.

MR. SCHNEIDER: Yeah, I did. That's why I'm telling you, okay? (VRP page 17, line 13 - page 18, line 7)

Counsel stated that he believed that his client already had the documents (at least those pertaining to the subject meeting with Benson) as attorney in fact for his mother before she died, but immediately clarified his answer to the court following proper procedure and candor toward the tribunal. There was no impropriety in any statements made to the trial court.

#### **SERVICE OF PROCESS AND NOTICE IN A WILL CONTEST AFTER TEDRA**

The issue of the confusing interrelation of the Will Contest Statute and TEDRA, and the legislature's attempts to reconcile the statutes, is explored fully in the Appellant's Brief. It is worthy of note however, that the misunderstandings are continued by Counsel's Response. For example, Mr. Stevens states, on page 2 of the Response: "No Will Contest citation or summons was served on any party."

At the time of the filing of the Petition, the legislature had removed the requirement of a citation being served. The current statute states that a Petition is to be served. Neither statute mentions or requires that a Summons be served.

This is not just a technicality, as cases discuss that a citation is the equivalent of a summons. Therefore, there must be something that is the equivalent of a summons in order for the Court to have jurisdiction to hear the Will Contest.

Mr. Stevens does not clear this up for this Court. He states, on page 2 of his brief, that because “the Petitioner failed to serve a summons and petition as required by RCW 11.24.020 and RCW 11.96A.100” the trial court did not have jurisdiction to hear the Will Contest.

On the contrary, RCW 11.24.020 does not mention a summons at all:

Upon the filing of the petition referred to in RCW 11.24.010, notice shall be given as provided in RCW 11.96A.100 to the executors who have taken upon themselves the execution of the will, or to the administrators with the will annexed, to all legatees named in the will or to their guardians if any of them are minors, or their personal representatives if any of them are dead, and to all persons interested in the matter, as defined in RCW 11.96A.030(5). RCW 11.24.020

RCW 11.96A does require a summons for a TEDRA Petition but only for parties not already before the Court:

A summons must be served in accordance with this chapter and, where not inconsistent with these rules, the procedural rules of court, however, if the proceeding is commenced as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset, notice must be provided by summons only with respect to those parties who were not already parties to the existing judicial proceedings; RCW 11.96A.100

The Amended Response Brief at Page 8, states: “(No certificate of service)” Respondent states that no Certificate of Service is in the record.

The Certificate of Service of the Petition upon the Personal Representative is in Supplemental Designation of Clerk’s Papers at pages 310-311. This shows service of the Summons after the Trial Court decision. The purpose of this filing was only to differentiate the instant case from precedent cited where the Summons was never served.

Another example of either sloppy drafting or intentional misrepresentation to the Court is found on page 11 of the Response. Mr. Stevens states: “A Will Contest brought under a TEDRA Petition must still satisfy the service requirement found in RCW 11.24.010 by personally serving a *citation*.”

The statute does not however, mention a citation or a summons. It expressly refers to the filing and service of a Petition.

On page 12 of the Response, the mistake is made again, “a party contesting a Will must satisfy the RCW 11.24.020 *citation* requirement”

As shown in the statute above, no such requirement exists.

Because of these misstatements in the briefing, the trial court also held that service of a *citation* was required. (CP 184)

This confusion mirrors that caused by the requirement of TEDRA Notice in addition to service of the Petition, unless a party has already appeared in the Probate. Therefore, this Court is forced to look at whether or not the Petition is the equivalent of a Summons in TEDRA and in the Will Contest Statute, and further, whether substantial compliance (service to the attorney under CR 5 is sufficient.

The unbriefed case *In re Jepsen*, relied upon by the trial court is similarly and erroneously paraphrased by Mr. Stevens on page 15 of the Response. “The Supreme Court affirmed in 2015, that Washington Courts have and will always strictly enforce the requirements of commencing Will Contest actions.”

The actual quote is less of a bright line: “Washington Courts have always strictly enforced the requirements for commencing Will Contest actions, and we do so again today.” *In re Estate of Jepsen*, 184 Wn.2d 376, 381 (2015). The Appellant’s Brief fully discusses and distinguishes why such a statement is erroneous and not applicable here.

The Amended Response Brief at Page 7 cites “RP 27:22-25” for the following: Counsel for Respondent claims that the Court instructed him to file a “renewed Motion for a Permanent Protective Order, Sanctions, Fees, and a Motion for Order Dismissing the Will Contest and Enforcing the No Contest clause found in Decedent’s Will”

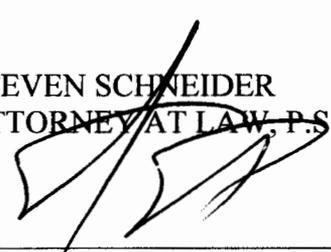
The Court did not however, specify causes of action or relief beyond the following:

I have January 22<sup>nd</sup> at 1:30 for these issues both for to decide whether or not this is a will contest or the issue of protective order, and that will give them time to get your answers back and possibly the deposition of your client done before that date. (VRP page 27 ll. 16-20)

The Court did not instruct the Estate what to file or what to renew regarding the motions.

DATED this 27 day of January, 2016.

STEVEN SCHNEIDER  
ATTORNEY AT LAW, P.S.



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Steven Schneider  
WSBA No. 22622  
Attorney for Petitioner

**FILED**

JAN 27 2017

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ESTATE OF MARIA PRIMIANI, Deceased, and ANNA ILIAKIS as  
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Respondents.

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CERTIFICATE OF SERVICE

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Attorneys for Appellant

ORIGINAL

I, Leanna Wilkey, with the law office of Steven Schneider, Attorney at Law, P.S., hereby declare under penalty of perjury under the laws of the State of Washington and the United States that: (1) I am a citizen of the United States of America and over the age of eighteen years and competent to be a witness; (2) I make this declaration based upon my personal knowledge and am competent to be a witness; and (3) I delivered a true and correct copy of the **Appellant's Amended Reply Brief** via messenger service on the 3rd, day of January, 2017, to the person(s) listed below:

Steven Hughes  
522 W. Riverside Ave., #800  
Spokane, WA 99201

Brant Stevens  
222 W. Mission, #25  
Spokane, WA 99201

SIGNED at Spokane, Washington, this 27<sup>th</sup> day of January, 2017.

  
LEANNA WILKEY