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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**Case No. 342000
Superior Court Case No. 15-4-0097-9**

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

In the Matter of the Estate of

MARIA PRIMIANI,

Deceased.

FRANK PRIMIANI,

Petitioner,

v.

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

Respondents.

**THE ESTATE OF MARIA PRIMIANI'S AMENDED RESPONSE
BRIEF WITH SUPPLEMENTAL CITATIONS**

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I. STANDARD OF REVIEW

The appellate courts review a trial court's conclusions of law de novo. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880 (2003). Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176 (2000). If this standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873,879-80 (2003). Questions of law and conclusions of law are reviewed de novo. *Id.* A mixed question of law and fact refers not to review of the facts themselves, nor the law governing the situation, but to the law as applied to those facts. Franklin Cty. Sheriff's Office v. Sellars, 97 Wn.2d 317, 329 (1982). Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts. *Id.* at 329-330. The standard of review for mixed questions of law and fact is also de novo. *Id.* citing Daily Herald Co. v. Dept. of Employment Security, 91 Wn.2d 559, 561 (1979).

II. STATEMENT OF THE CASE

Maria G. Primiani passed away on 12/24/14. (CP 87). A Petition to probate her Last Will and Testament was filed and her Last Will and

Testament was admitted to probate on January 22, 2015. (CP 306-09).

The Estate and heir Frank Primiani, an attorney himself, through counsel Steven Schneider agreed to extend the statutory deadline to file claims and will contests past the statutory four months until August 20, 2015, a 90-day extension. (CP 141). On August 19, 2015, within the extended time frame, Frank Primiani by and through his attorney filed a TEDRA Petition under the same cause number as the Probate action. (CP 1-4). The Petition was served only by standard mail on Brant L. Stevens, the attorney for the Estate, on August 19, 2015. (CP 86). No Will Contest citation or summons was served on any party. (CP 26-27). None of the heirs were served in any manner with the Petition. *Id.*

Following the Petition, Michael and Anna Iliakis retained Steven Hughes to represent them individually as Mr. Stevens represented Anna Iliakis solely as the Personal Representative (“PR”) of the Estate. (VR 63: 22-24).

The Estate filed an Answer on November 18, 2015, raising several objections relating to the Petition based on jurisdiction, standing, and statute of limitation issues. (CP 23-29). Namely, that the Petitioner failed to file a summons and petition as required by RCW 11.24.020 and RCW 11.96A.100, and consequently the trial court did not have subject matter and personal jurisdiction under TEDRA as to a Will Contest. *Id.* at 26.

Further, that the Statute of Limitations, even with the agreed upon extension, barred the Will Contest, as it was insufficiently served on all the heirs as required by RCW 11.24.010, RCW 11.24.020, and RCW 11.96A.030(5)(d). *Id.* at 26-27. Although the Estate raised these objections, candidly, it was not clear to the Estate if a Will Contest had been filed, but the Estate did not want to waive any defenses with a deficient answer to the Petition. (RP 24: 7-17).

Additionally, that the Estate raised an objection as to the standing Petitioner had to bring many of his claims; Petitioner lacked standing to bring a majority of his claims and requested the trial court to determine issues and claims as an heir. (CP 26). The claims and relief requested by the Petitioner is specifically enumerated as a power and duty of the Personal Representative of an Estate under RCW 11.48.010, not as an heir. *Id.*

Petitioner Primiani did not object to the appointment of Anna Iliakis as the PR, nor did he object to the admittance of the decedent's Will for probate entered on January 22, 2015. (*See* CP 1-4; first time Appellant raises any issues relating to the PR). The Petitioner did not once request a hearing on the removal or the PR in this case. (RP 42-24-25, 43:1).

On December 1st, 2015, the Estate was subsequently served a Subpeona for VNA medical records of Maria Primiani, deceased, by

Steven Schneider. (CP 42-45). The Estate was unaware how the medical records from 2014 could relate to the Petitioner's Claims and a potential Will Contest as the admitted Will was executed in 2008. (CP 47). On December 1st, 2015, the Estate notified VNA not to release the records until the matter was heard by the court. (CP 49). At that time, the VNA informed the Estate that Mr. Primiani had previously attempted to request and obtain the medical records, but was denied as he was not the PR of the Estate. (CP 38).

On December 3, 2015, the Estate emailed its objections to the subpoena to Steven Schneider, indicating a hearing on the matter for a protective order was necessary and to be set by the Estate. (CP 47).

Based on the Estate's position that the VNA medical records were likely irrelevant to a Will Contest or allegation of undue influence (regardless of its deficiencies in service), and the Estate's objection and position that Petitioner Primiani had no standing to bring any claims on behalf of the Estate as an heir, the Estate objected to the Subpoena as irrelevant, privileged, and confidential. (CP 26-29; 55-62; 77-90). The Estate filed a Motion for a Protective Order to quash the Subpoena for the VNA medical records and for the deposition of Maureen Benson, a VNA employee who would likely testify regarding the information contained in the VNA medical records. (CP 55-62).

A hearing on the sole issue of the issuance of a Protective Order quashing the subpoena for VNA medical records from 2014 and the deposition of Maureen Benson was heard on December 21, 2015, before Honorable Judge Plese. (CP 55-62, 71).

The hearing on December 21, 2015, was very informative. Despite The Estate's written correspondence with the VNA and Mr. Schneider regarding the Estate's clear and express objection to the subpoena for VNA medical records, Mr. Schneider admitted to the Court that he obtained the VNA medical Records over and after the Estate's objection and prior to the hearing on the Estate's Motion for a Protective Order. (*See* RP 6:10 wherein Mr. Schneider states he understood the Estate objected to the medical records request, but picked up the records anyway); (*See also* CP 39).

At the same hearing, it was further admitted by Petitioner Primiani's attorney, that Mr. Schneider had provided a copy of the records to his client, despite previously telling the Court he had not done so. (RP 17:13-22).

The Court expressly asked Mr. Schneider, "So you have not given these to your client, have you?" (RP 16:21). Mr. Schneider explicitly and immediately responds to the court: "I have not given them to my client, Your Honor." Yet, Mr. Schneider later states, "I did email them to my

client... I received the records, and we -- and I sent them to my client.”
(RP 16:21-22; 17:13-22).

Finally, the hearing flushed out the issue of whether the Petitioner intended to contest the Will.

Mr. Hughes points out to the Court, “This is a moving target, Judge. There’s no will contest here. Mr. Primiani was a lawyer. He had a Power of Attorney for his mother, and he didn’t file a will contest. There’s a lot of things that you can just get up, like the Court said, and allege, but it’s just not pending before this Court.” (RP 20: 18-23). The Estate’s attorney also was not sure of a Will Contest stating, “and that has been a big problem...trying to determine whether or not there actually is a will contest... So now Mr. Primiani is saying well, we are contesting the will.” (RP 24: 7-17). The Court even stated: “I did not expect that you were contesting the will, and I did not see that as a will contest.” (RP 23:20-23).

On December 21, 2015, the Court issued a Temporary Protective Order. (CP 68-70). The Court found:

1. Good Cause existed to issue a temporary protective order;
2. Medical records are privileged communications;
3. Frank Primiani is contesting the validity of the admitted Will;
4. The medical records and testimony of Maureen Benson are not relevant to the execution of the Will because all of the records and testimony requested take place after the execution of the Will;
5. The personal claims against Anna and Mike Iliakis are not ripe and are disputed as to standing and jurisdiction; any discovery relating

- to these issues is not yet relevant in the Probate at this time;
6. Mr. Schneider procured documents in violation of CR 45, HIPAA, and UHCIA;
 7. Mr. Schneider intentionally obtained documents from the VNA after Mr. Stevens objected to the Subpoena for document production from VNA; and
 8. Mr. Schneider currently possesses documents which were unlawfully procured.

Id. Based on the findings, the Court quashed both subpoenas, required Mr. Schneider and Frank Primiani, who had been given copies of the unlawfully obtained privileged medical records by Mr. Schneider, return the unlawfully obtained VNA documents to VNA, and delete and not retain any copies, electronic or otherwise. *Id.* The Court also requested additional motions and briefing by the parties to flush out the Will Contest issues as the Court was unsure if the Petitioner had brought a valid Will Contest, which was to be heard on January 22, 2016. *Id.* (See also RP 27:22-25).

Pursuant to the Court's instructions, the Estate filed a renewed motion for a Permanent Protective Order, Sanctions, Fees, and a Motion for an Order Dismissing the Will Contest and Enforcing the No-Contest Clause found in Decedent's Will. (CP 77-90). The Estate filed its motion on January 8, 2016. *Id.* Petitioner filed responsive pleadings. (CP 107-23). In Petitioner's responsive pleadings, Petitioner argued that a case relied upon by the Estate was unpersuasive as it was interpreting an old version of the

Will Contest Statute. *Id.* at 119-120). In Oral Argument, the Estate briefly cited *In Re Jepsen*, a 2015 Washington Supreme Court case, wherein the Supreme Court held that the statutory analysis was applicable to both the old and new version of RCW 11.24. (RP 29:23-31:19). Honorable Judge Plese took her ruling under advisement. (RP 47:15-16).

Following the hearing while the Judge was taking her ruling under advisement, the Petitioner filed a supplemental brief for the Court on the issues previously argued and briefed. (CP 261-274). The Petitioner requested the Court consider the supplemental brief in an emailed letter to the Judge's Judicial Assistant *ex parte*, not through a motion. The Estate responded with a letter noting its objection. The parties were informed all communications after the hearing were untimely and improper. (This is not a part of the record).

On February 23, 2016, over six (6) months after the Petition was filed, the Petitioner personally served Anna Iliakis with a copy of the August 19, 2015, Petition in an attempt to perfect service. (No certificate of service).

The Court issued its Order on the Motions on March 10, 2016, wherein the Court held that the Will Contest was not properly and timely served on the Estate or the Personal Representative. (CP 180-87). The Court also found that there was neither strict nor substantial compliance with the service requirements for a Will Contest. *Id.* at 183-86. The Court

awarded attorney fees for the Motion for Protective Order and found that Frank Primiani had obtained the medical records after the Estate's objection was known. *Id.* at 186. The Court made an explicit finding of bad faith against the Petitioner, based upon his action to obtain decedent's medical records after the objection by the Estate. *Id.* The Court dismissed the Will Contest and enforced the no contest provision, awarding the Petitioner the sum of one dollar. *Id.* at 186-87). From this order, the Petitioner moved for a discretionary appeal, which was granted on the grounds that the Judge's Order on the Motions on March 10, 2016, was a final order and Petitioner Primiani had a right to appeal; the discretionary appeal was not granted on any finding or basis of error by the trial court.

The Petitioner grossly misstates and misguides the Appellate Court as to the issues before the Court in this appeal. The Estate was the moving party relating to the only two issues that have yet to be heard, argued, addressed and adjudicated by the trial court, specifically: (1) a motion for the dismissal of the Will Contest barring the contest by the statute of limitations and for improper service as there was no subject matter jurisdiction for the Court to hear the contest; and (2) a motion for a protective order quashing subpoenas for VNA medical records from 2014 and related deposition. (CP 77-90).

III. ARGUMENT

A. ISSUES RELATING TO THE DISMISSAL OF THE WILL CONTEST.

1. The Court Properly Dismissed Petitioner's Will Contest.

First and basic to jurisdiction is service of process. *Scott v. Goldman*, 82 Wn. App. 1, 6 (1996). The party initiating a civil action bears the burden of showing proper service. *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 412 (2010). The Washington legislature prescribed two elements for proper service of process in will contests in RCW 11.24. First, any party contesting a will must personally serve the estate's personal representative with the petition commencing the will contest within ninety (90) days of filing the petition. RCW 11.24.010. Second, the contesting party must provide notice described in RCW 11.96A.100, meaning a summons using certain language or substantially equivalent language. RCW 11.24.020 and RCW 11.96A.100.

RCW 11.24.010, requires:

Contest of probate or rejection—Limitation of action—Issues.

If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he or she shall file a petition containing his or her objections and exception to said will, or to the rejection thereof. Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a

deceased of the last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a part of it, shall be tried and determined by the court.

For the purpose of tolling the four-month limitations period, a contest is deemed commenced when a petition is filed with the court and not when served upon the personal representative. The petitioner shall personally serve the personal representative within ninety days after the date of filing the petition. If, following filing, service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations.

If no person files and serves a petition within the time under this section, the probate or rejection of such will shall be binding and final.

RCW 11.24.020 provides:

Filing of will contest petition—Notice.

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 11.96A.100 requires in pertinent part:

Procedural rules.

Unless rules of court require or this title provides otherwise, or unless a court orders otherwise:

- (1) A judicial proceeding under RCW 11.96A.090 is to be commenced by filing a petition with the court;
- (2) 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 11.24 requires personal service of a will contest upon the personal representative within ninety (90) days of filing the petition contesting the will. It also requires service of the petition upon all legatees named in the will. RCW 11.96A.100 does not change any of these requirements. 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 as required in RCW 11.24.020 within ninety (90) days of timely filing the Petition. *In re Estate of Tuttle*, 18 Wn. App. 1029 (Div II, 2015) (the petitioner argued that personal service was not required for a will contest based on the TEDRA statutes, specifically RCW 11.96A.100(2). However, the Court held that TEDRA had no affect on the Will Contest requirements found in RCW 11.24, and the Petitioner was required to personally serve a summons on the Estate. The Appellate Court affirmed the Trial Court's ruling barring the Petitioner's Will Contest for failure to properly serve the Will Contest Petition).

RCW 11.96A does not affect the 11.24 Will Contest requirements. *In re Estate of Kordon*, the Petitioner argued that TEDRA eliminates the citation requirements under RCW 11.24.020. 157 Wn.2d 206, 209 (2006). The *Kordon* Court held that a will contest is a statutory proceeding

governed by RCW 11.24 and TEDRA does not affect the requirements delineated in RCW 11.24. *Id.* at 209-211. The court reasoned that the plain language of TEDRA indicates it does not affect the RCW 11.24.020 requirements. *Id.* at 211. In fact, TEDRA explicitly disavows any intention to alter the notice procedures in a will contest. *Id.* at 212; see also RCW 11.96A.100(2). The *Kordon* court interpreted RCW 11.24.020 “in both its current and former versions.” *In re Jespen*, 184 Wn2d 376, 381 (2015). Therefore, even if the Will Contest is brought under a TEDRA Petition, a party contesting a will must satisfy the RCW 11.24.020 citation requirement within the four-month statute of limitations imposed by RCW 11.24.010 or within 90 days of filing a will contest petition.

Therefore, under RCW 11.24, 11.96A, *Kordon*, *Tuttle*, and *Jepsen*, it is undisputed that both a citation and personal service is required in commencing a Will Contest. Neither requirement was met here.

Petitioner served the Estate a TEDRA Petition by mail on August 19, 2015, which is not in accordance with the requirements of the statute for personal service of the personal representative. It is important and crucial to note that additionally Petitioner *never served* any of the heirs or other legatees with the Petition. This is also a clear bar to the Petitioner’s Will Contest as service and notice upon all heirs in the Will is required by statute.

On February 23, 2016, Petitioner had Anna Iliakis, the Personal Representative, was personally served with the Petition, well after the ninety (90) day requirement for service, and after the Estate moved the trial court to dismiss the Petitioner's Will Contest for lack of jurisdiction based on failure to properly serve the Personal Representative and the legatees. The personal service of Anna Iliakis on February 23, 2016, over six (6) months after the Petition was filed on August 19, 2015, was ineffective to perfect service as it was served more than ninety (90) days after the filing of the Petition. RCW 11.24.010 requires the Petition for a Will Contest be personally served within ninety (90) days of filing. As the personal service in this case was over one-hundred and eighty (180) days after filing, the Court did not err in failing to consider the service prior to making its ruling on the Estate's motions which were under advisement.

The Trial court made a specific finding of fact that this is improper service that does not even constitute substantial compliance, let alone strict compliance.

The Petitioner's argument for substantial compliance for "personal service" is not only misplaced, but inherently flawed. The Court found, "while substantial compliance is a valid argument in issues of personal service for some cases, it does not apply, in this case because there was, in fact, no substantial compliance." (CP 186-186). The Petitioner offers no

law supporting that standard mail for a Will Contest to only the Attorney for the Estate is substantial compliance under RCW 11.24 and 11.96A.100.

As will contests are special statutory proceedings, strict compliance with the requirements of RCW 11.24.010 is required. *In Re Estate of Toth*, 138 Wn.2d. 650, 653 (1999). Strict compliance with the instructions of RCW 11.24.010 is a jurisdictional prerequisite to initiating a will contest matter in Superior Court. *See In Re Estate of Crane*, 15 Wn. App. 161, 163 (1976).

Petitioner's reliance on *Palucci* is misplaced as the facts in this case are quite distinguishable. In *Palucci*, the will contest was filed and a citation issued which was mailed to the personal representative and the estate with a notice that a hearing to show cause as to the validity of the Will was scheduled. 61 Wn. App. 412, 415 (1991). The citation and notice of hearing was also personally served on the heirs of the estate. *Id.* at 413. The crux of the case was in relation to the proof of service at the time of the hearing, not the fact that parties had not been served with a citation. *Id.* at 415-16. In *Palucci*, there was both a citation and personal service; here, there was neither.

The Supreme Court of Washington affirmed in 2015 that Washington Courts have and will always strictly enforce the requirements

of commencing will contest actions. In Re the Estate of Jepsen, 184 Wn.2d 376, 381 (2015, En Banc).¹

The Trial Court correctly held that the Will Contest was not properly served with sufficient notice in accordance with RCW 11.24.010, .020, and 11.96A.100.² As there is no err by the Court, the Estate requests this Court affirm the trial court's holding dismissing Petitioner's Will Contest and improperly and untimely served.

2. The Court did not Err in Enforcing the No Contest Clause of the Will.

In Washington, no contest clauses are valid and enforceable. *Boettcher v. Busse*, 45 Wn. 2d. 578, 585 (1954). The no contest or forfeiture clause is only enforceable and applicable when the will contest is brought in bad faith without probable cause. *In re Estate of Mumby*, 97 Wn. App. 385, 393 (1999).

Bad faith by Petitioner was found by the Court. In the Court's Order

¹ The *Jepsen* Court was 5-4 decision with a dissenting opinion, however, the dissent expressly discussed the issue of the Estate's waiver of jurisdiction. The Estate filed an answer to this petition specifically raising jurisdictional defenses. The dissent did not disagree with the majority's rule holding that will contests require strict compliance for commencing the action.

² On December 21, 2015, the Trial Court requested additional briefing relating to the filing of the Petitioner's Will Contest as the Court and the Parties were unaware a clear Will Contest had been brought. Petitioner argued a motion to dismiss the will contest was improperly and untimely filed. However, under 12(b)(c) a motion to dismiss is required to be filed under state and local rules with notice of at least 12 days. The motion to dismiss was filed with 14 days notice.

on Motions entered on March 10, 2016, the Court made a specific finding of bad faith against Petitioner. The Court stated, “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... The Court, also finds that the no contest provision shall be enforced as requested by the PR.” (CP 186). The Court also found that Petitioner acted in bad faith in its Temporary Protective Order issued on December 21, 2015. (CP 68-69).

It is true that Washington Law also requires a will contest be brought without probable cause. Although no specific finding in the Court’s Order was made, it is clear from the record that the Petitioner failed to provide the Court with any admissible evidence of the alleged undue influence other than self-serving declarations.

The Will Contest for Undue Influence brought by Petitioner has been brought without any evidence whatsoever. The VNA medical documents are not admissible. The VNA medical documents also bear no relation to the execution of the admitted Will and would proffer no evidence proving undue influence at the time of the execution of the Will. The other evidence Petitioner alleges supports his Will Contest is a letter from 1998 which has yet to be admitted in court. The letter was written 10 years prior to the execution of the Will. Therefore, the only evidence Petitioner

alleges to have to support a Will Contest, which requires clear and convincing evidence, is medical records from six years *after* the execution of the Will or one letter written ten years *before* the execution of the Will. This evidence is attenuated from the date of the execution of the will. The two pieces of evidence the Petitioner has to support his will contest is also eighteen (18) years apart. This is insufficient, if not irrelevant, evidence to establish probable cause for a will contest. The Petitioner's Will Contest is meritless and was brought as a means of further harassing and delaying the probate of the Estate as Petitioner Primiani has done throughout the entire probate proceeding.

The Petitioner also argues that the PR benefited from the will. [RP 39:23-24]. It is crucial to note that the Will divested the Estate *equally* between the decedent's only two children, the Petitioner and the PR. The PR was devised the exact same portion of the Estate as the Petitioner. There was nothing suspect or unfair about the terms of the Will.

Even if a Will Contest is not heard on the merits and dismissed, the no contest provision in the Will is still enforceable and applicable. The fact that it is untimely brought has no effect on the application and enforcement of the no contest clause in Washington. Citing a California decision, the Washington State Supreme Court held that "a proceeding begun but not prosecuted to a conclusion to contest the will amounted to a

contest which forfeited the legacy; the court saying that whenever the complaint uses the proper machinery of the law to the thwarting of testator's express wishes, whether he succeed or fail, his action is a contest." *In re Estate of Chappell*, 127 Wn. 638, 642 (1923).

The Petitioner has done substantially more on his untimely and unfounded Will Contest than simply file. The Petitioner has taken substantial, significant, and sufficient steps and actions under the Will Contest theory to attempt to thwart the intentions of the testator.

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 against Petitioner Primiani, upholding the intent of the Testator.

If is for these reasons the Estate requests this Court affirm the Trial Court's holding enforcing the No Contest Clause and awarding Petitioner the sum of one dollar.

In the alternative, the Estate requests the Appellate Court simply remand this issue to the trial court with instructions for further findings to support the enforcement of the No Contest Clause. When "findings and conclusions are missing or are defective, the proper remedy is remand for entry of adequate ones, unless the appellate court is persuaded that

sufficient basis for review is present in the record.” *Little v. King*, 160 Wn.2d 696, 699 (2007). When findings are not sufficiently specific, the appellate courts will remand to the trial court. *State v. Barber*, 118 Wn.2d 335, 345 (1992).

There are multiple findings of bad faith against petitioner, however, the findings of bad faith are not expressly specific to the Will Contest. Although there is no admissible evidence to support the Will Contest, there was also not a specific finding that the Will Contest was brought without probable cause. If the appellate court is not persuaded that the record is sufficient to affirm the Trial Court’s holding enforcing the No Contest Clause, the Estate requests the Appellate Court remand with instructions for further findings on this matter.

3. The Court properly relied upon *Estate of Jepsen* in its holding as the case was cited by the Estate in oral argument and Court’s are permitted to conduct independent legal research to support its rulings, orders, and judgments, in order to follow the law.

The Estate did in fact raise in oral argument a 2015 Washington Supreme Court case that supported the Estate’s argument that TEDRA does not do away with the service and citation requirements as delineated in RCW 11.24.010 and .020. This case was cited in rebuttal to Petitioner’s incorrect statement of the current case law on the related statutes. The Petitioner was attempting to argue without case law support that the

service requirements under RCW 11.24 were no longer applicable after TEDRA and the amendments to RCW 11.24.010 and .020 in 2007 and 2006, respectively. In rebuttal, the Estate simply offered the Court the cite of a case from 2015 that not only supported the Estate's argument well after the 2007 and 2006 amendments, but that specifically cited the *Kordon* case, the Estate's primary case supporting its legal argument. The *Jepsen* case expressly cited and quoted the legal principles raised by the Estate throughout the *Kordon* case. The case was simply more recent. There is no prohibition from raising case law the Petitioner should have been aware of. There was no new evidence or law presented by the Estate.

Further, even had the Estate not brought the case to the Court's attention, the Court is absolutely allowed to do its own independent legal research into issues in order to apply and follow the law. *See State v. Pang*, 132 Wn.2d 852, 891 (1997) (The Supreme Court discussing an order wherein the Trial Court conducted its own independent legal research before the findings and order was entered). There is no error committed by the Court for relying on case law that is on point and guides the Court to an accurate application of the law.

4. The Court properly applied both binding and persuasive authority from a Washington Supreme Court case to the facts of this case.

The Petitioner's position that the holdings, conclusions, and statutory

interpretation of the Court in *In Re Jepsen* is “dicta” is unpersuasive as the language relied upon by the trial court in this case from the *Jepsen* case was integral to the *Jepson* Court’s conclusions. Regardless, whether dicta or not, the Trial Court in this case did not err in relying on statutory interpretations from a Washington Supreme Court holding. Dicta is persuasive authority, although it is not binding, it is still good law and guiding authority provided by the appellate courts that a trial court may rely upon. The Court committed no error relying upon persuasive law from a Washington Supreme Court from a case issued in 2015.

5. The Trial Court properly did not consider Petitioner’s supplemental briefing that was filed after the statutory deadlines and oral argument on the issues had taken place.

Spokane County Local Rule 40 (10) requires that “the Note for Hearing/Issue of Law must be served and filed no later than twelve days prior to the hearing. Any responding documents must be served and filed at least seven days before the hearing. Reply documents must be served and filed at least two days before the hearing.” The Court properly denied any supplemental briefing, argument, and written communications from either party filed after the hearing on January 22, 2016. Furthermore, the Petitioner did not move for permission to file supplemental briefing, but simply filed a supplement brief and provided copies to the Judge Ex Parte.

**B. ISSUES RELATING TO THE PROTECTIVE ORDER
QUASHING SUBPOENAS FOR VNA MEDICAL RECORDS
AND THE DEPOSITION OF MAUREEN BENSON.**

1. The Court Properly Issued a Protective Order Squashing the Subpoenas for VNA Medical Records and The Deposition of Maureen Benson.

On shortened time, the Estate moved for a protective order under CR 26(c) and CR 45(c)(3)(A) at the hearing on December 21, 2015. The Estate argued the VNA Medical Records and testimony were privileged under RCW 5.60.060 and ER 501.49. The Estate further argued that the Medical records are irrelevant to any of the claims, including the Will Contest, because Petitioner did not have standing to bring them in his Petition as an heir.

Medical records are privileged. *Toole v. Franklin Inv. Co.*, 158 Wn. 696 (1930). The privilege against divulgence of confidential communications survives death. *Swearingen v. Vik*, 51 Wn. 2d 843, 848 (1958). After the Estate received Petitioner's subpoena for the medical records and deposition of Maureen Benson, the Estate objected as to relevance and privilege and requested the Court hear argument on the matter. Rather than wait for the hearing, over the Estate's objection, Petitioner procured the VNA privileged medical records in violation of CR 45(c)(2)(B) and RCW § 70.02.

Under CR 45(c)(2)(B), within 14 days after service of a subpoena or before the time specified for compliance, if a written objection is made, the party serving the subpoena “**shall not be entitled** to inspect and copy the materials or inspect the premises except pursuant to an order of the court.” (Emphasis added). A written objection was made to both the VNA and Mr. Schneider. There was no doubt by any of the parties or counsel that this subpoena had been objected to. When Mr. Stevens made his objection known in writing, Mr. Schneider replied by stating that the subpoena for the documents and the subpoena for the deposition were related and the issue should be dealt with together. Instead of waiting to deal with the issues before the court, Mr. Schneider went to the VNA and picked up the documents over the objection and prior to the date the Subpoena was to be complied with. These actions are in direct violation of the Court Rules controlling Subpoena practice.

The State of Washington has an Act parallel to that of the federal HIPAA laws found in RCW § 70.02 titled the Uniform Health Care Information Act. This Act is very clear in its requirements in order to lawfully obtain private health records. The law was enacted based on the legislative findings that “Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient’s interests in privacy, health care, or other interests.” RCW

§70.02.005(1). Further, the UHCIA states, “A personal representative of a deceased patient may exercise all of the deceased patient’s rights under this chapter.” RCW § 70.02.140. And most instructive, UHCIA specifically describes the process for discovery requests for health care information. RCW § 70.02.060 states:

Discovery request or compulsory process.

(1) Before service of a discovery request or compulsory process on a health care provider for health care information, an attorney shall provide advance notice to the health care provider and the patient or the patient's attorney involved through service of process or first-class mail, indicating the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying. Such date shall give the patient and the health care provider adequate time to seek a protective order, but in no event be less than fourteen days since the date of service or delivery to the patient and the health care provider of the foregoing. Thereafter the request for discovery or compulsory process shall be served on the health care provider.

(2) Without the written consent of the patient, the health care provider may not disclose the health care information sought under subsection (1) of this section if the requestor has not complied with the requirements of subsection (1) of this section. In the absence of a protective order issued by a court of competent jurisdiction forbidding compliance, the health care provider shall disclose the information in accordance with this chapter. In the case of compliance, the

request for discovery or compulsory process shall be made a part of the patient record.

(3) Production of health care information under this section, in and of itself, does not constitute a waiver of any privilege, objection, or defense existing under other law or rule of evidence or procedure.

The law clearly states that Mr. Schneider should have served Mr. Stevens no less than 14 days prior to service of the subpoena on the health care provider for health care information in order to give the Estate adequate time to seek a protective order. Further, without written consent of the patient or personal representative, the information may not be disclosed.

Again, Mr. Schnieder was in direct violation of the UHCIA and without following the proper service and notice requirements under the law, picked up the health care documents from the VNA without consent of the personal representative. Mr. Schneider may argue that the documents were against the interest of the personal representative, but that in no way excuses following privacy laws in this matter. Mr. Schneider did not even ask for consent or permission, he simply picked up private, protected health care documents over an express written objection to the documents.

Washington has a recognized a strong and longstanding policy of protecting the privacy of its citizens and introduction of evidence obtained

in violation of the statutes is prohibited. *State v. Baird*, 83 Wn. App. 477, 483 (1996) citing *State v. Clark*, 129 Wn.2d 211, 222 (1996); see also *Peninsula Counseling Center v. Rahm*, 105 Wn.2d 929, 993-35 (1986). It would be a true error and violation of public policy to permit the VNA medical records to be admitted to trial after the deceitful, dishonest, and unlawful manner in which they were obtained.

As to relevance, under CR 26, the scope for relevancy is very broad and permits parties to discover information that may lead to admissible evidence. However, it is unclear how these documents are relevant as the Will was executed in 2008 and the VNA documents are from 2014, more than six years after the execution of the Will. The Estate and the Court was unable to see how the VNA documents are related to evidence or circumstances anywhere around the time of the execution of the Will. The Court found the VNA documents irrelevant to the Will Contest as the timing of the VNA documents was too attenuated from the time of the execution of the Will. The Court stated, “but if [Petitioner is] standing in shoes attacking the will, then you have to attack the will and not what happened later on.” [RP 9:9-10].

The Court properly issued a protective order quashing the Petitioner’s subpoenas for VNA medical records and the deposition of Maureen Benson and further ordering the Petitioner, who unlawfully procured the

privileged medical records, to return the records and destroy any and all copies. Therefore, the Estate requests this Court affirm the Trial Court's Protective Order.

2. The Court did not err in finding bad faith when the Petitioner obtained privileged medical records of decedent in violation of CR 45, HIPAA, and UHICA, over the written and express objection of the Estate.

The Petitioner seems to be unable to appreciate the nature of his conduct when he unlawfully procured the VNA medical records of Maria Primiani over the Estate's objection and in violation of State and Federal Privacy Laws for patients. Obtaining the documents over the objection of the Estate without notifying the Estate that the Petitioner was attempting again to obtain the documents seems clearly and blatantly done in bad faith. Such behavior is insincere, dishonest, disloyal, and deceitful. Such behavior is disrespectful and shows indifference to the Court, the Court's powers, and the Court Rules. Such behavior demonstrates callousness and a complete disinterest to the privacy rights and privileges afforded to Maria Primaini by law.

Based on the Estate's written objection and direction to VNA not to release the medical records without a Court Order, it is concerning what Petitioner might have relayed to VNA in order to obtain the documents.

Based on the behavior of the Petitioner and his Counsel, a finding of bad faith by the Court was proper.

3. The Court did not err in awarding attorney fees relating to a successful motion for protective order for the VNA medical records.

The Court awarded attorney fees for incurred expenses for filing and serving the motion for a protective order on behalf of the Estate. (CP 186-87). The Court did not award fees under RCW 70.02.170 as Petitioner contends.

Rather, the Estate requested attorney fees and sanctions against Petitioner under CR 11, 26, 37, and 45 under the Court's inherent power to impose fees and sanctions connected with discovery. (See Docket #51, pg 7). Again, in the Estate's renewed motion for a protective order, it requested fees under the "Court's inherent powers under the Court rules as well as CR 26-45, not from state or federal privacy statutes." (CP 61). Therefore, as fees were awarded under Court Rules and not under RCW 70.02.170, the Court committed no error.

4. The Petitioner did not have standing to raise claims relating to the Exploitation of a Vulnerable Adult and Inheritance Rights of Slayers and Abusers Act.

The Estate objected to the standing of Mr. Primiani and the jurisdiction of this Court to hear the issues as to the "claims" and request determination of "claims" against Anna and Michael Iliakis personally. (CP 23-29). Mr. Primiani, as an heir and beneficiary, is asking the court to make a determination based on claims of the Estate, wherein a beneficiary

has no standing to do so; it is not an appropriate claim for an heir to raise, but a duty and exclusive right of the Personal Representative to bring claims and settle claims of the Estate as found in RCW 11.48.

Petitioner requested this court make a determination for “8. Violations of the Abuse of Vulnerable Adults Act, under Chapter 74.34 RCW and any common law causes of action derived from the same facts.” (CP 2). In Petitioner and Petitioner’s attorney’s response declarations, the Petitioner argues that the slayer and abuser statute disinherit both slayers and abusers alike found in RCW 11.84 is applicable and should be enforced in this case and used these claims to justify discovery of the VNA medical records and related deposition to this Probate.

In the Estate’s Answer to Petition, the Estate raised standing issues as Mr. Primiani is an heir and not the personal representative of the Estate and has no right or standing to request the Court make determinations on the Vulnerable Adult Act and the Slayer statute under RCW 74.34 and 11.84, respectively. These claims are to be litigated by the Personal Representative of the Estate as it is the Estate’s claim, not the heirs to bring. See RCW 11.48; *See also In re the Estate of Evans*, 181 Wn. App. 436, 439-41 (Div I, 2014) (Although standing was not at issue, the Trial Court was dealing with issues relating to the slayer statute and antilapse statutes under a probate. The heirs filed a TEDRA Petition requesting a

declaration of rights relating to the slayer and antilapse statutes as to determine bequests. The heir's TEDRA Petition was denied by the trial court. Further, the trial court expressly stated that "The Estate's personal representative had standing to appear" and litigate the application of the slayer statute and antilapse statute related to the bequests made to the alleged slayer's issue.). There is no law that states a "successor trustee" who is not yet appointed has standing to bring such claims. Therefore, any discovery requests relating to these claims was properly denied and the subpoenas quashed as the Petitioner had no standing to raise the claims.

The Petitioner correctly points out that it is unreasonable for the PR of the Estate to file claims against his or herself on behalf of the Estate; if the claims were justified, there should be an appointment of a new PR to look into the allegations. However, rather than follow this course of action and proper procedure, Petitioner simply picked up the VNA medical records. The Trial Court clearly points out the Petitioner's procedural error on this point, stating, "Until such time that the Court says there are claims against the PR, right now I have a will that says she's the PR, so she stands in the shoes of the estate. Until such time as you need a burden to show that, one, the PR should be removed; and, two, that the estate may have claims against the PR, and at this point, I don't have that. Then your argument does not hold water at this point." [RP 13:25-14:8].

As Petitioner Primiani was not the PR and there was never a hearing on the PR, Petitioner Primiani never had standing to bring a majority of the claims alleged in his Petition. In the temporary protective order issued on December 21, 2015, the Court made a specific finding that the Petitioner did not have standing at that time to raise claims on behalf of the Estate against the PR.

In the second hearing on January 22, 2016, the Court again points out to Petitioner that there was no formal motion to remove the PR, “but your first duty would be to set a hearing on that [removal of the PR] and have the Court make a decision on that and then address all your other claims... I do believe that you have to pass the standing muster before you can even get to the claim and the fact that I don’t think Mr. Primiani has standing to bring these claims on behalf of the [estate] without removing the PR and putting him in as the PR... You have to beat that threshold of the standing before the [court] can even move to the issues of that or the merits of that.” [RP 43:4-7; 47:7-21].

The Petitioner has not provided any law that supports he had standing to bring any of the claims on behalf of the Estate against the PR without first removing the PR, which the Petitioner never did. As the Petitioner did not have standing to bring the claims as an heir, the protective order

quashing the subpoenas for the VNA medical records and relating deposition was properly issued.

5. The issue of the confidentiality of the VNA medical records being waived by Decedent before the date of death was not raised at the trial court and is improperly raised on appeal.

The first and only time the Estate has heard any argument from Petitioner that the confidentiality of the medical records was waived by Decedent before the date of death was during Petitioner's Motion for Discretionary Review before this Court. As this argument was never raised before the trial court, it is improperly raised on appeal. RAP 2.5(a); *see also Lawson v. Helmich*, 20 Wn.2d 167 (1944) (questions which are not presented to or considered by trial court, will not be considered on appeal).

IV. ATTORNEY FEES

The Estate requests fees under RAP 18.9 as a respondent to an appeal may recover attorney's fees on appeal if the appeal is frivolous. An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and it is so devoid of merit that there is no possibility of reversal. *Yurtis v. Phipps*, 143 Wn. App. 680 (Div III, 2008). No reasonable minds could differ as to the outcome and merits of this appeal frivolous as there is no question that: (1) the Will Contest was properly dismissed; and (2)

the Court properly issued a protective order with an award of attorney fees. This appeal is another harassing and litigious attempt by Petitioner Primiani. The Estate should not be responsible for bearing the financial burden of responding to a frivolous motion for discretionary appeal. For these reasons, the Estate requests attorney fees be assessed against Petitioner.

V. CONCLUSION

As the Trial Court acted properly pursuant to the application of the correct law to substantially supported findings of facts, the Estate requests the Court of Appeals affirm the Trial Court's order dismissing the Petitioner's Will Contest, enforcing the No Contest Clause contained in the Will, granting a Protective Order, and award of attorney fees and sanctions for obtaining the VNA records in violation of Washington Civil Rules and privacy rights.

Respectfully Submitted this 2nd day of December, 2016.

By: 
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CERTIFICATE OF SERVICE

I, Brant L. Stevens, hereby certify that on December 2, 2016, and a true and exact copy of the foregoing Brief to the following by personal service:

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