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NO: 362205

Spokane County Superior Court No: 154015209

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

In the Matter of the Estate of Clara V. Larson,

Norman D. Larson, Personal Representative of the
Estate of Clara V. Larson and
Successor Trustee of Gordon E. Larson
Testamentary Trust,

Respondent/Appellant

v.

Connie M. Mitchell,

Petitioner/Respondent.

APPELLANT'S REPLY BRIEF - AMENDED

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Estate of Margaret Rai-Choudhury, 2019 WL 931658

(Unpublished) (Div. I Feb. 25, 2019)

I. ARGUMENT

Connie Mitchell is the Plaintiff in the underlying matter and the Respondent on appeal. She filed a TEDRA action seeking to have her brother, Norman Larson, removed as Personal Representative and as Successor Trustee of the Gordon E. Larson Trust. The TEDRA matter was opened on June 24, 2016 as Spokane County Superior Court cause no. 16-4-00919-2. (CP 4).

When Gordon Larson passed away June 22, 1984 his wife, Clara V. Larson, became the Trustee, and when she passed away in October 2015, Norman became the Successor Trustee. The Last Will and Testament of Clara V. Larson appointed Norman as the Personal Representative. (CP 2). Her probate was opened October 26, 2015 as Spokane County Superior Court cause no. 15-4-01520-8 (CP 3).

As discussed below, it is important to recognize that the two matters were not consolidated until November 16, 2016 (CP 8).

This Reply Brief will address the arguments raised by Connie Mitchell in the order raised by her.

A. Consideration of Denial of Summary Judgment is Appropriate

Connie Larson argues that denial of summary judgment cannot be considered on appeal. She is, of course, incorrect in this assertion.

Although the denial of a summary judgment motion is typically interlocutory and, therefore, not an appealable ruling, the issue can be reviewed after trial in an appeal from final summary judgment. *Huston v. First Church of God, of Vancouver*, 46 Wn.App. 740, 745, 732 P.2d 173 (1987) (citing *Rodin v. O'Beirn*, 3 Wn.App. 327, 332, 474 P.2d 903 (1970).) Similarly, when the denial is based on an issue of law it is appropriate for the appellate court to consider that denial.

Washburn v City of Federal Way, 178 Wn.2d 732, fn. 8, 310 P.3d 1275 (2013) (citing *University. Village Ltd. Partners v. King County*, 106 Wn.App. at 324, 23 P.3d 1090).

The Supreme Court also addressed this issue

“We are reviewing a denial of summary judgment and therefore make the same inquiry as the trial court, i.e., summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Taggart v. State*, 118 Wn.2d 195, 198–99, 822 P.2d 243 (1992). The facts and reasonable inferences from the facts are considered in the light most favorable to the nonmoving party. *Id.* at 199, 822 P.2d 243. Questions of law are reviewed de novo. *Sherman v. State*, 128 Wn.2d 164, 183, 905 P.2d 355 (1995).”

Robb v. City of Seattle, 176 Wn.2d 427, 432-433, 295 P.3d 212 (2013)

Therefore, it is appropriate for this Court to consider the issues addressed in the Motion for Summary Judgment that was denied by the trial court. (See CP 13 through 23).

This issue is relevant because the motion was noted April 20, 2017 (CP 13) and argued on July 7, 2017 together with a Petition for Removal of Norman Larson as Personal

Representative and as Successor Trustee filed by Connie Mitchell on June 23, 2017 (CP 16 through 19). However, the Trial Court did not enter a decision on either the summary judgment Motion filed by Norman Larson or the Petition for removal filed by Connie Mitchell. Instead, both matters were taken under advisement. (CP 25).

Subsequently, the Court proceeded to the previously scheduled pretrial matters thereby denying both the Motion and the Petition, but only by implication. Therefore, Norman Larson attempted to present Findings of Fact and Conclusions of Law as a reconsideration of the implied denial (CP 31). However, the issue of reconsideration was also taken under advisement. (CP 36).

Thereafter, a bench trial was held on October 30, 2017. The trial court issued Findings of Fact and Conclusions of Law six months later on May 1, 2018 (CP 43).

Consequently, the “denial” of Norman Larson’s motion was essentially subsumed into the trial and should be

considered by this Court, in the context of the unusual procedural facts involved.

B. The Trial Court Should Not Have Divided the Trust Property

Connie Mitchell argues that the Trial Court acted appropriately by dividing the trust property unequally, and by disregarding the Trustee's prior division. She makes the unusual claim that the Trial Court intentionally made the division unequal "*to account for Ms. Mitchell having to bring and maintain TEDRA action to get relief.*" (Respondent's Response Brief at p. 11). Nowhere in the record is this strange analysis articulated by the judge. (It may be a misunderstanding because Ms. Mitchell's current attorneys were not representing her at trial.)

This argument is also contrary to Connie Mitchell's trial testimony that she was entitled to no more than 50% of the value of the property. (RP 88:14-16)

Ms. Mitchell also argues that the evidence of value was disregarded by the Trial Court because the only expert was a real estate broker, Steve Barrett, and not an appraiser. This is a pointless argument because Ms. Mitchell did not present contrary evidence.

In fact, Mr. Barrett expressly noted the assessed values assigned by Spokane County (Exhibit R-104 at p. 4-5). Those assessed values were also included in testimony by Norman Larson (RP 193:21) and included in his hand-drawn allocation of the assessed values of the parcels. (Exhibit 115). This map formed the basis of his proposed distribution originally sent to Connie Mitchell December 2016 and filed with the court at that time. (Exhibit R-102).

Ms. Mitchell admitted she was requesting that the Trial Court award her property assessed at \$256,270 and Norman would receive property worth only \$140,380. (RP 92:2-93:3; RP 106:25-108:70). This was, of course, inconsistent with her

admission that the property value should be divided equally.

(RP 88:14-16).

C. The Trial Court Did Not Have Jurisdiction to Construe the Gordon E. Larson Trust

Washington law gives the trustee authority to allocate and distribute the trust assets.

“RCW 11.98.145. (1) Upon termination or partial termination of a trust, the trustee may send, by personal service, certified mail with return receipt requested, or in an electronic transmission if there is a consent of the recipient to electronic transmission then in effect under the terms of RCW 11.96A.110, to the beneficiaries a proposed plan to distribute existing trust assets. . . .”

Norman Larson simply tried to allocate essentially equal value to both beneficiaries. (CP 9). If Ms. Mitchell believes his proposed allocation was unequal she needs only look to the Fourteenth Affirmative Defense in the Amended Answer (CP 12) where Mr. Larson expressly offered to equally divide parcel 27024.9009 which has little or no farmable land. (RP 194:15-20).

This court is again requested to look to *In re Estate of Ehlers*, 80 Wn.App. 751, 911 P.2d 1017 (1996). In that case the mere fact there was an unequal division of trust property was not sufficient reason to remove the trustee. In this case, Mr. Larson testified he attempted to divide the property equally, based on assessed value. Ms. Mitchell, on the other hand, testified that she wanted an unequal division, as long as she got the lion's share of the property.

There is no reason for the Trial Court to intervene in the trust distribution, and no statutory basis to do so. Ms. Mitchell can point to no case or statute that gave the Trial Court authority to overrule the Trustee's distribution for what the judge perceived to be a more, "fair" allocation.

It is troublesome that Ms. Mitchell continues to assert that she can seek to have her brother removed as Personal Representative of Clara Larson's will because of actions taken by Brant Stevens (which were almost immediately canceled) without triggering the will provision that would cause her to

forfeit her inheritance. However, if she continues to claim that the actions of Brant Stevens were wrongful then it would seem clear that she is contesting the will. She cannot have it both ways.

Finally, because the TEDRA petition requested that Norman Larson be removed as Personal Representative and as Trustee (CP 16 through 18), it required the court to construe both the terms of the Trust and of the Last Will and Testament of Clara V. Larson. It is, therefore, appropriate for this court to consider *Estate of Rathbone*, 190 Wn.2d 332, 412 P.3d 1283 (2018) which included analysis of a “No Contest Provision” in a will in the course of construing a testamentary trust.

In a recent case, Division I of the Washington Court of Appeals held that an heir seeking to invalidate a will triggered the “No Contest” provision and forfeited his right to inherit. *Estate of Margaret Rai-Choudhury*, 2019 WL 931658 (Unpublished) (Div. I Feb. 25, 2019)¹. Although Connie

¹ See Appendix B

Mitchell is not seeking to have the will invalidated, she did request that the Court remove Norman Larson as Personal Representative for actions taken by attorney Stevens who was acting contrary to instructions, and which were almost immediately canceled. She then bootstrapped that argument into asserting Norman should also be removed as Trustee and she should get an unfair distribution of trust property.

By overriding the Trustee's allocation and distribution of trust property, the Trial Court simply substituted its judgment for the judgment of the Trustee. There is no legal or equitable basis for this action. Therefore, the judgment is void, and unenforceable. A judgment entered by a court lacking proper jurisdiction is void and may be vacated at any time. *In re Marriage of Powell*, 84 Wn.App. 432, 438, 927 P.2d 1154 (1996) (lack of *in personam* jurisdiction). A judgment is void if the court lacks either personal jurisdiction or subject matter jurisdiction. *Castellon v. Rodriguez*, 4 Wn.App. 2d 8, 14, 418 P.3d 804 (2018) (writ of garnishment).

D. The Trial Court Should Not Have Considered the Wrongful and Unauthorized Actions of Attorney Brant Stevens

The 2015 probate case and the 2016 TEDRA case were eventually consolidated November 16, 2016. (CP 8).

Unfortunately, Connie Mitchell has conflated the two separate cases by arguing that unapproved actions taken by Norman Larson's prior attorney (Brant Stevens) in the probate action also affected the TEDRA case.

Ms. Mitchell argues that the actions of attorney Stevens can be considered by the Court in the context of the division of trust property. However, it is undeniable that Stevens' unauthorized request for instructions was filed in the probate case only. (CP P-26). Therefore, it is wrong to say that his unauthorized actions can be considered as a basis for determining the TEDRA case.

Norman Larson retained Brant Stevens only because attorney Richard Algeo was representing the Estate of Clara Larson, and felt he had a conflict of interest, but briefly took

over when it became apparent that attorney Stevens was disregarding instructions. (RP 128:21 – 131:1). Norman Larson testified to the same facts. (RP 23:4-15; RP 24:13-30:14).

The TEDRA petition was filed June 24, 2016 (CP 4). Stevens' request for instructions was filed two weeks later on July 14, 2016 (CP5 & 6) and attorney Algeo canceled Stevens' motion one week after that on July 27, 2016 (CP 7). It strains credulity to argue that Ms. Mitchell was prejudiced in any way.

The case law is quite clear that Mr. Larson should not be held legally liable for the rogue actions of attorney Stevens, taken in direct defiance of instructions and contrary to Mr. Larson's wishes. See cases cited at page 12 of Appellant's Opening Brief, including *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298 616 P.2d 1223 (1980).

Norman Larson consistently denied that Brant Stevens was acting with authority, and expressly stated so in his Answer and his Amended Answer to the TEDRA petition. (CP 11 & 12).

**E. Appellant Properly Identified Findings of Fact
And Conclusions of Law for This Appeal**

Contrary to Ms. Mitchell's arguments, the Appellant's Assignments of Error to sufficiently identify the improper Findings of Fact and Conclusions of Law. Each incorrect statement and conclusion is identified and complies with RAP 10.3.

**F. Attorney Fees Should Not Be Awarded to
Connie Mitchell**

Ms. Mitchell continues to argue that the Trial Court somehow awarded her more land and greater value as a way to punish Norman Larson. Again, Ms. Mitchell misconstrues what the Trial Court said. The trial judge clearly stated it was his intention to make an equal award. Nowhere in the record is there anything even hinting that an unequal division was made as an alternative to an award of attorney fees.

The Court needs to look no further than the last line of the April 30, 2017 Findings of Fact and Conclusions of Law (CP 43).

“The Parties shall each pay their own attorney fees and costs of litigation”

Further, although RCW 11.96A.150 grants discretion to award attorney fees, it is important to recognize that an award should recognize the equities. Here, Clara V. Larson’s will gave her land to her son, Norman, and over \$400,000 cash to her daughter, Connie. Norman did nothing more than try to equally divide the trust property, recognizing that both he and Connie agreed they could not reasonably co-own the property. The fact that she wanted more than an equal share should not be an appropriate basis on which to impose attorney fees.

Finally, there is no explanation or basis in either law or equity for why Ms. Mitchell should be allowed to live on the trust property rent free. The fact that her mother’s will forgave all the loans that were made over many years, makes no mention of the debt she owed to the Gordon E. Larson Trust

which owned the farm which she received in the allocation of the trust assets.

II. CONCLUSION

The Trial Court abused its discretion by vacating the allocation and distribution announced by the Trustee (CP 9) without explaining how or why it was unfair or unequal. Instead, the Trial Court focused almost entirely on unauthorized actions by attorney Stevens (Findings of Fact 19-26, Conclusion of Law E).

This is a case between a brother and sister that simply do not get along well. That is no reason for the Trial Court to have disregarded the fact Mr. Larson fired Brant Stevens when he learned actions were being taken against his instructions. Norman knew that Clara wanted Connie to have the money, and he told Brant Stevens not to take actions contrary to that position. When he did, Norman fired him.

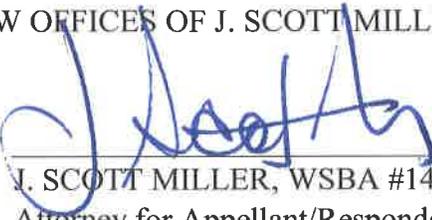
This is a situation where the Trial Court should not have intervened because whatever harm was caused by Brant Stevens was cured long before trial. Even though Mr. Larson disagreed with the distribution ordered by the Trial Court, he has transferred title to the land as ordered.

Norman Larson respectfully requests that the Court of Appeals reverse the Trial Court and instruct that the property be allocated and divided as identified in the December 2016 notice (CP 9).

DATED: April 11, 2019.

LAW OFFICES OF J. SCOTT MILLER, P.S.

By:



J. SCOTT MILLER, WSBA #14620
Attorney for Appellant/Respondent

CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on April 11, 2019, at Spokane, Washington, a copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

<input type="checkbox"/>	Via Hand Delivery	Jeffrey R. Ropp
<input type="checkbox"/>	Via Overnight Mail	Kevin J. Curtis
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APPENDIX A

ERRATA

Appellant's Brief

Page 11 – Please note the typographical error in the last sentence of the final paragraph, “Clearly the court recognized that Ms. Mitchell asked the court to intervene in how the will was administered, as recognized by the court’s Order expressly instructing Mr. ~~Mitchell~~ Larson to make certain payments pursuant to the court’s interpretation of the terms and condition of Clara Larson’s will.”

Respondent's Response Brief

Page 11 – At line 11 the Respondent incorrectly indicates that “... parcel no. 27024.9009 (80 acres) was to go to Gordon Larson ...”. However, the court’s Order indicates that property was to go to Norman Larson.

APPENDIX B

2019 WL 931658

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION,
SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

In the MATTER OF the ESTATE
OF Margaret RAI-CHOUDHURY

No. 77740-8-I

|

FILED: February 25, 2019

Appeal from Whatcom County Superior Court,
16-4-00659-4, Honorable Raquel D. Montoya-Lewis, J.

Attorneys and Law Firms

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Respondent.

UNPUBLISHED OPINION

Appelwick, C.J.

*1 Khashon Haselrig argues the trial court erred when
it determined he violated a no contest clause in his
grandmother's will. As a result, he was disqualified from
inheriting from her estate. We affirm.

FACTS

In July 2015, Margaret Rai-Choudhury met with attorney
Steve Avery to prepare a will and other estate documents.
She was 82 years old and recently had filed for dissolution
from her husband, Prosenjit Rai-Choudhury. Margaret
executed her will on July 21, 2015. It was attested by
two witnesses. Both witnesses declared that Margaret
appeared to be of sound mind and under no duress or
undue influence.

The will declared that it was Margaret's intention to
leave none of her property to Prosenjit or to their only
child, Indira Rai-Choudhury. Instead, she made a specific
bequest of \$ 10,000 to Linda Borland. Of the probate
estate residue, she left half to the University of British
Columbia and half in trust for her grandson, Khashon
Haselrig. She also included a no contest provision in
her will, whereby a beneficiary who contests the will
loses his or her interest in the estate. Margaret named
Stephanie Inslee, a professional guardian, as her personal
representative. Margaret had no later contact with Avery
to modify or revoke her will or other estate planning
documents. The combined value of her assets was
approximately \$ 1,877,000. The bulk of her assets were
nonprobate assets.

Margaret died on November 25, 2016. Inslee arranged
for the body to be cremated, and the cremation was
performed on December 6. The same day a neighbor
notified Indira of Margaret's death. Khashon was at
dinner with Indira when she found out. Indira called
Avery on December 8, 2016. Avery informed her that
he did not have the original will and would be filing the
probate soon. Upset about the cremation and perceiving
inaction on the estate, she began e-mailing with Avery and
Inslee.

Unable to locate Margaret's original will, Avery filed a
copy with Whatcom County Superior Court. He and the
two witnesses to the will attested that it was a true and
correct copy. On December 19, 2016, the court admitted
the will to probate and appointed Inslee as personal
representative.

On January 4, 2017, Avery e-mailed Indira asking
for Khashon's address and telephone number. Indira
responded that Khashon lived with her and that she would
show him the e-mail. The will and probate documents were
sent to Khashon by e-mail on January 7 and by mail on
January 18, 2017.

On January 25, Khashon filed a motion for removal
of the personal representative, appointment of a new
personal representative, and revocation of testate probate.
He argued that the will copy should not have been
admitted to probate. He argued Inslee violated [RCW
11.20.070](#), because she failed to prove that the will was not
intentionally revoked and failed to provide required notice

to interested parties before admitting the will to probate. Indira joined the motion.

At the hearing on February 10, 2017, Khashon's counsel argued that Inslee "need[s] to prove that she didn't intend to revoke her will. The will is lost, the law is clear on it, it's presumed to be revoked." Khashon's counsel further argued that "according, again, to the statute and to case law ... Khashon was entitled to notice[prior to admitting the lost will to probate] so that they can bring to the court the issue that there was a lost will." The court denied the motion. The order stated that "[n]o evidence has been submitted to this Court that the ... Will was lost or destroyed under circumstances such that the loss or destruction had the effect of revoking the will.... [I]t should be admitted to probate." Khashon did not request reconsideration or appeal this order.

*2 On June 19, 2017, Khashon filed a "motion to void fraudulent admission of copy will, removal of personal representative, obtain full accounting and impose sanctions." (Formatting omitted.) On August 22, 2017, he filed a "motion to strike defendants' responses and receive default judgment in favor of plaintiff's motion to void fraudulent admission of copy will, removal of personal representative, obtain full accounting and impose sanctions." (Formatting omitted.) On August 25, 2017, the court denied the relief that Khashon sought in both motions, because "[t]hat issue was raised earlier in front of the Court at the appropriate time, and the Court made findings with respect to ... the issues related to notice." Khashon moved for discretionary review, which was denied.

On September 20, 2017, Inslee filed a motion for judicial determination, arguing that Khashon's actions violate the no contest provision in Margaret's will and bar him from receiving any property from her estate. The trial court granted Inslee's motion for judicial determination on November 3, 2017, barring Khashon from inheriting from Margaret's estate. Khashon appeals.

DISCUSSION

Khashon appeals the judicial determination barring him from inheriting under Margaret's will. Khashon also argues that the trial court erred in admitting the will to probate under [RCW 11.20.070](#). He contends that his

probate court litigation was procedural, so it did not violate the will's no contest provision.

"[P]roceedings where a will is being challenged are equitable in nature and are reviewed de novo upon the entire record." [In re Estate of Black](#), 153 Wn.2d 152, 161, 102 P.3d 796 (2004). An interested person may contest the validity of a probated will within four months following the probate by filing a will contest petition with the court. [RCW 11.24.010](#). Generally, no contest clauses in wills are enforceable in Washington. [In re Estate of Mumby](#), 97 Wn. App. 385, 393, 982 P.2d 1219 (1999). The no contest provision in Margaret's will is expansive:

If a beneficiary named under this Will or one of my beneficiaries at law shall in any manner contest or attack this Will or any of its provisions, then in such event any share or interest in my estate given or passing to such contestant is hereby revoked.... This paragraph shall not be construed to apply to any action brought in good faith to interpret a provision of this Will which may be unclear or ambiguous.

Khashon's argument that [RCW 11.20.070](#) was violated and that the will was improperly admitted to probate was considered by the trial court and rejected in its February 10, 2017 order. "[I]f a party contests the admission of the will to probate, generally that same party may not file a later will contest. The party's only remedy is to appeal the order admitting the will." [Black](#), 153 Wn.2d at 170. Khashon did not appeal that order. It became final. "A final order from which no appeal is taken becomes the law of the case." [Tornetta v Allstate Ins. Co.](#), 94 Wn. App. 803, 809, 973 P.2d 8 (1999). We therefore decline to consider Khashon's arguments that the will was improperly admitted to probate.¹

On June 19, 2017, Khashon filed a "motion to void fraudulent admission of copy will, removal of personal representative, obtain full accounting and impose sanctions." (Formatting omitted.) Khashon argues his pleadings were merely procedural and not a will contest.

*3 “A court may treat a motion as a will contest, even where the petitioner styles it otherwise.” *In re Estate of Finch*, 172 Wn. App. 156, 162, 294 P.3d 1 (2012). In *Finch*, a personal representative sued a physician for medical malpractice. *Id.* at 159. The physician moved to dismiss the suit on the basis that the will appointing the personal representative was fraudulent, and was granted leave to intervene in the probate. *Id.* at 159, 161. This court reversed the order granting the physician leave to intervene, reasoning that the physician lacked standing to bring a will contest. *Id.* at 167. “These allegations—that *Finch* lacked the capacity to make a will ... that he had not signed the will, and that the will was not properly witnessed—are precisely what a court considers in a will contest under RCW 11.24.010.” *Id.* at 163. Khashon's pleadings were a challenge to the admission and validity of the will. Under *Finch*, Khashon cannot circumvent the no contest provision by styling his attack on the validity of the will as a procedural motion.

Khashon cites *In re Estate of Little*, 127 Wn. App. 915, 920, 113 P.3d 505 (2005) in support of his argument that he did not initiate a will contest. In *Little*, unnamed heirs who were not notified of the decedent's death moved the court to appoint a new administrator six years after the estate was closed. *Id.* at 918-19. The appellate court declined to apply the limitations period in the will contest statutes,

reasoning that this action was more akin to the law of vacating judgments. *Id.* (“The heirs have not yet brought a will contest and the trial court has therefore had no occasion to apply the law that governs will contests.”). But, this case is more like *Finch* than *Little*. Like the physician in *Finch*, Khashon sought to invalidate a lost will prior to the closure of probate, so his motion must be considered a will contest regardless of its label.²

The trial court did not err in concluding that that “[t]he pleadings filed by, and arguments made by, Khashon Haselrig, repeatedly contested and attempted to invalidate the Decedent's Last Will and Testament.... [They] violate the No Contest provision of Decedent's Last Will.” Khashon makes no allegation that the will contest provision is unclear or ambiguous.

We affirm.

WE CONCUR:

Andrus, J.

Smith, J.

All Citations

Not Reported in Pac. Rptr., 2019 WL 931658

Footnotes

- 1 Khashon makes several additional assignments of error, but fails to support those with argument in the brief. “An appellate brief should contain argument in support of every issue presented for review, including citations to legal authority and references to the relevant parts of the record.” *Farmer v. Davis*, 161 Wn. App. 420, 432, 250 P.3d 138 (2011). “Lacking either, we will not consider this issue.” *Id.*
- 2 Khashon also cites three Washington cases that examine whether no contest clauses are operable where an individual brings an action in good faith, or on public policy grounds: *In re Estate Chappell*, 127 Wash. 638, 221 P. 336 (1923); *In re Estate of Kubick*, 9 Wn. App. 413, 419, 513 P.2d 76 (1973); *In re Estate of Primiani*, No. 34200-0-III, slip op. at 11-15 (Wash. Ct. App. May 2, 2017)(unpublished), http://www.courts.wa.gov/opinions/pdf/342000_unp.pdf. But, Khashon does not make a discernable argument why he falls within safe harbor provision of the no contest clause, nor does he propose a public policy ground on which he attacks the will.

LAW OFFICES OF J. SCOTT MILLER

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