

No. 74873-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Matter of the Estate of Edward Coaker,

WILLIAM P. COAKER,

Appellant,

v.

MICHAEL E. COAKER,
Personal Representative of the Estate of Edward Coaker,

Respondent.

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Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
THE HONORABLE GEORGE N. BOWDEN

BRIEF OF RESPONDENT

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I. INTRODUCTION

RCW 11.24.010 imposes a four month statute of limitations for bringing will contests and requires that a will contest be personally served on the personal representative within 90 days of filing. The Supreme Court requires strict compliance with the service and filing provisions of RCW 11.24.010; substantial compliance is insufficient to invoke the authority of the superior court to revoke a will.

In February 2015, respondent Michael Coaker, as personal representative for his deceased father's estate, filed in probate his father's last will and testament leaving only \$5 to both himself and his brother, appellant William Coaker ("Bill") and granting the bulk of their father's estate to their mother. Bill did not file and serve a petition to contest the will until November 2015 – five months after the limitations period expired. Ignoring plain statutory language and established precedent, Bill now argues that his claim that he is "disabled" tolled the deadline established by RCW 11.24.010, and that his allegation that Michael submitted a forged will that left their father's estate not to Michael but to their mother prevented the court from accepting a will that was witnessed by two witnesses whose testimony was never impeached. This Court should affirm.

II. RESTATEMENT OF ISSUES

1. Did a will contestant fail to timely file and then personally serve his petition to set aside a will under RCW 11.24.010, which requires a will contest petition to be filed “within four months immediately following the probate” of the will and to be personally served on the personal representative within 90 days of filing?

2. Did the personal representative provide adequate notice of probate to heirs of an estate whose “names and addresses are known to him” under RCW 11.28.237(1) by searching for an address for his brother, who had been estranged from the family for nearly three decades and who concedes that he was living temporarily at someone else’s home, and then by publishing notice to creditors?

3. Did the trial court correctly refuse to toll RCW 11.24.010’s four-month limitations period, which is “absolute” and for which “[t]here are no exceptions,” *Estate of Toth*, 138 Wn.2d 650, 656, 981 P.2d 439 (1999), based on an alleged mental disability, which in any event was refuted by documentary evidence?

4. Does a trial court correctly dismiss a will contest petition alleging a will is a forgery when two witnesses aver in unimpeached testimony that the testator signed the will in their

presence and the only evidence supporting the allegation of forgery is the declaration of an “expert” witness trained in the pseudoscience of graphology?

III. RESTATEMENT OF FACTS

A. Ed Coaker had two sons, Michael and Bill. Bill has been estranged from his family for 28 years.

The decedent Edward William Coaker was born on November 28, 1944. (CP 326) Ed began dating Patricia Coaker in high school and they were married twice, divorcing in 1980, but quickly remarrying. (CP 99)¹ Ed and Patricia divorced again in 1985, but continued to remain a couple and reside together at their home in Brier, in Snohomish County. (CP 99)

Ed and Patricia had two sons, now adults, Michael and William (Bill). (CP 52, 98-99, 489) Bill was a poor student, receiving low grades and some learning assistance, but was never held back a grade and is not illiterate. (CP 83, 91, 100-01, 106) Bill dropped out of school in his junior year, and fell into a life of drug abuse and crime. (CP 69, 81, 85, 91, 93, 99-100, 103, 106, 113, 121)

Bill’s drug addiction burdened Ed and the rest of the Coaker family. (CP 94, 103, 106, 113) Bill would disappear for years at a

¹ Individuals are referred to by their first names for clarity. No disrespect is intended.

time, with his whereabouts unknown, occasionally appearing at Ed and Patricia's house asking to stay the night. (CP 94, 97, 99) After a drug overdose that almost killed him, Ed and Patricia took Bill in but he disappeared after a few days; Bill did not otherwise live with Ed and Patricia. (CP 81, 92-94, 99-100, 102-03, 110-11, 121) Ed eventually stopped trying to help Bill. (CP 94)

Ed and Patricia raised Bill's children after Bill abandoned them when they were very young. Ed was the only father figure his grandchildren knew. (CP 92, 96-97, 100, 104, 111) Bill, now 50, has been estranged from the Coaker family for 28 years. (CP 99, 193, 437) He has not attended any birthdays, funerals, graduations or other family functions. (CP 97, 99, 103)

Bill is well acquainted with the legal system; he has been a named plaintiff or defendant in at least 107 court cases since 1984. (CP 131-140) Bill often represents himself pro se, and does so effectively, with one attorney calling Bill a "crafty" litigant based on his experience against him in the summer of 2015. (CP 77-79, 142-44)

B. After Ed's death, Michael was appointed personal representative of Ed's estate under a will that left Bill and Michael only \$5 and left their mother the bulk of Ed's estate.

Ed died on November 28, 2013. (CP 315) On September 3, 2014, Michael submitted to probate in Snohomish County Superior

Court a July 24, 2013 will executed by Ed. (CP 348-51) The will named Michael personal representative and listed specific property that was to pass to Michael, including all bank accounts and six pieces of real property, listed other property that would pass to one of Bill's children (Shawn), and provided that the residue of the estate would pass to Patricia and Michael. (CP 325) It left Bill \$5. (CP 325)²

The probate court issued letters testamentary appointing Michael personal representative. (CP 335-39) Michael's counsel mailed a Notice of Appointment and Pendency of Probate to his nephew Shawn and to his mother Patricia. (CP 332-33) Michael's counsel also conducted an Internet search for Bill and contacted the Washington State Department of Corrections in case Bill was incarcerated, but was not able to find an address for him in Washington or any other state, and thus did not mail Bill the notice of probate. (CP 341-43) Michael published a Notice to Creditors in the Snohomish County Tribune from September 10-24, 2014, stating that Michael had been appointed personal representative and setting forth the time for submitting claims to the estate. (CP 327-28, 330, 341-43)

² Bill erroneously contends that Michael was "the sole beneficiary of the entire estate" under this July 2013 will. (App. Br. 30)

Michael found a subsequent will executed by Ed on August 26, 2013, that all but eliminated Michael's inheritance. (CP 315, 326) This will again named Michael personal representative and left Bill \$5. (CP 326) But unlike the previous will, the August 26, 2013 will left Michael only \$5, with the bulk of the estate going to their mother Patricia. (CP 326) Michael filed the August 2013 will for probate in Snohomish County on February 13, 2015, along with declarations from two witnesses, who were not beneficiaries under the will, attesting that "[o]n August 26th, 2013, Edward William Coaker, in my presence and in the presence of the other witness . . . [s]igned this will." (CP 315-17, 319-23) A Snohomish County Superior Court Commissioner entered an amended order admitting this will to probate on February 13, 2015. (CP 312-14)

C. The trial court dismissed Bill's will contest after he failed to timely file and serve a petition contesting the will.

It is undisputed that Bill had actual knowledge of his father's death and the pendency of probate by March 20, 2015. (CP 536, 540) On June 11, 2015, acting pro se, Bill filed a "Creditors Claim" stating "[t]he following claim is made against the estate . . . [for] 50% of the estate" and alleging "Dad's signature is forged on both wills." (CP 300)

Bill did not personally serve the creditor's claim on Michael. (CP 300) Four days later, on June 15, 2015, Bill filed a "calendar note," scheduling a June 25, 2015 hearing for "contesting of will" and "dismissal of current representative." (CP 297-99)³ Bill did not file any other pleadings or personally serve Michael with the note for calendar. (CP 399) Bill failed to confirm the hearing as required by Snohomish County Local Civil Rule 7 or appear, and the court struck the hearing. (CP 406, 285)

Rather than appearing in court on June 25, 2015, Bill filed a pro se motion and declaration seeking to remove Michael as personal representative, to contest the will as a forgery, and alleging that he was not properly served with notice of probate, noting his motion for July 2. (CP 286-91) When Bill failed to confirm or attend the hearing, the court struck it.⁴ Bill filed a similar pro se motion and declaration on July 6, noting it for hearing on July 17, and then renoting it for hearing for July 31. The court struck these hearings as well. (CP 268-69, 274-76, 278-83; Docket Sheet, 14-4-01297-2, entry #39)

³ Bill erroneously asserts that he filed a "note for calendar action" with his Creditors Claim on June 11, 2015. (App. Br. 12)

⁴ This ruling is reflected only on the docket sheet. (See Docket Sheet, 14-4-01297-2, entry #36)

On October 26, 2015, counsel appeared for Bill. (CP 265-66) On November 18, 2015, Michael filed a “Notice of Rejection of Creditor’s Claim,” rejecting Bill’s June 11th claim. (CP 258-60) On November 30, 2015, acting through counsel, Bill filed a TEDRA action, petitioning to contest the will and seeking to remove Michael as personal representative; on December 17, 2015, Bill filed a motion in the original probate action seeking the same relief. (CP 417-21, 534-44) Bill supported his petition with a declaration from a purported handwriting expert (trained in behavioral profiling) alleging that the signature on the will was forged. (CP 503-10) The court consolidated the probate action and Bill’s TEDRA action under the probate cause number. (CP 48-49)

On January 12, 2016, Michael sought dismissal of the will contest on the ground that it was untimely to contest Ed’s second will, which was probated on February 13, 2015. (CP 387-401) In opposing summary judgment, Bill argued for the first time that the court should have appointed a guardian ad litem for him, that the four-month statute of limitations should be tolled as a disability “accommodation,” and that his June 11, 2015, “Creditors Claim” was a timely will contest petition. (CP 206-24) Bill’s attorney filed a Petition for Appointment of Guardian Ad Litem on February 2, 2016,

asserting Bill could “only appear in court through a guardian ad litem.” (CP 163-64) On February 8, 2016, Michael provided an accounting of the estate. (CP 51-56)

On February 12, 2016, Snohomish County Superior Court Judge George Bowden (“the trial court”) granted Michael’s motion for summary judgment, dismissing Bill’s will contest and awarding attorney’s fees to Michael. (CP 31-34; App. A) Bill appeals. (CP 28-30)⁵

IV. ARGUMENT

A. Bill failed to comply with the “strict” requirements of RCW 11.24.010 that will contest petitions be filed within four months of probate and that the petition be personally served on the personal representative.

The requirements for commencing a will contest in RCW ch. 11.24 are “strictly enforced.” *Estate of Jepsen*, 184 Wn.2d 376, 381, ¶ 10, 358 P.3d 403 (2015). Here, Bill’s will contest is barred as a matter of law because he failed to personally serve Michael with a petition to contest the will, and in any event, his “Creditors Claim” could not be considered a timely petition contesting the will under RCW ch. 11.24. This Court should affirm the trial court’s order dismissing Bill’s will contest.

⁵ Michael and Bill’s purported half-sister, Angela Fehr (whom Bill was living with), also appeared and submitted a claim against the estate; her claim was denied and then dismissed on summary judgment. (CP 261-62, 305-06, 438) She has not appealed.

This Court reviews the trial court’s summary judgment order de novo. The Court will affirm a summary judgment order based on the statute of limitations “when the pleadings, depositions, interrogatories, admissions, and affidavits in the record demonstrate there is no genuine issue of material fact as to when the statutory period commenced.” *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 323, ¶ 8, 300 P.3d 431 (2013). Because “[w]ill contests are statutory proceedings . . . courts must be governed by the provisions of the applicable statute” prescribing claims filing limitations, RCW ch. 11.24. *Estate of Toth*, 138 Wn.2d 650, 653, 981 P.2d 439 (1999) (quotation omitted).

“RCW 11.24.010 . . . set[s] forth reasonable statutory prerequisites that must be fulfilled in order to commence a will contest action,” *Jepsen*, 184 Wn.2d at 381, ¶ 11, including that a will contestant file a petition setting forth his objections to the will within four months of the will’s probate – otherwise “the probate . . . shall be binding and final”:

If any person interested in any will shall appear within four months immediately following the probate . . . and by petition to the court having jurisdiction contest the validity of said will . . . he or she shall file a petition containing his or her objections and exceptions to said will. . . .

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

RCW 11.24.010. The petitioner must also personally serve the personal representative “within ninety days after the date of filing the petition.” RCW 11.24.010. If the petitioner fails to timely serve the personal representative, “the action is deemed to not have been commenced for purposes of tolling the statute of limitations.” RCW 11.24.010.

“The four-month period is absolute If the Will contest is not filed prior to the expiration of the four-month period, the contest will be absolutely barred.” *Toth*, 138 Wn.2d at 656 (quoting Bruce R. Moen, Nat’l Bus. Inst., Inc., *Washington Probate: Beyond the Basics* 171 (1996)); *Estate of Peterson*, 102 Wn. App. 456, 467, 9 P.3d 845 (2000) (“the statute is unambiguous that the period for contesting a will begins at the date of probate and ends four months later”), *rev. denied*, 142 Wn.2d 1021 (2001). The statute reflects the Legislature’s “long-standing preference for efficient administration and finality of judgments in probate matters.” *Jepsen*, 184 Wn.2d at 381 n.5, ¶ 11.

Here, Bill’s claims that his father’s will is a forgery is governed by RCW 11.24.010 (“any . . . cause affecting the validity of the will or a part of it, shall be tried and determined by the court”). *See Estates*

of *Palmer*, 146 Wn. App. 132, 137, ¶ 12, 189 P.3d 230 (2008) (challenge to party’s status as beneficiary under testamentary trust was time-barred under RCW 11.24.010 because it was “in all important respects, a will contest”).⁶ Bill’s argument that the TEDRA limitations period for actions against a personal representative in RCW 11.96A.070 governs his challenge to his father’s will ignores the plain language of RCW 11.24.010. (App. Br. 36) His argument also ignores RCW 11.96A.080, which states that RCW ch. 11.96A “shall not supersede . . . any otherwise applicable provisions . . . in chapter . . . 11.24.”

1. Bill did not timely serve a will contest petition on Michael as required by RCW 11.24.010.

The trial court correctly dismissed Bill’s will contest as untimely because Bill failed to timely personally serve a petition to contest the will on the personal representative, Michael, as required by RCW 11.24.010. Under RCW 11.24.010, “[i]f 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.*” (emphasis added). RCW 11.24.010 requires personal service of the petition to contest a

⁶ Bill’s characterization of his claim as one for fraud because “Michael Coaker . . . had knowledge of the falsity of the wills” (CP 540), does not alter the nature of his claim as one “contest[ing] the validity of” the will. RCW 11.24.010.

will on the personal representative. Bill's mail service of his "Creditors Claim" on Michael's attorney – even assuming it could be construed as a will contest petition – is not sufficient because RCW 11.24.010 requires strict compliance.

In *Jepsen*, the Supreme Court reaffirmed that "Washington courts have always strictly enforced the requirements for commencing will contest actions," holding that the failure to personally serve the personal representative with a will contest petition within the statutory time period means the will contest is "deemed to not have been commenced under" the statute. *Jepsen*, 184 Wn.2d at 379-81, ¶¶ 7, 9, 10 ("RCW 11.24.010 sets forth the steps necessary to commence a will contest action, one of which is personally serving the will contest petition on the PR. Mack did not do so, and the probate of Jepsen's will is now binding and final."). The Court held that email service of a will contest petition on the personal representative's attorney did not comply with RCW 11.24.010's personal service requirement, and thus the will contest was time-barred. *Jepsen*, 184 Wn.2d at 380 n.4, ¶ 9 ("[a]n e-mail to an attorney cannot constitute substantial compliance with personal service on a party where, as here, there is no express waiver of personal service, no agreement for electronic service, see GR

30(b)(4), and no acceptance of service by the PR anywhere in the record.”).⁷

Under RCW 11.24.010, any petition to contest Ed’s August 2013 will had to be commenced no later than June 13, 2015, four months after the will was filed for probate, with personal service required 90 days thereafter. Bill did not personally serve Michael with *anything* until December 2015, or even bother to obtain a citation from the probate court, as required by RCW 11.24.020, until December 23, 2015, long after expiration of the ninety days allowed by RCW 11.24.010. (CP 231-33, 472) Because Bill failed to “serve[] a petition within the time under this section” the court never acquired statutory authority to adjudicate the validity of Ed’s will and its probate is “binding and final.” RCW 11.24.010.

Bill recognizes that he failed to timely commence a will contest petition under the statute, arguing that RCW 11.24.010’s strict service requirement may be “waived” by the personal representative. (App. Br. 32) The *Jepsen* Court rejected this

⁷ That Bill was acting pro se prior to October 2015 is of no consequence, because Washington courts require pro se litigants to “comply with applicable rules and statutes and hold them to the same responsibility as an attorney.” *Recall of Piper*, 184 Wn.2d 780, 791, ¶ 19, 364 P.3d 113 (2015) (quoted source omitted).

argument as well, holding that RCW 11.24.010 “sets forth the requirements for *commencing* a will contest action.” 184 Wn.2d at 380-81, ¶ 10 (emphasis in original).

Even if a personal representative could “waive” the requirements for commencing a will contest, Michael did not do so here because in both the probate action and the TEDRA action initiated by Bill, Michael immediately asserted that the petition failed to comply with RCW 11.24.010. (CP 270-71, 447-52) Bill’s will contest is time-barred because he failed to timely serve the personal representative. This Court should affirm the trial court’s summary judgment order.

2. Bill’s “Creditors Claim” under RCW ch. 11.40 is not a will contest petition.

Bill’s argument that he “met the requirements to commence a will contest” (App. Br. 31) fails for another reason – his “Creditors Claim,” filed on June 11, 2015, is not a petition to contest the will under RCW 11.24.010, but a claim to the decedent’s estate, governed by RCW ch. 11.40.

Creditor claims are distinct from will contest petitions and serve a very different purpose. Creditor’s claims, unlike petitions, do not seek to set aside a will, but instead seek payment from the decedent’s estate. Under RCW 11.40.070, a claim must state the

“name and address of the claimant,” whether the claim is secured, and the amount of the claim.

Bill’s “Creditors Claim” complied with RCW 11.40.070, not RCW 11.24.010, stating “[t]he following claim is made against the estate of the decedent,” providing his name and address, stating his claim was unsecured, and seeking payment of half the estate. (CP 300) As required by RCW 11.40.080, Michael then acted on Bill’s claim by rejecting it and providing Bill notice of the rejection. (CP 258-60) Recognizing that no will contest had ever been filed, Bill, through counsel, filed a petition to contest the will on November 30, 2015, after receiving the PR’s rejection of the creditor claim. (CP 534-43) But that was over five months past the deadline established by RCW 11.24.010. This Court should affirm for the separate reason that no timely petition to contest Ed’s last will and testament was ever filed.

B. Bill had actual notice of the probate. Michael complied with RCW 11.28.237 because Bill had no known current address.

Bill’s contention that he never had notice of the probate is without merit. RCW 11.28.237(1) did not require Michael to mail a notice to Bill because Bill had no known regular address. Regardless, Bill undisputedly received *actual notice* of the probate before the

limitations period expired. Bill had ample opportunity to timely challenge the will.

RCW 11.28.237(1) requires personal representatives to provide notice of their appointment and pendency of the probate to heirs, legatees, and devisees of the estate if their “names and addresses are known to him or her”:

Within twenty days after appointment, the personal representative of the estate of a decedent shall cause written notice of his or her appointment and the pendency of said probate proceedings, to be served personally or by mail to each heir, legatee and devisee of the estate and each beneficiary or transferee of a nonprobate asset of the decedent *whose names and addresses are known to him or her*

RCW 11.28.237(1) (emphasis added).

A personal representative must use “due diligence” to provide notice under RCW 11.28.237. *Estate of Little*, 127 Wn. App. 915, 923, ¶ 20, 113 P.3d 505 (2005), *rev. denied*, 156 Wn.2d 1019 (2006). In similar contexts, Washington courts have held that “due diligence” requires “honest and reasonable efforts to locate the defendant” but “[n]ot all conceivable means.” *Crystal, China & Gold, Ltd. v. Factoria Ctr. Investments, Inc.*, 93 Wn. App. 606, 611, 969 P.2d 1093 (1999) (corporation service statute, RCW 23B.05.040) (internal quotation marks omitted); *Martin v. Meier*, 111 Wn.2d 471, 482, 760 P.2d 925 (1988) (nonresident motorist statute, RCW 46.64.040).

Michael exercised the diligence required by RCW 11.28.237(1). *See Crystal*, 93 Wn. App. at 608, 611 (plaintiff exercised due diligence by unsuccessfully trying to obtain agent's address in telephone directory and by calling directory assistance; "Crystal's inability to serve the registered agent was not a result of its lack of diligence but was a result of the registered agent not being available for service."). Michael did not know Bill's address or if Bill even had one as Bill had been estranged from the Coaker family for nearly three decades, disappearing for years at a time during which he failed to contact his own children. (CP 94, 97, 99) Michael's attorney conducted an Internet search for Bill's address and contacted the Washington Department of Corrections, all to no avail. (CP 341-43) Moreover, after being unable to find Bill, Michael published notice of the probate proceedings as an alternative method of providing Bill notice. (CP 327-28, 330, 341-43)

Bill attempted to establish that his address was ascertainable, but the evidence he submitted on summary judgment shows just the opposite. (CP 530) Bill admitted that he lived at someone else's house in Mill Creek and at a construction site (presumably without an address), confirming that his address could not be found with the exercise of reasonable diligence. (App. Br. 35-36, citing CP 491) Bill

also relied on internet search results for “William Coaker Washington” that showed he resided in seven different cities, without any relevant dates or even specific addresses. (CP 530) Bill’s evidence confirmed what Michael and the rest of the Coaker family already knew – Bill’s whereabouts at any given time were unknown and unknowable.

Bill further muddles his whereabouts by asserting he received Social Security checks at a Mill Creek address. (App. Br. 36; CP 491) But the Social Security Administration contacted Bill at an Everett address, not a Mill Creek one. (CP 202) Michael could, and did, reasonably conclude based on Bill’s lifetime of transiency and his attorney’s efforts that Bill did not have an address or, if he did, it could only be discovered through strenuous efforts not required by law, and that the best way to provide Bill notice was by publication. (CP 341)

Bill’s other “evidence” likewise fails to support his claim that he could have been personally served with notice of the probate. Both Michael and Shawn (Bill’s son) refuted Bill’s attorney’s wholly unsupported declaration that Ed knew where Bill lived, that Shawn

knew where Bill lived, and that Michael knew Bill's phone number. (*Compare* CP 512, *with* CP 97, 437)⁸

Significantly, Bill undisputedly received actual notice of the estate's probate, mooting any claim of deficient notice. Bill acknowledges that he learned of his father's passing and probate no later than March 20, 2015, less than five weeks after Ed's will was admitted to probate. (CP 536, 540; *see also* App. Br. 36 (acknowledging "actual notice given to Bill")) Bill began filing documents in the probate case in June 2015. (CP 297-300) Bill cannot contend that the court lacked jurisdiction over him when he repeatedly appeared and participated in the proceedings. *Estate of Walker*, 10 Wn. App. 925, 930-31, 521 P.2d 43 (1974) ("the superior court has personal jurisdiction over the persons who appear in the proceedings whether or not they receive the requisite notices"; "appellants and the other heirs who appeared and participated in the proceedings . . . must be held bound by those proceedings"). And even if Bill could assert that he somehow received deficient notice, that would not make his will contest timely because "the will

⁸ Bill's attorney nowhere explained how he could have personal knowledge of what Coaker family members knew or did not know, and any claims about Ed's knowledge are barred by the Dead Man's Statute, RCW 5.60.030. *See Kellar v. Estate of Kellar*, 172 Wn. App. 562, 574, ¶¶ 21-22, 291 P.3d 906 (2012), *rev. denied*, 178 Wn.2d 1025 (2013).

contestant's time period in which to act is tied to the date the will is admitted to probate, regardless of when the contestant receives notice." *Toth*, 138 Wn.2d at 654.

This case is nothing like *Estate of Little*, 127 Wn. App. 915, 113 P.3d 505 (2005), relied on heavily by Bill. (App. Br. 29-30, 33-34) In *Little*, the Court of Appeals ruled that a completed estate under which the PR was the sole beneficiary could be reopened because the PR failed to provide notice of the probate proceeding to the decedent's lawful heirs, the decedent's nieces and nephews (despite knowing of at least one of them), who only learned of the probate years after the estate had closed. In addition to failing to provide notice to the heirs, the personal representative falsely listed himself as the only "heir, legatee, or devisee" in his petition for probate, thus concealing the heirs' existence from the court and taking the entire estate for himself. The personal representative's declaration did not even address "his awareness of the heirs or any efforts he may have made to find them." *Little*, 127 Wn. App. at 924, ¶ 21.

In stark contrast to *Little*, Michael is not a "primary beneficiary," as Bill maintains. (App. Br. 33) Michael did not conceal Bill's existence to unjustly enrich himself. Michael disclosed Bill as an heir to the court, explained that despite his efforts he could not

locate Bill, and probated a will that left them both \$5, thereby nullifying the first will that left Michael all of Ed's bank accounts and six pieces of real estate. (CP 316, 341, 325-26) Far from breaching his fiduciary duties or engaging in a "fraud of the grossest kind" (App. Br. 32), Michael dutifully probated a will that left him virtually nothing,

Moreover, unlike *Little*, Bill cannot claim that he did not have the opportunity to be heard. *See Little*, 127 Wn. App. at 922, ¶ 16 (purpose of notice is to provide "an opportunity to challenge" probate of estate) (citing *Estate of Walker*, 10 Wn. App. at 931-32). Bill learned of his father's death and the probate in time to file a timely will contest, but failed to do so. This Court should affirm.

C. The trial court was not required to "accommodate" Bill's alleged disability by tolling the strict statute of limitations in RCW 11.24.010.

No authority requires, or even permits, a court to toll the limitations period for will contests as a disability "accommodation," and, regardless, Bill is not disabled. Bill's contention that his "disability" required the court to toll the limitations period as an "accommodation" is without merit, as is his assertion that he was denied his constitutional right to access the courts. The trial court

properly rejected Bill’s opportunistic end-run around the strict statute of limitations in RCW 11.24.010.

1. No statute provides for tolling of the limitations period for will contests based on mental disability.

Bill’s allegation of a disability is not a basis for tolling the limitations period under RCW 11.24.010. “There are no exceptions to [RCW 11.24.010] and no equitable doctrines to afford any flexibility.” *Toth*, 138 Wn.2d at 656 (quoted source omitted).

Washington has a “long-standing public policy of promoting the prompt and efficient resolution of matters involving trusts and estates.” RCW 11.96A.070; *see also Jepsen*, 184 Wn.2d at 381 n.5, ¶ 11. Consistent with this policy, in 1917 the Legislature repealed the provision of RCW 11.24.010 that tolled the limitations period for persons “of unsound mind.” Laws of 1917, ch. 156 § 15 (providing persons of “unsound mind” one year from passage of act to initiate will contests, after which tolling exception would no longer exist).⁹ The Legislature thus specifically eliminated what Bill asks for here –

⁹ The prior version of the statute, Remington & Ballinger’s 1910 Code § 1309, stated that “[i]f no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding, save to infants, married women, persons absent from the United States, or of unsound mind, a period of one year after their respective disabilities are removed.”

“the right of a disabled litigant to the tolling of the statute of limitations for incompetent individuals until their disability is cured.” (App. Br. 27)

Bill’s reliance on RCW 4.16.190(1) is likewise misplaced. (App. Br. 28) That statute provides that the limitations period can be tolled for incompetency for “action[s] mentioned in this chapter.” Will contests are nowhere mentioned in RCW ch. 4.16; they are governed by RCW ch. 11.24. That the Legislature provided tolling for incompetence on some claims, including TEDRA claims under RCW 11.96A.070(4), but not for will contests under RCW ch. 11.24, confirms it did not intend for will contests to be tolled based on incompetence. *Cf. Estate of Peterson*, 102 Wn. App. 456, 467-68, 9 P.3d 845 (2000) (because “the Legislature has expressly extended the discovery rule to actions against trustees [and] it has declined to do so in will contests we infer that had the Legislature intended to extend the discovery rule to RCW 11.24.010, it would have done so”), *rev. denied*, 142 Wn.2d 1021 (2001); *City of Seattle v. Sisley*, 164 Wn. App. 261, 265-66, ¶ 13, 263 P.3d 610 (2011) (“When a statute lists the things upon which it operates, we presume the legislature intended the omissions”), *rev. denied*, 173 Wn.2d 1022 (2012).

The Supreme Court has rejected Bill’s argument that TEDRA may toll the limitations period for will contests. (App. Br. 37) “While TEDRA applies to will contests, it ‘shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title,’ including chapter 11.24 RCW.” *Estate of Kordon*, 157 Wn.2d 206, 212, ¶ 14, 137 P.3d 16 (2006) (quoting RCW 11.96A.080(2)). If TEDRA “expand[ed] the time . . . beyond the four-month statute of limitations” (App. Br. 36) then it would supersede, not supplement RCW 11.24.010.

Bill’s argument that the limitations period can be tolled for his alleged disability is refuted by every statute on which he relies. The Legislature’s deliberate abrogation of the tolling Bill seeks here would be meaningless if litigants could obtain that tolling by repackaging it as a request for “accommodation” of a disability. This Court should reject Bill’s attempt to override the Legislature’s plain intent that will contests would be forever barred if not brought within four months, regardless of any disability.

2. Bill is not incompetent.

Bill’s assertion that the trial court should have tolled the limitations period based on mental disability must fail for another fundamental reason – he is not “disabled to such a degree that he . . .

cannot understand the nature of the proceedings.” RCW 4.16.190. Bill provided only self-serving “evidence” of a mental disability that was refuted by undisputed documentary proof.

RCW 4.16.190 tolls the limitations period for civil actions if the plaintiff is “incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings.” The statute also requires a plaintiff to prove the “incompetency or disability as determined according to chapter 11.88 RCW,” the guardianship statute. RCW 11.88.010(1)(a) states that “a person may be deemed incapacitated as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.”

“Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity,” RCW 11.88.010(1)(c), and “[i]ncapacity’ is not lightly declared.” *State v. Simms*, 95 Wn. App. 910, 917, 977 P.2d 647 (1999); *see also Endicott v. Saul*, 142 Wn. App. 899, 912, ¶ 27, 176 P.3d 560 (2008) (affirming finding that elderly woman was incapacitated based on testimony of disinterested parties that she was repeatedly found confused, including wandering in a roadside ditch, and did not recognize

lifelong friends). RCW 11.76.080 provides for the appointment of a guardian ad litem in estate litigation if a person meets the definition of incapacity under RCW 11.88.010.

Here, Bill cannot show that he has a disability that prevents him from “understand[ing] the nature of the proceedings,” RCW 4.16.190, or that renders him incapacitated. RCW 11.88.010. Bill alleges that he “has been found to be mentally disabled by the Social Security Administration.” (App. Br. 11, citing CP 194-95) But establishing a disability under the Social Security Act requires a far lesser showing than establishing incompetency under RCW 4.16.190 or incapacity under RCW 11.88.010. The Social Security Act defines disability as an “inability to engage in any substantial gainful activity,” *i.e.*, an inability to work, not an inability to understand legal proceedings or provide the basic necessities of life. 42 U.S.C. § 423(d)(1)(A). Likewise, whether Bill is disabled under the Americans with Disabilities Act or the Washington Law Against Discrimination (App. Br. 23-25) is irrelevant; those statutes do not define disability as an inability to understand legal proceedings or to care for oneself. *See* 42 U.S.C. § 12102(1)(A) (disability is “a physical or mental impairment that substantially limits one or more major life activities of such individual”); RCW 49.60.040 (disability is “a sensory,

mental, or physical impairment that . . . is medically cognizable or diagnosable”).

Bill has not submitted *any* testimony from a medical expert that he is incompetent under RCW 4.16.190 or incapacitated under RCW 11.88.010. The sole evidence submitted of Bill’s “mental disability” is a record that he sought pain medication for a knee injury. (CP 193 (“Patient interested in re-opening an L&I claim . . . for knee”)) If Bill in fact had a mental disability that rendered him incapacitated, he would not receive disability checks directly; they would be sent to a representative on his behalf. (*Compare* CP 491, *with* <https://www.ssa.gov/payee/index.htm> (describing Social Security’s Representative Payment Program for “beneficiaries who are incapable of managing their . . . payments” (last visited June 29, 2016))

Equally false is Bill’s assertion that he “attended special education classes the entire time he was in school.” (App. Br. 11, citing CP 196-201) Bill’s school records in fact show that Bill received tutoring in the “resource room” (RR) while he was in school, receiving less assistance as he advanced grades, not that he needed “special education” because he was mentally disabled. (CP 83, 100-01) Bill also claimed below that these records showed he dropped

out of school after eighth grade; that claim was likewise false. (Compare CP 188, with CP 83, 100, 103)

Nor is Bill illiterate (App. Br. 13), as evidenced by his untimely filings that set forth his allegations of forgery and lack of notice. (See, e.g., CP 278-91; see also CP 91, 106) See *Jessie v. Potter*, 516 F.3d 709, 715 (8th Cir. 2008) (rejecting tolling because plaintiff's "own evidence disproves the notion that she could not manage her business, since she filed exhibits showing that she pursued her workers' compensation claim pro se and requested disability retirement from the Postal Service."). Bill's literacy was confirmed by numerous family members and childhood friends, all of whom stated that Bill is not disabled. (CP 91, 100-01, 103, 106, 111, 113, 121)

Moreover, Bill could, and did, retain counsel to represent his interests. (CP 265-66) He did so after a commissioner advised him to contact the WSBA, confirming he can understand and act on advice. (CP 189) Bill's assertion that he is mentally disabled cannot be squared with his retention of counsel; if he could not understand legal proceedings, then he could not have "sought and received [advice] on legal matters," the foundation of the attorney-client relationship. *Discipline of Egger*, 152 Wn.2d 393, 410, 98 P.3d 477 (2004); see also *Lopez v. Citibank, N.A.*, 808 F.2d 905, 907 (1st Cir.

1987) (rejecting tolling because plaintiff retained counsel that filed complaint on his behalf). When Bill sought treatment for his knee, his doctor found that Bill “has fair awareness of current events,” confirming that Bill could understand this and the numerous other legal proceedings in which he has been involved, often as a “crafty” pro se litigant. (CP 77-79, 131-140, 142-44, 194)¹⁰

Bill’s history of drug abuse does not render him incapacitated under RCW 11.88.010. RCW 11.88.010(1)(e) provides that a person may be declared incompetent “[f]or purposes of giving informed consent for health care” due to “habitual drunkenness” and “excessive use of drugs,” or incapacity as defined in RCW 11.88.010(1)(a). By distinguishing between incompetence because of excessive use of drugs and incapacity under RCW 11.88.010(a), the Legislature made clear that drug abuse is not enough to establish incapacity under RCW 11.88.010(a).

Bill fundamentally misconstrues the constitutional right to access courts and due process. (See App. Br. 20-23) Bill filed documents, appeared at hearings, and later obtained counsel who

¹⁰ Bill’s repeated complaint that the trial court “failed” to make findings of fact (App. Br. 19, 23, 31) ignores that a trial court is precluded from making findings on summary judgment and that any “findings” made are superfluous. *Fabre v. Town of Ruston*, 180 Wn. App. 150, 158, ¶ 16, 321 P.3d 1208 (2014))

did the same. This case is nothing like those relied on by Bill, in which a paraplegic was denied physical access to a courtroom or indigent plaintiffs sought the waiver of filing fees. (See App. Br. 21, citing *Tennessee v. Lane*, 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), and *Bullock v. Superior Court for King County*, 84 Wn.2d 101, 524 P.2d 385 (1974)) A litigant is not denied access to courts or due process when a court dismisses a claim as untimely after a full and fair hearing. There is no evidence that had Bill timely filed and served a will contest petition he or his attorney would have been unable to pursue it without accommodation of a disability.

Bill's request for accommodation was a transparent attempt to circumvent the statute of limitations. This Court should reject it.

3. Bill's claim cannot be rendered timely by a disability "accommodation" he did not request until after the limitations period had expired.

Even if Bill were disabled, he did not request a guardian ad litem or any other accommodation (or even assert he was disabled) until after the limitations period had already expired, only raising his "disability" after Michael moved for summary judgment. An "accommodation" after the time expired under RCW 11.24.010 can do nothing to make Bill's petition timely.

A Washington court's duty to provide an accommodation is triggered when it receives a request for one. *See* GR 33(b) (setting forth the "Process for Requesting Accommodation"); 2 Wash. Prac., Rules Practice GR 33, Drafters' Comment (7th ed.) ("Addressing requests for accommodation in the court system involves a multi-step process consisting of *notification*, assessment, and, as appropriate, accommodation.") (emphasis added). *See Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) (discussing duty to provide accommodation "on receiving a request for accommodation"). A public entity is required to provide an accommodation that was not requested only when "the need for accommodation is obvious." *Duvall*, 260 F.3d at 1139.

Bill did not request a guardian ad litem, or any other accommodation, until nearly eight months after the limitations period expired and did so only in response to the imminent dismissal of his petition. (CP 163-64, 223) Indeed, Bill conceded that "the threshold issue as to disability accommodation is whether or not the allegedly incapacitated individual requested accommodation" (CP 45), and that any accommodations could only be relevant if he requested them prior to the limitations period expiring: "A reader, or appointment of a GAL . . . during the four months from February

13, 2015, and June 12, 2015, may have enabled Bill to access the courts.” (App. Br. 21) Because he failed to attend the hearings he noted, any need to accommodate a disability could not have been obvious to the court until Bill’s first appearance after the limitations period had already expired. (CP 269)

Moreover, the remedy for a public entity’s failure to accommodate a disability is to require the entity to provide the accommodation or to pay damages, not the resurrection of barred legal claims against a private party that had no role in the public entity’s failure to accommodate. *See Duvall*, 260 F.3d at 1132 n.4, 1135 (discussing injunctive and compensatory remedies available against “a public program or service”). Even had Bill requested an accommodation prior to the limitations period running, his remedy would not be to toll the statutory deadline for contesting his father’s will.

As the personal representative of his father’s estate, Michael had a duty to defend the will and act in the Estate’s best interest, not to aid Bill’s time-barred will contest. *See Estate of Riley*, 78 Wn.2d 623, 665, 479 P.2d 1 (1970) (under RCW 11.24.050 “the duty of the executor is to take all legitimate steps to uphold the testamentary instrument”). Michael has steadfastly done so, defending a will that

leaves him next to nothing. There is no merit to Bill’s complaint that “[c]ounsel for the personal representative” had a duty to “request any disability accommodation or Guardian ad Litem for Bill or for waiver of such requirements.” (App. Br. 13) Bill’s disability claim does not revive his untimely will contest.

D. Bill cannot overcome the declarations of two disinterested witnesses that Ed signed the will by relying on the declaration of an unqualified expert.

Bill’s will contest fails on the merits.¹¹ The only “evidence” Bill submitted to support his allegation of forgery is the declaration of an unqualified expert witness. No reasonable trier of fact could find that Ed’s signature was forged based on this declaration in the face of declarations from two unimpeached and disinterested witnesses that Ed signed the will in their presence.

Under ER 702, “a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify” regarding “scientific, technical, or other specialized knowledge.” Where an expert testifies on summary judgment, this Court reviews the expert’s qualifications de novo. *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 494, ¶ 26, 183 P.3d 283 (2008). “[D]eclarations [that]

¹¹ This Court may affirm the trial court’s summary judgment on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

do not affirmatively show that [the expert] was competent to render an opinion” are insufficient to defeat a summary judgment motion. *Davies*, 144 Wn. App. at 495, ¶ 30.

Bill’s expert, Marcel Elfers, lacked the qualifications to offer an opinion about the veracity of Ed’s signature. Mr. Elfers has a Bachelor’s degree in physical therapy and offers “Behavioral Profiling through written communication and behavioral pattern recognition.” (CP 505-06) His principle accomplishment concerning document examination is publication in a journal of graphology (CP 505), “the alleged science of divining personality from handwriting.” Julie A. Spoh, *The Legal Implications of Graphology*, 75 Wash. U. L.Q. 1307, 1307 (1997). “[T]estimony based on graphology is inadmissible virtually everywhere.” Spoh, 75 Wash. U. L.Q. at 1311; *see, e.g., State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985) (holding graphology “is not generally accepted in the scientific fields of psychology and psychiatry”), *cert. denied*, 476 U.S. 1141 (1986); *State v. Davis*, 154 Ariz. 370, 742 P.2d 1356, 1361 (Ct. App. 1987) (affirming exclusion of graphologist testimony under *Fyre* test).

Mr. Elfers’ “expert” testimony could not impeach the declarations of two disinterested witnesses that Ed signed the will in

their presence, both of whom reaffirmed their declarations after Bill raised his allegation of forgery. (CP 70, 113, 319-23) Bill nowhere impeached their testimony that they witnessed Ed sign the will.¹² No reasonable finder of fact could find that Ed's signature is forged in light of these unimpeached declarations. *See In re Mooney*, 74 A.D.3d 1073, 1074-75, 903 N.Y.S.2d 490 (2010) ("the unsupported assertion of the objectant's experts that the decedent's signature on the will was forged was insufficient to raise a triable issue of fact" in face of declarations from two witnesses and drafter of the will); *Succession of Lombardo*, 205 La. 261, 17 So.2d 303, 306 (1944) (refusing to "disregard the positive testimony of five witnesses by accepting the opinion of the hand-writing expert"). This Court should affirm the trial court's dismissal of Bill's untimely will contest for this additional reason.

E. This Court should award the Estate its fees on appeal.

Under RCW 11.24.050, a court may award reasonable attorney's fees where a will is sustained against a will contest, and under RCW 11.96A.150 the "court may order the costs, including

¹² Bill alleged that one witness is "a retired policeman with a criminal record" and the other "has a personal issue with me." (CP 191) Lloyd Anderson, the retired policeman, refuted Bill's allegation that he has a criminal record. (CP 112)

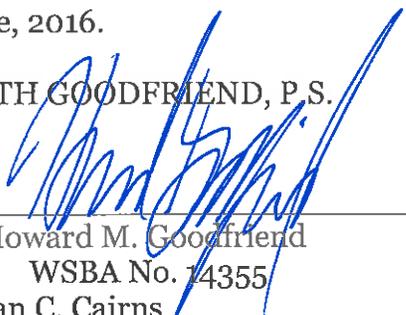
reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable." Bill's will contest has needlessly dissipated Estate assets. Michael is entitled to his fees under both RCW 11.24.050 and RCW 11.96A.150.

V. CONCLUSION

This Court should affirm the trial court's summary judgment order and award Michael his attorney's fees.

Dated this 30th day of June, 2016.

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend

WSBA No. 14355

Ian C. Cairns

WSBA No. 43210

Attorneys for Respondent

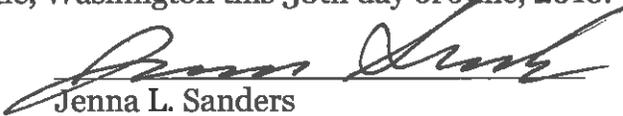
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 30, 2016, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Dubs Ari Herschlip Dubs Ari Tanner Herschlip PLLC 627 5th Street, Suite 203 Mukilteo, WA 98275-1580 dubs@mukilteolawfirm.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 30th day of June, 2016.


Jenna L. Sanders

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

In Re the Matter of the Estate of Edward Coaker:

No. 15-4-01827-8

William P. Coaker,

ORDER GRANTING PR'S MOTION FOR
SUMMARY JUDGMENT ON WILL
CONTEST CLAIMS

Petitioner,

Angela Fehr,

Interested Party,

vs.

Michael Coaker, Personal Representative, and
Patricia Coaker,

Respondents.

THIS MATTER having come on for hearing upon the PR's Motion for Summary Judgment on Will Contest Claims, and appearing are Bruce R. Moen, of attorneys for Michael Coaker, as Personal Representative ("PR") of the Estate of Edward William Coaker; Dubs A. T. Herschlip, of attorneys for William Coaker; _____, and the Court having heard the oral presentation of counsel, having reviewed the following pleadings:

- 1. PR's Motion for Summary Judgment on Will Contest Claims;

ORDER GRANTING PR'S MOTION FOR SUMMARY
JUDGMENT ON WILL CONTEST CLAIMS
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- 1 2. Creditor Claim (Exhibit A to Motion for Summary Judgment; Cause No. 14-4-01297-2,
2 Clerk's Sub. No. 29);
- 3 3. Minute Entry dated June 25, 2015 (Exhibit B to Motion for Summary Judgment; Cause No.
4 14-4-01297-2, Clerk's Sub. No. 36);
- 5 4. Order on Motion for William Coaker (Exhibit C to Motion for Summary Judgment; Cause
6 No. 14-4-01297-2, Clerk's Sub. No. 44);
- 7 5. Minute Entry dated July 31, 2015 (Exhibit D to Motion for Summary Judgment; Cause No.
8 14-4-01297-2, Clerk's Sub. No. 43);
- 9 6. Minute Entry dated December 18, 2015 (Exhibit E to Motion for Summary Judgment; Cause
10 No. 15-4-01827-8, Clerk's Sub. No. 22);
- 11 7. Response to Coaker Estate's Motion for Summary Judgment and Motion to Reject Forged
12 Wills (filed under Cause No. 14-4-01297-2);
- 13 8. Affidavit of William P. Coaker in Support of Response to Motion for Summary Judgment
14 (filed under Cause No. 14-4-01297-2);
- 15 9. Affidavit of Theresa Knight in Support of Response to Motion for Summary Judgment (filed
16 under Cause No. 14-4-01297-2);
- 17 10. PR's Reply in Support of Motion for Summary Judgment;
- 18 11. Evidentiary Objections to Affidavit of William P. Coaker in Support of Response to Motion
19 for Summary Judgment Dated January 20, 2016;
- 20 12. Evidentiary Objections to Affidavit of Theresa Knight in Support of Response to Motion for
21 Summary Judgment Dated January 22, 2016;
- 22
- 23
- 24

25 **ORDER GRANTING PR'S MOTION FOR SUMMARY**
26 **JUDGMENT ON WILL CONTEST CLAIMS**
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13. Declaration of Sarah L. Moen;

and the Court finding that William Coaker failed to strictly comply with the requirements of RCW 11.24.010 to commence a Will contest and that there is no just reason for delay for entry of a final judgment upon the Will contest claim, and the Court being fully advised, NOW, THEREFORE, THE COURT ENTERS THE FOLLOWING:

ORDER

1. The PR's Motion for Summary Judgment on Will Contest Claim is GRANTED.
2. The PR is entitled to reasonable fees and costs against William Coaker in an amount to be determined at a separate hearing.

DONE IN OPEN COURT this 12th day of February, 2016.

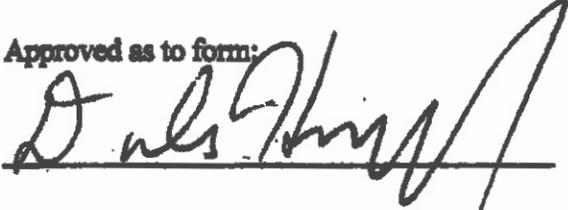

Judge George M. Bowden

Presented by:

MOEN LAW OFFICES, P.S.


Bruce R. Moen, WSBA #05640
Of attorneys for Michael Coaker, as Personal Representative

Approved as to form:


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