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No. 98399-2
(COA 78932-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THOMAS GILLESPIE and MARIE GILLESPIE

Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

Respondents.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Barbara Linde

ANSWER TO PETITION FOR REVIEW AND CROSS PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS & MOTION

Defendants Valerie Gillespie ("Val") and James Eeckhoudt ("Jim") are (1) Co-Executors of the Estate of T.R. Gillespie and Co-Trustees of the T.R. and Marianne Gillespie Irrevocable Trust dated September 20, 2000, (2) Co-Managing Members of the Gillespie LLC and (3) Co-Trustees of the Gillespie Family Trust ("the GFT"). They were defendants in the trial court, were respondents in the Court of Appeals and are now the respondents herein.

A. Relief Requested.

Val and Jim ask the Court to (A) consider this pleading and its appendix as their Answer and Cross Petition for review of the decision of the Court of Appeals ("the Decision") filed on February 3, 2020, (B) deny the Appellants' Petition for Review and (C) grant their Cross Petition for Review for the reasons given herein and in their reconsideration papers in the Court of Appeals.

B. Basis for Denying Petitioners Relief, Granting Respondents Relief and Argument.

While no competent evidence demonstrates that Petitioners Thomas Gillespie and Marie Gillespie ("Tom and Marie") are actually indigent, even if they have depleted their funds as a result of repeatedly and improperly suing Val and Jim and have not paid their attorneys for

several months, their financial condition does not constitute a basis for granting their Petition. In light of Judge Prochnau's ruling in 2014 that they are "forever barred" from suing Val and Jim, the Court should not be sympathetic toward them in any respect or waive defects in the form of their Petition.

This case involved a broader *in terrorem* clause, not a no-contest clause that would only narrowly address forfeiture in the event that someone contests the validity of a will. If the Court determines that it is necessary to give additional guidance concerning the validity, scope and construction of *in terrorem* clauses, then the Court should rule that the trial courts should independently determine, with each new lawsuit that parties might file, whether they have triggered such clauses and whether the petitioners' purported good faith and public policy purpose must be proven or disproven.

II. FACTS AND COURT OF APPEALS DECISION

The relentless filing of lawsuits by Tom and Marie resulted in one first trial court ruling that they are "forever barred" from suing Val and Jim. Subsequently, the second trial court ruled that the *in terrorem* clause in the Will of Val's and Tom's father was triggered and that Tom and Marie were not entitled to additional estate distributions and must disgorge the distributions already received by them. It finally served some of the

purpose for which it was intended: deter meritless litigation by disgruntled heirs.

In the Decision, the Court of Appeals affirmed in part and reversed in part. The remand to determine whether Tom and Marie proceeded with claims in good faith was error because it relied upon a misapplication of the doctrine of res judicata. Every time that a party files a new lawsuit, the judge in that lawsuit should be free to determine whether, how and to what extent the new filing triggered an *in terrorem* clause; such judge, for example, should not be bound by any previous judge's determination of whether good faith had been proven or disproven.

Regarding Petitioners' assertions, the Decision did not adopt a broad reading of the subject *in terrorem* clause and did not apply it broadly or in any manner that was contrary to current case law. Tom and Marie simply object to the law dictionary definition for "probate" that the Court of Appeals properly relied upon, adopted and applied. The orders disinheriting them, therefore, should remain in effect.

The actual language of the subject clause was the determinative factor in whether it constitutes a broader *in terrorem* clause or a narrower no-contest clause. In particular, Article IX of TR's Will prohibited more than a mere challenge to the validity of TR's Will as follows (emphasis added): "**Should any beneficiary under this Last Will become an**

adverse party in a proceeding for its probate, such beneficiary shall forfeit his entire interest hereunder and such interest shall pass as part of the residue of my estate …."

Contrary to Petitioners' contention, this Court and the Washington Legislature have addressed how *in terrorem* and no-contest clauses should be interpreted and applied with three primary rules. First, they are valid and enforceable. *Boettcher v. Busse*, 45 Wn.2d 579, 585, 277 P.2d 368 (1954). Second, "[a]ll courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them." RCW 11.12.230. The purpose of construing wills and trusts is to give effect to the testator's intent. *In Re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972). Third, the courts ascertain the intent from the language of the testamentary instrument itself, considering the instrument in its entirety and giving effect to every part thereof. *In Re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985). If possible, the court should determine this intent from the four corners of the will and the will must be considered in its entirety. *In Re Estate of Mell*, 105 Wn.2d 518, 524, 716 P.2d 836 (1986).

These three main rules from the Court provide ample guidance for the application of *in terrorem* and no-contest clauses. In *Boettcher v. Busse*, 45 Wn.2d 579, 277 P.2d 368 (1954), the court did not state whether such clauses should be construed strictly or liberally. In fact, *Boettcher* did not even involve a will contest; it was an action to enforce the terms of an alleged oral contract to devise property. *Id.* at 585, 277 P.2d at 368.

The Court of Appeals did not apply the *in terrorem* clause broadly in its Decision. Rather, it applied the Black's Law Dictionary (6th ed. 1990) definition of "probate" that was in effect when the testator executed his Will in 1996 instead of the newer, inapplicable definition that Petitioners sought to have the court apply. Decision, p.14.

Instead of being wielded as a sword by Respondents, the subject clause is a shield against which Tom and Marie have been throwing themselves. Again and again, they have pursued meritless litigation against Val and Jim for almost a decade. Their failure to instead find gainful employment is the cause of their financial condition, whatever it may be.

If this Court accepts review, it should be limited to considering two primary issues. The first question is whether trial courts in subsequent lawsuits are bound by the doctrine of res judicata in applying an *in*

terrorem clause to any newly filed cases before them. The second issue is whether a good-faith presumption always applies to judicial applications of *in terrorem* and no-contest clauses and whether there must be a public policy reason supported by good faith and probable cause in order to avoid the application of an *in terrorem* or no contest clause.

III. ISSUES PRESENTED FOR REVIEW

A. With respect to the rules of construction applied, the Court of Appeals Decision's interpretation and application of the *in terrorem* clause does not conflict with established Washington law.

Contrary to Petitioners' contentions, *Boettcher* is not a landmark no-contest case and this Court has subsequently given ample guidance on how *in terrorem* clauses should be interpreted. Tom and Marie cite no cases in which any court has explicitly ruled that such clauses should be given strict construction or limited applications.

The Decision used a 1990 law dictionary definition of "probate" to find that such term includes, not only the procedure to find a will valid or invalid, but also "the legal process wherein the state of a decedent is administered …." This definition was appropriate because the decedent executed the Will in 1996. A testator is only presumed to know the law in force when the will was drafted in conformity with the law, *McDonald v.*

Moore, 57 Wn.App. 778, 780, 790 P.2d 213 (1990), not a future definition. The Court of Appeals correctly rejected the law dictionary definition that Petitioners offered from a more recent edition of Black's Law Dictionary.

In essence, the Decision turned on the proper dictionary definition of "probate" to use rather than any broad judicial reading of the clause. The provision applies to challenges to the administration of the Estate, not just to challenges to the validity of the Will.

Petitioners' reliance upon *Kellar v. Estate of Kellar*, 172 Wn.App. 562, 29 P.3d 906 (2012) is misplaced. The Court of Appeals therein merely noted that the breadth of no-contest clauses depends upon the specific provision's language and ruled that the challenge to a prenuptial agreement was not a challenge to the estate that triggered a forfeiture clause. *Id.* at 590-591, 29 P.3d at 906. Petitioners' additional inapposite case citations do not bolster their position.

B. The Court of Appeals' interpretation of the *in terrorem* clause to the probate administration of the Estate, rather than to just a will contest, does not conflict with established Washington law.

Petitioners are correct that this Court has not defined what constitutes "probate." In addition to the 1990 Black's Law Dictionary definition that the Court of Appeals used in the Decision, however, a common understanding of

the term "probate" is that it encompasses much more than a mere will contest. When someone states that they are "filing a probate," for example, they generally are not stating that they are contesting the validity of a will. The Decision is consistent with established Washington law and should be affirmed.

C. The Court of Appeals' refusal to consider arguments related to a fee award that Tom and Marie desired but did not brief was proper.

Contrary to Petitioners' contention, the Decision does not set out a new requirement for challenging trial court fee awards. Petitioners' omission in their appellate briefs to address whether and why the attorneys' fees award should be vacated was the result of their own neglect or intentional decision, not some overlooking or misapprehension of points of law or fact by the Court of Appeals. Indeed, on page 26 of its Decision, the appeals court expressly found that "[a]lthough Tom and Marie assigned error to the award of fees, they did not brief the issue" and concluded that "[w]e thus decline to address the issue."

Contrary to their contention, therefore, Tom and Marie did not seek to merely have the Court of Appeals "revise or clarify the Decision." They sought to have it reverse itself completely because they completely failed to brief the issue in their appellate briefs. In essence, they wanted the appeals court to find that they had adequately briefed the issue.

Petitioners' request flew in the face of well-established case law. The appellate courts do not consider inadequately briefed arguments. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011). Petitioners' briefing on this issue to the Court of Appeals was not only inadequate, it was nonexistent.

D. The Court of Appeals' reversal and related application of the doctrine of *res judicata* to preclude the trial judge in the case at bar from deciding whether the good faith and probable cause and public policy exceptions to application of the *in terrorem* clause were established is in conflict with established Washington law.

The Washington courts examine and apply *in terrorem* clauses on a case-by-case basis. While the breadth of such clauses depends upon the specific language used, the application thereof depends upon the specific circumstances surrounding each new filing that might trigger them.

Tom and Marie generally refused to adhere to Judge Prochnau's 2014 rulings. It is ironic that they, nevertheless, sought to cherry pick them by relying upon Judge Prochnau's 2014 ruling in the former cases to seek to impose a good-faith exception in this post-trial lawsuit. In opposing Val's and Jim's summary judgment motion in the instant case, they argued that the doctrine of res judicata did not preclude their new lawsuit, but before the Court of Appeals they successfully contended that Judge Prochnau's prior

ruling that the good-faith exception applied in a completely different case did indeed have res judicata effect.

Res judicata does not control whether the good-faith exception arose from the *in terrorem* clause. "The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should be litigated again." *Marino Prop. Co. v. Port Comm'rs of Port of Seattle*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982); *Ensley Pitcher*, 152 Wn.App. 891, 899, 222 P.3d 99 (2009).

Judge Prochnau's good-faith ruling is not the law of **this** case on this issue because Petitioners' 2017 case is obviously a new and separate case from the 2014 cases. It is the first case that arose after Judge Prochnau ruled that Tom and Marie are "forever barred" from suing Val and Jim. The 2014 Judgment did not give Tom and Marie a license to repeatedly sue Val and Jim without ever invoking the *in terrorem* clause. The instant action is a completely different lawsuit from the two 2014 cases.

The litigious actions of which Val and Jim complained in their counterclaims arose after the judgment in the 2014 cases. For purposes of the applicability of TR's *in terrorem* clause, the lower court properly looked at the post-trial litigation actions of Tom and Marie.

Tom and Marie filed this lawsuit in blatant disregard of Judge Prochnau's prohibition against litigation. The subject matter is their contempt for and circumvention of such litigation prohibition and that subject matter was never before litigated or available to litigate.

Given the new subject matter presented in the case at bar, Judge Linde properly made her own ruling on whether good faith would allow Tom and Marie to avoid TR's clause and whether they exhibited good faith. The Court of Appeals erred in ruling that she was bound by Judge Prochnau's previous ruling on good faith.

Pursuant to RAP 13.4(b)(1), (2) and (4), this Court should accept review because the Court of Appeals' Decision on this issue is in conflict with decisions of the Supreme Court and the Court of Appeals and involves an issue of substantial public interest that the Court should determine. Trial judges in estate litigation should not be bound by decisions in prior superior court cases in determining the nature, applicability and extent of *in terrorem* clauses.

E. The Court of Appeals' reversal of the trial court's finding that Tom and Marie failed to bring the latest lawsuit in good faith conflicts with established Washington law.

TR's *in terrorem* clause does not contain, or afford the protections of, a safe harbor provision for actions brought in good faith and for probable

cause. No language therein refers to "good faith" or "probable cause." This is important because Washington does not blanketly provide that the good faith, if any, of a challenger precludes the enforcement of an *in terrorem* clause.

Tom's and Marie's reliance on *In re Kubick's Estate*, 9 Wn. App. 413, 513 P.2d 76 (1973), was seriously misplaced. The *Kubick* Estate clause included the following safe harbor: "this provision for forfeiture shall not affect any contest or objection which is found by the court wherein this Will is admitted to probate to have been made in good faith and for probable cause …" 9 Wn. App. at 416. Again, the *in terrorem* clause in TR's Will does not contain, or afford the protections of, a safe harbor provision for actions brought in good faith and for probable cause.

Moreover, the *Kubrick* decision held that there was **no public policy** reason to avoid application of the no contest clause if "an heir makes a bad faith challenge to some provision in a will." The court went on to indicate that, in fact, there must be a public policy reason supported by good faith and probable cause in order to avoid the application of a no contest clause if the violation is of the language in the document. This case follows the ruling of *In re Chappell's estate*, 127 Wash. 638, 221 P. 336 (1923) wherein the court found that a no contest clause should not be

enforced if the challenge was made on public policy grounds, as opposed to personal grounds

An excellent recent analysis of the applicability of *in terrorem* clauses is set forth in the unpublished Division III case of *In Re Primiani*, 050217 WACA (May 2, 2017) (copy appended hereto) wherein the Court of Appeals distinguished *In re Kubick's Estate*, 9 Wn. App. 413, 513 P.2d 76 (1973) because its clause had included that safe harbor. The court in *Primiani* expressly stated that it was not the holding in *Kubick* that "no contest clauses are inoperable if a will contest is brought in good faith and with probable cause." *In Re Primiani*, 050217 WACA (May 2, 2017).

Petitioners' reliance upon *In Re Chappell's Estate*, 127 Wash. 638, 221 P. 336 (1923) is also misplaced. As the *Primiani* court pointed out, the rule adopted in *Chappell* only "protects the rights of heirs who seek to invalidate a will's provision on public policy grounds, provided the grounds were asserted in good faith and with probable cause. *In Re Primiani*, 050217 WACA (May 2, 2017). Here Tom and Marie have made no public policy arguments for why TR's clause should not be enforced.

The *Primiani* court also criticized the court in *In Re Estate of Mumby*, 97 Wn.App. 385, 982 P.2d 1219 (1999) for its reliance upon *Kubick* and *Chappell* for the proposition that good faith precludes the enforcement of no-contest clauses. It explained "that is not the holding of those two

cases." *Id.*, and stated that a public policy reason for modifying the provisions must also exist. In the subsequent unpublished Division III case of *In Re Primiani*, 053019 WACA (May 30, 2019) (copy appended hereto), the Court of Appeals reiterated in its footnote 4 that *Chappell* and *Kubick*, on which *Mumby*, relied are more limited than a broad holding that the good faith and probably cause exception applies to all will contests.

Even if *arguendo* Tom and Marie had brought this action in good faith and for probable cause, they have not provided any public policy reason for avoiding application of the *in terrorem* clause. Therefore, they have forfeited their interests in TR's Estate. They are adverse parties in this proceeding concerning how Val and Jim have handled this probate. 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 case of *In Re Estate of Mumby, supra,* supports Val's and Jim's claim for forfeiture of both Tom's and Marie's interest in TR's Estate. In that case, the court enforced the *in terrorem* clause, stating as follows:

> Here, [beneficiary] contends that because she consulted an attorney before filing suit she must be deemed to have acted in good faith and with probable cause. But the trial court reviewed the declaration of [beneficiary]'s counsel and concluded to the contrary. "To a large degree the declaration of counsel ... simply resubmits the facts testified at trial in a light most favorable to Petitioner Wood's position."
> The record supports the trial court's conclusion that [beneficiary] did not fully and fairly disclose all material facts. . . .

> Because [beneficiary] did not fully and fairly disclose all material facts to counsel, she is not entitled to a presumption of good faith.

97 Wn.App. at 394. The court proceeded to review the beneficiaries' motives and conduct and affirmed the trial court's decision that the beneficiary acted in bad faith and should forfeit her interest in the trust.

In the event that a good-faith exception nevertheless arose, Val and Jim have already presented substantial evidence that Tom and Marie did not initiate the instant case in good faith or with probable cause or with a public policy purpose. While the Court of Appeals correctly concluded that Tom and Marie bore the burden, if any, of proving they filed their latest lawsuit in good faith, it erred in remanding the case to the trial judge to determine whether they made a full and fair disclosure of all material facts to their counsel.

The evidence before the trial court already demonstrated that Tom and Marie did not act in good faith or with probable cause partly because they failed to fully and fairly inform their counsel of all of the pertinent facts and partly because they acted in bad faith and without probable cause. The evidence also indicated that Tom and Marie had no public policy issue in mind when they filed the present lawsuit; they were merely trying to increase their benefits from T.R. Gillespie's Estate. In filing and maintaining this lawsuit, they, their counsel and their expert witness obviously ignored and/or

simply failed to read the express and conclusive language contained in the LLC Operating Agreement and the 2014 Judgment.

For answers, Tom and Marie needed to look no further than what Tom attached as Exhibit A to the very Declaration that Tom and Marie filed on 9/28/17 simultaneously with filing their original Petition herein. Entitled "LIMITED LIABILITY COMPANY AGREEMENT OF GILLESPIE LLC" (Trial Exhibit 19; CP 26-66), this primary document held the clear answers to any questions that they genuinely have held post-trial regarding the LLC capital account that TR's Estate held. See CP 47.

Tom and Marie and their counsel not only *had* the LLC Agreement in their possession, but also they *read* it. See hearsay Wright Declaration, ¶5, and hearsay Hart Declaration, ¶5. CP 688 & 695. While Val and Jim have no desire to besmirch the integrity and competency of Appellants' counsel, the answer to all the purported outstanding questions regarding capital accounts was always right in front of all of them. No one was hiding the ball!

The 2014 Judgment was completely consistent with the fact that the capital accounts transferred to the Gillespie Family Trust in 2001 with the LLC shares. Tom and Marie simply have not wanted to accept what Judge Prochnau found: starting in 2001, the tax returns were muddled and unreliable and did not reflect the capital account transfers that occurred *de jure* and *de facto* in 2001 with the transfer of the LLC shares.

Again, no new transfer of capital accounts occurred in 2014. Val and Jim merely had the 2014 tax return reflect what had transpired back in 2001.

It is telling that Tom and Marie failed to share the LLC Operating Agreement with their CPA Gregory Porter when they procured his Declaration. CP 199-203. Had they done so, perhaps he could have done what Val and Jim were unable to do: persuade Petitioners that their post-trial claims were completely misguided. Without such full and fair disclosure, they cannot claim they acted in good faith and with probable cause. In fact, the evidence all points to Tom's and Marie's bad faith in prosecuting the current action. The court in *In Re Estate of Mumby* stated:

> "Bad faith has been defined as "'actual or constructive fraud' or a 'neglect or refusal to fulfill some duty ... not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.' "

97 Wn.App. at 394.

Tom and Marie were trying to obtain a larger distribution from TR's Estate by making their bogus claim of improper capital account transfers. Moreover, they lost their current claim on summary judgment. Tom has a documented history of greed and unfair treatment of others, all of which came out at the first trial in 2014. Tom and Marie were trying to get more money from TR's Estate even though it would be at the expense of the 13 beneficiaries of the Gillespie Family Trust. Tom has had several attorneys

since 2014 and perhaps some of them ceased to represent Tom and Marie because they knew the claim was improper. One can only speculate what their current attorneys were told to encourage them to file this action. Tom and Marie had a greedy motive and made no honest mistakes in filing this lawsuit. They acted in bad faith and without a public policy purpose.

Pursuant to RAP 13.4(b)(1), (2) and (4), this Court should accept review because the Court of Appeals' Decision on this issue is in conflict with decisions of the Supreme Court and the Court of Appeals and involves an issue of substantial public interest that the Court should determine. The Petitioners' intentional decision to ignore the clear provisions of an LLC operating agreement that they included as an exhibit that directly answers the primary question of whether the capital accounts transferred demonstrates a lack of good faith as a matter of law.

CONCLUSION

In this proceeding concerning the probate of TR's Will, TR's Will had a broad *in terrorem* clause, not a narrow no-contest clause that only applied to will contests. In all her rulings, Judge Linde hewed closely to the actual language of Article IX.

Tom's and Marie's complete rewrite of TR's clause should fail. It applies to more than pure will contests and provides for the forfeiture of their entire interest.

Tom's and Marie's attempts to circumvent TR's Will and intentions must stop. In 2014, Judge Prochnau found that Val and Jim had not engaged in any actionable conduct through the time of the two-week trial. Then, in 2018, Judge Linde found that Val and Jim had not engaged in any actionable conduct since the two-week trial. This Court should affirm all of Judge Linde's decisions.

Date: July 14, 2020

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Answer to Petition for Review and Cross Petition for Review of Respondents Valerie Gillespie and James Eeckhoudt on Appellants Thomas J. Gillespie and Marie Gillespie by emailing it to their counsel at their known e-mail addresses,

hart@carneylaw.com and miller@carneylaw.com, on July 14, 2020 pursuant to prior agreement to accept service via e-mail.

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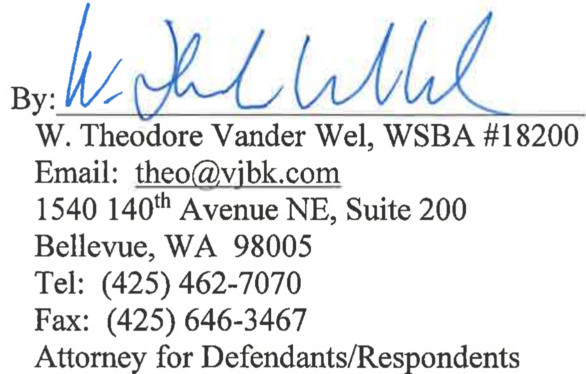
By: 

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No. 78932-5-I

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Appellants,

v.

VALERIE GILLESPIE and JAMES EECKHOUDT,

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ANSWER OF RESPONDENTS VALERIE GILLESPIE AND JAMES EECKHOUDT TO APPELLANTS' MOTION FOR RECONSIDERATION

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ATTACHMENT 1

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I. RELIEF REQUESTED

Respondents Valerie Gillespie and James Eeckhoudt ("Val and Jim") request that the Court deny the Appellants' Motion for Reconsideration and not reconsider its February 3, 2020 Opinion ("Decision") because the Court has neither overlooked nor misapprehended any points of law or fact.

II. INTRODUCTION AND SUMMARY

Appellants' Reconsideration Motion is just the latest submittal in their long pattern of after-the-fact pleadings in this appeal. As explained more fully below, they have repeatedly pursued arguments and motions herein long after the appropriate time in which to make them has passed.

Given Appellants' recalcitrance, moreover, the Court should not be sympathetic to them in any respect. The only reason this matter is still using up the precious resources of the judicial system and depleting the assets of the Gillespie Estate and the Gillespie Trust is because, when they filed this case, Appellants blatantly disregarded Judge Prochnau's very clear 2014 bar prohibiting them from engaging in any further litigation.

Appellants' Motion is just another example of their relentless attacks. This Court correctly assessed the situation on page 6 of the Decision: "Tom and Marie were apparently not dissuaded from further

litigation, despite the resounding defeat they suffered in 2014." This conclusion applies yet again.

To the extent that Appellants genuinely believed that the trial court erred, the onus was on them, not only to assign what errors Judge Linde had purportedly committed, but also to brief them in their Opening Brief and Reply Brief (they never filed one). These parties should not still be in litigation incurring attorneys' fees and costs, much less because of Appellants' failure to adequately brief the issues that they now seek to have the Court consider for the first time.

This Court has clearly vacated Judge Linde's June 29, 2018 ruling that Appellants litigation herein triggered the *in terrorem* clause. No genuine need exists to further clarify that vacation. Following the Decision affirming in part, reversing in part and remanding for further proceedings consistent therewith, Judge Linde already has sufficient direction from this Court to resume her jurisdiction over this case.

III. FACTS RELEVANT TO ARGUMENT

Although the panel is familiar with the underlying facts in this action, it should note how the Appellants have proceeded procedurally herein. Appellants have repeatedly protracted this appeal, delayed its resolution and raised arguments after-the-fact.

Appellants timely filed their Notice of Appeal on September 10, 2018. They filed an Amended Notice of Appeal on September 18, 2018.

Appellants filed many motions herein to extend time. In particular, they filed no less than three Motions for Extension of Time for their Opening Brief on October 10, 2018 (on which the Court ruled "no further extensions will be granted without sanctions being imposed"), January 18, 2019 and January 23, 2019 (the Court's Letter Ruling granted them such time extension retroactively). After Appellants subsequently filed a Motion for Extension of Time for their Reply Brief on March 25, 2019 and the Court granted it, they never filed a Reply Brief. On August 2, 2019, Appellants filed a Motion to change the date for oral argument and, on September 24, 2019, they filed a Motion for Additional Time for Oral Argument.

Instead of filing a Reply brief, Appellants submitted additional authorities *after* oral argument herein. They submitted Appellants' Statement of Additional Authorities on November 15, 2019, *after* the oral argument before this Court the preceding day.

Appellants, therefore, have had ample time and opportunity to brief and orally argue their appeal. The decision to not brief (and to not orally argue) why the trial court's award of $53,302.50 should be reversed in neither their Opening Brief nor their Reply Brief was solely theirs.

Lastly, Appellants filed a Cost Bill herein on February 11, 2020. If they were the substantially prevailing parties herein entitled to recover costs, then why did they file their Motion to have this Court reconsider its decision?[1] Appellants seek to turn appellate procedure upside down.

IV. REASONS WHY THE COURT SHOULD DENY RECONSIDERATION

A. Because this Court did not overlook or misapprehend applicable law or operative facts, reconsideration pursuant to RAP 12.4(c) is not warranted.

Appellants do not satisfy the requirements of RAP 12.4(c). An RAP 12.4 motion for reconsideration has a different standard than a CR 60(b)(1) motion based upon mistake, inadvertence or excusable neglect.

Appellants' omission in their appellate briefs to address whether and why the attorneys' fees award should be vacated is the result of their own neglect or intentional decision, not some overlooking or misapprehension of points of law or fact by this Court. Indeed, on page 26 of its Decision, the Court expressly found that "[a]lthough Tom and Marie assigned error to the award of fees, they did not brief the issue" and concluded that "[w]e thus decline to address the issue."

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[1] Appellants filed their Motion for Reconsideration on February 24, 2020, the first court day after the deadline for Val and Jim to file an objection to their Cost Bill expired.

Contrary to their contention, therefore, Tom and Marie do not seek to merely have the Court "revise or clarify the Decision." They seek to have this Court reverse itself completely because they completely failed to brief the issue in their appellate briefs. In essence, they want the Court to find that they adequately briefed the issue.

Appellants' request flies in the face of well-established case law. The appellate courts do not consider inadequately briefed arguments. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 486, 254 P.3d 835 (2011). Here, Appellants briefing was not only inadequate, it was nonexistent.

B. Reconsideration is unwarranted because the Court has already expressed the full relief intended in its partial reversal of the trial court's ruling on the good-faith exception.

For an order or judgment to be reversed on appeal, the appellants must properly assign error to those points of law and fact that they appeal *and* adequately brief them. A failure to brief why an independent order should be reversed does not constitute grounds for reversing such an order.

Here the parties should not even be in court. But for Tom's and Marie's violation and blatant disregard for Judge Prochnau's Judgment barring further litigation, the parties would not have been filing any motions or making any arguments to Judge Linde. Even though this Court has

partially reversed Judge Linde's rulings, therefore, the award of attorneys' fees and costs against Tom and Marie for forcing Val and Jim to go through this exercise should stand.

Subject to this Court's instructions on remand, Judge Linde's findings of fact still support her conclusions of law which still support her orders and Judgment. Tom and Marie should remain liable to Val and Jim for the full amount of the $53,302.50 award. The fee order does not *ipso facto* fall if Appellants' arguments related to the in terrorem clause were correct.

It is abundantly clear that this Court has reversed and remanded Judge Linde's ruling on the forfeiture of the bequests from the Gillespie Estate. Reconsideration is not warranted to reiterate that ruling.

While in their Opening Brief Tom and Marie made some passing contention that the fee award should be vacated, they never stated the reasons why this Court should vacate it. They gave absolutely no rationale and cited no case law and Val and Jim had nothing to address and rebut in Respondents' Brief. Appellants' time to make that argument long passed and the Court should not entertain one now.

Tom and Marie obviously lost on their misguided theory that the *in terrorem* clause only addressed challenges brought to the probate of the

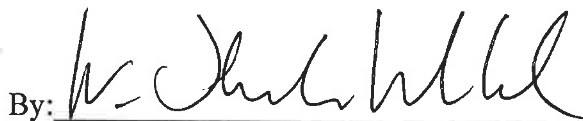
Will. They ignore the fact that they lost many of the arguments that they made in this appeal.

The most significant ruling of Judge Linde stands. This Court has affirmed the summary judgment that she granted Val and Jim and the cross summary judgment that she denied Tom and Marie. The bulk of the $53,302.50 in attorneys' fees and costs that Val and Jim incurred below arose out of addressing those two primary matters; the *in terrorem* issue was only incidental thereto. In pleading to have this Court chip further away at Judge Linde's rulings, Tom and Marie seek to have the tail wag the dog, i.e., have victories and losses on ancillary issues dictate whether reconsideration should be granted.

V. CONCLUSION

Val and Jim respectfully request that the Court deny the request of Tom and Marie to reverse itself. The Decision should stand as written.

Date: March 3, 2020 VANDER WEL, JACOBSON & KIM, PLLC

By: 

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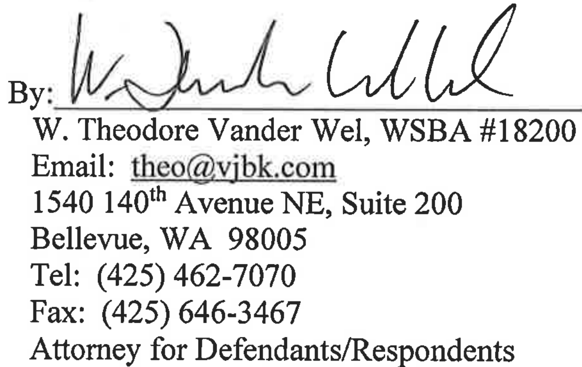
CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing Brief of Respondents Valerie Gillespie and James Eeckhoudt on Appellants Thomas J. Gillespie and Marie Gillespie by emailing it to their counsel at their known e-mail addresses, hart@carneylaw.com and miller@carneylaw.com, on March 3, 2020 pursuant to prior agreement to accept service via e-mail.

VANDER WEL, JACOBSON & KIM, PLLC



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In re Estate of Primiani, 050217 WACA, 34200-0-III /**/ div.c1 {text-align: center} /**/

In the Matter of the Estate of: MARIA G. PRIMIANI.

No. 34200-0-III

Court of Appeals of Washington, Division 3

May 2, 2017

UNPUBLISHED OPINION

Lawrence-Berrey, A.C.J.

Frank Primiani appeals from the trial court's memorandum opinion that dismissed his will contest, enforced the no contest clause of the will, and imposed terms on him for a bad faith discovery abuse. He raises a number of arguments. We generally disagree with his arguments, but remand to the trial court for entry of findings concerning the enforceability of the no contest clause.

FACTS

In 2008, Maria Primiani executed her last will and testament. The will appointed her daughter, Anna Primiani Iliakis, as the personal representative with nonintervention powers, and appointed Frank as successor personal representative.[1] The will divided Maria's real property in Spokane County between Frank and Anna. The will also contained the following no contest clause:

In the event that any person shall contest this Will or attempt to establish that he or she is entitled to any portion of my estate or to any right as an heir, other than as herein provided, I hereby give and bequeath unto any such person the sum of one dollar.

Clerk's Papers (CP) at 307.

Maria died in December 2014. On January 29, 2015, the trial court admitted Maria's will to probate and appointed Anna as the estate's personal representative. Frank wished to preserve potential claims, which he believed could be the subject of a creditor's claim or petition under the Trust and estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. The estate and Frank agreed to extend the four-month statutory deadline to file creditor's claims and will contests by 90 days. The new deadline was August 20, 2015.

On August 19, 2015, Frank filed a TEDRA petition, entitled "petition for determination of claims of the estate against Anna and Michael Iliakis, for an accounting and removal of personal representative and for partition of acreage." CP at 1 (capitalization omitted). Frank filed the petition under the probate cause number rather than as a new action. The petition asked the court to partition Maria's real property, sought damages on behalf of the estate from Anna and her husband Michael, alleged violations of the abuse of vulnerable adults act, chapter 74.34 RCW, sought to remove Anna as personal representative, and asserted "[u]ndue influence, misrepresentation, or concealment involving making or execution of [the] Will." CP at 2.

The certificate of service stated that Frank mailed the petition to Brant Stevens, the attorney representing Anna in her capacity as personal representative. Frank did not personally serve the petition on Anna.

ATTACHMENT 2

On November 18, 2015, the estate filed an answer to Frank's petition and raised multiple affirmative defenses. The affirmative defenses included that Frank lacked standing to assert

claims on behalf of the estate, and that Frank had failed to bring a will contest within the statute of limitations as extended by the parties. The answer requested that the court enforce the will's no contest clause and reduce Frank's award to one dollar.

On December 1, 2015, Frank served the estate a subpoena for Maria's medical records from Providence Visiting Nurses Association (VNA) Home Health (Providence). The subpoena demanded all records of services Providence had provided Maria in the last 10 years. The estate called Providence's records department and instructed it not to release Maria's medical records until the court could hear the matter. Providence agreed it would not. The estate sent Providence a letter memorializing the telephone conversation.

The estate then e-mailed Frank, stating it objected to the subpoena on the grounds that Maria's medical information was both privileged and irrelevant. The estate told Frank it had asked Providence to hold off putting the records together until the parties could address the issue. The estate also e-mailed Frank a copy of its letter to Providence about not releasing Maria's medical records.

On December 5, Frank served the estate a subpoena for the deposition of Maureen Benson, who was a Providence social worker who had met with Maria in 2011 and 2014. The deposition was scheduled for late that month.

On December 11, the estate called Providence to confirm receipt of its letter, and also to confirm it would not disclose the documents by the end of the week, which was the deadline for the subpoena. During this conversation, Providence told the estate that Frank's attorney had picked up the documents the day before, on December 10.

In light of this conversation, the estate moved for a protective order quashing Frank's subpoenas for Providence's medical records and for Ms. Benson's deposition. The court held a hearing on the estate's motion.

At the hearing, Frank's attorney acknowledged he had obtained the records, reviewed them, e-mailed them to his client, and knew the estate had objected to this. Frank's attorney also indicated he needed the medical records for the will contest. Anna's attorney argued there was no will contest. Frank's attorney disagreed. He argued the undue influence allegation in the August 19 TEDRA petition constituted a will contest.

The court issued a temporary protective order. The court found that Providence's medical records were irrelevant because Providence provided Maria healthcare services years after she executed her will. The court further found that Frank's attorney obtained the records in violation of CR 45, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the Washington Uniform Health Care Information Act (UHCIA), chapter 70.02 RCW. The court quashed Frank's subpoenas, ordered Frank to return all records to Providence, and ordered Frank to destroy any copies he still possessed. The court reserved the issues of attorney fees and sanctions relating to the protective order.

Following the hearing, the estate moved for a permanent protective order, and to dismiss Frank's other claims. The estate argued Frank never served the personal representative with the petition. The estate also moved to enforce the no contest clause in the will. Frank responded that the current version of the will contest statute did not require personal service. Frank also alleged

Anna and Michael abused and exploited Maria and unduly influenced the will. Frank filed old letters between Maria and Anna to support his claims of exploitation of a vulnerable adult and undue influence. Frank asked the trial court not to enforce the no contest clause and argued he had commenced the will contest in good faith and with probable cause.

On January 22, 2016, the court heard argument on the issues. At the hearing, the estate argued that under *In re estate of Jepsen v. Miles,* 184 Wn.2d 376, 358 P.3d 403 (2015), the court lacked jurisdiction to consider Frank's will contest because Frank failed to personally serve the personal representative. Frank argued he substantially complied with the service requirements. After listening to counsel's arguments, the trial court took the matter under advisement and indicated it would issue a ruling soon.

A few days after the hearing, Frank e-mailed the trial court's judicial assistant a request to file a supplemental brief addressing *Jepsen,* 184 Wn.2d 376. Counsel attached his supplemental memorandum to his e-mail. The estate objected. The court's judicial assistant notified all parties that the posthearing communication was untimely, that the court would not review it, and that the court would issue its ruling as soon as possible.

On February 23, 2016, Frank personally served Anna with the petition.

The trial court soon after issued an opinion on the estate's motions. The court noted that to commence a will contest, there must be timely personal service on the personal representative and Washington courts strictly enforce this requirement. The court found that Frank did not personally serve the will contest on the personal representative and dismissed his will contest.

The trial court awarded the estate attorney fees for the costs it incurred in seeking the protective order for the medical records. The court found Frank's attorney acted in bad faith when he obtained the medical records after the estate objected. The court further enforced the will's no contest clause against Frank.

Frank sought discretionary review in this court. A commissioner of this court determined that the trial court's memorandum opinion was a final order and, therefore, appealable as a matter of right.

ANALYSIS

A. SERVICE OF WILL CONTEST

Frank argues the trial court erred by dismissing his will contest because he properly served the estate based on provisions of TEDRA. He argues personal service was not required. Alternatively, he argues he substantially complied with the service requirements. We disagree.

1. PROPER SERVICE TO COMMENCE A WILL CONTEST

One who wishes to contest a will must file a petition within four months of the will being admitted to probate. RCW 11.24.010. The four month period is tolled provided the petition is timely filed and the personal representative is served within 90 days of the petition's filing. *Id.* "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." *Id.*

Here, Frank filed his petition contesting the will on August 19, 2015, one day before the extended deadline agreed to by the parties. RCW 11.24.010's tolling provision required Frank to personally serve Anna within 90 days of filing his petition. Frank did not personally serve Anna

until long after the 90 days expired.

Frank argues the legislature changed the service requirement when it enacted TEDRA, and that the will contest statute now incorporates TEDRA's notice provisions. However, the requirement of personal service of the petition on the personal representative arises from RCW 11.24.010, which is not part of TEDRA. TEDRA does not supersede these requirements. RCW 11.96A.080; *In re estate of Kordon,* 157 Wn.2d 206, 212, 137 P.3d 16 (2006); *In re estate of Harder,* 185 Wn.App. 378, 385, 341 P.3d 342 (2015).

2. SUBSTANTIAL COMPLIANCE IS NOT SUFFICIENT

Frank also argues he substantially complied with the service requirements when he served the petition on Anna's attorney. We disagree that substantial compliance is sufficient.

In *Jepsen,* Virginia Jepsen's will was admitted to probate and her son filed a petition contesting the will. *Jepsen,* 184 Wn.2d at 378. The son's attorney e-mailed the petition to the personal representative's attorney the same day it was filed. *Id.* The personal representative moved to dismiss the will contest on the basis that she was not personally served with the petition within 90 days. *Id.* The son argued that personal service was a defense that was waivable if not timely asserted. *See id.* The trial court originally rejected the argument, but on reconsideration agreed with it. *Id.*

The *Jepsen* court stated the statutory personal service requirement for commencing will contests was unambiguous and required no construction. Mat 380. The *Jepsen* court held that because the personal representative was never personally served with the will contest, the will contest was not timely and the probate of Virginia Jepsen's will was binding and final. *Id.*

The *Jepsen* court also held that the statutory requirements for commencing will contests have always been strictly enforced and were not subject to being impliedly waived under CR 12(h)(1). *Id.* at 381, 382 n.7.[2] Because the statutory requirements for commencing will contests have always been strictly enforced, we reject Frank's substantial compliance argument.

Because Frank failed to timely personally serve Anna under RCW 11.24.010, the probate of Maria's will is binding and final. We conclude the trial court properly dismissed Frank's petition contesting the will.

B. FRANK'S STANDING TO BRINGCLAIMS ON BEHALF OFESTATE

Frank argues the trial court erred when it concluded he did not have standing to allege violations under chapter 74.34 RCW, relating to the abuse of vulnerable adults, and under chapter 11.84 RCW, relating to the inheritance rights of slayers or abusers. He acknowledges that Anna, as the estate's personal representative, was the only one with authority to bring these claims on behalf of the estate. However, he contends his TEDRA petition included a request to remove Anna as personal representative.

Only the personal representative has the authority to "maintain and prosecute" actions on behalf of the estate. RCW 11.48.010. Because Frank was not the personal representative, he had no authority to bring claims under chapter 74.34 RCW and chapter 11.84 RCW.

On December 26, 2016, Anna passed away from lung cancer. Thus, Frank's request to remove her as personal representative is moot. After Anna's death, this court granted the estate's motion for an order extending the trial court's authority to appoint a successor personal

representative. Under RCW 11.48.010, this individual will have the prerogative to decide whether to pursue these claims on behalf of the estate.

C. NO CONTEST CLAUSE

Frank argues the trial court improperly enforced the no contest clause because it never found he prosecuted the will contest in bad faith and without probable cause. He contends the evidence he offered the trial court, such as the letters from Maria to Anna, establish a prima facie case that he contested the will in good faith and with probable cause.

1. *The trial court enforced the no contest provision without the requisite findings*

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 breadth of the rule's exception is uncertain. We therefore take this opportunity to provide some guidance.

In In re Chappell's estate, 127 Wash. 638, 221 P. 336 (1923), a son unsuccessfully challenged a trust created in his father's will on the basis that the trust violated the rule against perpetuities. *Id.* at 639-40. Having lost that challenge, the son then sought to avoid application of the no contest clause in the will. *Id.* at 640. That clause barred any heir from receiving any distribution of property in the event the heir challenged the will.

Id. The son argued that a court should not enforce a no contest clause to the extent the challenge was based on public policy grounds, such as the rule against perpetuities, as opposed to personal grounds, such as the soundness of a testator's mind. *Id.* at 640-41.

The *Chappell* court reviewed holdings of various states throughout the country. *Id.* at 641-45. The *Chappell* court approvingly noted decisions that enforced no contest clauses if the will contest was brought on personal grounds. For instance:

"A testator has the lawful right to dispose of his property upon whatever condition he desires, as long as the condition is not prohibited by some law or opposed to public policy, such as conditions in restraint of marriage or of lawful trade, and when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts rightly hold that no legatee shall without compliance with that condition receive his bounty, or be put in a position to use it. . . ."

Id. at 642 (internal quotation marks omitted) (quoting *In re estate of Miller,* 156 Cal. 119, 121-22, 103 P. 842 (1909)). The rule adopted in *Chappell* protects the rights of heirs who seek to invalidate a will's provision on public policy grounds, provided the grounds were asserted in good faith and with probable cause. *Id.* at 646.

In *In re estate of Kubick,* 9 Wn.App. 413, 513 P.2d 76 (1973), a daughter sought to remove a bank as the will's executor on the basis that the bank had a conflict of interest. *Id.* at 414. The no contest clause reduced the inheritance of any person who contested any provision of the will to one dollar. *Id.* at 416. The clause contained a proviso: "' [T]his provision for forfeiture shall not affect any contest or objection which is found by the court wherein this Will is admitted to probate to have been made in good faith and for probable cause.'" *Id.* The trial court dismissed the daughter's petition. *Id.* at 417. However, the trial court found that the daughter's petition was brought in good faith and for probable cause and, because of the proviso, it did not reduce her inheritance. *Id.*

The *Kubick* court held that the clause was enforceable as written because it saw "no public policy against a forfeiture where an heir makes a bad faith challenge to some provision in a will." *Id.* at 420. The *Kubick* court further held if the daughter "laid the facts fully and fairly before her attorney and acted on his advice in bringing the action, she must be deemed to have acted 'in good faith and for probable cause' as a matter of law."[3] *Id.* At 420.

The *Kubick* court also addressed the daughter's argument that the no contest clause violated public policy, as expressed in RCW 11.28.020, .160 and .250, by prohibiting challenges to the appointment of an administrator. *Id.* at 419. The court noted that those statutes allowed interested persons and courts to challenge and replace estate administrators. *Id.* The *Kubick* court, in dicta, noted "if the ... clause purported to prohibit, under penalty of forfeiture, a good faith challenge to the appointment of an executor pursuant to a will, such prohibition might very well violate the policies inherent in RCW 11.28.020." *Id.* This dicta is consistent with *Chappell* because it focuses on public policy reasons for invalidating a no contest clause.

In *estate of Mumby,* 97 Wn.App. 385, the testator used a trust to convey and bequeath 38 acres of wooded property to a neighbor friend. *Id.* at 388. The trust included a clause that disinherited any person who contested the trust. *Id.* at 393 n.6. The testator's daughter, an heir to the residuary, petitioned to invalidate the trust. *Id.* at 388. After a trial, the trial court found there was no undue influence, denied the daughter's petition, and enforced the no contest clause in the trust. *Id.* at 391. On appeal, the *Mumby* court cited *Kubick* and *Chappell* for the proposition that no contest clauses are inoperable if a will contest is brought in good faith and with probable cause. *Id.* at 393. But as explained above, that is not the holding of those two cases. *Chappell* limited its holding to will contests based upon *public policy* grounds that are supported by good faith and probable cause, and *Kubick's* holding was based upon the good faith and probable cause safe harbor contained in the no contest clause's proviso.

Nevertheless, the estate does not argue against *Mumby's* holding that a no contest clause is inoperable if the challenger brings his or her contest in good faith and with probable cause. Here, the trial court failed to enter findings as to whether Frank brought his will contest in good faith and with probable cause.

2. *Remedy*

The estate asks this court to review the record and find as a matter of law that Frank did not bring his will contest in good faith or with probable cause. Alternatively, the estate asks us to remand so the trial court may enter appropriate findings to support its enforcement of the no contest clause.

An appellate court does not make initial findings of fact and, where the trial court fails to enter sufficient findings, remand is the proper remedy. *State v. J.C.,* 192 Wn.App. 122, 133, 366 P.3d 455 (2016); *see Bale v. Allison,* 173 Wn.App. 435, 458, 294 P.3d 789 (2013). "However, '[w]hen a trial court fails to make any factual findings to support its conclusion, and the only evidence considered consists of written documents, an appellate court may, if necessary, independently review the same evidence and make the required findings.'" *Satomi Owners Ass'n v. Satomi, LLC,* 167 Wn.2d 781, 808, 225 P.3d 213 (2009) (alteration in original) (quoting *In re Firestorm 1991,* 129 Wn.2d 130, 135, 916 P.2d 411(1996)).

Here, resolving the factual questions of whether Frank contested the will in good faith and with probable cause requires admitting additional evidence, and weighing the relevance and persuasiveness of that evidence. This likely requires a hearing.[4] Because the trial court is more appropriately situated to conduct these tasks, we remand so the trial court may enter appropriate findings. In remanding, we do not suggest whether the trial court's findings should favor one party or the other.

D. ALLEGED VIOLATION OF APPEARANCE OF FAIRNESS DOCTRINE

Frank argues the trial court violated the appearance of fairness doctrine because it allowed the estate to discuss *Jepsen,* 184 Wn.2d 376 for the first time at the January 22, 2016 hearing, refused to consider his supplemental brief addressing the case, and then relied on *Jepsen* in its ruling.

"An appearance of fairness claim is not 'constitutional' in nature under RAP 2.5(a)(3) and, thus, may not be raised for the first time on appeal." *In re Guardianship of Cobb,* 172 Wn.App. 393, 404, 292 P.3d 772 (2012); *see also City of Bellevue v. King County Boundary Review Bd.,* 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based."). Frank never objected at the hearing to the estate's reliance on *Jepsen,* 184 Wn.2d 376, nor does the record show he ever objected to the trial court's refusal to consider his supplemental brief. Accordingly, Frank failed to preserve this issue for appeal. *See Cobb,* 172 Wn.App. at 404.

E. PROTECTIVE ORDER FOR PROVIDENCE MEDICAL RECORDS

Frank argues the trial court erred when it quashed his subpoenas for the Providence medical records and Ms. Benson's deposition. He argues that substantial evidence does not support the trial court's finding that he acted in bad faith, that Washington's UHCIA does not provide a private right of action to sue nonhealthcare providers who violate the act, and that the records were relevant to his allegations in his will contest.[5]

CR 45 requires a court to quash or modify a subpoena if the subpoena requires disclosure of privileged or protected information and no exception or waiver applies. CR 45(c)(3)(A)(iii). Under the UHCIA, unless an exception applies, "a health care provider may not disclose health care information about a patient to any other person without the patient's written authorization." RCW 70.02.020(1). The trial court found that Maria's medical records were protected. Accordingly, the trial court properly quashed Frank's subpoenas.

1. *Bad faith*

Frank argues substantial evidence does not support the trial court's finding that he acted in bad faith.

Here, the estate e-mailed Frank an objection to the subpoena on the basis that it requested Maria's privileged medical records. *See* RCW 5.60.060(4); RCW 70.02.020(1), .060. The estate also e-mailed Frank a copy of its letter to Providence about not releasing the records until the trial court could hear the matter. One week later, without notifying the estate or obtaining a court order, Frank went to Providence and picked up the records. The trial court reasonably inferred Frank did this in bad faith.

Frank argues he mistakenly believed he could obtain the records until the estate sought a

protective order. He argues this was an honest mistake, rather than bad faith. While this is one possible interpretation of what happened, the trial court found otherwise. When substantial evidence supports the trial court's findings, it is not this court's role to reweigh the evidence and substitute its judgment for the trial court's. *See Bale,* 173 Wn.App. at 458.

Frank also presents a lengthy e-mail chain in which he and the estate discussed the subpoenas. He faults the estate for changing its position, and vaguely asserts the estate agreed to continue the protective order hearing "in consideration" for continuing the deposition. *See* Br. of Appellant at 45. But this e-mail conversation began on December 14-*after* Frank went to Providence and got the records. Again, substantial evidence supports the trial court's finding that Frank acted in bad faith.

2. *Attorney fees*

Frank argues the UHCIA does not provide a private right of action to sue nonhealthcare providers, such as attorneys, who violate the act. Frank's argument is unclear, as the estate never brought a cause of action under the UHCIA.

It appears Frank may be challenging the trial court's award of attorney fees to the estate for the expenses it incurred in litigating its motion for a protective order. However, the estate requested attorney fees and sanctions under CR 26, 37, 45, and the court's inherent power to impose sanctions for discovery violations. The estate made clear it did not request attorney fees "from state or federal privacy statutes." CP at 90. At a minimum, the trial court had authority under its inherent power to impose sanctions for bad faith conduct. *See State v. S.H.,* 102 Wn.App. 468, 474-75, 8 P.3d 1058 (2000). The trial court did not err in awarding the estate attorney fees on this basis.

3. *Relevance to will contest*

Frank also argues the trial court should have given him access to the medical records because they were relevant to the allegations in his will contest. His argument is moot because we affirmed the trial court's dismissal of his will contest on the basis he failed to timely serve the personal representative.

F. Attorney Fees

The estate requests attorney fees under RAP 18.9 on the basis that Frank filed a frivolous appeal. RAP 18.9 authorizes an appellate court to order a party who filed a frivolous appeal "to pay terms or compensatory damages to any other party who has been harmed." For an appeal to be deemed frivolous under RAP 18.9, the entire appeal must be totally devoid of merit. *In re Recall of Boldt,* 187 Wn.2d 542, 556, 386 P.3d 1104 (2017). Because Frank partially prevailed on the issue of the no contest provision, we decline to impose attorney fees on this basis.

Affirmed in part and remanded.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Siddoway, J. Pennell, J.

Notes:

[1] Given the common last name, the parties' first names are used for purposes of clarity.

[2] An express waiver of personal service, such as a personal representative's attorney signing an acceptance of service, might create equitable estoppel. *See Jepsen,* 184Wn.2dat380n.4.

[3] The *Kubick* court relied on *Dutterer v. Logan,* 103 W.Va. 216, 137 S.E. 1 (1927), which fashioned this rule to protect beneficiaries from the harsh consequences of forfeiture in the event the facts at trial developed differently or the beneficiary's attorney made a legal error. *See id.* at 2-3. It follows, therefore, that to achieve the policy behind this rule, the will contestant must show he or she reasonably relied on the attorney's advice in pursuing the will contest.

[4] The estate argues that this court should not consider some of Frank's evidence, such as Maria's 1998 letter to Anna, because the letter "has yet to be admitted in court." Br. of Resp't at 17. The estate also argues the letter is unpersuasive in light of the fact that Maria wrote it 10 years before she executed her will. These arguments only further demonstrate why remand is the appropriate remedy.

[5] Frank also argues Maria waived the confidentiality of her medical records before her death. Although he brought this issue to the attention of the trial court, *see* CP at 199-202, he fails to provide any evidence or cite any legal authority to support this contention. We therefore will not consider this argument on appeal. *See West v. Thurston County,* 168 Wn.App. 162, 187, 275 P.3d 1200 (2012) (appellate court will not consider bald assertions lacking cited factual and legal support).

In re Estate of Primiani, 053019 WACA, 35845-3-III /**/ div.c1 {text-align: center} /**/

9 Wn.App.2d 1007

In the Matter of the Estate of MARIA G. PRIMIANI.

No. 35845-3-III

Court of Appeals of Washington, Division 3

May 30, 2019

UNPUBLISHED OPINION

SLDDOWAY, J.

A testator wishing to discourage litigation over the terms of her will can include a "no contest" or "in terrorem" provision, under which a beneficiary who challenges the will forfeits his share of the estate or has it reduced to a nominal amount. Such provisions are generally enforceable; however, Washington courts will not enforce a provision in some actions brought in good faith and with probable cause.

Frank Primiani brought an unsuccessful challenge to his mother's will and appeals the trial court's decision that he failed to demonstrate why her no contest clause should not be enforced. We affirm the trial court.

FACTS AND PROCEDURAL BACKGROUND

Following the death of Maria Primiani in 2014, her will was admitted to probate and her daughter Anna[1] was appointed personal representative. Maria's other living child, her son Frank, filed a complaint in the probate proceeding, purporting to assert claims on behalf of the estate against Anna and her husband, seeking Anna's removal as personal representative, and asking the court to order an accounting and partition real property. The complaint also included allegations of undue influence, misrepresentation and concealment in the making or execution of Maria's will, but in an apparent effort to avoid triggering the no contest provision in Maria's will, Frank purported to "reserve[ ] the right to allege details of undue influence in the making and execution of the Will." Clerk's Papers (CP) at 7.[2] His prayer for relief did not go so far as to seek a declaration that her will was invalid.

When no other legal action to challenge the will was brought within the limitations period for a will contest, however, Frank's lawyer, Steven Schneider, told the court that the intention in filing the complaint had been to include a will contest. The case proceeded on that basis.

The estate eventually obtained dismissal of the will contest based on Frank's failure to timely personally serve Anna with a complaint. With the will contest having failed, Anna asked the trial court to enforce the no contest provision and treat Frank as having forfeited his one-half share of Maria's real property in Spokane County. The trial court enforced the no contest provision.

Frank appealed, and in a 2017 decision, this court affirmed dismissal of the will contest. *In re Estate of Primiani,* No. 34200-0-III, slip op. at 1 (Wash.Ct.App. May 2, 2017) (unpublished), http://www.courts.wa.gov/opinions/pdf/342000_unp.pdf. When it came to enforcement of the no contest provision, however, this court concluded that the trial court had not made findings addressing Frank's contention that the provision should not be enforced because he had challenged the will in good faith and with probable cause.

ATTACHMENT 3

Following remand, a hearing was conducted at which the trial court and counsel discussed

how to proceed. Frank's lawyer outlined evidence he intended to present in support of his good faith, which included matters remote in time from 2008. The court observed that what was material was whether or not Maria was subjected to undue influence *in 2008,* in connection with the making and execution of the will. The court also cautioned counsel against relying on inadmissible evidence. The court then set a schedule for Frank to submit an offer of proof and for the estate to respond.

After considering Frank's offer of proof and the estate's response, the trial court entered a memorandum opinion concluding that the will contest was not filed in good faith. It again enforced the no contest provision.

During the weeks the court had enforcement of the provision under advisement, Mr. Schneider was notified that Frank was investigating potential legal claims against him and his law firm. Mr. Schneider moved for leave to withdraw. The hearing on Mr. Schneider's motion took place shortly after the trial court filed its memorandum opinion. Among matters argued was whether Frank would be prejudiced by the withdrawal. Mr. Schneider stated during the hearing:

I'd like to remind the Court that Mr. Primiani is actually co-counsel on this matter to the point of contacting and dealing with Mr. Stevens directly at some points. Mr. Primiani did researching, briefed cases, provided a lot of information as an attorney, and Mr. Primiani knows what this case is about. So to say that Mr. Primiani doesn't know what's going on, he's been participating with me at every decision made in this case as co-counsel, and that's the way he wanted it. So he knows what's happening.

Report of Proceedings (RP) (Oct. 10, 2017) at 34-35.

The court granted Mr. Schneider leave to withdraw. It thereafter entered formal findings of fact and conclusions of law on the no contest enforcement issue.

Through new counsel, Frank timely moved for reconsideration, arguing that the court had applied the wrong standard in making its findings because it failed to consider whether Frank had relied on Mr. Schneider's advice in contesting the will. Division Two of this court held in *In re Estate of Mumby,* 97 Wn.App. 385, 393, 982 P.2d 1219 (1999), that relying on advice of counsel after fully and fairly laying out material facts is one way of demonstrating good faith and probable cause.

Frank supported his motion with a declaration in which he conclusorily asserted that he had fully and fairly laid out the material facts to Mr. Schneider and relied on his counsel.[3] The trial court entertained the reconsideration motion but denied it, stating that it had *Mumby* in mind in making its original decision. The court's opinion denying reconsideration observed that "[m]any of the documents filed by attorney Steve Schneider start with referring to Frank Primiani as **co-counsel."** CP at 392-93 (boldface in original). It included a supplemental finding that Mr. Primiani, a licensed attorney, "did not rely on advice of his co-counsel when pursuing the will contest and was not candid in his disclosures to his co-counsel regarding the undue influence claims." CP at 394.

Frank appeals.

ANALYSIS

Will contests in Washington have long been governed by statute. *E.g., State ex rel. Wood v.*

Super. Ct. of Chelan County, 76 Wash. 27, 31, 135 P. 494 (1913). Modernly, they are governed by chapter 11.24 RCW. A statutory consequence of bringing an unsuccessful will contest is that the trial court may assess reasonable attorney's fees against the contestant "unless it appears that the contestant acted with probable cause and in good faith." RCW 11.24.050. The good faith exception to liability for attorney fees in will contests was originally judicially created in *In re Estate of Eichler (Preuss v. Berg),* 102 Wash. 497, 173 P. 435 (1918), in which the court held that "where a person in good faith brings an action to contest a will and makes a prima facie case, attorney's fees should not be awarded against him in the event his action fails." *In re Estate of Chapman,* 133 Wash. 318, 322, 233 P. 657 (1925) (emphasis omitted). The legislature later amended the will contest statutes to identify probable cause and good faith as a basis for excusing a contestant from liability for the estate's attorney's fees. LAWS OF 1965, ch. 145, § 11.24.050 (codified at RCW 11.24.050).

At around the same time that our Supreme Court recognized a contestant's good faith and probable cause as grounds for shielding the contestant from paying attorney's fees, it considered similar reasons for sparing the contestant from the operation of a no contest provision. *In In re Estate of Chappell,* 127 Wash. 638, 646, 221 P. 336 (1923), the contestant believed, ultimately incorrectly, that California law would apply and render the will invalid. After surveying cases from other jurisdictions to decide "whether we shall adopt the rule of probable cause," the Supreme Court held that "it not being denied that the contest was made *in good faith* . . . we are . . . convinced that appellant *had probable cause* for instituting the proceedings he did, and that by so doing he did not forfeit his legacy." *Id.* (emphasis added).

In a 1973 case, this court identified reliance on counsel as "persuasive" of the bona fides of a will contest in some cases. *In re Estate of Kubick,* 9 Wn.App. 413, 420, 513 P.2d 76 (1973). The court agreed with the proposition in a West Virginia decision that if the facts are "fully and fairly laid before counsel" and the contestant then relies on counsel's advice in challenging a will, that would establish the contestant's good faith and probable cause. *Id.* (emphasis omitted) (citing *Dutterer v. Logan,* 103 W.Va. 216, 137 S.E. 1 (1927)). The court cautioned that reliance on counsel alone would not be conclusive without "establishing] what facts were before counsel when and if he advised the suit in the face of the in terrorem provision." *Id.*

Mumby, on which Frank relies, applied *Kubick's* proposition that reliance on fully-informed counsel can demonstrate good faith and probable cause, but found that it was not demonstrated by the contestant, who was challenging her father's will.[4] In that case, the daughter's lawyer provided a declaration in support of his client's argument that a no contest provision should not be enforced against her. The trial court concluded that the lawyer's declaration did not demonstrate that his advice was based on an evenhanded, full and fair presentation of the facts; instead, the lawyer simply resubmitted facts that the daughter had presented at trial, in a light most favorable to her.

Mr. Primiani makes several arguments as to why the trial court erred. Three can be resolved summarily before turning to the sufficiency of Mr. Primiani's evidence of good faith and probable cause.

I. Mr. Primiani had a full opportunity to present relevant evidence and Applicable Law

Mr. Primiani argues that the court failed to consider *Mumby* in rendering its initial decision.

The court states that it did, however, and since it entertained Mr. Primiani's motion for reconsideration and entered supplemental findings, any dispute over whether it initially had *Mumby* in mind is moot.

He argues that the court frustrated presentation of his argument on remand by insisting that he present relevant, admissible evidence of undue influence in connection with Maria's execution of the 2008 will. He contends that what should have mattered was his subjective motivation and concerns in filing the petition.

The trial court never foreclosed Mr. Primiani from making his record on the issues he deemed material and wished to preserve for appeal. It provided guidance as to the matters it projected would be the basis for its decision, which most parties would welcome. If Mr. Primiani believed that the court was wrong about the facts and law that mattered, it was incumbent upon him to present them, failing which error would be unpreserved. *See* RAP 2.5(a). In any event, the trial court better appreciated what evidence was relevant.

Finally, Mr. Primiani complains that he was denied the opportunity to conduct additional discovery. Mr. Primiani did not demonstrate to the trial court why he needed additional discovery to establish that he had a good faith basis and probable cause for filing his petition in 2015.

II. Mr. Primiani did not demonstrate good faith and probable cause

A will is presumed valid, but may be disregarded when a will contestant presents clear, cogent, and convincing evidence that a beneficiary exercised undue influence over the testator. *In re Trust & Estate of Melter,* 167 Wn.App. 285, 298, 273 P.3d 991 (2012). "[T]he undue influence which operates to void a will must be something more than mere influence alone. Rather, it must be influence which *'at the time of the testamentary act,* controlled the volition of the testator, interfered with his free will, and prevented an exercise of his judgment and choice.'" *In re Estate of Kessler,* 95 Wn.App. 358, 376-77, 977 P.2d 591 (1999) (emphasis added) (quoting *In re Estate of Lint,* 135 Wn.2d 518, 535, 957 P.2d 755 (1998)).

In attempting to demonstrate good faith and probable cause, Mr. Primiani was entitled to rely on information obtained up until the time he filed the will contest, but the trial court properly cautioned counsel that information should bear on the circumstances under which Maria executed the 2008 will. And it needed to be admissible evidence, or information supporting the existence of admissible evidence. An action is not brought in good faith if the only information that can be presented to support it is legally inadmissible.

A. Clear, cogent and convincing evidence does not support Mr. Primiani's reliance on counsel

As demonstrated by *Chappell* and *Kubick,* when a contestant seeks to establish good faith and probable cause by showing the contestant's reliance on counsel, a demonstration of the facts that were fully and fairly laid out is as important a part of the exception to enforcement as is a credible showing of reliance. Mr. Primiani complains that this requires the client to understand the law, but it does not. The required showing can also be made if the contestant consults competent counsel who asks about material facts and the contestant provides full and fair responsive information. If, as Mr. Primiani contends, the exception applies anytime a contestant with a meritless challenge hires a lawyer and claims to rely on legal advice, the exception would swallow

the general rule of enforceability.

Mr. Primiani made no effort to specify the facts that he fully and fairly laid out to Mr. Schneider. Given his position that what mattered was his subjective motivation and concerns, it is doubtful that the material facts were laid out.

The trial court also reasonably found that Mr. Primiani did not credibly demonstrate reliance. He and Mr. Schneider were identified as "co-counsel" on a number of materials filed with the court. *E.g.,* CP at 59, 101, 190 (declaration of Mr. Primiani, stating "I am the Petitioner and Co-Counsel herein"), 194, 403, 408, 413. Only weeks earlier, Mr. Schneider, as an officer of the court, had made representations to the court about the extent of Mr. Primiani's involvement. After Mr. Schneider was allowed to withdraw, Mr. Primiani, acting "pro se", filed a 9-page response to the findings and conclusions presented by the estate. The trial court could reasonably find that Mr. Primiani's conclusory declaration-unsupported by any declaration from Mr. Schneider-did not meet his burden of proving reliance.

B. Clear, cogent and convincing evidence did not otherwise support good faith and probable cause

Before the legislature incorporated the "probable cause and in good faith" defense to an unsuccessful will contestant's *liability for attorney 'sfees* into RCW 11.24.050, our Supreme Court repeatedly held that the judicially-recognized exception to liability applies when a contestant's evidence establishes a prima facie case, even if the challenge ultimately fails. *See Eichler,* 102 Wash, at 499-500; *In re Estate of Hille,* 117 Wash. 205, 206, 200 P. 1034 (1921); and *In re Estate of Mitchell,* 41 Wn.2d 326, 353, 249 P.2d 385 (1952). The same should be true of the judicially-created exception to enforcing a no contest clause, since the same "good faith and probable cause" language is used. A contestant bears the burden of establishing that he falls within the exception to the general rule that no contest provisions are enforceable.

In concluding that Mr. Primiani did not demonstrate good faith and probable cause, the trial court looked to *Dean v. Jordan,* 194 Wash. 661, 79 P.2d 331 (1938), "which is often relied upon as the earliest formulation of circumstances giving rise to concern [about undue influence], and their effect on the parties' proofs." *Melter,* 167 Wn.App. at 298; CP at 366. *Dean* holds that the most important facts and circumstances weighing against the validity of a testamentary instrument are "(1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate." *Dean,* 194 Wash, at 672.

The trial court found that Anna occupied a fiduciary or confidential relation to her mother, but entered the following findings with respect to the other two most important facts and circumstances:

[T]he Court finds that Petitioner fails with the second factor. There was no direct evidence presented by the Petitioner that Anna actively participated in the preparation or procurement of the will itself. Two independent witnesses signed the will, and an attorney prepared the will. The will was signed in July 2008. At no time, did the Petitioner present any evidence that during the time of making and signing this will there was undue influence on Maria. Other than Maria living with Anna, there is no actual evidence other than self-serving double hearsay evidence that Ann[a] or

her husband actively participated in the preparation or procurement of the will. . . . Under the third factor in *Dean v. Jordan,* the Petitioner fails to establish that Anna received an unusually large portion of the estate. At the time of her death, Maria had two children, Anna and Frank, and each child received half her estate. This does not constitute an unnatural or unusual to one over the other.

CP at 366-67 (Findings of Fact 12, 13). Mr. Primiani does not assign error to the findings, which are verities on appeal. *In re Estate of Mutter,* 197 Wn.App. 477, 486, 389 P.3d 604 (2016).

Ultimately, Mr. Primiani's undue influence claim was predicated on a change in Maria's 2008 will from provisions made in a will she had executed in 1999. As explained by one of Mr. Primiani's declarations:

Particularly relevant is the fact that the 1999 Will states that Anna and I should equally divide the farmland, and that if one of them died, that share would go to the survivor. In the 2008 Will, that provision was changed so that if Anna predeceased me, her share would go to her children instead. This is a very substantial difference, and results in a very disproportionate gain to Anna's estate.

CP at 228.

In fact, the 2008 will evenhandedly divided the residuary estate in equal shares to Anna and Frank and provided *as to both* that "[i]f any child does not so survive me, I give that child's share to his or her living issue." CP at 1. If the result of the 2008 change was a "very disproportionate gain to Anna's estate," it was only because Anna was 14 years older than Mr. Primiani and, at the time he filed the will contest, she was terminally ill. The trial court found that Mr. Primiani "wanted more than his share of his mother's estate." CP at 394.

Substantial evidence supports the trial court's findings of fact entered following remand, which in turn support its conclusions of law.

III. Attorney fees

The estate requests an award of attorney's fees, characterizing this as a frivolous appeal.

An appeal is frivolous if the court is convinced that it presents no debatable issues on which reasonable minds could differ, and is so lacking in merit that there is no possibility of reversal. *In re Marriage of Foley,* 84 Wn.App. 839, 847, 930 P.2d 929 (1997). A civil appellant has a right to appeal under RAP 2.2, and all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *See Streater v. White,* 26 Wn.App. 430, 434-35, 613 P.2d 187 (1980).

Little published case law exists on the exception to the general enforceability of no contest provisions, perhaps because they usually have their intended effect of discouraging challenges. We decline to find the appeal entirely frivolous and deny the estate's request for an award of reasonable attorney's fees.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR: Lawrence-Berrey, C.J., Pennell, J.

Notes:

[1] We use first names of the members of the Primiani family in this section of the opinion, for clarity. We intend no disrespect.

[2] The no contest provision states:

In the event that any person shall contest this Will or attempt to establish that he or she is entitled to any portion of my estate or to any right as an heir, other than as herein provided, I hereby give and bequeath unto any such person the sum of one dollar.

CP at 2.

[3] Frank's declaration states:

Prior to filing this case, I consulted with my former counsel, Mr. Schneider, and disclosed all material facts known to me at the time. I moved ahead with this case on the basis of Mr. Schneider's counsel and representation that there was a case worth pursuing. Had I believed that there would be material facts that would prevent me from prevailing in this matter, or had I believed that the evidence I could collect would be inadmissible, I would not have moved forward with the case.

CP at 377.

[4] This court's 2017 opinion in this case pointed out that the decision in *Mumby* might have made an unwarranted leap by suggesting that the good faith and probable cause exception applies to all will contests. *Chappell* and *Kubick,* on which *Mumby* relied, were more limited. *Chappell* involved a challenge to a will on public policy grounds, and discussed the fact that challenges on personal or private grounds might not qualify for the exception. 127 Wash, at 640-41. In *Kubick,* the no contest clause contained an express proviso that it would not apply to a challenge made in good faith and for probable cause. 9 Wn.App. at 419-20. As discussed in this court's 2017 opinion, since the estate did not challenge *Mumby* or argue that the good faith and probable cause exception did not apply, we assumed without deciding that it *did* apply and remanded for the trial court to make findings. *Estate of Primiani,* slip op. at 15-16.

The estate now challenges *Mumby.* But for purposes of this appeal, application of the good faith and probable cause exception to private or personal disputes is law of the case. "' [Q]uestions determined on appeal, or which might have been determined had they been presented, will not again be considered on a subsequent appeal if there is no substantial change in the evidence.'" *Folsom v. County of Spokane,* 111 Wn.2d 256, 263, 759 P.2d 1196 (1988) (quoting *Adamson v. Traylor,* 66 Wn.2d 338, 339, 402 P.2d 499 (1965)).

VANDER WEL, JACOBSON & KIM, PLLC

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