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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Estate of JOSEPH P. BURROUGHS, Deceased. SAMUEL PATRICK BURROUGHS, Appellant/Cross Respondent, v. ESTATE OF JOSEPH BURROUGHS; and JENNIFER GORDON, as Personal Representative of the Estate of Joseph Burroughs, Respondents/Cross Appellants, DAVID BOWERS, STAN BOWERS, CURT BOWERS, and CYNTHIA BOWERS, Defendants.	No. 79737-9-I (Consolidated with Nos. 80757-9-I, 80930-0-I) DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — Samuel Burroughs contested probate of his father's will under both the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, and the will contest statutes, chapter 11.24 RCW, alleging that his father had revoked the will. The trial court admitted the will to probate and dismissed Burroughs' will contest under TEDRA. A different trial judge granted summary judgment on Burroughs' chapter 11.24 RCW will contest. The personal

representative (PR) of the estate appeals the summary judgment order, asserting that Burroughs' chapter 11.24 RCW will contest was time barred and precluded as res judicata. The PR also argues that the court erred in admitting evidence barred by the attorney-client privilege, insufficient evidence supports the court's determination that the deceased revoked his will, and the court erred by removing the PR pending appellate review. We affirm the court's order granting summary judgment in favor of Burroughs, but remand to vacate the order removing the PR and to appoint a successor PR.

FACTS

Joseph Burroughs executed a "Last Will and Testament" (Will) on April 6, 2011. He left $50,000 to his only child, Samuel Burroughs, and the residual of the estate to his wife, Cynthia Marie Burroughs. Joseph[1] appointed Cynthia as the PR of his estate and Cynthia's sister, Jennifer Gordon, as an alternate PR. The Will provided that if Cynthia predeceased Joseph, equal shares of "all property that would otherwise go to her" went to Samuel and Cynthia's four siblings, Gordon, David Bowers, Stan Bowers, and Curt Bowers.

Joseph and Cynthia divorced in January 2015. Despite the dissolution, Cynthia kept the original 2011 Will.

On May 17, 2018, Joseph met with attorney Nancy Ivarinen to prepare a new Will. Joseph told Ivarinen that he wanted to revoke his 2011 Will and leave his entire estate to Samuel. He also appointed Samuel as the PR of his estate.[2]

[1] We refer to Joseph Burroughs, Samuel Burroughs, and Cynthia Burroughs by their first names for purposes of clarity and mean no disrespect by doing so.

[2] Joseph appointed his friend Tom Derrick as an alternate PR. He also divided his estate among Derrick and two charitable organizations if Samuel predeceased him.

Ivarinen prepared a new Will and mailed a copy to Joseph. On June 12, 2018, Joseph called Ivarinen's office and approved the draft of the new Will. He scheduled an appointment for June 15, 2018 to execute the new Will. Joseph died on June 15, 2018, before he could sign the new Will.

After Joseph died, Samuel found a signed draft of the 2018 Will while cleaning his father's house. Samuel also found a document, signed by Joseph on April 6, 2015, designating Samuel as the primary beneficiary for Joseph's AssetMark Trust Company IRA.[3]

On July 20, 2018, Ivarinen filed a "Petition for Letters of Administration," informing the court that Joseph's estate should pass intestate because Joseph revoked his 2011 Will on May 17, 2018. The court agreed and appointed Samuel as the PR of Joseph's estate.

On September 18, 2018, Gordon filed a "Petition for Probate of Testate Estate," asking the court to admit Joseph's 2011 Will to probate and appoint her as PR of Joseph's estate.[4] Gordon argued that the court should admit the 2011 Will to probate because "no admissible evidence of will revocation is before this court." The court scheduled a probate hearing for October 5, 2018.

The day of the probate hearing, Samuel filed a TEDRA petition, requesting a hearing to determine whether Joseph revoked his 2011 Will and asking the court to declare Joseph's AssetMark IRA a nonprobate asset to which Samuel is entitled as the designated beneficiary.

[3] Individual retirement account.

[4] Gordon argued that the court should appoint her as the PR under the terms of the 2011 Will because Cynthia declined service.

Samuel also filed a declaration from Ivarinen. In the October 1, 2018 declaration, Ivarinen said that Samuel's attorney advised her that "the PR . . . has waived Joseph Patrick Burroughs' attorney-client privilege." Ivarinen explained that Joseph retained her "to assist him in preparing a new Last Will" and that she prepared the new Will as he instructed. She said Joseph "made it clear to me that he wanted his son, Samuel Patrick Burroughs, to get all his estate upon his death." Ivarinen attached a copy of an unsigned draft of the new Will to her declaration.

At the October 5 probate hearing, Samuel argued that the court should set a fact-finding hearing to determine whether Joseph revoked his 2011 Will. The court did not set a hearing. Instead, it concluded that Joseph's 2011 Will "meets all of the requisites to establish the validity of a will under RCW 11.12.020" and that "Samuel has failed [to] establish by clear, cogent and convincing evidence that the Will had been revoked." The court admitted the 2011 Will to probate. It also revoked the letters of administration previously issued to Samuel and appointed Gordon as the successor PR with nonintervention powers.

Samuel filed a motion for reconsideration of the court's October 5 order admitting the 2011 Will to probate, revoking the letters of administration to Samuel, and appointing Gordon as PR of Joseph's estate. In support of the motion, Samuel filed a second declaration from Ivarinen. In that declaration, Ivarinen explained that Joseph gave her a copy of his 2011 Will at their May 2018 meeting. She said Joseph instructed her to revoke the 2011 Will, so she "wrote on the copy of the old Will, 'revoked' and placed [her] initials next to

revoked." Ivarinen attached the described copy of the 2011 Will with the "revoked" notation to her second declaration.

Ivarinen's paralegal Chellie Anderson also filed a declaration stating that she was present at the May 2018 meeting between Ivarinen and Joseph. Anderson said that she later had a telephone conversation with Joseph in June and he told her that the draft of the 2018 Will "was consistent with his instructions and intentions." Both Ivarinen and Anderson said they believed Joseph was competent to make and revoke his Will.

Gordon on behalf of the Estate of Joseph P. Burroughs (collectively the Estate) moved to strike the second declaration of Ivarinen "based on attorney-client privilege." It argued that Joseph's instructions to Ivarinen are privileged because Gordon is now the PR of Joseph's estate, and she "has not granted any permission or authority to Ms. Ivarinen to disclose any such communications between Decedent and herself and has continued to assert the privilege." The Estate also moved to dismiss Samuel's TEDRA petition as barred by res judicata because he sought to relitigate issues determined at the probate hearing.[5] The court scheduled a hearing for November 9, 2018 to address Samuel's motion for reconsideration, the Estate's motion to strike Ivarinen's second declaration, and the Estate's motion to dismiss Samuel's TEDRA petition.

[5] The Estate also argued the court should dismiss the TEDRA petition because Samuel failed to join the Estate and AssetMark as necessary parties to the suit. It further argued that because the Bowers siblings were "mere estate beneficiaries," Samuel improperly joined them in the petition, and the court should remove them as named parties.

On October 15, 2018, Samuel filed a "Petition for Will Contest" under chapter 11.24 RCW, alleging that Joseph directed Ivarinen to revoke the 2011 Will during their May 17, 2018 meeting; and that "[i]n May and June of 2018, it was the clear intention, of decedent, by signing a new will and by revocation of the 2011 Will, to leave his entire estate to his son." Samuel asked the court to administer the Estate as though Joseph died intestate.

At the November 9 hearing, Samuel asked the court to reconsider its "finding on the will contest before [the will has] even been filed." The trial court consolidated Gordon's probate petition and Samuel's TEDRA petition and continued the matters.

In January 2019, the Estate filed another motion to dismiss Samuel's TEDRA claim and requested that the court award it the funds in Joseph's AssetMark IRA as well. The Estate again argued that the court should bar Samuel's TEDRA challenge as res judicata. In February 2019, the Estate also moved to dismiss Samuel's chapter 11.24 RCW will contest, arguing it was both time barred and foreclosed as res judicata.

On February 1 and February 22, 2019, the court held hearings on Samuel's motion to reconsider its October 5, 2018 order admitting the 2011 Will to probate. The court also considered the Estate's motions to dismiss. Samuel argued that the court should reconsider its order given the additional evidence that Ivarinen revoked the 2011 Will at Joseph's direction by writing "revoked" on a copy of the document. The court disagreed and stated:

> The statute says if you're going to revoke it in the — by somebody other than the testator is going to revoke the will, it must be done in

> the presence of the testator, and Ms. Ivarinen's declarations never say she was there — that he was there when she did that.

Samuel then explained that "our evidence and responses were stopped by a claim of attorney/client privilege, . . . so we're not able to talk to Ivarinen and get any subsequent declarations and/or from her employees."

The court assured Samuel that "you have a will contest matter going forward under . . . [chapter 11.24 RCW] in which all of that material could be presented." The court told Samuel, "This order does not affect that case." It elaborated that

> the only way it's going to affect the other case is if a later judge[6] determined that it's res judicata, and that's for a later determination.
>
> This ruling, this ruling is not in the case of the will contest. It doesn't impact the will contest except insofar as it may at some point if it's determined to be res judicata, it may or may not, but you still have the opportunity to present evidence to show that it's otherwise.
>
> . . . .
>
> . . . And that that evidence wasn't before the Court and was not part of the consideration that this Court had. Therefore, it probably wouldn't be res judicata. At least that's how I see it. Another judge may see it differently.

The court entered findings of fact and conclusions of law on February 22, 2019, denying Samuel's motion for reconsideration. The court found Samuel failed to establish by clear, cogent, and convincing evidence that Joseph revoked his 2011 Will. The court also concluded that Samuel's TEDRA petition failed because "he has submitted nothing which would appropriately alter this Court's ruling in the October 5 Order that the [2011] Will is the valid Will of decedent and

[6] February 22, 2019 was the last working day before the trial judge retired from the bench.

properly admitted to probate." As a result, the court dismissed with prejudice the portion of Samuel's TEDRA petition "through which he challenged the ruling set forth in the October 5 Order that the Will is the valid Will of Decedent and property admitted to probate." The court reserved "[a]ny ruling as to whom the [AssetMark] IRA should be awarded . . . pending further proceedings of this Court." The trial court did not rule on the Estate's motion to strike the second declaration of Ivarinen and deferred ruling on the Estate's motion to dismiss the chapter 11.24 RCW will contest, leaving the issues for the next judge to decide.

Samuel petitioned this court for discretionary review of the court's October 5, 2018 order admitting the 2011 Will to probate and appointing Gordon as the PR of Joseph's estate and the February 22, 2019 order denying his motion for reconsideration and dismissing a portion of his TEDRA petition. A commissioner of this court accepted review under RAP 2.2(a)(3) and stayed the appeal pending resolution of Samuel's chapter 11.24 RCW will contest.

In June 2019, Samuel filed a "Note for Trial Setting," seeking a trial date for his will contest. The Estate moved to strike the trial setting, arguing that Samuel's claim is time barred under RCW 11.24.010 because he failed to set an initial hearing in the matter pursuant to the TEDRA statute, RCW 11.96A.100. The newly assigned trial judge granted the Estate's motion and struck the trial setting pending resolution of the Estate's claim and other outstanding dispositive motions.

The Estate moved for summary judgment on the will contest, again arguing the petition was time barred and subject to res judicata. Samuel

opposed the motion and asked the court to determine whether attorney-client privilege precludes Ivarinen "and her staff" from submitting supplemental declarations. Following a hearing in September 2019, the court entered findings of fact and conclusions of law, concluding that the will contest was not time barred or barred as res judicata. The court continued the Estate's motion for summary judgment to address the Estate's assertion of attorney-client privilege and allow Samuel to present additional evidence about the facts surrounding Joseph's revocation of his 2011 Will.

The Estate moved for reconsideration. The court denied the motion to reconsider. It explained that the will contest was not barred as res judicata because Samuel's claim that Joseph revoked his 2011 Will "was never actually litigated and never had an opportunity to be litigated in the other matter." As to the question of whether the prior judge had considered the will contest issues, the trial court noted:

> I don't believe he fully considered the issue of whether that will was revoked, and I think he knew he wasn't fully considering that issue when he stated in his ruling that the will contest would still be alive, and that he did not — he did state that he did not believe res judicata would apply.

The court concluded, "I reviewed the record, and I don't see where the Petitioner ever got an evidentiary hearing on whether the will was revoked."

The court then determined that Joseph's instructions to Ivarinen were admissible because Samuel, acting as the PR of the estate at the time, waived Joseph's attorney-client privilege:

> I don't think the attorney/client privilege prevented Ms. Ivarinen from providing evidence in this case for a couple reasons. I think

> that the privilege was waived by the personal representative, Sam Burroughs, at the time, and cannot then be reasserted by the current personal representative, but more importantly, I think that the broad — the purpose of the attorney/client privilege is not met by imposing it or requiring it to apply in this case.

The court concluded that the attorney-client privilege "is not absolute" and that "[i]n a controversy between heirs, the interests of the deceased as well as the estate was that the truth be ascertained." The court also denied the Estate's motion for summary judgment dismissal of the will contest.[7]

In November 2019, Samuel moved for a summary judgment determination "return[ing] the Joseph Burroughs probate to an intestate probate" and reappointing Samuel as the PR. In support of his motion, Samuel filed a third declaration from Ivarinen. In that declaration, Ivarinen gave a full account of her May 2018 meeting with Joseph in her office. Ivarinen stated that Joseph "made it clear" that he wanted "all his estate and assets" to go to Samuel. Although he could not find his original 2011 Will, Joseph brought a copy of the 2011 Will to the meeting and directed Ivarinen to revoke it. Based on his instructions, Ivarinen then wrote and initialed "revoked" on Joseph's copy of the 2011 Will. Ivarinen noted that Anderson also attended the meeting and heard Joseph's instructions to revoke the 2011 Will.

Anderson also filed another declaration providing detailed information about Joseph's May 2018 meeting with Ivarinen. According to Anderson, Joseph advised them that he could not find the original 2011 Will so he gave them a

[7] The Estate petitioned this court for review of several of the court's orders, including the order denying the Estate's summary judgment motion. A commissioner of this court stayed review, reasoning review would likely be consolidated under Samuel's pending appeal.

copy. With Anderson present, Joseph instructed Ivarinen to revoke the 2011 Will. Anderson then watched as Ivarinen wrote and initialed "revoked" on Joseph's copy of the 2011 Will. Ivarinen and Anderson both believed Joseph was competent when he revoked his 2011 Will.

The Estate opposed Samuel's motion for summary judgment and moved for a continuance under CR 56(f). The Estate argued a continuance was necessary to explore Joseph's testamentary capacity due to a relapse of his alcoholism before his death. The trial court denied the motion to continue and granted Samuel's motion for summary judgment, concluding that clear, cogent, and convincing evidence showed Joseph revoked the 2011 Will.

On December 27, 2019, the Estate appealed the order granting Samuel's summary judgment motion, the order denying the Estate's summary judgment motion to dismiss the will contest, and the court's conclusion that the PR waived attorney-client privilege. On December 31, a commissioner of this court determined that "review in this matter is now available" and consolidated the pending discretionary review and appeals.

In February 2020, Samuel petitioned to remove Gordon as the PR of Joseph's estate, terminate her nonintervention powers, and appoint an independent PR. The trial court granted the motion and removed Gordon as the PR. The court appointed attorney Steve Chance as PR of the estate without nonintervention powers and issued letters testamentary to Chance. The Estate

appealed the removal of Gordon as the PR.[8]

ANALYSIS

Will Contest

Samuel petitioned to contest the probate of Joseph's 2011 Will under chapter 11.24 RCW. The Estate contends that Samuel's will contest is barred as both res judicata and untimely.

1. Res Judicata

The Estate argues that Samuel's will contest is barred as res judicata because it was "Samuel's third attempt to re-litigat[e] claims addressed and resolved through the [trial court's] October 5 Order and the February 22 Order." Samuel contends the trial court did not allow him to present all of his evidence that Joseph revoked his 2011 Will before the court issued its October 5, 2018 order admitting the 2011 Will to probate and its February 22, 2019 order dismissing his TEDRA claims challenging the validity of the 2011 Will. We agree with Samuel.

Res judicata is an equitable, common law doctrine. Weaver v. City of Everett, 194 Wn.2d 464, 482, 450 P.3d 177 (2019). Res judicata affords every party one fair adjudication of their claim. Lejeune v. Clallam County, 64 Wn. App. 257, 266, 823 P.2d 1144 (1992).

> "The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an

[8] The Estate filed a motion with this court requesting determination that the removal order violated RAP 7.2(e). A commissioner of this court ordered the Estate to file an amended notice of appeal under the consolidated appeal. The Estate filed the amended notice of appeal as directed. A commissioner then stayed the probate proceedings pending appellate review.

> opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again."

Marino Prop. Co. v. Port Comm'rs of the Port of Seattle, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982) (quoting Walsh v. Wolff, 32 Wn.2d 285, 287, 201 P.2d 215 (1949)).

Res judicata bars a claim where the subsequent action is identical with the prior action in (1) persons and parties, (2) causes of action, (3) subject matter, and (4) the quality of the persons for or against whom the claim is made. Ensley v. Pitcher, 152 Wn. App. 891, 902, 222 P.3d 99 (2009). Res judicata only applies to matters actually litigated and to those that could have, and should have, been raised in the prior proceedings. Emeson v. Dep't of Corr., 194 Wn. App. 617, 626, 376 P.3d 430 (2016). And " 'res judicata . . . is not to be applied so rigidly as to defeat the ends of justice, or to work an injustice.' " Weaver, 194 Wn.2d at 482[9] (quoting Henderson v. Bardahl Int'l Corp., 72 Wn.2d 109, 119, 431 P.2d 961 (1967)). The party asserting res judicata bears the burden of proof. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 865, 93 P.3d 108 (2004). Whether res judicata bars an action is a question of law we review de novo. Ensley, 152 Wn. App. at 899.

Citing In re Estate of Black, 153 Wn.2d 152, 102 P.3d 796 (2004), the Estate argues that Samuel contested the validity of Joseph's 2011 Will at probate and was precluded from filing a subsequent will contest. In Black, the decedent's daughter contested her mother's will at probate under chapter 11.24 RCW, asking the court to admit a "lost will" instead. Black, 153 Wn.2d at 157. The

[9] Alteration in original.

court granted the daughter's motion for summary judgment, admitting the lost will to probate. Black, 153 Wn.2d at 159. The estate appealed. Division Three of our court determined that summary judgment admitting the lost will was not appropriate because it precluded challenges to the will's validity. In re Estate of Black, 116 Wn. App. 476, 485-86, 66 P.3d 670 (2003). On review, our Supreme Court acknowledged that "if a party contests the admission of [a] will to probate, generally that same party may not file a later will contest." Black, 153 Wn.2d at 170. But the court also recognized that "it must be remembered that res judicata bars only claims actually adjudicated which were or should have been raised in the proceeding." Black, 153 Wn.2d at 171.

Here, the record shows that Samuel did not have the chance to actually litigate his will contest at the probate hearing or through his TEDRA petition. Samuel urged the court several times to allow a full hearing on the merits of his claim. The court did not set a hearing to address the will contest. Instead, it consolidated Samuel's TEDRA petition with the probate matter, dismissed the portion of his TEDRA contesting validity of the will, and assured Samuel that he would have the chance to present all of his evidence to a different judge as part of his chapter 11.24 RCW will contest action. The trial court knew that the Estate's assertion of attorney-client privilege prevented Samuel from accessing more evidence in support of his argument that Joseph revoked his 2011 Will, and assured Samuel that he still had "a will contest moving forward" and "all of that material could be presented."

Precluding Samuel's will contest as res judicata under these circumstances would work an injustice by denying Samuel a full and fair adjudication on the merits of his Will revocation claim. The court did not err in concluding that res judicata did not bar Samuel's chapter 11.24 RCW will contest.

2. Time Barred

The Estate contends that Samuel's will contest under chapter 11.24 RCW is time barred because he failed to comply with the notice requirements of RCW 11.24.020. We disagree.

Statutory interpretation is a question of law we review de novo. Jametsky v. Olsen, 179 Wn.2d 756, 761-62, 317 P.3d 1003 (2014). We begin with the statute's plain meaning, which we discern from the ordinary meaning of the language at issue, the context of the statute in which we find the provision, related provisions, and the statutory scheme as a whole. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). Our inquiry ends if the plain language of the statute is unambiguous. Lake, 169 Wn.2d at 526-27.

Under RCW 11.24.010, an interested party must file a will contest petition within four months of a will's admission to probate or "rejection thereof." The petitioner "shall personally serve the [PR] within ninety days after the date of filing the petition." RCW 11.24.010. "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." RCW 11.24.010. Under RCW 11.24.020, notice of the

filing of the will contest must be given to the executors and administrators of the will, legatees named in the will, and all interested parties "as provided in RCW 11.96A.100."

RCW 11.96A.100 establishes the procedural rules for commencing an action under TEDRA. Under the statute, "[a] summons must be served in accordance with this chapter." RCW 11.96A.100(2). The summons, as specified in RCW 11.96A.100(3),[10] "need only contain the following language or substantially similar" language:

> TO THE RESPONDENT OR OTHER INTERESTED PARTY: A petition has been filed in the superior court of Washington for (. . .) County. Petitioner's claim is stated in the petition, a copy of which is served upon you with this summons.
>
> In order to defend against or to object to the petition, you must answer the petition by stating your defense or objections in writing, and by serving your answer upon the person signing this summons not later than five days before the date of the hearing on the petition. Your failure to answer within this time limit might result in a default judgment being entered against you without further notice. A default judgment grants the petitioner all that the petitioner seeks under the petition because you have not filed an answer.
>
> If you wish to seek the advice of a lawyer, you should do so promptly so that your written answer, if any, may be served on time.

The parties do not dispute that Samuel timely filed his will contest petition and that he timely served Joseph's estate and other interested parties with a copy of his petition and a summons containing the language mandated by RCW 11.96A.100(3). But the Estate argues that the tolling requirements of RCW 11.24.010 were not satisfied because Samuel "did not provide for and set an

[10] Alteration in original.

Initial Hearing" as required by RCW 11.96A.100(4), and he did not give notice of a hearing date in his petition or summons.

The Estate conflates the requirements to commence an action properly under chapter 11.24 RCW to toll the statute of limitations with a procedural step toward litigating the dispute. If the Estate were seeking relief from an order of default issued for failure to answer Samuel's petition, the argument would have merit. But the will contest statute sets only two requirements for commencing an action and tolling the statute of limitations—filing a petition with the court within 4 months following probate and personally serving the PR within 90 days of filing the petition. RCW 11.24.010. Here, Samuel did both.[11] The court did not err in finding that his will contest was not time barred.

Attorney-Client Privilege

The Estate claims that the court erred by determining that Joseph's attorney-client privilege "was waived by the Estate of Joseph P. Burroughs on October 1, 2018" and that it "cannot be reinstated as a matter of law." We disagree.

We review waiver of attorney-client privilege de novo. Steel v. Phila. Indem. Ins. Co., 195 Wn. App. 811, 822, 381 P.3d 111 (2016). The purpose of the attorney-client privilege is to allow communication between the client and

[11] The Estate cites In re Estate of Kordon, 157 Wn.2d 206, 137 P.3d 16 (2006), to support its claim that "a will contest petition sufficient to toll the four-month limitation period must be filed and served upon all necessary parties such that a command is issued requiring them to appear and respond by the expiration of the applicable deadlines." But the petitioner in Kordon failed to issue the citation to the parties within the time limit as required by former RCW 11.24.020 (1965). Kordon, 157 Wn.2d at 208-09. Without service of the citation, the petitioner failed to satisfy one of the two necessary steps for timely commencing a will contest. Kordon, 157 Wn.2d at 213. Kordon is inapposite because Samuel both filed the petition and served the summons to commence his will contest within the statutory tolling period.

their attorney without fear of compulsory discovery. Steel, 195 Wn. App. at 823. Under the privilege, "[a]n attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2)(a). But the attorney-client privilege is not absolute:

> Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists.

Dietz v. Doe, 131 Wn.2d 835, 843, 935 P.2d 611 (1997).

After death, attorney-client privilege passes to the PR of the decedent's estate. Martin v. Shaen, 22 Wn.2d 505, 511, 156 P.2d 681 (1945). The PR inherits the right to waive attorney-client privilege on behalf of the deceased, assuming that the PR is " 'interested in the protection of the estate' " and " 'would consent to the waiver of the privileged communication only for the purpose of securing that end.' " In re Thomas' Estate, 165 Wash. 42, 55, 4 P.2d 837 (1931) (quoting Appeal of Prohon, 67 A. 317, 319, 102 Me. 455 (1907)).

The Estate does not dispute that Samuel inherited Joseph's authority to waive attorney-client privilege on behalf of the estate when Samuel became PR of Joseph's estate. Nor does the Estate dispute that Samuel actually waived the privilege on October 1, 2018, the date Ivarinen filed her first declaration, as it applied to Joseph's discussions with Ivarinen about the revocation of his 2011 Will. Instead, it argues that as the successor PR, Gordon's subsequent assertion

of the attorney-client privilege "should have been honored." Gordon offers no case law in support of her assertion.[12]

Regardless, assertion of the attorney-client privilege under these circumstances does not serve its purpose. In Thomas' Estate, our Supreme Court considered the purpose of the attorney-client privilege in the context of a will contest and determined:

> "We are of opinion that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin."

Thomas' Estate, 164 Wash. at 52-53 (quoting Glover v. Patten, 165 U.S. 394, 406, 17 S. Ct. 411, 41 L. Ed. 760 (1897)).

Here, Joseph's privileged communications consist of instructions to Ivarinen regarding the revocation of his will. Exclusion of those relevant and material statements would prevent full disclosure of the facts necessary to reach a fair and just distribution of Joseph's estate in a lawsuit between devisees under his will. The trial court properly concluded that Joseph waived his attorney-client privilege as it related to the revocation of his 2011 Will.

[12] Indeed, existing case law holds that once waived, a privilege generally cannot be reinstated. See State v. Smith, 84 Wn. App. 813, 822-24, 929 P.2d 1191 (1997) (In the context of the physician-patient privilege, " 'the original disclosure takes away once and for all the confidentiality sought to be protected by the privilege.' ") (quoting 8 J.W. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2389(4), at 860-61 (McNaughton rev. ed. 1961)).

Summary Judgment

The Estate contends the trial court erred by granting summary judgment for Samuel. It argues that Ivarinen's writing of "revoked" on the copy of Joseph's 2011 Will "cannot constitute a revocation under RCW 11.12.040(1)(b)." We disagree.

We review orders on summary judgment de novo and consider all evidence and reasonable inferences in the light most favorable to the nonmoving party. Kim v. Lakeside Adult Family Home, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). "Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (citing CR 56(c)). The moving party bears the burden of proving there are no issues of material fact. Kim, 185 Wn.2d at 547.

"Revocation of a will—as distinguished from making a new will—is permitted without the formalities required for executing a will." In re Estate of Malloy, 134 Wn.2d 316, 323, 949 P.2d 804 (1998). A will can be revoked

> [b]y being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator or by another person in the presence and by the direction of the testator. If such act is done by any person other than the testator, the direction of the testator and the facts of such injury or destruction must be proved by two witnesses.

RCW 11.12.040(1)(b). A petitioner must prove by clear, cogent, and convincing evidence that a testator revoked their will. In re Estate of Drown, 60 Wn.2d 110, 113, 372 P.2d 196 (1962).

The Estate contends that Samuel failed to show by clear, cogent, and convincing evidence that Joseph revoked his 2011 Will because "marking upon a copy of a will does not serve to revoke the actual (original) will." The Estate points to certain sections of the probate code that specifically refer to "original" wills. It cites RCW 11.12.265, which permits a person with custody of an "original" will and "who has not received knowledge of the death of the testator" to file it with "any court having jurisdiction." The Estate also relies on RCW 11.20.070, which provides that if a will "has been lost or destroyed under circumstances such that the loss or destruction does not have the effect of revoking the will," a petitioner must meet certain requirements before the court can consider "the validity of the will and establish it." RCW 11.20.070(1), (2). RCW 11.20.070(3)[13] provides that if the petition meets those requirements in subsections (1) and (2), the court may appoint a PR "in the same manner as is herein provided with reference to original wills presented to the court for probate."

But RCW 11.12.040 does not use the word "original." See RCW 11.12.040(1) ("A will, or any part thereof, can be revoked . . . ."). If the legislature intended RCW 11.12.040 to apply to only an "original" will, it would have included that term in the statute. See Citizens All. for Prop. Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 440, 359 P.3d 753 (2015) (When the legislature uses two different terms in the same statute, we presume it intended the terms to have different meanings.).

[13] Emphasis added.

Here, Joseph had no access to the original 2011 Will because Cynthia kept it after the couple divorced. Joseph told Ivarinen he did not have the original and produced a copy in its stead. The Estate does not dispute the authenticity or accuracy of the copy. Two witnesses declared that Joseph directed Ivarinen to revoke his 2011 Will. Ivarinen then cancelled the 2011 Will by writing "revoked" on Joseph's copy of the document. Joseph's intent to revoke his 2011 Will and leave his estate to Samuel was clear. The trial court properly determined that the undisputed clear, cogent, and convincing evidence showed Joseph revoked his 2011 Will. The court did not err in granting summary judgment for Samuel.[14]

Replacement of the PR

The Estate argues that the trial court lacked the authority to remove Gordon as the PR of Joseph's estate after this court accepted appellate review. We agree.

The trial court has limited authority to act in a case after the appellate court accepts review. RAP 7.2(a). "If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e)(2).

[14] Besides opposing the summary judgment, the Estate argues that the trial court erred by failing to defer or deny Samuel's motion for summary judgment under CR 56(f) to allow for investigation and discovery of issues related to Joseph's testamentary capacity, his interactions with Ivarinen, and his relationships with the various possible heirs. The Estate fails to provide legal citation or analysis in support of this claim. This violates RAP 10.3(a)(6), which requires "argument in support of the issues presented for review, together with citations to legal authority." This passing treatment of an issue, lack of reasoned argument, and conclusory arguments without citation to authority do not merit our consideration. Winter v. Dep't of Soc. & Health Servs., 12 Wn. App. 2d 815, 835, 460 P.3d 667, review denied, 476 P.3d 565 (2020).

Here, the trial court granted Samuel's motion to remove and replace Gordon as PR of Joseph's estate after this court accepted appellate review. Under RAP 7.2(a), the trial court had no authority to grant the motion. We remand to vacate the order removing and replacing Gordon as the PR of Joseph's estate. See State ex rel. Shafer v. Bloomer, 94 Wn. App. 246, 250, 973 P.2d 1062 (1999). On remand, the court shall appoint a successor PR.

Attorney Fees

Samuel requests fees on appeal under RAP 18.1 and RCW 11.96A.150. The authority to award attorney fees under RCW 11.96A.150 includes actions initiated under any provision of Title 11 RCW. RCW 11.96A.150(2); In re Estate of Berry, 189 Wn. App. 368, 379, 358 P.3d 426 (2015). Under RCW 11.96A.150(1), we may award fees at our discretion, considering any relevant and appropriate factors, which may but need not include whether the litigation benefits the estate or trust involved.[15] In re Estate of Mower, 193 Wn. App. 706, 729, 374 P.3d 180 (2016). Given the unnecessarily complicated litigation created by the multiple lawsuits and challenges by both parties, we decline to award fees in this case.

[15] RCW 11.96A.150(1) provides:

> Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

We conclude that Samuel's petition to contest Joseph's 2011 Will under chapter 11.24 RCW was not precluded as res judicata and was not time barred. We affirm the trial court's order granting summary judgment in favor of Samuel and remand for the trial court to appoint a successor PR of Joseph's estate.

Bowman, J.

WE CONCUR:

Smith, J.

Andrus, A.C.J.