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No. 65970-7 and 65970-7
Combined Cases

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

DYLAN THOMPSON WOOD

Petitioner,

vs.

**MARY FRANCES WHEALEN, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF JODY
SCOTT WOOD,**

Respondent.

DECISIONS OF THE SUPERIOR COURT FOR KING COUNTY

**The Honorable Laura Inveen and the Honorable Commissioner Carlos
Velatgegui
Cause No. 08-4-00829-8 SEA**

**RESPONSE BRIEF OF MARY FRANCES WHEALEN,
RESPONDENT**

**D. DOUGLAS TITUS
Attorney for Respondent
LAW OFFICE OF D. DOUGLAS TITUS
6041 California Avenue SW
Seattle, Washington 98136
(206) 935-6620
(206) 935-6623 (Facsimile)**

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I. INTRODUCTION

Mary Frances Whealen (“Respondent”) is the duly appointed and qualified personal representative of the Estate of Jody Scott Wood (“Decedent”), and the respondent in the action initiated by the Petition to Revoke Probate of Will be the Decedent’s son, Appellant Dylan Thompson Wood (“Appellant” or “Tom Wood”). The Respondent is also the Decedent’s surviving partner from a thirty year meretricious relationship. The Appellant seeks reversal of the denial of his petition to revoke the probate of the will of his mother Jody Scott Wood by summary judgment and the award of costs and fees to the Respondent incident to the summary judgment. In the consolidated appeal Appellant also seeks to overturn the decision of the Superior Court denying his petition to remove the Respondent as personal representative of the estate of Jody Scott Wood and granting Respondent her costs and attorney fees in defending against that petition.

II. ASSIGNMENTS OF ERROR

Appellant has set out eight assignments of error in the trial court below. Respondent submits and will argue that no errors have occurred and that the decisions of the King County Superior Court should be

affirmed.

III. STATEMENT OF THE CASE

Respondent Mary Frances Wood incorporates here the Appellant's Statement of the Case as if it were set out here in full.

IV. SUMMARY OF FACTS

Introductory Perspective as to Facts of the Case

By way of introduction, Respondent wishes to put the facts of this case into an accurate and appropriate perspective. Beginning in January 2008, this case and another case relying on the same facts (the "Slayer" case) have proceeded through the courts, all seeking relief for Tom Wood, Appellant. These cases have even included numerous interlocutory appeals to this Court. As more fully discussed below, an examination of the over 3,000 pages of record herein compels a conclusion that, while Appellant has no "hard" or direct evidence to support his numerous claims, he and his counsel have repeatedly presented their own conclusions or opinions as "facts" or "admissions." They have, similarly, over and over again, including the initial brief herein, characterized the behavior of Respondent as criminal, using such words as "forgery" or "embezzlement," when they should know the uncontroverted evidence does not support these conclusions and no person has ever been charged

with these crimes. It is necessary that this Court, like the courts below, understand this “theme,” or pervasive tenor, as you will, of this litigation.

At the outset it must be noted that in his initial brief, Appellant begins a long discussion or summary of facts by stating: “The following facts have been admitted by Mary Whealen,” and then goes on a nine-page narrative of facts which were not admitted by Mary Whealen and, in fact, have no basis in any actual independent evidence in the records of this case whatsoever. The records in this proceeding have many instances where Appellant or his counsel have made repeated statements (allegedly of fact) that are either false or misleading. (CP3077-3087)

Prior to the Decedent’s death, she and Respondent had been engaged in a long-term, same sex, meretricious relationship for over thirty years. They had lived together in Decedent’s home, working together in the business activities of the purchase and sale of land and rental of real estate. Together they lived and acted as a family unit, putting each of their earnings in one checking account in the name of the Decedent and paying all of the parties’ living expenss out of that account. Not only did they commingle their funds, but also combined and commingled their household goods and other property in their home. (CP511)

With the Decedent's full knowledge and consent Respondent, as the life partner of the Decedent, did in fact write the Decedent's signature on numerous checks on the single checking account for the payment of daily living expenses, business expenses and personal expenses of the Respondent and the Decedent. Copies of such checks were willingly produced by Respondent during discovery and also furnished as exemplars for the use of Appellant's forensic document examiner, David Sterling. (CP2370-2415)

In October 2004, Decedent applied for and received a reverse mortgage on the home Respondent and she shared. There is no evidence in the record to establish that Respondent "tricked Jody Wood into believing that she needed a reverse mortgage," as claimed by Appellant.

At the time of Decedent's death, the balance of the reverse mortgage was approximately \$130,000. Over time the proceeds from the reverse mortgage were first applied to very high administrative costs for the mortgage itself, \$59,254.00 (CP2523). Then \$18,802.00 was used to make needed repairs on Decedent's residence. (CP2524) Finally, \$46,698.00 was used to pay on land contracts and expenses of the Decedent's land business in Okanogan and Jefferson Counties. (CP2524) These payments total \$126,754.00. Accordingly, basically the full amount of the proceeds of the Decedent's reverse mortgage was factually

accounted for, and none of the proceeds was a "gift" to the Respondent. The proceeds from the reverse mortgage were completely accounted for by the Respondent to the Appellant. (CP510-525) Respondent had no authority to draw upon the Decedent's reverse mortgage and she did not make any withdrawals under that mortgage. (CP2995-3076) There is thus no basis in evidence to show that Respondent received any substantial "gifts" from the proceeds of the reverse mortgage. Likewise, as is clearly established when finances are more fully set out below, there is no evidence whatsoever that Respondent "embezzled" any funds belonging to the Decedent.

Respondent acknowledges that while, as a domestic partner or spousal equivalent, she may have occupied a fiduciary role vis-à-vis the Decedent, nothing in the record whatsoever (i.e., no evidence) indicates that she was the "manager of the Decedent's money" or even of their partnership. Bearing in mind that the Decedent was fully competent and in relatively good health until shortly before her death, there is nothing in the record whatsoever to indicate that Respondent was responsible to keep and organize Decedent's bank statements, balance the Decedent's checking account, or maintain the integrity of Decedent's check registers. The Decedent too an active role in all financial affairs affecting her resources. (CP2995-3076) At no point has the Respondent ever admitted

improper record keeping on behalf of the Decedent, and there is no evidence in the record to show that Respondent generally undertook the responsibility to balance the check book and, in particular, that she “intentionally failed to balance Jody Wood’s checkbook.” Again, there is no evidence that Respondent managed the finances of the Decedent in general of her bank accounts in particular. Tom Wood has repeated over and over again that Respondent managed his mother’s money and property; however, repetition does not make it a fact. (CP3002)

In fact, in response to Appellant’s discovery requests, the Respondent produced all of the records of Decedent’s bank accounts for the years beginning October 2004 and ending at Decedent’s passing in December 2007 which remained in the home shared by Decedent and Respondent. For records she could not find there, Respondent ordered copies from the bank. (CP510-525) These records disclosed combined income, including the proceeds of the reverse mortgage, all earnings of the Decedent and all earnings of Respondent for a total of \$263,029.00. (CP2522) Oddly enough, unless he intended to actually mislead the court, when Appellant, using Respondent’s information produced through discovery, he omitted the following significant categories of expenses: “Land Business, Taxes and Insurance Expenses, Reverse Mortgage Home Repairs.” (CP515)

Although Respondent had given him a copy of Decedent's will in early January 2008, Appellant thereafter originally filed a petition to administer the Decedent's estate, positively representing to the King County Superior Court under oath that "Decedent died intestate," representing that there was no will. (CP2742 and 2751) He gave no notice of the hearing on his petition to open administration to the Respondent, although he was aware that she had lived in the Decedent's home for the better part of thirty years. (CP2743) This clear deception was later severely criticized by the Court Commissionr at the hearing to admit Decedent's will to probate. (Transcript of Hearing January 28, 2008)

The undersigned Respondent's counsel had worked out an agreement with Appellant's then attorney to facilitate the removal of the Decedent's original will from the courthouse to allow Appellant's expert witness to examine it for authenticity. (CP2744) Then he received a notice of the withdrawal of that lawyer. In May 2008, Respondent's attorney was contacted by John Flowers who rudely and offensively demanded that Respondent furnish to him thirty years' worth of documents relating to the financial affairs of the Decedent and the Respondent. He replied that his demand was unreasonable and that discovery was generally not allowed in probate proceedings. He then

“demanded” that he execute another agreement like he had with Appellant’s prior lawyer. I responded to this “demand” that I believed my undertaking was a personal agreement with former counsel. Shortly thereafter I agreed with Mr. Flowers on an arrangement whereby I would withdraw the original will from the court and deliver it, with a number of exemplars of the Decedent’s handwriting to David Sterling, Appellant’s forensic expert. On June 16, 2008, the Superior Court entered an order allowing removal of the will under the condition that “a copy of the forensic report shall be promptly provided counsel for both parties (Emphasis supplied). (CP2744, 2766) Contrary to the allegations of the Appellant, Respondent’s attorney promptly delivered the will and twelve signature exemplars to Mr. Sterling, in addition to and together with Respondent’s original June 1, 2004 signed will (witnessed by the same people and notary the very same day as Decedent’s will). Between July and October 2008, Respondent’s attorney telephoned Mr. Sterling several times asking about his report and Mr. Sterling told him that Mr. Flowers told him not to complete the report. Mr. Flowers then requested that the Respondent, through counsel, submit additional exemplars of the Decedent’s handwriting and exemplars of the Respondent’s signing of the Decedent’s name. On October 10, 2008, Respondent’s counsel sent eighteen more exemplars to Sterling. (CP2745) Apparently Sterling

completed and signed his report on October 23, 2008 and delivered it to Mr. Flowers. His report concluded that Decedent had indeed signed her own will. (CP2370-2415) No copy of the report was sent to Respondent or her attorney or to the court at that time as required by the June 16, 2008 Superior Court order. (CP1700) Respondent did not receive a copy of the Sterling Report until it was served in March 2009 as part of Appellant's response to Respondent's Motion for Summary Judgment. (CP2745)

Respondent, in her capacity as personal representative, began a "long and sometimes frustrating effort" to repay the reverse mortgage on the home she shared with Decedent. (CP517) She understood, as did the Appellant's attorney, that there was a six-month deadline for the reverse mortgage to be paid off. In April 2008, Respondent contacted a mortgage broker who assured her that she could help find a mortgage company to finance the repayment. Before this new mortgage could be found, however, Appellant filed a notice of lis pendens covering the property. (CP1693-1696) Appellant and his attorney, Mr. Flowers, were informed that the notice of lis pendens had to be removed before a new mortgage could be obtained. Tom Wood and his attorney refused to do this until ordered by Judge McBroom to do so on December 5, 2008. That order notwithstanding, Appellant still did not remove the notice of lis pendens until March 10, 2010, more than three months later. (CP1809-1910) This

date was far beyond the six-month deadline Respondent had been given to obtain refinancing and avoid foreclosure.

After the notice of lis pendens was finally removed, the lender Respondent was dealing with not only then required co-signers for new financing but also required that title be transferred into the names of all co-signers. Then a senior lender stepped in and killed the deal. No lender would allow Respondent to mortgage the residence property while it remained in the estate. (CP517-518) Finally a lender agreed to a loan secured by the property but required that Respondent not only be on the title but also to have co-signers who were also on the title. As a result, Respondent was forced to convey the property to herself, her mother and her mother's husband, and then Respondent, her mother and the husband signed the bank papers. (CP527-518). If this had not been done, the property would have been lost.

Although Appellant asserts that he has brought his actions on the advice of counsel, the "evidence" in this proceeding clearly shows otherwise and impeaches that statement. A good indicator that Appellant did not disclose the full facts to his first attorney is Mr. Olver's characterization of Respondent as a "squatter living in your mother's house" in a letter dated January 22, 2010, and his comments to Commissioner Velategui in open court on January 28, 2008 as follows:

“We did not understand the relationship to be the same as the Court has heard it at this time.” (Transcript of Hearing January 28, 2008) As the Appellant had known (and known of) Respondent for thirty years and had known that Respondent had lived with his mother for the better part of those years, how could he not have disclosed this fact to his attorney?

The record is clear that the Decedent and Respondent prepared their 2004 wills by using blank copies of their 1984 wills and cutting and pasting on new provisions. The Decedent, not the Respondent, in fact, did the cutting, pasting and copying of her will. The Decedent’s 2004 will, questioned in this proceeding by Appellant, was basically the same as its 1984 counterpart, except that the newer will failed to give to the Appellant a parcel of Decedent’s rental property because she no longer owned that property. Otherwise, the older and newer will carried out the same basic dispositive scheme.

Contrary to claims of Appellant, the record shows that Decedent was not suffering or overpowered by the Respondent with a pile of papers that she knew nothing about. Multiple witnesses establish that Decedent was not at the Virginia Mason Hospital where she was to have surgery three days later, but at the administrative offices of Group Health Cooperative, quite some distance away. The witnesses asked the Decedent about the “cutting and pasting” of her will and Decedent replied

to them that she thought it would be ok. There was no question that the Decedent knew that she was signing her will and that she knew the contents thereof. (CP1845-1852, 1853-1860)

As a final note, it must be acknowledged that the Appellant has held a long time grudge against the Respondent which may explain the nature of these proceedings. (CP2706-2740)

V. ARGUMENT

Issue No. 1: Whether the Personal Representative Mary Whealen Should Have Been Removed

(a) Respondent has performed her general duties as personal representative.

Respondent Mary Frances Whealen has done everything within her power to settle the estate in her hands as rapidly and quickly as possible as required by RCW 11.48.010. The reason she could do no more was totally outside her power and control. The reason the estate was not closed long ago, however, was the continuous bombardment of legal proceedings and litigation begun by Appellant in January 2008 and continuing to this very day. The Respondent, and thus the estate, have been the target of an attempt to bypass the Decedent's will and do an intestate administration, a will contest, a separate legal action under the so-called "Slayer" Statute, and a petition to remove the personal representative.

On January 28, 2008, the Respondent was appointed personal representative of the Decedent's estate to serve with non-intervention powers. Generally speaking, for the courts to intervene in an administration governed by non-intervention powers, the court must find that the personal representative has mismanaged the estate or otherwise failed to faithfully execute his trust. In Re Estate of Jones, 116 Wn.App. 353, 67 P.3d 1113 (2003). Instructively, 11.28.250 sets out the grounds for which the letters of a personal representative may be revoked, as follows:

[if] the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is about to waste, or embezzle the property of the estate committed to his charge, or has committed, or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, . . . which to the court appears necessary.

Respondent respectfully submits that Appellant has failed to produce any credible evidence to justify the fiduciary's removal and has propounded so many falsehoods and distorted so many actual records that the Superior Court's dismissal of the petition to revoke probate was justified. The Superior Court can not remove a personal representative without substantial evidence that the individual has violated the conditions set out in RCW 11.28.250. In Re Estate of Jones, 152 Wn2d 1, 8, 93 P.3d 147

(2004). Substantial evidence is that which is “sufficient to persuade a rational, fair-minded person of the truth of the finding.” Id. It has been held that if substantial evidence does not support the removal, then the removal of a personal representative is arbitrary and capricious. In Re Estate of Coates, 55 Wn.2d 250, 259, 347 P.2d 875 (1959). A showing must be made of faithlessness and intent to “mulct” the estate. Id. At 260.

(b) There is no evidence to indicate Respondent has “embezzled” funds belonging to the Decedent

The Respondent’s declaration submitted in response to the Appellant’s petition to remove the Respondent as personal representative clearly pointed out one direct false statement after another in the materials submitted in purported support of the position that Respondent had committed any wrongdoing as defined in RCW 11.28.250 as would justify her removal. Appellant can not argue there is credible or “substantial evidence” when the fist twenty items of a party’s purported evidence are false. (CP510-607) The actual facts totally impeached the analysis created by Appellant’s witness Hanes.

Tom Wood actually presented an “alternative” portrait of the Decedent’s finances over the four years preceding her death, but these were self-evidently based on assumptions of what he thought “ought” to have been rather than a factual reflection of what actually was. The real

facts demonstrate that Petitioner lacked knowledge of the actual details of his mother's life and finances. He was never around and they did not tell each other a lot of things. Further, as noted above, evidence does support a conclusion that Appellant bore a grudge, a malevolent attitude or resentment, against the Respondent for many years prior to his mother's death. (CP2506-2740)

On the other hand, Respondent produced to the Appellant every single known banking document that was obtainable for the 39 month period preceding the Decedent's death. (CP513-514). Those documents speak for themselves.

Perhaps, even worse, the Appellant introduced as "evidence" outright lies and speculation on his part as to the household and business affairs of the Decedent and Respondent. (CP132-141) One can not characterize grocery store purchases as "dining out" and expect the Court to swallow the rest of the story.

Similarly, the work of Mr. Hanes has been shown to be rife with gross errors of fact and reasoning. (CP510) The conclusions of Mr. Hanes, with respect to Appellant's allegation of embezzlement, must be dismissed entirely because the process by which he arrived at his conclusions is so fatally flawed by the quantity and magnitude of his

errors as to render those conclusions wholly discredited and useless, much less substantial evidence.

Mr. Hanes credibility is impeached and his conclusions rendered unreliable on two grounds. This occurs first by failings of logic, including but not limited to, accepting and relying upon unverified summations, assumptons and allegations of the Appellant as fact. Secondly, Hanes based all his conclusions and findings upon false facts.

The fact that Appellant does not know what his mother did with her money from 2004 to the time of her death does not constitute evidence that something illegal was done with it, or that Respondent did anything with it. That Appellant does not know what the Decedent did with some of it during her lifetime does not constitute evidence that Respondent embezzled funds. Appellant presented no factual evidence to support this allegation. Appellant had not been to visit his mother but once in the twenty years prior to her death and has no knowledge of what Decedent's and Decedent's family finances were. It would take pages to enumerate all of the inaccuracies and the incompleteness of the so-called accounting thereof, which effort is neither pertinent nor necessary to this appeal.

Although the Respondent made a complete and full disclosure regarding the Decedent's finances in discovery, including a complete and reasonable account of the application of the proceeds of the Decedent's

reverse mortgage (i.e., virtually every penny was accounted for), Appellant still had the obligation to prove his allegations against the Respondent through substantial evidence, not his guesses notwithstanding Respondent's complete disclosure. (CP510-540) Appellant has not even begun to plead or introduce anything that would meet this standard. Respondent respectfully submits that Appellant has failed to produce any credible evidence to justify the fiduciary's removal and has propounded so many falsehoods and distorted so many actual records as to justify the court's dismissal of his petition. As noted above, the Superior Court can not remove a personal representative without substantial evidence that the individual has violated the conditions set out in RCW 11.28.250. In Re Estate of Jones, 252 Wn.2d at 8. Again, substantial evidence is that which is "sufficient to persuade a rational, fair-minded person of the truth of the finding." Id.

The testimony of Shelley A. Drury is equally flawed and produces no evidence whatsoever (much less any credible or substantial evidence) that the Respondent breached any fiduciary duties. Drury "understands" that Respondent "forged" Decedent's signatures on hundreds of checks, transferred large sums of money, and "made" multiple requests for draws on Decedent's reverse mortgage. (CP2947-2954) On the other hand, the record composed of substantial evidence, shows that

the Respondent did not manage Decedent's money and bank accounts, did not "forge" Decedent's signatures, did not transfer large sums of money from account to account, and did not have authority to and did not make any draws on Decedent's reverse mortgage. Thus, Drury's entire opinion is based upon "understandings" not supported by the actual evidence. (CP2948) Drury had no personal knowledge about Respondent or her doings whatsoever and obviously based and formed her "understandings" on the basis of what Tom Wood told her.

Mention should also be made regarding regarding the reverse mortgage the Decedent obtained on her home in October 2004. As fully explained by Respondent, Respondent worked continuously for over a year to obtain refinancing for this property to satisfy the balance due under the Decedent's reverse mortgage. The Court must take into account the draconian mortgage industry situation in 2008- 2009. It becomes obvious that the Respondent expended her best efforts in this regard, particularly with the lack of cooperation and delays by the Appellant. Appellant was ultimately successful in refinancing and paying off Decedent's mortgage.

(c) There is no evidence Respondent has multiple, serious, And irreconcilable conflicts of interest

Appellant has identified no facts supporting irreconcilable and serious conflicts of interest on the part of the Respondent and has not

recognized that Respondent did (and has done) what was necessary to pay off the balance of Decedent's reverse mortgage and avoided foreclosure. It should be noted at this point that with the Appellant having filed a notice of lis pendens on all of the Decedent's properties, the Respondent could not sell any other property in order to pay off the reverse mortgage or any other expenses of the estate. (CP1693-1695)

(d) Decedent and Respondent made significant repairs to the home

Upon receiving the 2004 reverse mortgage, the Decedent and Respondent undertook to make significant and needed repairs to the Decedent's home, including clearing plant growth which was attaching itself to the house and install a new roof. From the proceeds of the reverse mortgage, \$18,802 was used to make repairs. (CP2524) When the home was appraised on August 4, 2009, the appraiser value the home at \$415,000.00 comparable in value to similar houses in the neighborhood, contrary to the claims made by the Appellant.

Appellant again mischaracterizes the facts surrounding the refinancing of the reverse mortgage. Instead of there being "fault" on the part of the Respondent with respect to the mortgage payoff, the evidence in the record not only shows that Appellant is mischaracterizing the circumstances and efforts of the Respondent but fails to acknowledge that the Appellant himself contributed significantly to the mortgage crisis.

Payoff of the balance remaining on the Decedent's reverse mortgage was required within six months of her demise. Repayment would require a new mortgage on the property, but on May 23, 2008 Appellant filed a notice of lis pendens on the records of the property. (CP1693-1694). Despite numerous requests of Respondent's attorney to lift the notice of lis pendens, Appellant failed to do so. Finally, in November 2008, almost a year after Decedent's death, Respondent asked Judge McBroom to order him to do so. (CP1735-1740) On December 5, 2008 the judge ordered Tom Wood to remove the lis pendens. Appellant did not actually withdraw the lis pendens until March 10, 2009. (CP1975-1976).

Issue No. 2: Whether another Personal Representative should be appointed

Appellant has presented no evidence to justify the removal of Respondent as personal representative. Accordingly the issue of appointment of a new personal representative is not before the Court at this time.

Issue No. 3: Whether the trial court committed reversible error in requiring Tom Wood to post a pretrial bond for costs in his will contest

RCW 4.84.210 clearly and unequivocally states: "security for the costs and charges which may be awarded against such plaintiff [residing outside the state or the county] may be required by the defendant . . .

When required, all proceedings in the action or proceeding shall be stayed until a bond . . . be filed with the clerk.” The statute does not say when a bond is to be sought or what conditions are to be considered a waiver of this right, if any. We can say that the statute speaks for itself.

The case relied upon by the Appellant, Swift v. Stine, 3 Wash.Terr. 518, 521, 19 Pac. 63 (1888), was decided 122 years ago and suggests that request for a cost bond should be made before answer, but, in any event, “at least with diligence” and can not be delayed until trial. In Swift, 19 Pac. At 64, the case had actually gone to trial. In addition, the court there said that the moving party “cannot delay until, from the developments of the trial, he seriously apprehends defeat . . .” Id. This Court’s Commissioner, in previous matters involving this case correctly pointed out that the language requiring the request for the bond prior to answer was dicta. Respondent filed her motion for a cost bond about two and one-half months before trial was scheduled by stipulation of the parties herein. (CP1735-1740)

It is absolutely clear that the facts in this case are distinctly different than in Swift as the Commissioner rightfully previously noted. The Commissioner also pointed out that Swift v. Stine has “never been cited in Washington for the principle that a failure to request a bond before filing an answer waives the right to do so.” This is despite the fact

that the case has been cited five times, the latest being in 1938. Also it has never been relied upon in any other published decision for the principal that a defendant must request a cost bond from and out-of-county plaintiff under RCW 4.84.210 or any predecessor statute before answer to the complaint.

The first case in over fifty years to interpret RCW 4.84.210 is White Coral Corporation v. Geysler Giant Clam Farms, LLC, 145 WnApp. 862, 189 P.3d 205 (2008), which provides a modern and detailed explanation of the authority of the Superior Court to require a bond from an out-of-state or out-of-county plaintiff. The White Coral case began in the King County Superior Court and was later transferred to the Superior Court of Thurston County. It is important to note that the defendants in White Coral did not request a bond in either King or Thurston Counties until after the initial responsive pleadings had been filed. On appeal, as particularly relevant here, at no point did this Court of Appeals state that the defendant was not permitted to request a bond because it had not done so before filing its answer.

In White Coral, 245 Wn.App. at 869, this Court looked at the judge's decision to require security for attorney fees and the amount thereof in the context of an abuse of discretion, citing Austin v. U.S. Bank of Wash., 73 Wn.App. 293, 309, 869 P.2d 404 (1994). Respondent would

thus submit that Judge McBrooms discretion under the statute would extend to the timing of the request for the cost bond.

Further, in response to Tom Wood's argument that the statutory bond, if permitted, can not exceed \$200.00. White Coral clearly addressed that issue as well. Noting that RCSW 4.84.210 specified a bond of "\$200.00." the Court said "we next address White Coral's argument that the trial court abused its discretion in ordering a \$125,000 security bond," and noted that the defendant's attorney had submitted a declaring attesting to his belief that his client's attorney fees would approach or exceed \$200,000. 145 Wn.App at 869. The Court concluded that the requirement of an increased bond was within the discretion of the judge under the statute. A trial court judge has broad discretion in determining the amount of fee awards and this should apply to bonds as well. Ethridge v. Hwang, 105 Wn.App. 447, 459-460, 20 P.3d 958 (2001).

In the instant case, Respondent's counsel submitted information, by way of declaration, setting out his fees and costs to date, showing that his fees to date were \$30,000.00 and that he anticipated completion of the will contest would require an additional \$30,000.00 in fees and costs of at least \$5,000.00, for a total of \$65,000.00. (CP1743-1746) Based upon that information, Judge McBroom reasonable required a cost bond of

\$50,000.00. Judge McBroom's action met the parameters set out in the White Coral case and clearly was within his discretion.

Issue No. 4: If a cost bond can be required, did Respondent waive it

The discussion set out above would seem to compel a conclusion that Respondent did not waive her right to request a cost bond from Tom Wood.

Issue No. 5: Did the trial court commit reversible error in denying Tom Wood's Motion to Compel Discovery and granting a protective order

Respondent argued to the trial court that the requests of Appellant to enter her home, inspect the same and to examine the insides of two individual's computers clearly placed an undue burden on the Decedent's estate and the Respondent personally, a situation that a protective order was designed to avoid, citing Rainbow Investors Group, Inc. v. Fuji Trucolor Missouri, Inc., 168 F.R.D. 34, 36 (W.D. La. 1996), and Doubleday v. Ruh, 149 F.R.D. 601 (E.D. Cal. 1993). Not only would Appellant's unlimited access to the residence have given him access to whatever remained of the Decedent's property, but also access to all of Respondent's private personal property which was not subject to this litigation. Accordingly, this discovery effort fell into the category described in Harstad v. Melcalf, 56 Wn.2d 239, 243, 351 P.2d 1037 (1960), where the court unequivocally said that "Appellant has no right to

a fishing expedition in respondent's private affairs," citing Hardman v. Brown, 153 Wash. 85. Finally, Appellant fails to show specifically why EER 106 applies to his request to enter property. That rule deals with writings and other parts thereof or other writings that should be considered therewith. There is and was no evidence that any other documents or writings existed that would bring ER 106 into play.

Issue No. 6: Summary judgment was appropriately granted in this case

First Ground: There was testamentary intent

At the outset, it must be made clear that the Decedent did not disinherit her son. In her 2004 will she acknowledged him and left him certain personal property. Her 1984 will was the same except that Decedent also left Appellant one parcel of real estate, which she no longer owned in 2004. At the time Decedent made her 2004 will, the subject of this action, her son was unmarried and had no known children. Appellant in his brief at page 33 tries to imply that in conversations Decedent had with her distant neighbor, Kenneth Cottingham, she had said it was her intent not to disinherit her son. Cottingham provided no facts whatsoever about Decedent's testamentary intent, only saying: "She was very happy and proud when she heard that she was going to be a grandmother."

(CP2940) The Decedent's testamentary intent seems clearly manifest in the will she signed on June 1, 2004.

Second Ground: Lack of proper manner and form

The Decedent's June 1, 2004 original will, with its "cutting and pasting" attributes readily apparent, was held to comply with Washington law and admitted to proate on January 28, 2008. The Decedent herself had prepared the cut and pasted final version on the photocopier. Both the Respondent and Decedent prepared their reciprocal wills together. At the January 28, 2008 hearing, Respondent produced her own corresponding original June 1, 2004 will in open court for examination and comparison by Commissioner Velategui.

Decedent's will was examined by the Appellant's own forensic examiner David Sterling who concluded that the document had most likely been signed by the Decedent. (CP2508) Hannah McFarland, a recognized forensic document examiner obtained by Respondent, found that the signature "Jody Scott Wood" on the June 1, 2004 will to be genuine and concluded also that the will itself appeared to be the actual original will. (CP2509)

Third Ground: Undue Influence

Tom Wood submits a partially correct summary of facts concerning Respondent's relationship with the Decedent, Some of these

purported “facts,” like so many others in this case, are not supported by any evidence, i.e., Respondent helped manage Decedent’s assets, was her financial advisor, and gave Jody legal advice. These mischaracterizations notwithstanding, because Respondent was in a thirty-year meretricious relationship with Decedent, it is inescapable that Respondent was indeed a fiduciary with respect to the Decedent. As Decedent’s “partner for life,” Respondent did occupy a position which was coupled with trust and confidence. See In Re Estate of Ganfian, 55 Wn.2d 360, 347 P.2d 891 (1959).

The record in this entire case, however, does not establish or provide any basis for a finding of undue influence. “Undue influence” means that one person has overcome the testatrix’s free will such that the wrongdoer’s willpower is expressed in her last will and testament. In Re Bottger’s Estate, 13 Wn.2d 676, 700, 129 P.2d 518 (1942). Not all influence is undue influence and forbidden, as stated in Bottger, 13 Wn.2d at 699:

‘To vitiate a will there must be more than influence. It must be undue influence. It was not undue influence for the son to persuade or solicit his mother to award him the greater part of the estate rather than to award it to the daughter. Influence becomes undue only when it overcomes the will of the . . . testatrix.’

Many forms of influence will not invalidate a will. Rose v. Duty , 115 Wash. 313, 197 Pac. 47 (1921). In Converse v. Mix, 63 Wash. 318, 115 Pac. 305 (1911), the court held:

It is not improper to advise, to persuade, to solicit, to importune, to entreat, and to implore. Hopes and fears and even prejudices may be moved . . . It is not enough that the testator's convictions be brought into harmony with that of another by such means. His views may be radically changed, but so long as he is not overborne and rendered incapable of acting upon his own motives . . . his choice of course is his choice.

Further the extreme effect or manifestation of undue influence is explained as follows:]

To be classed as undue, influence must place the testator in the attitude of saying 'it is not my will, but I must do it.' He must act under such coercion, compulsion, or constraint that his own free agency is destroyed. The will, or the provision assailed, does not truly proceed from him. He becomes the tutored instrument of a dominating mind which dictates to him what he shall do, compels him to adopt its will instead of exercising his own, and by overcoming his power of resistance impels him to do what he would not have done had he been free from its control

60 Wash at 320. Undue influence is thus a rather severe form of behavior.

There is not a scintilla of evidence in the entire record of this case that would indicate that Jody Scott Wood would be susceptible to this extreme level of influence and persuasion. There was testimony from witnesses who knew the Decedent that she was a very strong-willed

individual and who stated that it was the Decedent who influenced the Respondent, not vice-versa. Independent outside witnesses provided direct testimony about their observations. Laura Broadax said “I do not believe that she [meaning Decedent] would be susceptible to the influence of others, not at all. She was more the influencer.” (CP1843-1844) Susan Hopkins, a friend of Decedent and Respondent with long experience as a psychological counselor said:

Decedent appeared to be confident, independent, sure of herself and as having strong beliefs and opinions. As such Decedent did not appear to be easily influenced by other people . . . If any influence was exerted over the other, it was the Decedent influencing and instructing the Respondent as she had for many years. In all the times I was in the presence of both the Decedent and Respondent, at no time did I see Respondent impose her will or wishes upon the Decedent. I observed no signs of abuse in their relationship.

(CP1845-1852) It should be noted that Susan Hopkins was a witness to Decedent’s signing of her will. Similarly, Marjorie Lynn, a friend of Decedent and another witness to the will, testified as to the Decedent’s strong will and absence of undue influence by the Respondent, as follows:

Over the course of my acquaintance with Decedent, I had occasion to observe her personality and demeanor. Decedent was very focused and hard working, exhibiting confidence, independence and strong beliefs about many things. Decedent did not appear to be influenced by others. Based on many conversations and social interactions over the years, it was my observation that the Decedent was the dominating person in her domestic environment.

(CP1845-1852) James B. Moore, a neighbor, testified that Decedent “was in charge and controlled everything that she came in contact with. To the end she was out there and powerful.” (CP1873-1875) Eric Volkstorf testified that “Decedent wa a very strong person . . . I perceived that Decedent had a stronger influence over the Respondent than vice versa.” (CP1876-1878)

This direct evidence shows an individual who would not be influence or overpowered by anyone. On the other hand, there is no evidence whatsoever as to any overbearing on the part of Respondent, except the speculations of her son, Tom Wood, who did not come to visit his mother but once in twenty years.

Fourth Ground: Fraud

Appellant alleges fraud in that he apparently believes that Respondent made untrue representations to the Decedent to induce her to write her will in a certain way. Appellant never produced any evidence to support his allegations of fraud. When asked in interrogatories to produce direct evidence or witnesses who had information about his allegations of fraud, he could not do so. The burden of proof is on the person alleging the fraud. The burden does not shift to the defense as is possible in a contest based upon undue influence. In Re Estate of Bottger, 14 Wn.2d

676, 707, 129 P.2d 518 (1942). Appellant has clearly not met his burden on this issue.

Sixth Ground: Forgery

Appellant has thrown around the term “forgery” throughout this litigation, and repeated, over and over again, that Respondent has admitted that she “forged” the signature of the Decedent. This is a false statement.

Forgery is a crime and is defined by RCW 9A.60.020, as follows:

- (1) A person is guilty of forgery if, with intent to injure or defraud:
 - (a) He falsely makes, completes, or alters a written instrument; or
 - (b) He possesses, utters, offers, disposes of or puts off as true a written instrument which he knows to be forged . . . (Emphasis supplied.)

Respondent has clearly admitted throughout these proceedings that she signed checks and other documents with the full knowledge of and on behalf of the Decedent. Contrary to Appellant’s repeated misstatements, Respondent has never admitted “forging” Decedent’s signature. In addition, there is no evidence whatsoever that Respondent signed Decedent’s name “with intent to injure or defraud.” She signed these papers with the full knowledge of Decedent. The bulk of the checks signed by Respondent on Decedent’s account were for household or family expenses of the Decedent and Respondent. Further, the Respondent

deposited all her earnings into the Decedent's account. That account was indeed the household account.

Fifth Ground: Mistake

Appellant argues that the Decedent was operating under some sort of mistake or confusion when she signed her will. Again this is pure speculation on his part. Appellant claims that it is odd that Decedent did not write a will providing for Appellant's spouse and daughter; however, his allegations are diminished by the fact that Appellant did not even tell his mother, the Decedent, that he was married until a long time afterwards and the granddaughter was on the way. (CP513) Further, Appellant has alleged that, on the date Decedent signed her will, June 1, 2004, she was at the "hospital" and, while distracted by the impending surgery and medication, Respondent threw a bunch of papers at her so that she did not know what she was signing. This is totally contradicted by the actual direct evidence submitted by witnesses who actually observed the Decedent sign her will. Not only was the Decedent not at the hospital Virginia Mason where she was to have surgery several days later, but the witnesses discussed her will with her and she explained it to them, particularly the cut and past pages. (CP1945-1960)

It also must be remembered that the "new" 2004 will was virtually the same as Decedent's prior will, written twenty years before, with the

exception that it did not give a rental house to Tom Wood because the property had been sold in the intervening years.

It must also be stressed that the dispositions made in Decedent's will were "natural," in that they reflected her real life and family. Respondent was Decedent's life partner and had lived with Decedent in her home since 1977, with about a five year absence when she lived in other property belonging to Decedent. Respondent and Decedent had been in the same home for the fifteen years prior to Decedent's death. A will may be brought into question where there is an "unnatural share given to a person whose share is disproportionately larger than others in an equally close relationship or simply a divergence from prior wills without a good explanation. See In Re Estate of McCombs, 184 Wash. 339, 2 P.2d 692 (1931), and In Re Estate of Riley, 78 Wn.2d 623, 646, 479 P.2d 1 (1970).

B. Summary Judgment was appropriately granted in this case with respect to the Petition to Revoke Probate of Will

An order of summary judgment is appropriate if, after viewing all the evidence and all reasonable inferences in the light most favorable to the nonmoving party: (1) there is no genuine issue of material fact; (2) a reasonable person could reach but one conclusion; and (3) the moving party is entitled to judgment as a matter of law. American Manufacturers

Mutual Insurance Company v. Osborn, 104 Wn.App. 686, 696, 17 P.3d 1229 (2001). Similarly, see Go2Net, Inc. v. C.I. Host, Inc., 115 Wn.App. 73, 83, 60 P.3d 1245 (2003), where the Court set out the standard for summary judgment under Rule 56 as follows:

Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact, and that the moving party is entitled to summary judgment as a matter of law.

See also, Wilson v. City of Seattle, 146 Wn.App. 737, 740, 194 P.3d 997 (2008). For summary judgment purposes, a material fact is a fact upon which the outcome of litigation depends. Aiken v. Reed, 89 Wn.App. 474, 482, 824 P.2d 1207 (1992), See also, Eriks v. Denver 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). A genuine issue for trial must be established to defeat a motion for summary judgment. See Key v. Cascade Packing, Inc., 19 Wn.App. 579, 582, 576 P.2d 929 (1978). Tom Wood established none of the material facts necessary to support the elements required to revoke probate of a will discussed at length above.

In Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960), the court explained that the purpose of summary judgment is “not to cut litigants off from their right of trial . . . if they really have evidence they will offer on at trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists . . . (Italics ours)”

In the instant case, as more fully discussed below, the Appellant presented no evidence supporting the bare speculative claims set out in his petition. The Declaration of Respondent's Attorney in support of the motion for for summary judgment produced Appellant's responses to discovery and showed that Tom Wood had no admissible evidence to support the many claims in his will contest. Respondent also introduced the testimony of five witnesses who were not parties who had knowldge of the facts and circumstances surrounding the execution of Decedent's will and also of her characteristics and susceptibility to influence or mistake. (CP1845-1878) Unlike the dynamic described in the Preston opinion cited above, Appellant did not come forward with any evidence in response to the motion for summary judgment. Instead, he relied, as he has throughout this long litigation, on declaring his opinions as to what the facts are.

A situation similar to Appellant's reliance on opinions and concusons of a personal nature, rather than independent, verifiable facts is discussed in Hash v. Children's Orthopedic Hospital and Medical Center, 49 Wn.App. 130, 133, 741 P.2d 585 (1987), where the Court relevantly said:

Conclusions of law stated in an affidavit filed in a summary judgment proceeding are improper and should be disregarded. Orion Corp v. State, 103 Wn.2d 441, 693 P.2d 1369 (1985). Unsupporte conclusional statements alone are

insufficient to prove the existence or nonexistence of issues of fact. *Brown v. Child*, 3 Wn.App. 342, 343, 474 P.2d 908 (1970); *Mansfield v. Holcomb*, 5 Wn.App. 881, 491 P.2d 672 (1971).

Similarly, in *Parkin v. Colocousis*, 53 Wn.App. 649, 651, 769 P.2d 326 (1989), the Court explained:

Dr. Colocousis's affidavit is conclusory and insufficient in the same manner that the affidavit in *Hash* was insufficient. It sets forth no specific facts that support the opinion that Colocousis performed his duty toward Parkin. It does little more than state the legal conclusion that Colocousis was not negligent. In fact, the affidavit does not describe the standard of care with which the doctor allegedly complied. As to the issue of informed consent, the affidavit is particularly insufficient. It lacks both "specific facts" and legal conclusions pertaining to informed consent. It does not address Parkin's allegations regarding Colocousis's failure to advise of the possibility and risk of the surgical clips, nor does it negate any of the required elements of a cause of action for failure to secure informed consent. *Nicholson v. Deal*, 52 Wn.App. 814, 764 P.2d 1007 (1988).

The record establishes that in response to Respondent's motion for summary judgment, Appellant made no showing that: (1) the execution of the will was invalid; (2) that dispositions made in the will were "unnatural;" (3) that the signatures of the Decedent and witnesses were "forgeries;" (4) that the Decedent lacked testamentary intent due to the influence of drugs, fear, mental and physical weakness, and distress or duress; (5) the will was made in reliance on Respondent who was practicing law without a license; (6) that Respondent exerted undue

influence or coercion over the Decedent; (7) the Respondent committed fraud upon the Decedent; and (8) Decedent was under a mistake of fact. Appellant produced factual evidence of none of these things.

Judge Inveen set out in her summary judgment order that she had read the Declarations of the actual witnesses, Susan Hopkins, Marjorie Lynn, Laura Broadax, Erick Volkstorf, James Moore, and Respondent as well as from Respondent's attorney. She also acknowledged she had read the Declaration of Appellant (and his exhibits), and of Appellant's attorney. Appellant's total failure to meet his evidentiary requirements to rebut the motion for summary judgment was described by Judge Inveen as follows:

Wood's 30 page declaration is largely inadmissible as evidence and those portions are not considered by the court. Those portions that are argumentative, speculative, based on inadmissible hearsay, or lack of personal knowledge or foundation are inadmissible and have not been considered by the court.

(CP2600-2601) Respondent submits that Judge Inveen's comments basically summarize Appellant's evidence.

It should be remembered, with respect to all the proceedings in this case, not just summary judgment, that the proof of matters in a will-related case require "clear, cogent and convincing" evidence. See Crlton

v. Black, 153 Wn.2d 152, 102 P.3d 796 ((2004), and In Re Estate of Lint, 135 Wn.2d 519, 957 P.2d 755 (1998).

Tom Wood, however, now claims that Judge Inveen erred in granting summary judgment. Appellant's time to show the court that there was admissible evidence to support the eight main claims in his petition to revoke probate was in response to Respondent's motion. As indicated by the judge, he clearly failed to do so. How can he argue now that there were issues of material fact when he failed, for whatever reason, to present any evidence whatsoever supporting his claims.

Issue Nol. 7: Whether attorney's fees were properly awarded to Mary Whalen and not to Tom Wood

Mary Whealen is entitled to costs and fees in this Will Contest Under multiple statutory authority.

Respondent has three independent statutory bases upon which she may recover costs (including legal fees). First, since this action is governed by TEDRA, RCW 11.96A.150 provides an independent statutory basis by which the Respondent may be entitled to costs including attorney fees. Secondly, RCW 11.24.050 provides, in the contest of an action to revoke probate of a will: "If the will be s sustained, the court may assess the costs against the contestant, including . . . such reasonable attorney's fees as the court may deem proper." Finally, RCW 4.84.185 allows the

court to award attorney fees if it finds that the action “was frivolous, and advanced without reasonable cause.”

The broad general statute allowing the court to award attorney fees in this case to Mary Frances Whealen is RCW 11.96A.150, which contains no conditions or provisos, and, as explained in In Re Estate of Black, 153 Wn.2d 152, 173, 102 P.3d 796 (2004):

This statute leaves the award of attorney fees to the discretion of the court, and we will not interfere with a trial court’s determination unless ‘there are facts and circumstances clearly showing an abuse of the trial court’s discretion.

RCW 11.96A.150(1) grants both trial and appellate courts broad discretion to grant fees, and instructively and specifically says: “In exercising its discretion . . . the court may consider any and all factors that it deems to be relevant and appropriate, which facts may but need not include whether the litigation benefits the estate. . .”

First, with respect to the Appellant’s petition to remove the personal representative, Commissioner Velategui found that the petition was “totally unsupported by any factual statements that the court can rely on (Hearing Transcript January 20, 2010) and “There’s no benefit to this estate.” (Hearing Transcript January 20, 2010) Similarly, Judge Inveen, in awarding attorney fees to the Respondent in Tom Wood’s will contest, found “The extensive record before the court establishes the sole design of

Petitioner [Appellant] was to harass the Respondent through litigation of no merit, and to obfuscate the truth.” (CP3088-3091)

Appellant here would have this Court ignore these very important and strong findings of the trial court. Further, Appellant produced no case law, evidence or cogent argument as to how both the Commissioner and Judge abused their discretion in awarding costs and attorney fees on two separate occasions. It is significant that both judicial officers reached totally consistent conclusions in different instances. As more specifically set out below, pursuant to RAP 18.1, Respondent respectfully requests attorney fees and expenses she is incurring as a result of this appeal. Thus, the award of attorney fees and costs here can stand on one statutory basis alone, RCW 11.96A.150.

The preceding paragraph notwithstanding, RCW 11.24.050 deals specifically with will contests and allows the court to award costs and attorney fees against the unsuccessful contestant, “unless it appears that the contestant acted with probable cause and in good faith.” Respondent strongly urges that Judge Inveen’s finding that Appellant’s purpose “was to harass the Respondent through litigation of no merit, and to obfuscate the truth,” clearly shows that the record supports a conclusion that Tom Wood acted without probable cause and not in good faith. Equally persuasive here are the admissions of Appellant’s prior counsel, that he

was not aware of the Decedent's long-time meretricious relationship with the Respondent, referred to her as a "squatter," and did not give her any notice of the hearing on Appellant's application to be named administrator of the Decedent's estate.

Appellant tries to step aside the application of RCW 11.24.050 by rely on the "advise of counsel" excuse. In that respect, Estate of Kubick, 9 Wn.App. 413, 420, 513 P.2d 76 (1973), clearly states:

If a contestant brings an action or defends one on the advice of counsel, after fully and fairly disclosing all material facts, he or she will be deemed to have acted in good faith and for probable cause (Emphasis supplied.)

On its face the above rule seems simple. The application of its term, however, are not as simple as Appellant argues. The Kubick court goes on to cogently explain the requirements imposed on a party to establish that he or she qualifies for the "advise of counsel" excuse, as follows:

We agree that such a suit as this brought on advice of counsel is persuasive of the bona fides of the suit. We are not prepared to say, however, that such result is conclusive where the guardian has not been given an opportunity to establish what facts were before counsel when and if he advised the suit in the face of the in terrorem clause.

The court also cites a West Virginia decision to further explain how the "advise of counsel" rule applies, by saying:

'The question remains: Was there probable cause of the contest, and *were the facts fully and fairly laid before*

: *counsel*, and defendants advised by them [counsel] that there was probable cause.

9 Wn.App. at 420. This clarifies the burden on the Appellant here.

More recently, the applicable rule was again set out by this Court in In Re Estate of Mumby, 97 Wn.App. 385, 394, 982 P.2d 1219 (1999), as follows:

If a contestant initiates an action on the advice of counsel, after fully and fairly disclosing all material facts, she will be deemed to have acted in good faith and for probable cause as a matter of law. (Emphasis supplied)

The Court goes on to examine whether the contestant had indeed made a full and fair disclosure to his counsel of all material facts. There, like here, the record showed that the party had not made such a disclosure and was not entitled to rely on the counsel rule.

In order to avail himself of the “advice of counsel” rule, Appellant must show that the facts were fully and fairly set out before counsel, prior to those attorneys giving him advice. Appellant has not done so. The record is silent in this respect. Respondent would respectfully submit that when Mary Frances Whealen invoked the benefits of RCW 11.24.050, the burden of persuasion shifted to the Appellant to come forward with evidence that he “acted with probable cause and in good faith,” including a complete disclosure of all the facts fully and fairly laid out before counsel. In other words, once Respondent claimed the statutory fees for a

will contest, the burden shifted to Appellant to come forward with evidence as to good faith and probable cause. Appellant did not do so. He presented no facts which would support his reliance on the “advice of counsel” rule.

In addition to not producing evidence to show he was entitled to rely on the exception contained in the will contest statute, the actual evidence in this proceeding, as noted above, indicates to the contrary, i.e., Appellant’s attorney’s admission in open court that he did not know about the nature of Respondent’s thirty-year relationship with Decedent, and his failure to give Respondent notice of the application for intestate administration, a factor particularly vexatious to Commissioner Velategui (Transcript of Hearing January 28, 2010) It is therefore curious that Appellant or Appellant’s counsel failed to acknowledge Respondent’s role in Decedent’s life because Tom Wood has stated that he had known Respondent for over 30 years and that she had lived in his mother’s home for most of the time. (CP123). There was also evidence introduced that showed that Decedent had sent emails to her son talking about the Respondent.

Thus, there is evidence in the record that the Appellant must have affirmatively misrepresented the facts to Mr. Flowers in that the Appellant continually speaks of a contract requiring his mother to pay him \$325 per

month for a house whereas the actual evidence support a finding that the Decedent was sending her son \$325 monthly to help him with school expenses. (CP510)

Finally, Respondent submits that she would be entitled to attorney fees under RCW 4.84.185, the frivolous claims law, on the basis that both the Commissioner and Judge Inveen found Appellant's claims to be totally without merit; however, it would appear unnecessary to discuss this case and its components as frivolous claims as the two statutes discussed at length above provide ample authority for the court to award fees to the Respondent from the appellant herein.

VII. THERE IS NO EVIDENCE OF UNLAWFUL DISCRIMINATION BY THE SUPERIOR COURT JUDGE OR COMMISSIONER AGAINST THE APPELLANT

A thorough examination of the record in this case in general and in particular of the Declarations filed March 8, 2010 by Tom Wood (CP1538) and John Flowers (CP1506) discloses no evidenced whatsoever of any type of impermissible discrimination against the Appellant as forbidden by the Washington Constitution Article XXXI, and the Washington Law Against Discrimination, RCW 49.60. The purported evidence submitted by these two consists mainly of their interpretations of the speaking volume and body language of Commissioner Velategui and reiterations of the arguments made by Appellant throughout the prior two

years of estate litigation. Appellant's evidence here consists of hyperbole and name-calling against the Respondent's attorney.

Appellant was treated no differently than any other litigator who brings an action and fails to introduce clear, cogent and convincing evidence to the court to support his claims, his sexual orientation notwithstanding. Respondent further submits that RCW 4.84.210 which allows a party defendant to request a bond to cover potential costs and attorney fees from a plaintiff who does not reside in the county does not violate Article I, Section 12 of the Washington Constitution, the privileges and immunities clause. While we do not have the history of this statute which was enacted over 100 years ago in its basic form, it is simple to ascertain its purpose which is to assure that assets would be available to satisfy any judgment obtained against a party plaintiff. If the plaintiff resided outside the jurisdiction of the court from which he or she seeks protection, then his or her assets would not be subject to the jurisdiction of the court. With respect to this general subject, the court in Lenci v. City of Seattle, 763 Wn2d 664, 672, 388 P.2d 296 (1964), said:

Article I, [Sec.] 12 of the state constitution . . . prohibiting special privileges and immunities and guaranteeing equal protection of the laws, require[s] that class legislation must apply alike to all persons within a class, and reasonable ground must exist for making a distinction between those persons within a class. . . Within the limits of these restrictive rules, the legislature has a

wide measure of discretion, and its determination, when expressed in statutory enactment, cannot be successfully attacked unless it is manifestly arbitrary, unreasonable, inequitable, and unjust.

Similarly, “even if there is a distinction between classes that gives rise to an article I, section 12 inquiry, the provision is not violated if there is a sufficient basis for the distinction. Madison v. Washington, 161 Wn.2d 85, 115, 263 P.3d 77 (2007), concurring opinion. It is submitted that the classification of litigants who may be required to post a bond is not manifestly arbitrary, unreasonable, inequitable, or unjust. The purpose seems clear and the statute provides a reasonable means of achieving the purpose of assuring payment of costs.

IX. REQUEST FOR ATTORNEY FEES AND COSTS ON APPEAL

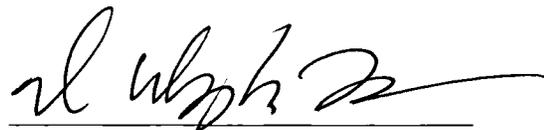
Pursuant to Rap 18.1, Respondent hereby requests that she be allowed to recover her attorney fees and costs incurred in this appeal from the Appellant. Respondent respectfully submits that an award of costs and fees on appeal is contemplated by RCW 11.96A.150 and RCW 11.24.050. Respondent further believes that this Court may conclude this is a frivolous appeal. In that event, this Court may award her costs and fees. Harrington v. Pailthorp, 67 Wn.App. 901, 841 P.2d 1258, review denied 121 Wn.2d 1018, 854 P.2d 41 (1992).

X. CONCLUSION

Respondent believes that a full reading of the records of this almost three-year-old case will realize that Appellant has submitted virtually no admissible evidence in support of his petition to revoke probate of Decedent's will and his petition to remove the Respondent as personal representative, and clearly no "clear, cogent and convincing" evidence. The failure of Appellant to do so renders all of his issues on appeal moot. Similar, such a consistent lack of providing evidence would seem to support a conclusion that all of Appellant's actions in this case were indeed "frivolous," but such a finding is not necessary to legally justify the award of attorney fees and costs to the Respondent as she has defended both herself and the Decedent's estate. Accordingly, Respondent respectfully submits that the trial court made no errors here and prays that Appellant's appeal be dismissed.

DATED: December 17, 2010

Respectfully submitted,



D. Douglas Titus, WSBA #26644
Attorney for Respondent Mary
Frances Whealen

No. 65970-7 and 65970-7
Combined Cases

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

DYLAN THOMPSON WOOD

Petitioner,

vs.

**MARY FRANCES WHEALEN, INDIVIDUALLY AND AS
PERSONAL REPRESENTATIVE OF THE ESTATE OF JODY
SCOTT WOOD,**

Respondent.

2010 DEC 20 PM 3:45
COURT OF APPEALS
STATE OF WASHINGTON
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DECISIONS OF THE SUPERIOR COURT FOR KING COUNTY

**The Honorable Laura Inveen and the Honorable Commissioner Carlos
Velatgegui
Cause No. 08-4-00829-8 SEA**

**CERTIFICATE OF SERVICE OF RESPONSE BRIEF OF MARY
FRANCES WHEALEN, RESPONDENT**

**D. DOUGLAS TITUS
Attorney for Respondent
LAW OFFICE OF D. DOUGLAS TITUS
6041 California Avenue SW
Seattle, Washington 98136
(206) 935-6620
(206) 935-6623 (Facsimile)**

**The undersigned hereby certifies that on this 17th day of
December 2010, ABC Legal Services, Inc. delivered to Appellant's
attorney, John Flowers, in Everett, Washington, a copy of RESPONSE
BRIEF OF MARY FRANCES WHEALEN, RESPONDENT at 2927
Rockefeller, Everett, Washington 98201. at his request and upon his
instructions.**

DATED: December 17, 2010



D. Douglas Titus, WSBA #26644