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No. 69708-1

**COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON**

ORIGINAL

IN RE THE ESTATE OF ELMORE ELLISON

Elaine Ellison and Kathy Cook,

Appellants

v.

Patricia Harmon, Michael Golden, and Christine Baklund,

Respondents

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

This is an appeal of a trial court's summary judgment decision in a TEDRA litigation to determine who the beneficiaries of an IRA are after the death of its owner.

Respondents claim instead that equity requires replacing Appellants as IRA beneficiaries with Respondents to match the decedent's testamentary intent under the "substantial compliance" doctrine.

Respondents' equity argument is fatally flawed. While Respondents did submit testimonial evidence regarding the decedent's intent, that testimony is barred by the Deadman Statute. Even if admissible, the evidence is mixed regarding the decedent's intent in relation to his IRA (as opposed to his probate assets generally).

But the most glaring hole in Respondents' claim is the lack of any evidence that the decedent "substantially complied" with the IRA contractual provisions setting out the clear and simple procedure for changing beneficiaries. Without evidence that the decedent "substantially complied" with the Edward Jones procedure for changing IRA beneficiaries, the Respondents cannot establish "substantial compliance." Absent "substantial

compliance," Appellants submit that the courts should not use equitable power to supersede the undisputed legal effect of the written nonprobate asset arrangements in place when Mr. Ellison died.

The trial court found, and Respondents will ask this Court to find, that equity is properly used in this case to set aside the written IRA beneficiary terms and provisions controlling distribution of the decedent's Edward Jones IRA, and to substitute others in as beneficiaries. Appellants submit that doing so would be a big mistake. It would transform the "substantial compliance" doctrine from an equitable safety valve—designed to correct a financial institution's administrative errors or to correct a decedent's merely technical mistake in designating a nonprobate beneficiary—into an easy means of changing nonprobate asset arrangements after the owner has died, based solely on evidence of intent.

What would result is the proverbial exception swallowing the rule. If this Court approves application of the "substantial compliance" doctrine on these facts—where the decedent did not do or even attempt to do any of the clearly identified steps required by the IRA Account contract to name a new beneficiary—then the doctrine would be transformed from an examination of the

decedent's compliance with nonprobate asset arrangement terms into an examination solely of the decedent's testamentary intent. If that happens:

- No financial institution will feel safe following the written beneficiary designation controlling nonprobate assets, since the written designation could be overcome merely by introducing evidence of decedent's contrary intent. Instead, financial institutions would interplead the funds and let the courts decide the decedent's intent
- Every dispute about nonprobate asset distribution would require a trial between the competing parties, with the winner being whichever party can put on more, or more convincing, evidence of the decedent's intent, independent of written beneficiary designations
- Every nonprobate asset would require TEDRA litigation before it can be distributed
- Our court system would be swamped with TEDRA litigation involving nonprobate assets
- Washington citizens would no longer benefit from clear, predictable, and certain rules for directing distribution of their nonprobate assets after they die

Allowing testimonial evidence of intent alone, and mixed evidence at that, to overcome written nonprobate asset arrangements, as the trial court did below and as Respondents will ask this Court to do, simply put, would not be good.

II. ASSIGNMENTS OF ERROR

No. 1. The trial court erred when it ruled under CR 56(c) that Respondents were entitled to judgment as a matter of law

replacing Respondents for Appellants as beneficiaries of the decedent's Edward Jones IRA. CP 239-40.

No. 2. The trial court erred when it entered an order denying Appellants' motion under the Deadman Statute to strike testimony from an interested party about conversations and transactions he had with the decedent. CP 237-38.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1. RCW 11.02.005(10) provides that a nonprobate asset's contractual terms and provisions govern post-death distribution. There are no exceptions written into the statute. An IRA is a nonprobate asset. Id. Not even a "super will" can alter the written, contractual arrangements governing post-death distribution of an IRA. RCW 11.11.010(7)(a) (specifically excluding IRA's from the "super will" provisions). The Washington Legislature immunized financial institutions and other third parties from any liability for enforcing "the terms of the nonprobate asset arrangement in effect on the date of death of the owner." RCW 11.11.040. Should these statutory provisions be applied here to determine the beneficiaries of the decedent's Edward Jones IRA?

No. 2. The Edward Jones IRA Custodial Agreement provides that, upon the account owner's death, the account funds

shall be distributed to the person properly designated in a writing signed by the owner as the account beneficiary. CP 100 at § 4(b), 105-06. When a properly designated beneficiary pre-deceases the owner, and no other beneficiary has been properly designated, the Custodial Agreement provides that the account funds will be distributed to the account owner's natural children. CP 101 at § 4(d). Appellants are the decedent's only surviving natural children. CP 246 (Petition at 2 ¶ 3). Should the provisions of the Edward Jones IRA Custodial Agreement—the written asset arrangement in effect on the date of its owner's death—determine the beneficiaries of decedent's IRA?

No. 3. Was the Edward Jones IRA Custodial Agreement nothing but "boilerplate" that can properly be ignored by Washington courts?

No. 4. Were the designated beneficiaries of the decedent's Edward Jones IRA superseded by a "super will" under RCW 11.11.020?

No. 5. The "substantial compliance" doctrine authorizes a court to substitute a nonprobate asset's designated beneficiary only when its owner "has not only manifested an intent to change beneficiaries, but has done everything which was reasonably

possible to make that change." Allen v. Abrahamson, 12 Wn. App. 103, 105, 529 P.2d 469 (1974). What is required is that the owner "*has substantially complied with the provisions of the policy regarding that change.*" Id. (emphasis added). That is because:

Equity requires diligence. Therefore, where the [owner] failed to do all which might reasonably have been possible to effectuate his wishes, as to change a named beneficiary, aid will be denied.

Id. at 106. When the nonprobate asset's written arrangements require that the owner, to change beneficiaries, (1) make a designation (2) "in a writing acceptable to Custodian"¹ and (3) deliver it to Custodian, CP 100 at § 4(b), 105-06, but the decedent did none of those things, does the "substantial compliance" doctrine authorize Washington courts to name new beneficiaries?

No. 6. Should the equitable doctrine of "substantial compliance" be modified to allow substitution of nonprobate asset beneficiaries, in the absence of substantial evidence of compliance with the specific written nonprobate asset arrangements in effect on the date of the owner's death, based solely on conflicting evidence of decedent's testamentary intent?

¹ A "form acceptable to Custodian"—designating the account beneficiary in writing, signed and dated by the account owner, delivered to Custodian, and placed in the account records, appears at CP 105-06.

No. 7. One of the major purposes of RCW 5.60.030, the Deadman Statute, is to give protection to the writings and documents of a decedent or persons claiming thereunder, in order to prevent the decedent's purposes in making a conveyance in writing from being defeated by parol description of the decedent's acts and purposes after death. Hampton v. Gilleland, 61 Wn.2d 537, 543, 379 P.2d 194 (1963). The Deadman Statute accomplishes this purpose by rendering the interested litigant or witness incompetent to testify about either a transaction with or a statement made by the deceased. Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). Does the Deadman Statute bar the Edward Jones financial adviser from testifying in this case about his conversations and transactions with the decedent?

IV. STATEMENT OF THE CASE

A. Facts Pertaining to Decedent's Edward Jones IRA

Appellants are Kathy Cook and Elaine Ellison. They are the sole surviving natural children of the decedent, Elmore Ellison. CP 246 at ¶ 2. Mr. Ellison had no surviving spouse or other surviving natural children when he died. CP 108.

The decedent is Elmore Ellison. He re-married later in life to Louise Ellison, the mother of Respondents Patricia Harmon,

Michael Golden, and Christine Baklund. Mr. Ellison was stepfather to Louise's children. CP 246 at ¶ 3. He never adopted any of them.

On March 12, 2010, Mr. Ellison opened Edward Jones IRA Account # 870-96627. CP 98-105. The terms and provisions of the IRA are contained in a document entitled "Edward Jones Traditional Individual Retirement Account Custodial Agreement" (hereinafter, Custodial Agreement). CP 98-103.

Mr. Ellison's signature agreeing to the terms and provisions of the Custodial Agreement appears on a document entitled "Edward Jones Individual Retirement Account Authorization, Adoption Agreement and Beneficiary Designation" (hereinafter, Beneficiary Designation). CP 105-06.

In the Beneficiary Designation, Mr. Ellison acknowledged and agreed that he had received and read the Custodial Agreement and other pertinent account forms with his signature. CP 105-06. The terms and provisions of the Custodial Agreement, as pertinent to this action, provide as follows:

Depositor . . . is establishing a traditional individual retirement account . . . to provide for his or her retirement *and for the support of his or her beneficiaries after death.*

.....

Article VIII

1. Definitions. . . .

(d) "Children" means a person's children, and no other lineal descendants. *Children includes an adopted child but not a foster child or a step child, even if there is a parent-child relationship.*

.....

(l) "Issue" or "Descendants" means a person's descendants, *per stirpes*. Issue or Descendants includes a person's child(ren), grandchild(ren) and their descendants of all generations, including an adopted child and a child biologically descended from and acknowledged by any such descendant *but not a foster child or a step child, even if there is a parent-child relationship.*

.....

4. Death of Account Owner; Designation of Beneficiaries.

.....

(b) *Designation of Beneficiary(ies).* Depositor may designate in a writing acceptable to Custodian any primary or contingent Beneficiary(ies). Any designation not received by Custodian during depositor's lifetime shall be void. . . .

.....

(d) *Absence of Designation of Beneficiary(ies).* If Depositor does not designate a Beneficiary, or if no Beneficiary Survives Depositor, or if all Beneficiaries disclaim their interest in the Account, upon Depositor's

death, then the Beneficiary(ies) of the Account shall be deemed to be designated in the following order:

- (i) Depositor's surviving spouse; or if none, then
- (ii) Depositor's descendants, per stirpes; or if none, then
- (iii) Depositor's estate.

CP 98-101 (emphasis added).

Mr. Ellison's March 12, 2010 signature on the Beneficiary Designation demonstrates that he received and read the Custodial Agreement. CP 105-06. The terms and provisions immediately above Mr. Ellison's signature provide as follows:

D. IMPORTANT INFORMATION ABOUT YOUR BENEFICIARY DESIGNATIONS.

I understand that if I designate a person and his or her "children," "issue," or "descendants" as beneficiaries of all or a portion of my account

E. ACCOUNT HOLDER'S ACCEPTANCE:

-
- *I have received and read the Edward Jones Retirement Account Agreement Disclosure, and Self-Directed Individual Retirement Account Custodial Agreement, Disclosure Schedule of Fees and appoint Edward Jones as custodian in accordance with the terms and conditions contained within.*

CP 105-06 (emphasis added).

On the day he opened his Edward Jones IRA, Mr. Ellison

designated as his sole beneficiary his wife, Louise Ellison. Id.

Louise Ellison died on May 15, 2010. CP 108.

The Edward Jones employee that worked with Mr. Ellison was William Anderson. CP 112:5-19. Following his designated beneficiary's death, Mr. Ellison took no steps to designate a new beneficiary:

- He did not seek advice from his Edward Jones financial adviser, CP 113
- He did not fill out a new Beneficiary Designation
- He did not sign a new Beneficiary Designation
- He did not submit a new Beneficiary Designation to his financial adviser or to Edward Jones

On April 19, 2011, 11 months after beneficiary Louise's death, and just 3 weeks before his own death, Mr. Ellison executed a new will. CP 115-19. In this will, Mr. Ellison left all probate assets to his stepchildren, Respondents. He specifically left no probate assets to his natural children, Appellants. Id.

Mr. Ellison's April 2011 will makes no reference to his Edward Jones IRA. The will contains no terms expressing any desire to distribute all nonprobate assets, or even a specific category of nonprobate assets, through the will.

Mr. Anderson testified that Mr. Ellison took care of all the

testamentary changes he wanted to make through his last will. CP 113. Mr. Anderson also testified that he asked Mr. Ellison, during the last couple weeks of his life, about Edward Jones account "beneficiary designations." "I asked him about making sure that he had things set up so that the assets flowed the way he wanted them to flow." "And he believed that he had that covered." CP 44:19-45:7.

On May 9, 2011, 3 weeks after executing his last will, Mr. Ellison died. CP 121. According to the Certificate of Death, Mr. Ellison died of brain cancer and malignant leukemia. Id.

On May 11, 2011, Edward Jones set up IRA accounts for each of the Respondents. CP 155-57.

More than 5 months after Mr. Ellison died, on October 19, 2011, Edward Jones created a new record that listed his IRA beneficiary as his Estate. CP 125-27. The identification of the Estate as beneficiary was done by the financial advisor's assistant, based on her understanding of the financial advisor's belief regarding who Mr. Ellison had designated as beneficiary. Id.

Mr. Anderson, the Edward Jones financial adviser who helped Mr. Ellison open and manage his IRA, agrees that pursuant to the Custodial Agreement and the only Beneficiary Designation

executed by Mr. Ellison, the beneficiaries of the IRA are Appellants Elaine Ellison and Kathy Cook, Mr. Ellison's only surviving natural children. CP 131.

B. Facts Pertaining to Application of the Deadman Statute

Mr. Anderson is a financial adviser at Edward Jones. As such, he assisted the decedent in opening his IRA and managed the investment of IRA funds. Edward Jones anticipates litigation with the Ellison Estate relating to Edward Jones' handling of the decedent's IRA, depending on how this litigation turns out. CP 147-49. Such litigation would involve Mr. Anderson as both a party and as an agent of Edward Jones.

In addition, both Mr. Anderson and Edward Jones stand to either earn account management and investment fees or commissions—or not—depending directly on how this litigation turns out. If Respondents prevail, the disputed IRA funds will be transferred to new Edward Jones accounts already set up in the names of each stepchild. CP 151-53. These new accounts would earn management fees or commissions for both Mr. Anderson and Edward Jones. On the other hand, should Appellants prevail, the IRA funds will be paid out to Appellants and would no longer be

managed by either Mr. Anderson or Edward Jones, and thus would earn them no fees or commissions.

Mr. Anderson testified by deposition in this action on August 31, 2012. Respondents submitted in evidence on summary judgment substantial excerpts from his deposition consisting primarily of testimony regarding Mr. Anderson's conversations and transactions with the decedent. CP 17-67. Respondents briefing below relied heavily upon Mr. Anderson's testimony. CP 1-16. Respondents moved under the Deadman Statute to strike those portions of the Respondents evidence consisting of testimony about conversations and transactions with the decedent, along with the briefing citing the same. CP 159-206.²

C. Procedural History

Appellants filed their Petition below on April 18, 2012, specifying ownership of the Edward Jones IRA funds as the issue in dispute. CP 245-49. Appellants' and Respondents' cross-motions for summary judgment, and Appellants' motion to strike under the Deadman Statute, were argued and decided on

² The motion to strike and the supporting declaration were filed below with yellow highlighting denoting those portions which Respondents moved to strike. The undersigned is not sure if that highlighting will show up in the Clerk's Papers transmitted by the Superior Court to the Court of Appeals. Therefore, those pleadings are included in the Appendices to this brief in the exact form they were filed below.

November 16, 2012. CP 237-40. This appeal timely followed. CP 241-44.

V. ARGUMENT

A. Standard of Review

"The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." Cornish College of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 215, 242 P.3d 1 (2010) (quoting Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)).

B. Washington Statutes Provide That the Beneficiaries of Nonprobate Assets Are Determined by the Terms of the Nonprobate Asset Arrangements in Effect on the Date of Death of the Owner

There can be no dispute that, under Washington law, nonprobate assets are supposed to be distributed after its owner's death according to the written terms governing its disposition.

"Nonprobate asset" means those rights and interests of a person having beneficial ownership of an asset *that pass on the person's death under a written instrument or arrangement other than the person's will.*

RCW 11.02.005(10) (emphasis added). See also, e.g., Estate of Burks v. Kidd, 124 Wn. App. 327, 100 P.3d 328 (2004) (reversing

trial court's distribution of nonprobate assets pursuant to the decedent's will, holding that the terms of the bank account written asset arrangement controlled). Under RCW 11.11.040, financial institutions and other third parties are even granted Legislative immunity from liability for "transferring nonprobate assets" according to "the terms of the nonprobate asset arrangement in effect on the date of death of the owner."

C. The Decedent's Edward Jones IRA is a Nonprobate Asset

Nor can there be any dispute that the decedent's IRA is a nonprobate asset. RCW 11.02.005(10) provides that "'Nonprobate asset' includes, but is not limited to . . . individual retirement account or bond." Likewise, under RCW 11.02.091(3), an "otherwise effective written instrument of transfer" includes both "an account agreement" and "an individual retirement plan." Under RCW 11.02.091(4), such transfers need not comply with will formalities.

D. Appellants Are the Undisputed Legal Beneficiaries Designated in the Edward Jones IRA Custodial Agreement

Nor is there any real dispute that, under the Edward Jones IRA Custodial Agreement, CP 98-103, in the absence of a surviving

beneficiary designated in writing, the IRA passes to the account owner's surviving natural children—Appellants—upon his death.

The original designated beneficiary of the IRA was Louise Ellison, CP 105-06, who predeceased Elmore Ellison. CP 108, 121. The Custodial Agreement provides that, in the absence of a surviving designated beneficiary, the IRA passes to the owner's "descendants" upon death. CP 101 § 4(d). The Custodial Agreement provides that "descendants" means natural children, but not stepchildren. CP 100 § 1(l). Appellants are the decedent's sole surviving natural children; Respondents are his stepchildren. Mr. Ellison acknowledged that he received the Custodial Agreement and had read and agreed to its terms when he signed the Beneficiary Designation on March 12, 2010. CP 105-06.

Thus, under the Washington statutes and case law cited in the previous section, and under the terms of the written nonprobate asset arrangement in effect on the date of death of the owner—the Custodial Agreement, CP 98-103—Mr. Ellison's Edward Jones IRA became the property of his sole surviving natural children—Appellants Elaine Ellison and Kathy Cook.

This upon-death transfer of the IRA to Appellants occurs as a matter of law, outside of probate, independent of the decedent's

will. RCW 11.02.005(10).

E. The Beneficiary Change Provisions in the Edward Jones IRA Custodial Agreement Are Not Unimportant "Boilerplate" That Washington Courts Can Simply Set Aside, Nor Can the Courts Infer That the Decedent Was Unaware of Them

Respondents below continually referred to the beneficiary provisions in the Edward Jones IRA Custodial Agreement as "boilerplate." CP 1:19, 7:23, 9:25, 207:24. 211:3, 12. The Respondents express argument is that "the Court should not give effect to default, boilerplate language," CP 207:23-34, and that "a boilerplate provision in the Edward Jones Custodial Agreement should not operate to frustrate Mr. Ellison's estate plan [as expressed in his last will]." CP 9:25-10:1.

Respondents are simply asking too much. Respondents ask the Court to ignore all of the Washington statutes and case law, cited above, which specify that the written contractual provisions of nonprobate assets govern their post-death distribution.

Respondents ask the Court to instead apply will provisions to infer testamentary intent regarding an IRA nonprobate asset that is specifically excluded from being distributed through a "super will."

RCW 11.11.010(7)(a).

Respondents further ask the Court to ignore black-letter

Washington law, with at least a century-long tradition, that presumes contracting parties have informed themselves of the contract's terms and refuses to excuse a party from contractual obligations just because they failed to read the contract. See, e.g., Pierson v. Northern P. Ry. Co., 61 Wash. 450, 456, 112 P. 509 (1911) (internal citations omitted):

The shipper was not obliged to sign the contract without reading it, and, if he saw fit to do so, he must take the consequences. It would tend to disturb the force of all contracts if one in possession of ordinary capacity and intelligence were allowed to sign a contract and act under it in the enjoyment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation, or mistake, it must be presumed that he read the contract, and assented to its provisions. There being no special parol contract, and there being nothing in the written contract contrary to public policy, plaintiff cannot now assert that the written contract is not binding because he signed it in haste, without reading. But this rule is elementary, and sound public policy would not permit of the adoption of any other. We are therefore clearly of opinion that the rights of the parties are measured by the limitations contained in this contract.

Respondents ask the Court to instead do the opposite of sound public policy—to ignore enforceable contract terms, and not enforce them unless Appellants somehow prove Mr. Ellison was specifically aware of his contractual obligations. Appellants respectfully submit

that this Court should not so cavalierly and blatantly ignore Washington law in this fashion. The Custodial Agreement is controlling, it is enforceable, and it should be enforced.

F. The Decedent's Will Does Not Supersede the Edward Jones IRA Custodial Agreement Beneficiary Provisions

Respondents also argued below that the decedent's testamentary intent, as expressed in his last will, was for his stepchildren (Respondents) to inherit everything and his biological children (Appellants) to inherit nothing. Therefore, Respondents argue, the decedent's IRA Account should be distributed to them according to his last will. CP 9-10.

But, as RCW 11.02.005(10) provides, nonprobate assets "pass on the person's death under a written instrument or arrangement other than the person's will." Therefore, a decedent's testamentary intent expressed in his or her will has no bearing on how an IRA is distributed. Even if Mr. Ellison's last will was a "super will," as Respondents argued below, CP 13-14, it cannot alter the written beneficiary arrangements of an IRA, here the Edward Jones IRA Custodial Agreement. RCW 11.11.010(7)(a) (specifically excluding IRA's from being devised by will). '

Thus, even though the "super will" statutes purpose is to

"[e]nhance and facilitate the power of testators to control the disposition of assets that pass outside their wills," RCW 11.11.003(1), a will cannot be used to control the disposition of an IRA like the one at issue here.

In fact, the statutory presumption that written IRA beneficiary arrangements will be enforced over even contrary will provisions is so strong that financial institutions and other third parties are given immunity from liability for "transferring nonprobate assets" according to "the terms of the nonprobate asset arrangement in effect on the date of death of the owner." RCW 11.11.040.

Respondents' arguments ignore clear, controlling Washington law, and ask the Court to do the same. Specifically, the Respondents' arguments ignore Washington's clear statutory distinction between the distribution of nonprobate assets according to statute and contractual terms, and the distribution of probate assets according to will provisions. This black-letter law clearly provides that the intent of the testator, as expressed in the will, controls distribution of *probate assets*. But RCW 11.02.005(10), to the contrary, clearly provides that *nonprobate assets*—and especially IRA's—are not controlled by will provisions. The Respondents' argument that the Court should ignore the distinction

between probate and nonprobate assets, should ignore Washington's statutory scheme establishing different frameworks for the distribution of probate and nonprobate assets, and should look to the last will to infer distributive intent regarding a nonprobate asset that is never even mentioned in the will and is specifically excluded by statute from being controlled by the will, should be rejected. What a will cannot do directly, it should not accomplish indirectly through equity.

G. The "Substantial Compliance" Test For Substituting the Designated Beneficiaries of the IRA in Favor of Equitable Beneficiaries Has Not Been Met by Respondents

Respondents' last argument is that Mr. Ellison both intended to and attempted to change the IRA beneficiaries, so the Court should determine that he "substantially complied" with the Custodial Agreement requirements for doing so, and should therefore use its equitable authority to substitute Respondents in as beneficiaries to replace Appellants. See, e.g., CP 10-13.

Respondents have not met their burden of proving "substantial compliance," and therefore an equitable substitution of IRA beneficiaries is not proper. Appellants have five main points to make in response to Respondents' "substantial compliance" claim,

one per subsection below.

First, the party asserting "substantial compliance" must meet a heavy burden. In order for Washington Court's to use equitable power to substitute equitable beneficiaries in place of legal beneficiaries, it must be shown that the nonprobate asset owner "*has substantially complied with the provisions of the policy regarding that change*" by completing "everything which was reasonably possible to make that change." Allen v. Abrahamson, 12 Wn. App. 103, 105, 529 P.2d 469 (1974) (emphasis added).

"Substantial compliance" means that the owner "has not only manifested an intent to change beneficiaries, but has done everything which was reasonably possible to make that change."

Id. That is because:

Equity requires diligence. Therefore, where the [owner] failed to do all which might reasonably have been possible to effectuate his wishes, as to change a named beneficiary, aid will be denied.

Id. at 106.

Second, Respondents evidence of intent, the first prong of the "substantial compliance" test, is lacking. Respondents rely in part on the decedent's last will, but as discussed above, last wills do not control nonprobate assets with other distribution

arrangements, especially IRA's. The only other intent evidence relied on by Respondents is the testimony of the Edward Jones financial adviser, Mr. Anderson, relating his conversations and transaction with the decedent. That evidence is barred by the Deadman Statute.

Third, even if Mr. Anderson's testimony is admissible, only mixed conclusions are fairly drawn from this evidence. While he does offer statements by Mr. Ellison on his intent regarding his estate generally, there is nothing directly from Mr. Ellison specifically about his IRA. Moreover, when Mr. Anderson directly asked Mr. Ellison whether he wanted to change his IRA beneficiaries, his response was that it had already been taken care of and nothing more needed to be done. CP 44:19-45:7. Since Mr. Ellison had not changed his Edward Jones IRA beneficiaries, what this means is that he wanted things left as they were. Therefore, any equitable change in beneficiaries would upset, rather than implement, Mr. Ellison's distributive intent.

Fourth, even if the Court is persuaded that the decedent did indeed intend for his IRA to go to Respondents rather than Appellants, using equity to do so requires a showing that the decedent did everything he could reasonably have done to make

the change according to the procedures established in the Custodial Agreement. The record shows that he did none of the clear, simple things required by Custodial Agreement terms to change beneficiaries. As a result, the "substantial compliance" test is not met, so changing beneficiaries would be improper.

Fifth, the Court's ruling in this case could have a profound effect on probate administration in Washington. If, as Respondents ask of this Court, nonprobate asset beneficiaries can be changed solely on testimonial statements by third parties about the decedent's intent—without requiring acts by the decedent substantially complying with the contractual requirements for changing beneficiaries, the result will be a flood of probate litigation. In short, any claimant of a nonprobate asset would just need to introduce evidence of intent contrary to what is contained in the written asset arrangements. In that situation, few if any nonprobate assets would ever be distributed without a trial on the decedent's intent.

- 1. The "Substantial Compliance" Test Requires Both (1) Manifest Evidence of Intent and (2) Substantial Compliance With the Method Specified in the Custodial Agreement For Designating Beneficiaries**

"Washington permits courts, acting in equity, to enforce attempted changes in beneficiaries." In re Estate of Freeberg, 130 Wn. App. 202, 205, 122 P.3d 741 (2005).

"The general rule in this jurisdiction and elsewhere as to attempted changes of beneficiaries on an insurance policy is that courts of equity will give effect to the intention of the insured *when the insured has substantially complied with the provisions of the policy regarding that change.*" Id. (emphasis added).

But Washington law puts a heavy burden on the party asserting "substantial compliance" as a basis to change a nonprobate asset beneficiary after the owner's death. "Substantial compliance requires that the insured has manifested an intent to change beneficiaries and done everything reasonably possible to make that change." Id. at 205-06. This rule applies to IRAs.

Several Washington cases apply the "substantial compliance" doctrine. In In re Estate of Freeberg, 130 Wn. App. 202, 122 P.3d 741 (2005), an unmarried decedent named his children as beneficiaries of his IRA. Id. at 204. He subsequently remarried and sought to change the beneficiary of the IRA from his children to his wife. Freeberg personally went to the Edward Jones office and directed that his wife be designated as beneficiary on all

his accounts, including the IRA. But, for some unknown reason, Edward Jones made the beneficiary change to all of the decedent's accounts *except* the IRA. Edward Jones could not explain why the IRA Beneficiary Designation was never changed when all the other account beneficiaries had been changed. The Freeberg Court held that the decedent substantially complied because he had taken every step actually required by Edward Jones to make the change. The Court therefore designated the beneficiary according to the decedent's intent as expressed through his substantial compliance. Id. at 207.

In Rice v. Life Insurance Company of North America, 25 Wn. App. 479, 482, 609 P.2d 1387, review denied 93 Wn.2d 1027 (1980), the decedent owned a life insurance policy naming his mother, brother, and sister as beneficiaries. Id. at 480. He later submitted a form supplied by his employer entitled "Request for Voluntary Accident Insurance" in which he named his fiancée as beneficiary. He died three days later, before the insurance company had processed his request. The court held that the evidence met the "substantial compliance" test. Id. at 481.

In Sun Life Assurance Company v. Sutter, 1 Wn.2d 285, 289, 95 P.2d 1014 (1939), the decedent sent an unsigned letter to

his insurance company requesting a change of beneficiary. Id. at 289-90. The insurance company sent him the required forms to effect a change in beneficiary. Id. He died without submitting the forms. Id. The court held the decedent's letter demonstrated that he "substantially complied" with policy requirements for changing beneficiaries, even though the insurer's delay in processing the unsigned beneficiary change request meant that the change was not made before the insured died. Id. at 296-97. The most important aspect of the Sutter case in relation to this action is that, before using its equitable power, the Supreme Court first compared the insured's unsigned letter requesting a beneficiary change against what the policy terms required for such a change:

The policies which are the subject matter of this action expressly provide that the insured may change the beneficiary "by filing written notice at the home office of the company," accompanied by the insurance policy, for suitable endorsement. The policy does not require that the written notice shall be prepared in or upon any particular form, or that it shall be acknowledged before a notary, or witnessed, or even that it be signed.

Id. at 291.

In Allen v. Abrahamson, 12 Wn. App. 103, 104-05, 529 P.2d 469 (1974). the decedent purchased life insurance and named his girlfriend as beneficiary. The insurance contract required the

insured to submit a written request to change beneficiaries. He later delivered the insurance certificates to his parents and told them he was going to change the beneficiary designation to them. He died six weeks later without having tendered a written request to change beneficiaries or having contacted the insurance company or his employer about making a change. The Allen Court rejected the parents' "substantial compliance" claim, stating that the decedent "never even attempted to comply with the policy requirement of written notification." Id. at 108.

2. Respondents' Intent Evidence is Inadmissible Under the Deadman Statute

The purpose of Washington's Deadman Statute, RCW 5.60.030, is to prevent interested parties from giving self-serving testimony about conversations or transactions with the decedent. Wildman v. Taylor, 46 Wn. App. 546, 549, 731 P.2d 541 (1987). An interested party is one that could gain or lose in the matter before the court. Id. Whether testimony involves conversations or transactions with the decedent depends on whether the decedent, if alive, could contradict the witness. Id. at 549. The reason behind the rule is that it would be unfair for the Court to reach a decision based on only one side of the story. "Death having closed the lips

of one party, the law closes the lips of the other." In re Cunningham's Estate, 94 Wash. 191, 193, 161 P. 1193 (1917).

"One of the major purposes of this legislative enactment is to give protection to the writings and documents of a decedent or persons claiming thereunder, so that decedent's purposes in making a conveyance in writing will not be defeated by parol description of his acts and purposes after his death." Hampton v. Gilleland, 61 Wn.2d 537, 543, 379 P.2d 194 (1963).

Thus, the statute serves to protect the decedent and those who take or claim under him by virtue of his writings. Indeed, the decedent and his successors by written instrument are frequently described in the authorities as "protected persons"

Wildman, 46 Wn. App. at 553.

a. Mr. Anderson is an Interested Party

A "party in interest" prohibited from testifying is one who would gain or lose by the action in question.

Wildman, 46 Wn. App. at 549.

A purely speculative possibility that the witness could conceivably be subjected to an independent claim or suit depending upon the outcome is not a disqualifying interest. In re Estate of Krappes, 121 Wn. App. 653, 666-67, 91 P.3d 194 (1963).
But where the future litigation is likely and the witness stands to

gain or lose by the result in the current action, then the witness is an interested party under the Deadman Statute. Hofsvang v. Estate of Brooke, 78 Wn. App. 315, 321-22, 897 P.2d 370 (1995) ("[The witness] Champine's potential liability to the Hofsvangs would be reduced by any amount recovered by the Estate. Thus, Champine stands to gain by this lawsuit, and he is an interested party under the terms of the statute. His proffered testimony is forbidden by the statute.").

In Hofsvang v. Estate of Brooke, 78 Wn. App. 315, 321-22, 897 P.2d 370 (1995), the issue involved a dispute between an estate and a lender who had obtained the decedent's co-signing on a loan to the decedent's nephew. The lender had claims for the defaulted loan payments against both the nephew and the estate; the estate had a legal malpractice claim against the attorney that allegedly represented the decedent in the underlying transaction. The Deadman Statute issue was whether the nephew could testify in support of the estate's malpractice claim, or was barred by the Deadman Statute. The Hofsvang Court held that, where the future litigation is likely and the witness stands to gain or lose by the result in the current action (here, by having his own defaulted loan debt reduced by any malpractice recovery made by the Estate), then the

witness is an interested party and barred from testifying under the Deadman Statute. The Hofsvang Court ultimately held that, because the Deadman Statute barred the estate from making a *prima facie* malpractice claim, the estate's claim must be dismissed on summary judgment, reversing the trial court. Id., 78 Wn. App. at 322.

An interested party under the Deadman Statute includes an agent of an affected principal. In Wildman, the Court of Appeals barred the testimony of a bank officer because the bank's interest would be affected by the result of the probate litigation:

Barry Jackson, an officer of Royal Bank of Canada, is an interested party ***because the bank financed the leased equipment for Mr. Wildman and stands to gain or lose by the action*** under the rationale of *In re Estate of Tate*, 32 Wn.2d [252] at 254. The bank would gain if Mr. Wildman is found to be the owner of the equipment since the chances of repayment would be increased. Barry Jackson's ***testimony should be excluded to the extent it relates to a transaction with the deceased . . .***

Wildman, 46 Wn. App. at 554 (emphasis added).

Thus, the Wildman case stands both for the proposition that when testimony benefits a party by affecting the exposure of that

party in future litigation, the testifying witness is an interested party, and for the proposition that when the probate litigation affects the financial interests of the witnesses' principal, the witness/agent is an interested party. Both are pertinent here.

"A witness is considered a party in interest . . . ***if the record may be used as evidence against the witness in some other action.***" 5A Wash. Prac., Evidence Law & Practice § 601.17 (5th ed.). Here, since the Estate could use Mr. Anderson's testimony against him in its suit against Edward Jones, Mr. Anderson and Edward Jones are interested parties per the Deadman Statute.

In this case, Mr. Anderson and Edward Jones are interested parties under the Deadman Statute, both because of financial interest in the result (Wildman) and because of likely future litigation with Respondents or the Estate should Appellants prevail (Hofsvang).

Mr. Anderson and Edward Jones are interested parties for the simple reason that they stand to gain or lose financially in this matter, and also because they face litigation, depending on how this matter is decided. They stand to gain financially if Respondents are successful in obtaining ownership of the decedent's IRA, because the IRA funds would in that case continue

to be managed by Edward Jones and Mr. Anderson, through accounts set up by the decedent's stepchildren after the decedent's death, resulting in ongoing account management earnings to Anderson and Edward Jones. If Appellants are successful in preserving their ownership of the decedent's IRA, Anderson and Edward Jones will both lose those account management earnings and face near-certain litigation by the Estate and/or the Respondents for which Edward Jones is already preparing. CP 147-49.

b. The Relevant Portions of Mr. Anderson's Testimony Relate to Alleged Conversations and Transactions With the Decedent, and Are Therefore Inadmissible

"Transaction" under the deadman's statute means doing or performing some business or management of any affair. The test of a transaction with a decedent is whether the decedent, if living, could contradict the witness of his own knowledge.

Wildman, 46 Wn. App. at 549.

The key to understanding what an interested party is prohibited from doing under RCW 5.60.030 is the interpretation of the word "testifying". . . . "Testimony" is defined as:

Evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources.

Testimony is [a] particular kind of evidence that comes to [a] tribunal through live witnesses speaking under oath or affirmation . . .

Black's Law Dictionary 1324 (5th ed. 1979). The statute does not expressly prohibit the interested party from introducing documents or other written statements by the deceased which support a claim of ownership of property by the interested party against the deceased's estate.

Wildman, 46 Wn. App. at 550-51.

The Anderson testimony proffered by Respondents below that Appellants moved to strike—highlighted in yellow and attached as Appendices 3 and 4—consists of testimony about statements allegedly made by the decedent to Mr. Anderson, and statements about Mr. Anderson performing some business for or managing decedent's affairs. This testimony is therefore barred by the Deadman Statute. Wildman, *supra*.

3. Even If the Deadman Statute Does Not Bar Respondents' Intent Evidence, the Intent Evidence as a Whole is Conflicting and Equivocal in Regards to the IRA

Even if Mr. Anderson's testimony about Mr. Ellison's intent is deemed admissible, the conclusions to be drawn from that testimony as a whole are mixed. While it is quite clear what Mr. Anderson thought Mr. Ellison's intent was, it is never clear whether

Mr. Ellison's actual intent regarding his stepchildren extended to his IRA or was limited to his probate assets.³

Moreover, there is substantial reason to doubt that Mr. Ellison really intended to make his stepchildren his IRA beneficiaries, because he had many chances to do so but never did. First, when he opened his IRA in March 2010, Mr. Ellison could have designated his wife Louise "and her children" or "and her issue" or "and her descendants" as beneficiary--this would have made the stepchildren beneficiaries if Louise died before Mr. Ellison. CP 106 § D. Second, when he opened his IRA, Mr. Ellison could alternatively have designated his stepchildren as Contingent Beneficiaries (as beneficiaries should the Primary Beneficiary predecease him). CP 100 § 4(b). Third, after Louise died in May 2010, Elmore could have submitted to Edward Jones the same paperwork he did when he opened his IRA, only this time designating his stepchildren as beneficiaries. Though he had 11 months from Louise's death to his own, he never did.

Finally, and perhaps most tellingly, when his Edward Jones financial adviser asked him specifically about changing IRA

³ Respondents also argue that Mr. Ellison's last will is evidence of his intent. That argument is addressed above in § V.F.

beneficiaries, he stated that everything was set up the way he wanted it. 44:19-45:7.

4. Even if the Admissible Evidence Shows Manifest Intent, Equitable Replacement of the IRA Beneficiaries Would Be Improper Here, Because the Decedent Did Nothing to Comply With the Custodial Agreement Requirements For Changing Beneficiaries

Here, Mr. Ellison's actions do not meet the "substantial compliance" test because he took no steps to comply with the Custodial Agreement requirements for changing beneficiaries. The IRA Custodial Agreement provided that a change in beneficiary must be delivered to Edward Jones, in writing, in a form acceptable to Edward Jones. CP 100 § 4(b). Moreover, the Custodial Agreement expressly provides that "any designation not received by Custodian during Depositor's lifetime shall be void." Id.

An example of an acceptable form of Beneficiary Designation is the one Edward Jones had Mr. Ellison sign when he opened his IRA. CP 105-06. That form identifies the primary beneficiary, any secondary beneficiary, and required the IRA owner to sign, date, and deliver the form to Edward Jones for placement into its account records. Yet Mr. Ellison did none of the clearly identified, simple steps required to make a beneficiary change

before he died. The Court should not now do, after he has died, what Mr. Ellison chose not to do when he was alive.

Respondents have argued that Edward Jones setting up "inherited IRA" accounts in the names of each stepchild is evidence of Mr. Ellison's intent. See CP 155-57. But that was not done by Mr. Ellison. Nor was it done until *after* Mr. Ellison had died. If anything, those documents show what Edward Jones thought, not what Mr. Ellison intended.

This case is very similar to the Allen case. Even if one assumes that Mr. Ellison actually did want his IRA to go to his stepchildren, it was incumbent on him to properly designate his stepchildren as his beneficiaries. He did not do so. He did not even try to do so. In fact, when asked about changing beneficiaries by his Edward Jones financial adviser, he refused the invitation. CP 44:19-45:7. This simply does not satisfy the "substantial compliance" test, because "substantial compliance" requires action by the decedent in conformance with contract requirements. Absent substantial compliance, even the decedent's most clearly-stated desire regarding who he or she wants to receive the nonprobate asset after death is not enough to justify changing the actual, designated beneficiary after the decedent is gone.

And, in cases in which Washington courts have made an equitable change in a nonprobate asset beneficiary, there was *substantial compliance in the form of the decedent actually doing what the asset arrangements required to change beneficiaries*. In the Freeberg case, a decedent informed Edward Jones that he wanted to change his beneficiary designations on all of his Edward Jones accounts, including his IRA, but for some reason Edward Jones made the beneficiary change to all of his accounts except his IRA. Obviously, the method chosen by the decedent was acceptable to Edward Jones, since all the other account beneficiaries were changed, so the Freeberg Court held that the decedent had substantially complied, and corrected Edward Jones' mistake through the "substantial compliance" doctrine. Freeberg, 130 Wn. App. at 207.

In Rice, the asset owner completed and submitted the required change in beneficiary forms, but did so only 3 days before his death. The insurer did not make the beneficiary change official before the insured died. Because the insured had followed policy procedures, the court equitably completed the beneficiary change under the "substantial compliance" doctrine. 25 Wn. App. at 481.

In Sutter, the Supreme Court specifically made sure that

writer of the unsigned letter to his insurer requesting a beneficiary change had complied with the insurance policy requirements for changing beneficiaries, before using the "substantial compliance" doctrine to finalize the beneficiary change on behalf of the insurer, which had delayed doing so until after the insured had died. Sutter, 1 Wn.2d at 291.

In sum, under Washington law, absent specific actions by the decedent to change beneficiaries according to the method, steps, and procedures required in the nonprobate asset contract, there is no "substantial compliance" and no beneficiary change can be equitably made by the Court—irrespective of the decedent's intent. Because Mr. Ellison made no effort to follow the steps and procedures set out in the Edward Jones IRA Custodial Agreement, Respondents request for an equitable beneficiary replacement must be rejected.

Finally, a very recent Supreme Court opinion applying the "super will" statute to a trust situation is quite instructive here. In Manary v. Anderson, 176 Wn.2d 342, 292 P.3d 96 (2013), the dispositive issue was whether a decedent had distributed a nonprobate asset pursuant to a will, or whether the terms of the trust had to be followed to distribute its property.

Homer was not required to comply with the Trust's terms. Finally, Manary argues that the Act [Super Will Act, RCW 11.11] "does not eliminate the need to substantially follow requirements specifically set forth in the terms of a will substitute." But as noted by the Court of Appeals, "the Act does just that." *Manary*, 164 Wash.App. at 582, 265 P.3d 163; see Cynthia J. Artura, *Superwill to the Rescue? How Washington's Statute Falls Short of Being a Hero in the Field of Trust and Probate Law*, 74 Wash. L.Rev. 799, 807 (1999) ("Rather than requiring the testator to follow the established procedures for changing the terms of a will substitute, the superwill statute permits a testator to make those changes in his will.").

Id. at 361 (internal citations omitted).

The reason this is particularly relevant here is that it shows what is supposed to happen with a nonprobate asset that is not subject to will provisions. What the Manary Court explains here is that the super will statute *relieves testators from having to follow the established procedures of the nonprobate asset* in question (be it a trust, an insurance policy, a bank account, etc.) to control post-death distribution according to the testator's wishes—with a super will, they can just do it by will. But because an IRA is specifically excluded from the super will statute, the super will statute and this recent Supreme Court holding re-emphasize that, *for IRA's, a testator must follow the established procedures to change the beneficiaries.* Because Mr. Ellison did not do, the beneficiaries

must remain as provided in the Custodial Agreement—Appellants Elaine Ellison and Kathy Cook.

H. RAP 18.1: Appellants Request Taxable Costs and Attorney Fees on Appeal

Under RAP 18.1, Appellants request that, should they prevail, the appellate court award their taxable costs incurred on appeal per RAP 14.2. Appellants also request reasonable attorney fees incurred on appeal under TEDRA. RCW 11.96A.150.

VI. CONCLUSION

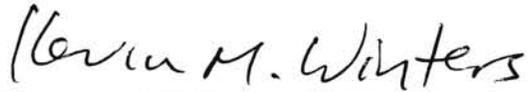
As a matter of law, Appellants are the legal beneficiaries of the disputed IRA. Even if the decedent had expressed a clear, contrary testamentary intent regarding the distribution of his IRA after his death in his will, the nonprobate asset arrangements cannot be set aside in favor of a contrary will provision. This is especially true for IRA assets, which even a "super will" cannot control. RCW 11.11.010(7)(a).

Nor are Respondents entitled to an equitable beneficiary change under the "substantial compliance" doctrine, because the admissible evidence demonstrates neither manifest intent nor substantial compliance with the beneficiary change requirements specified in the Edward Jones IRA Custodial Agreement.

Appellants therefore respectfully request that Division One reverse the trial court's summary judgment order, and remand for entry of summary judgment in favor of Appellants.

Respectfully Submitted on APR 29th, 2013.

HAWKES LAW FIRM, P.S.



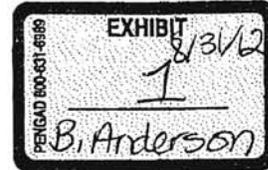
Kevin M. Winters, WSBA 27251
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Appendices

1. CP 98-103 (Custodial Agreement)
2. CP 105-06 (Beneficiary Designation)
3. CP 159-90 (Evidence Objected to Under Deadman Statute)
4. CP 192-206 (Briefing Objected to Under Deadman Statute)

Appendix 1



EDWARD JONES
TRADITIONAL INDIVIDUAL RETIREMENT ACCOUNT CUSTODIAL AGREEMENT
(Under Section 408(a) of the Internal Revenue Code)
IRS Form 5305-A (Rev. March 2002)

Depositor whose name appears on the Adoption Agreement is establishing a traditional individual retirement account ("IRA") under Section 408(a) of the Code to provide for his or her retirement and for the support of his or her beneficiaries after death. Custodian has given Depositor the disclosure statement required by Regulations Section 1.408-6. Depositor and Custodian make the following Agreement:

Article I

Except in the case of a rollover contribution described in Section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), an employer contribution to a simplified employee pension plan as described in Section 408(k) or a recharacterized contribution described in Section 408A(d)(6), Custodian will accept only cash contributions up to \$3,000 per year for tax years 2002 through 2004. That contribution limit is increased to \$4,000 for tax years 2005 through 2007 and \$5,000 for 2008 and thereafter. For individuals who have reached the age of 50 before the close of the tax year, the contribution limit is increased to \$3,500 per year for tax years 2002 through 2004, \$4,500 for 2005, \$5,000 for 2006 and 2007, and \$6,000 for 2008 and thereafter. For tax years after 2008, the above limits will be increased to reflect a cost-of-living adjustment, if any.

Article II

Depositor's interest in the balance in the Custodial Account is nonforfeitable.

Article III

1. No part of the Custodial Account funds may be invested in life insurance contracts, nor may the assets of the Custodial Account be commingled with other property except in a common trust fund or common investment fund (within the meaning of Section 408(a)(5)).

2. No part of the Custodial Account funds may be invested in collectibles (within the meaning of Section 408(m)) except as otherwise permitted by Section 408(m)(3), which provides an exception for certain gold, silver, and platinum coins, coins issued under the laws of any state, and certain bullion.

Article IV

1. Notwithstanding any provision of this Agreement to the contrary, the distribution of Depositor's interest in the Custodial Account shall be made in accordance with the following requirements and shall otherwise comply with Section 408(a)(6) and the Regulations thereunder, the provisions of which are herein incorporated by reference.

2. Depositor's entire interest in the Custodial Account must be, or begin to be, distributed not later than Depositor's required beginning date, April 1 following the calendar year in which Depositor reaches age 70½. By that date, Depositor may elect, in a manner acceptable to Custodian, to have the balance in the Custodial Account distributed in:

(a) A single sum or

(b) Payments over a period not longer than the life of Depositor or the joint lives of Depositor and his or her designated Beneficiary.

3. If Depositor dies before his or her entire interest is distributed to him or her, the remaining interest will be distributed as follows:

(a) If Depositor dies on or after the required beginning date and:

(i) the designated Beneficiary is Depositor's surviving spouse, the remaining interest will be distributed over the surviving spouse's life expectancy, as determined each year until such spouse's death, or over the period in paragraph (a)(iii) below if longer. Any interest remaining after the spouse's death will be distributed over such spouse's remaining life expectancy as determined in the year of the spouse's death and reduced by 1 for each subsequent year, or, if distributions are being made over the period in paragraph (a)(iii) below, over such period.

(ii) the designated Beneficiary is not Depositor's surviving spouse, the remaining interest will be distributed over the Beneficiary's remaining life expectancy as determined in the year following the death of Depositor and reduced by 1 for each subsequent year, or over the period in paragraph (a)(iii) below if longer.

(iii) there is no designated Beneficiary, the remaining interest will be distributed over the remaining life expectancy of Depositor as determined in the year of Depositor's death and reduced by 1 for each subsequent year.

(b) If Depositor dies before the required beginning date, the remaining interest will be distributed in accordance with (i) below or, if elected or there is no designated Beneficiary, in accordance with (ii) below:

(i) The remaining interest will be distributed in accordance with paragraphs (a)(i) and (a)(ii) above (but not over the period in paragraph (a)(iii), even if longer), starting by the end of the calendar year following the year of Depositor's death. If, however, the designated Beneficiary is Depositor's surviving spouse, then this distribution is not required to begin before the end of the calendar year in which Depositor would have reached age 70½. But, in such case, if Depositor's surviving spouse dies before distributions are required to begin, then the remaining interest will be distributed in accordance with (a)(ii) above (but not over the period in paragraph (a)(iii), even if longer), over such spouse's designated Beneficiary's life expectancy, or in accordance with (ii) below if there is no such designated Beneficiary.

(ii) The remaining interest will be distributed by the end of the calendar year containing the fifth anniversary of Depositor's death.

4. If Depositor dies before his or her entire interest has been distributed and if the designated Beneficiary is not Depositor's surviving spouse, no additional contributions may be accepted in the account.

EDWARD JONES
TRADITIONAL INDIVIDUAL RETIREMENT ACCOUNT CUSTODIAL AGREEMENT
(Under Section 408(a) of the Internal Revenue Code)
IRS Form 5305-A (Rev. March 2002)

Page 2

5. The minimum amount that must be distributed each year, beginning with the year containing Depositor's required beginning date, is known as the "required minimum distribution" ("RMD") and is determined as follows:

(a) The RMD under paragraph 2(b) for any year, beginning with the year Depositor reaches age 70½, is Depositor's account value at the close of business on Dec. 31 of the preceding year divided by the distribution period in the uniform lifetime table in Regulations Section 1.401(a)(9)-9. However, if Depositor's designated Beneficiary is his or her surviving spouse, the RMD for a year shall not be more than Depositor's account value at the close of business on Dec. 31 of the preceding year divided by the number in the joint and last survivor table in Regulations Section 1.401(a)(9)-9. The RMD for a year under this paragraph (a) is determined using Depositor's (or, if applicable, Depositor and spouse's) attained age (or ages) in the year.

(b) The RMD under paragraphs 3(a) and 3(b)(i) for a year, beginning with the year following the year of Depositor's death (or the year Depositor would have reached age 70½, if applicable under paragraph 3(b)(i)) is the account value at the close of business on Dec. 31 of the preceding year divided by the life expectancy (in the single life table in Regulations Section 1.401(a)(9)-9) of the individual specified in such paragraphs 3(a) and 3(b)(i).

(c) The RMD for the year Depositor reaches age 70½ can be made as late as April 1 of the following year. The RMD for any other year must be made by the end of such year.

6. The owner of two or more traditional IRAs may satisfy the minimum distribution requirements described above by taking from one traditional IRA the amount required to satisfy the requirement for another in accordance with the Regulations under Section 408(a)(6).

Article V

1. Depositor agrees to provide Custodian with all information necessary to prepare any reports required by Section 408(i) and Regulations Sections 1.408-5 and 1.408-6.

2. Custodian agrees to submit to the Internal Revenue Service (IRS) and Depositor the reports prescribed by the IRS.

Article VI

Notwithstanding any other articles which may be added or incorporated, the provisions of Articles I through III and this sentence will be controlling. Any additional articles inconsistent with Section 408(a) and the related Regulations will be invalid.

Article VII

This Agreement will be amended as necessary to comply with the provisions of the Code and the related Regulations. Other amendments may be made with the Consent of Depositor and of Custodian.

Article VIII

1. Definitions. Terms used in the Agreement and the Adoption Agreement shall be defined as follows:

(a) "Adoption Agreement" means the account authorization form by which Depositor establishes the Account and enters into and agrees to be bound by all the terms and conditions of this Custodial Agreement.

(b) "Agreement" means this Custodial Agreement.

(c) "Beneficiary" means the person(s) designated by Depositor in a writing acceptable to Custodian to receive all or part of the Account balance if Depositor dies before receiving complete payment of such balance.

(d) "Children" means a person's children, and no other lineal descendants. Children includes an adopted child but not a foster child or a step child, even if there is a parent-child relationship.

(e) "Code" means the Internal Revenue Code of 1986, as amended.

(f) "Compensation" means wages, salaries, professional fees or other amounts derived from or received for personal services actually rendered (including, but not limited to, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips and bonuses) and includes earned income, as defined in Section 401(c)(2) of the Code (reduced by the deduction the self-employed individual takes for contributions to a self-employed retirement plan). For purposes of this definition, Section 401(c)(2) shall be applied as if the term trade or business for purposes of Section 1402 of the Code included service described in Section 1402(c)(6). Compensation does not include amounts derived from or received as earnings or profits from property (including but not limited to interest and dividends) or amounts not includible in gross income. Compensation also does not include any amount received as a pension or annuity or as deferred compensation. Compensation shall include any amount includible in the individual's gross income under Section 71 of the Code with respect to a divorce or separation instrument described in subparagraph (A) of Section 71(b)(2).

(g) "Consent of Depositor" means (a) express consent of Depositor or (b) Depositor receives notice of an amendment and Depositor does not, within thirty (30) calendar days, object to the amendment by sending notice to Custodian, in a form and manner acceptable to Custodian, to terminate this Custodial Account and distribute the proceeds, as so directed by Depositor.

(h) "Custodial Account" or "Account" means the account established by or on behalf of Depositor under Section 408(a) of the Code by executing the Adoption Agreement.

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(i) "Custodian" means Edward Jones.

(j) "Depositor" means the person for whom the Account is established by executing the Adoption Agreement. Depositor includes a Beneficiary who, following the death of Depositor, establishes, by executing a new Adoption Agreement, the Account in the name of the decedent Depositor, for the benefit of such Beneficiary. "Depositor", "Account Holder" and "Account Owner" may be used interchangeably.

(k) "Edward Jones" means Edward D. Jones & Co., L.P., a registered broker dealer and investment advisor, wholly owned by The Jones Financial Companies, L.L.L.P.

(l) "Issue" or "Descendants" means a person's descendants, per stirpes. Issue or Descendants includes a person's child(ren), grandchild(ren) and their descendants of all generations, including an adopted child and a child biologically descended from and acknowledged by any such descendant but not a foster child or a step child, even if there is a parent-child relationship.

(m) "Per stirpes" means assets shall be divided into as many equal shares as there are then-living children of a deceased individual and deceased children of the deceased individual with then-living descendants. The share of each deceased child with then-living descendants shall be further divided in the same manner. For such purpose the terms "children" and "descendants" include an adopted child and a child biologically descended from and acknowledged by any such descendant but not a foster child or a step child, even if there is a parent-child relationship.

(n) "Regulations" means the Federal Income Tax regulations, as amended.

(o) "Survival" or "Survive(s)" means that an individual Beneficiary has survived Account Owner by 120 hours. A Beneficiary shall not be entitled to assets from the Account unless the Beneficiary survives Account Owner by 120 hours. If the Beneficiary does not survive Account Owner by 120 hours, then he or she will be treated as having predeceased Account Owner.

2. **Contributions, Rollovers, Transfers and Conversions.** Depositor may make contributions, rollovers, and transfers to the Account, in amounts and at such time as may be as permitted by the Code and Regulations. Depositor shall designate whether each such deposit is a contribution, rollover, or transfer and Custodian shall have no responsibility for whether such designation is correct or permissible. Custodian reserves the right to refuse any contribution, rollover, transfer or conversion. Depositor is responsible for the determination of any excess contributions and the timely withdrawal thereof. The last day to make annual IRA contributions for a particular tax year is the deadline for filing the Depositor's federal income tax return, not including extensions, or such later date as may be determined by the Department of Treasury or the Internal Revenue Service for the taxable year for which the contribution relates. Depositor shall designate, in a form and manner acceptable to the Custodian, the taxable year for which such contribution is made. All contributions will be recorded as current year contributions unless Depositor provides timely notice to Custodian to the contrary. Custodian may terminate contributions for any reason, including if Custodian is notified of the death of Account Owner, or for traditional IRA accounts only, if Account Owner reaches the age of 70½. When the cumulative amount of contributions exceeds the IRS maximum allowable contribution limits for a given year, Custodian will have no obligation to accept further contributions for the year. Recurring contributions that exceed such limit will be reinstated automatically the following calendar year.

3. **Investments.** Investments shall be limited to those obtainable through Custodian in its regular course of business and are subject to such limits as Custodian may establish from time to time. Custodian shall execute transactions and shall be paid for such services from the Account. Unless Depositor and Custodian have entered into a Managed Account Program agreement or Advisory Solutions agreement, Custodian shall have no obligation or discretion to direct the investment of the Account and is merely authorized to acquire and hold the particular investments specified by Depositor. Custodian shall not question any such directions, review any securities or other property held in an Account, render advice to Depositor with respect to the investment, retention, or disposition of any assets held in the Account. Unless Depositor and Custodian have entered into a Managed Account Program agreement or Advisory Solutions agreement, Custodian will not act as investment advisor to Depositor. If Depositor fails to give investment directions to Custodian, or if such directions are not given in accordance with the policies and procedures established by Custodian, Custodian shall have the right to hold uninvested amounts in cash and may, but need not, establish a program pursuant to which cash amounts in excess of a stated dollar amount will be invested in an interest bearing account or a money market fund, pending directions of Depositor, and may change the terms and conditions of such program at any time.

4. **Death of Account Owner; Designation of Beneficiaries.**

(a) **Death of Account Owner.** Unless otherwise authorized by Custodian, upon the death of Account Owner and after Custodian receives requested documentation and information from the Beneficiary(ies), the assets in the Account will be transferred to a separate Account(s) held by Custodian in the name of the decedent Account Owner, care of the Beneficiary(ies). If required by Custodian, each Beneficiary shall enter into a new Adoption Agreement. Custodian may sell any asset that cannot be divided into negotiable amounts and distribute the proceeds of such sale. Custodian also may divide fractional shares in any manner it deems appropriate and distribute such shares or the proceeds of such sale. Custodian shall have no liability to any Beneficiary for any loss of or fluctuation in the value of assets held in the Account in which fluctuation or loss may occur after the death of Account Owner and before transfer of assets to Beneficiaries after receipt of all requested documentation and information. Custodian shall, in its sole discretion, determine a reasonable method for transferring or otherwise administering all assets, payments or dividends received into the Account after the death of Account Owners.

(b) **Designation of Beneficiary(ies).** Depositor may designate in a writing acceptable to Custodian any primary or contingent Beneficiary(ies). Any designation not received by Custodian during Depositor's lifetime shall be void. Any designation not in a form acceptable to Custodian may be rejected by Custodian. Any designation, if accepted by Custodian, will be effective as of the date executed by Depositor.

(c) **Beneficiary Designations of Investments.** Any investment for the Account which incorporates a beneficiary designation of its own, including, but not limited to fixed and variable annuity policies, must designate as its sole

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Beneficiary, Edward Jones & Co., L.P., Custodian, for the benefit of Account Owner.

(d) *Absence of Designation of Beneficiary(ies)*. If Depositor does not designate a Beneficiary, or if no Beneficiary Survives Depositor, or if all Beneficiaries disclaim their interest in the Account, upon Depositor's death, then the Beneficiary(ies) of the Account shall be deemed to be designated in the following order:

- (i) Depositor's surviving spouse; or if none, then
- (ii) Depositor's descendants, per stirpes; or if none, then
- (iii) Depositor's estate.

(e) *Death of Primary Beneficiary after Depositor*. If a Beneficiary does Survive Depositor, but dies before receiving his or her entire interest in the Account, his or her remaining interest in the Account shall be paid to the Beneficiary(ies) designated by the deceased Beneficiary in a writing acceptable to Custodian. If there is no Beneficiary designation of the deceased Beneficiary on file with Custodian, Custodian shall distribute the deceased Beneficiary's interest in the Account in the following order:

- (i) the deceased Beneficiary's surviving spouse; or if none, then
- (ii) the deceased Beneficiary's descendants, per stirpes; or if none, then
- (iii) the deceased Beneficiary's estate.

(f) *Time Limit for Beneficiary to Claim Assets*. If a Beneficiary does not claim such Beneficiary's share by September 30 of the year following Depositor's death, then Custodian may treat such Beneficiary as failing to Survive Depositor. Should the applicable September 30 not be a business day, the claim must be made by the next business day.

5. Distributions.

(a) *Form of Distributions*. Distributions may be made in cash or, if permitted under policies and procedures established by Custodian, in kind. Subject to the provisions of Article IV, Custodian shall make distributions from the Account at such time, in such manner and in such amounts as shall be requested by Depositor (or, in the event of Depositor's death, the Beneficiary). Any such request may be verbal or in writing on a form acceptable to Custodian, shall designate the assets to be sold to provide for the distribution, and shall be followed or accompanied by such documentation as shall be requested by Custodian. Depositor shall be solely responsible to pay all taxes and penalties that may become due as a result of any such distribution. Custodian shall not be responsible or be liable for the purpose, timing, sufficiency or propriety of any distribution or for distributions made in reasonable good faith.

(b) *Withholding*. All distributions shall be subject to applicable withholding, taxes and penalties. Custodian may require Depositor or his or her Beneficiary(ies) to provide a withholding election and taxpayer identification number before making any distribution from the Account.

(c) *Required Minimum Distributions (RMD)*. Custodian shall, if requested by Depositor, compute the RMD amount in accordance with Article IV of the Agreement. Depositor shall be responsible for causing the RMD amount to be withdrawn from the Account each year.

6. Powers, Duties and Obligations of Custodian.

(a) *Proxies*. Unless instructed otherwise by Depositor in writing, Custodian shall deliver to Depositor all prospectuses and proxies that may come into Custodian's possession by reason of its holding of securities in the Account in accordance with the standards of the Securities and Exchange Commission and the Financial Industry Regulatory Authority (FINRA).

(b) *Records and Reports*. Custodian shall furnish Account Owner with periodic brokerage statements, with an annual report prepared in accordance with the requirements of the Code, and with such information concerning required distributions as is prescribed by the Commissioner of the IRS. Unless Depositor files with Custodian a written statement of exceptions or objections to any report, record or information within 10 days after notice of the report, record or information, Depositor shall be deemed to have approved such report, record or information and Custodian shall be released from all liability to anyone (including any Depositor's spouse or Beneficiary) with respect to all matters set forth in the report, record or information as though the report, record or information had been settled by judgment or decree of a court of competent jurisdiction. No person other than Depositor may require an accounting.

(c) *Right to Request Judicial Assistance*. Custodian shall have the right at any time to apply to a court of competent jurisdiction for judicial settlement of its accounts or for determination of any questions of construction, which may arise, or for instructions. The only necessary party defendant to any such action shall be Depositor, but Custodian may join any other person or persons as a party defendant. The cost, including attorney's fees, of any such proceeding shall be charged as an administrative expense under Article VIII, Section 7, of this Agreement. Any request by Custodian for judicial assistance shall not be considered a waiver of Custodian's right to arbitrate as set forth in Article VIII, Section 15, of this Agreement.

(d) *Scope of Custodian's Duties*. Custodian shall have no duty to question, investigate or ascertain whether contributions, transfers, rollovers, distributions or any other Account activity comply with the Code or whether the duties of those directing the activity have been satisfied. Custodian shall not have any duty to question the directions of Depositor regarding the purchase, reinvestment, diversification, retention or sale of assets credited to the Account.

(e) *Scope of Custodian's Liability*. Custodian shall not be liable for any loss of any kind which may result from any action taken by it in accordance with the directions of Depositor or from any failure to act because of the absence of any such directions or resulting from Depositor's or investment advisor's control (whether by action or inaction) over the Account. Custodian shall not be liable for any taxes (or interest thereon) or penalties incurred by Depositor in connection with the Account or in connection with any transaction of the Account. Custodian is entitled to act upon any instrument, certificate or form it believes is genuine and believes is executed or presented by the proper person or persons, and Custodian need not investigate or inquire as to any statement contained in such document but may accept it as true and accurate. Custodian is not liable for any losses directly or indirectly caused by acts of war, acts of terrorism, force majeure, labor disputes, and exchange or market decisions including the suspension of trading, market volatility, and trade

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volume, or by government restriction. Depositor shall indemnify and hold harmless Custodian from any liability that may arise hereunder except liability arising from the gross negligence or willful misconduct of Custodian.

7. Fees, Expenses and Taxes.

(a) *Fees of Custodian.* Depositor authorizes Custodian to retain payment from the Account for its services as Custodian, in accordance with its Schedule of Fees as published from time to time and as in effect at the time such compensation becomes payable.

(b) *Expenses and Taxes.* All expenses incurred by Custodian in connection with the establishment and maintenance of the Account and its duties under this Agreement, including fees for brokerage services, the fees of attorneys and other persons providing services with respect to the Account, and all taxes and penalties of any kind imposed, levied or assessed with respect to the Account or the assets or income thereof shall be paid from the Account, unless otherwise paid by Depositor in accordance with policies and procedures established by Custodian.

(c) *Liquidation of Assets.* If Account Owner fails to pay any administrative fee, expense, or tax provided under this Agreement within a reasonable time after demand for such payment has been made by Custodian, or if the Account does not contain adequate cash to cover such items or cover the cost of investment purchases or brokerage fees provided under this Agreement, Custodian may liquidate without notice such of the assets of the Account as it deems appropriate for this purpose. If the liquidation of all assets in the Account is not sufficient, Custodian shall charge Account Owner for such excess amounts.

8. Notices. Any notices required under this Agreement may be (a) mailed, first class, to Depositor or any Beneficiary at the last address set forth in Custodian's records, and to Custodian at its principal place of business; (b) delivered by email to Depositor or any Beneficiary at the last email address set forth in Custodian's records, if Depositor or any such Beneficiary have elected to receive statements and/or other matters by email; (c) personally delivered to Depositor or any Beneficiary; or (d) posted on Custodian's public Web site and/or such Web site where Custodian provides Depositor information, if allowed by applicable law. Any such notice mailed (i) to Depositor or any Beneficiary shall be effective when mailed, and (ii) to Custodian shall be effective when actually received. All other notices shall be effective when posted or delivered. Custodian may, in its sole discretion and to the extent permitted by applicable law, including but not limited to the Code and Regulations, provide or accept notice in any other form, such as orally or by telephonic or electronic media.

9. Termination. This Agreement may be terminated by Depositor at any time by notice to Custodian with accompanying instructions regarding distribution of the Account. Distribution of the Account or transfer of the assets in the Account to another custodian shall be in accordance with this Agreement as soon as administratively practicable following receipt of such notice. Custodian may deduct the amount necessary to pay any outstanding fees, expenses and taxes with respect to the Account from such distribution or transfer. This Agreement shall terminate upon complete withdrawal or transfer of the assets of the Account or upon resignation of the Custodian.

10. Resignation. Custodian may resign for any reason by giving notice to Depositor thirty (30) calendar days in advance. Upon receipt of such notice, Depositor shall appoint a successor trustee or custodian and shall notify Custodian in writing of such appointment. Custodian shall transfer the balance of the Account as soon as administratively practicable following receipt of such notice. If Depositor fails to appoint a successor trustee or custodian within thirty (30) calendar days after the date Custodian gives notice of its resignation, Custodian may transfer the balance of the Account to a successor trustee or custodian which it chooses, or distribute such balance to Depositor in kind or may liquidate all or a portion of the assets and distribute in cash or in kind. Custodian may deduct the amount necessary to pay any outstanding fees, with respect to the expenses and taxes Account from such transfer or distribution. Custodian shall not be liable for any actions or failures to act neither on the part of any successor trustee or custodian, nor for any tax consequences Depositor may incur as a result of such transfer or distribution.

11. Successor or Substitute Custodian. If Custodian merges with, purchases or is purchased by another organization, such organization shall automatically become Custodian of the IRA established pursuant to this Agreement, but only if such organization is authorized under applicable law to be custodian of an IRA. No successor trustee or custodian shall have any obligation or liability for the acts or omissions of its predecessors. If the Commissioner of the IRS notifies that a substitute custodian must be appointed, then Depositor shall appoint a substitute custodian.

12. Amendments. The Custodian may amend this Agreement in any respect at any time (including retroactively), so that it may conform with applicable provisions of the Code, or with any other applicable law as in effect from time to time, or to make such other changes to this Agreement as the Custodian deems advisable. Any such amendment shall be effected by delivery to the Custodian and to the Depositor at his or her last known address, including an electronic address (as shown in the records of the Custodian), a copy of such amendment or a restatement of this Custodial Agreement. The Depositor shall be deemed to consent to any such amendment(s) if he or she fails to object thereto by sending notice to the Custodian, in a form and manner acceptable to the Custodian, within thirty (30) calendar days from the date a copy of such amendment(s) or restatement is delivered to the Depositor to terminate this Custodial Account and distribute the proceeds, as so directed by the Depositor.

13. Additional Agreement Provisions.

(a) *Prohibited Transactions.* Depositor, spouse of Depositor or Beneficiary may not assign the Account or use it, or any portion of it, as security for a loan or borrow from the Account. Neither Custodian or Depositor nor any other person or institution shall engage in any prohibited transaction, within the meaning of Section 4975 of the Code, with respect to Depositor's Account.

(b) *Prohibition against Assignment of Benefits.* Except to the extent otherwise required by law, none of the benefits, payments or proceeds held in the Account on behalf of Depositor, spouse of Depositor or Beneficiary shall be subject to the claims of any creditor of Depositor, spouse or Beneficiary, nor shall Depositor, spouse or Beneficiary have

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any right to anticipate, sell, pledge, option, encumber or assign any of the benefits, payments or proceeds to which he or she is or may be entitled under the Agreement.

(c) *IRS Model Form.* This Form 5305-A is a model Custodial Account Agreement that meets the requirements of Section 408(a) of the Code and has been automatically pre-approved by the IRS. A traditional IRA is established after the Adoption Agreement is fully executed by the Depositor and entered in the records of the Custodian and must be completed no later than the due date of the Depositor's income tax return for the tax year (without regard to extensions). This account must be created in the United States for the exclusive benefit of the Depositor or the Depositor's Beneficiary(ies).

(d) *Spousal Account.* Contributions to an Account for a non-working spouse must be made to a separate Account established by the non-working spouse.

(e) *Minor Accounts.* A parent or legal guardian may execute the Adoption Agreement on behalf of a Depositor who is a minor. In the event an IRA is established for a minor, the parent or legal guardian is authorized, on behalf of such minor, to take whatever actions are afforded Depositor of the IRA under the terms of this Agreement, other than designating a Beneficiary. Custodian has no obligation or duty to investigate, review, or question the action of the parent or legal guardian. The parent or legal guardian, by establishing an Account on behalf of a minor, agrees to indemnify and hold harmless Custodian and its affiliates from any losses, claims or damages, including court costs and reasonable attorney fees incurred by Custodian or its affiliates, as a result of or in connection with establishing or maintaining the Account in the name of the minor.

(f) *Depositor's Representation and Warranty.* Depositor represents and warrants to Custodian that any information provided to Custodian by Depositor with respect to this Agreement or in connection with the Account is complete and accurate. Custodian may rely on, and has no duty to investigate or inquire about, any such information.

(g) *Depositor indemnifies Custodian.* Depositor shall indemnify and hold Custodian harmless from any claims, losses, charges, expenses or other liability arising or resulting from (i) the information provided by Depositor, (ii) Depositor's failure to maintain the confidentiality of Depositor's personal identifying information, (iii) any subsequent notice to third party purporting to be Custodian, or Depositor, or (iv) by reason of any action or inaction by Depositor.

14. *Governing Law.* Except to the extent preempted by federal law, this Agreement, its validity, effect, construction, administration and application, and the parties' respective rights and duties, shall be governed by the laws of the State of Missouri without giving effect to any choice of law or conflict of laws provisions. Any property rights created or associated with any account that is established under this Agreement, including rights of spouses, as well as the rights of their legal and personal representatives, heirs, distributees and successors, shall be governed by the laws of the State of Missouri, regardless of any party's residency or domicile and without regard to the community property laws of any state.

15. *Arbitration Agreement.*

(a) THIS AGREEMENT CONTAINS A BINDING, PRE-DISPUTE ARBITRATION CLAUSE THAT MAY BE ENFORCED BY THE PARTIES. By signing the Adoption Agreement I agree as follows:

(1) All parties to this Agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.

(2) Arbitration awards are generally final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.

(3) The ability of the parties to obtain documents, witness statements and other discovery is generally more limited in arbitration than in court proceedings.

(4) The arbitrators do not have to explain the reason(s) for their award.

(5) The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

(6) The rules of some arbitration forums may impose time limits for bringing a claim in arbitration. In some cases, a claim that is ineligible in arbitration may be brought in court.

(7) The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.

Any controversy arising out of or relating to any account from its inception, any business, transactions or relationships Depositor has now, had in the past or may in the future have with Custodian, its current and/or former officers, directors, partners, agents, affiliates, and/or employees, this Agreement, or to the breach thereof, or transactions or accounts maintained by Depositor with any of Custodian's predecessor or successor firms by merger, acquisition or other business combinations shall be settled by arbitration in accordance with the FINRA Code of Arbitration Procedure then in effect. Depositor's demand for arbitration shall be made within the time prescribed by those rules and will be subject to the applicable state or federal statutes of limitations as though filed in court. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

(b) *Class Actions.* No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action, or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this Agreement except to the extent stated herein.

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Appendix 2

Edward Jones

CUSTOMER NAME: ELLISON, ELMORE E DESTINATION: NEW ACCOUNTS
 ACCOUNT NUMBER: 870-96627 BRANCH #: 08709 DATE: 03/08/2010

**EDWARD JONES INDIVIDUAL RETIREMENT ACCOUNT
 AUTHORIZATION, ADOPTION AGREEMENT and BENEFICIARY DESIGNATION**

A. TYPE OF ACCOUNT (INDICATE ONE) Traditional IRA ROTH IRA SEP-IRA SIMPLE IRA

B. ACCOUNT HOLDER INFORMATION:

Account Holder Name ELMORE E ELLISON
 Address 19906 114TH ST EAST City BONNIE LAKE State WA ZIP 98391-7759
 Date of Birth 02 / 22 / 1931 Social Security Number 497 - 30 - 7803

C. BENEFICIARY DESIGNATION:

Beneficiary Percentage

PRIMARY BENEFICIARIES:

LOUISE I ELLISON	SPOUSE? (Y/N): Y	100.00%
19906 114TH ST E		
BONNIE LAKE	WA 98391 0000	
DATE OF BIRTH/TRUST: 09/14/1937	SSN/TAX ID #: S-533366700	

END OF BENEFICIARY DESIGNATION

I hereby designate the above beneficiary(ies) to revoke any or all prior designations. I understand that if I am married and reside in a community or marital property state, a portion of this account may be subject to such state's community or marital property laws at the time of my death.
 If you are married and live in a community property state - and you are NOT designating your spouse as sole beneficiary, your spouse must sign and witness the statement below:
 I am the spouse of the above named Account Holder. If any portion of this account is determined to be community or marital property, I consent to and join in the Account Holder's designation of a beneficiary other than me. I agree to convey, upon death of the Account Holder, my interest in the community or marital property to the designated beneficiary(ies).

D. IMPORTANT INFORMATION ABOUT YOUR BENEFICIARY DESIGNATIONS:

I understand that if I designate a person and his or her "children," "issue," or "descendants" as beneficiaries of all or a portion of my account, and if it becomes necessary for Edward Jones to distribute assets to living children or their descendants, then Edward Jones will require a judicial determination of the persons entitled to receive a distribution of assets before it delivers assets to any person. I understand that it will require a proceeding in court to make such a legal determination.

E. ACCOUNT HOLDER'S ACCEPTANCE:

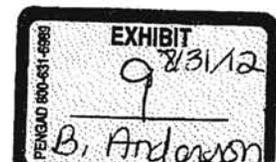
- Under penalties of perjury, I certify that the number shown on this form is my correct Taxpayer Identification Number.
- I have received and read the Edward Jones Retirement Account Agreement Disclosure, and Self-Directed Individual Retirement Account Custodial Agreement, Disclosure and Schedule of Fees and appoint Edward Jones as custodian in accordance with the terms and conditions contained within.
- I understand that this document allows my financial advisor to accept my verbal instructions to initiate and/or terminate certain services.
- I understand that any annual and/or termination custodial fees will automatically be deducted from my account and also understand the annual fee is due if the account is open for any portion of a calendar year.
- I understand that (1) federal law requires Edward Jones to verify my identity when I open an account; (2) I must provide my name, address, date of birth, and other information that personally identifies me, such as a social security number; (3) if requested, I must present to Edward Jones a government issued identification document; and, (4) Edward Jones may verify the information I provide with a third party service provider. I agree to provide the required information and documents to Edward Jones and agree to the verification of such information.
- THESE CONTRACTS CONTAIN A BINDING ARBITRATION PROVISION, ON PAGE 8, PARAGRAPH 19 OF THE EDWARD JONES RETIREMENT ACCOUNT AGREEMENT, WHICH MAY BE ENFORCED BY THE PARTIES.

Elmore E. Ellison 3/12/10 N/A
 Signature of Account Holder Date Signature of Spouse (See Spousal Consent in Section C Above) Date
 (If Account Holder is deceased, signature of beneficiary is required.)

Signature of Witness (Only if Spousal Consent is Required) Date



2010030825492P1450101US
 SGLAUTHIRA
 DOC-NO:100308-25492 SECTOR CODE: 005



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END OF BENEFICIARY DESIGNATION

* I hereby designate the above beneficiary(ies) to revoke any or all prior designations. I understand that if I am married and reside in a community or marital property state, a portion of this account may be subject to such state's community or marital property laws at the time of my death.

If you are married and live in a community property state - and you are NOT designating your spouse as sole beneficiary, your spouse must sign and witness the statement below:

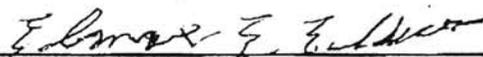
I am the spouse of the above named Account Holder. If any portion of this account is determined to be community or marital property, I consent to and join in the Account Holder's designation of a beneficiary other than me. I agree to convey, upon death of the Account Holder, my interest in the community or marital property to the designated beneficiary(ies).

~~D. IMPORTANT INFORMATION ABOUT YOUR BENEFICIARY DESIGNATIONS~~

* I understand that if I designate a person and his or her "children," "issue," or "descendants" as beneficiaries of all or a portion of my account, and if it becomes necessary for Edward Jones to distribute assets to living children or their descendants, then Edward Jones will require a judicial determination of the persons entitled to receive a distribution of assets before it delivers assets to any person. I understand that it will require a proceeding in court to make such a legal determination.

~~E. ACCOUNT HOLDER'S ACCEPTANCE~~

- * Under penalties of perjury, I certify that the number shown on this form is my correct Taxpayer Identification Number.
- * I have received and read the Edward Jones Retirement Account Agreement Disclosure, and Self-Directed Individual Retirement Account Custodial Agreement, Disclosure and Schedule of Fees and appoint Edward Jones as custodian in accordance with the terms and conditions contained within.
- * I understand that this document allows my financial advisor to accept my verbal instructions to initiate and/or terminate certain services.
- * I understand that any annual and/or termination custodial fees will automatically be deducted from my account and also understand the annual fee is due if the account is open for any portion of a calendar year.
- * I understand that (1) federal law requires Edward Jones to verify my identity when I open an account; (2) I must provide my name, address, date of birth, and other information that personally identifies me, such as a social security number; (3) If requested, I must present to Edward Jones a government issued identification document, and, (4) Edward Jones may verify the information I provide with a third party service provider. I agree to provide the required information and documents to Edward Jones and agree to the verification of such information.
- * **THESE CONTRACTS CONTAIN A BINDING ARBITRATION PROVISION, ON PAGE 8, PARAGRAPH 19 OF THE EDWARD JONES RETIREMENT ACCOUNT AGREEMENT, WHICH MAY BE ENFORCED BY THE PARTIES.**


 Signature of Account Holder (If Account Holder is deceased, signature of beneficiary is required.)

3/12/10
 Date

N/A
 Signature of Spouse (See Spousal Consent in Section C Above)

 Date

 Signature of Witness (Only if Spousal Consent is Required)

 Date



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Appendix 3

HONORABLE HOLLIS R. HILL
Noted: November 16, 2012 at 10 a.m.
With oral argument

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

The Estate of
ELMORE E. ELLISON,
Deceased.

Case No.: 11-4-03139-7 KNT
DECLARATION OF THERESA H.
WANG

I, Theresa H. Wang, am over the age of 18, have personal knowledge of all the facts stated herein and declare as follows:

1. I am an attorney at the law firm of Stokes Lawrence, P.S., and am one of the attorneys representing the Estate of Elmore E. Ellison in the above-captioned action.
2. Attached as Exhibit A are true and correct copies of excerpts from the Deposition of William Vaughn Anderson dated August 31, 2012, including Exhibit 7 to the Anderson Deposition. Mr. Anderson was Elmore Ellison's Edward Jones broker. I took the deposition and Mr. Hawkes, counsel for the Petitioners, also examined Mr. Anderson.
3. Attached as Exhibit B is a true and correct copy of the Last Will and Testament of Elmore E. Ellison dated April 19, 2012.
4. Attached as Exhibit C is a true and correct copy of the Edward Jones Traditional Individual Retirement Account Custodial Agreement.

DECLARATION OF THERESA H. WANG - 1
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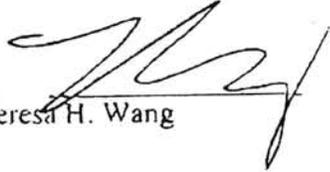
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STOKES LAWRENCE, P.S.
1420 FIFTH AVENUE, SUITE 1000
SEATTLE WASHINGTON 98101-2301
(206) 626-6900

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1 I declare under penalty of perjury under the laws of the State of Washington that the
2 foregoing is true and correct.

3 EXECUTED at Seattle, Washington this 18 day of October, 2012.

4
5  _____
6 Theresa H. Wang

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Exhibit A

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

The Estate of,)
)
 ELMORE E. ELLISON,)
)
) No. 11-4-03139-7 KNT
 Deceased.)
)

DEPOSITION UPON ORAL EXAMINATION OF
WILLIAM VAUGHN ANDERSON

2:23 P.M.

August 31, 2012

1420 Fifth Avenue, Suite 3000

Seattle, Washington

Johanna Rau, CCR

1 WILLIAM VAUGHN ANDERSON, witness herein, having been
2 duly sworn by the Court Reporter,
3 testified under oath as
4 follows:

6 EXAMINATION

7 BY MS. WANG:

8 Q Good afternoon. How are you doing today?

9 A Just fine. Thank you.

10 Q Good. So my name is Theresa Wang. And I'm here
11 on behalf of the personal representative of The Estate of
12 Elmore Ellison. And I am here today to take your deposition
13 to determine the scope of your knowledge with regard to the
14 claims in the case that is pending.

15 A Okay.

16 Q Is that your understanding of why you are here
17 today?

18 A It is.

19 Q Would you please state your name and spell your
20 last for the record?

21 A Yes. It's William Vaughn Anderson,
22 A-n-d-e-r-s-o-n.

23 Q And have you been deposed before?

24 A Yes.

25 Q On what occasion?

1 And you held that position for six years, you
2 said?

3 A I was with UBS for six years as branch manager and
4 executive director.

5 Q Okay. So in 2009, what was your position?

6 A At UBS?

7 Q Yes.

8 A Executive director and branch manager.

9 Q In 2010?

10 A Edward Jones financial adviser. In December of
11 '09, actually.

12 Q And when, if at all, did you change positions at
13 Edward Jones?

14 A I have not changed positions at Edward Jones.

15 Q Okay. Describe for me your responsibilities as
16 financial adviser at Edward Jones.

17 A My responsibilities would include investing assets
18 for clients, maintaining relationships, giving investment
19 advice.

20 Q Anything else?

21 A There are probably a hundred things. Those are
22 the primary things.

23 Q Do you oversee or manage any staff?

24 A Yes.

25 Q Who do you oversee or manage?

1 invested.

2 Q And describe for me the standard practice, if any,
3 for the designation of beneficiaries?

4 A Beneficiaries are generally designated on the
5 application form.

6 Q What is the procedure for filling out the
7 application form?

8 A That's filled out with the client.

9 Q So the Edward Jones agent -- a company is
10 supplying it and filling it out?

11 A No. The client gives us the information that they
12 want as their beneficiary designations. I actually put it
13 on the form.

14 Q Okay. And what, if any, events trigger review of
15 the beneficiary form?

16 A Well, the death of the owner of an IRA.

17 Q Anything else?

18 A Is a triggering event?

19 Q Correct.

20 A Would you explain to me what you mean by
21 "triggering event" in this case.

22 Q An event that causes Edward Jones to pull up the
23 beneficiary form and take a look at it.

24 A Okay. When a person passes away.

25 Q Okay.

1 A In my practice, I have regular communication with
2 clients either via phone or in person. And by regular, I
3 mean, probably between six and ten communications a year
4 either by phone or in person. Elmore and Louise live out in
5 the Bonney Lake area, and so I would see them probably every
6 three to six months, but have a phone conversation more
7 often than that.

8 Q And did you consider Mr. Ellison a friend?

9 A I considered Mr. Ellison someone that I liked and
10 respected and enjoyed his company.

11 Q Okay. What, if anything, did Mr. Ellison tell you
12 about Patricia Harmon, Christine Baklund, and Michael
13 Golden?

14 A Those were his stepchildren, Louise's children.
15 And he explained to me how good those children had been to
16 him and that his assets were supposed to transfer to those
17 children. Also a grandchild.

18 MR. HAWKES: Objection; nonresponsive.

19 Q (By Ms. Wang) Had you ever met Patricia Harmon,
20 Christine Baklund, and Michael Golden?

21 A I had met Patricia, and I actually had met the
22 other two just prior to Elmore's death. I mean, within a
23 few days of his death.

24 Q How would you characterize Patricia and Elmore's
25 relationship?

1 Q Oh, no. Please continue.

2 A The assets that he and Louise had together were to
3 be passed on to Michael and Christina and Patricia.

4 Q And did this include any accounts at Edward Jones?

5 A It included every account at Edward Jones.

6 Q I see. Could you please, to the best of your
7 knowledge, sitting here today, tell me which accounts those
8 were for?

9 A Yes. There was one account that was just a
10 traditional brokerage account, and there was another account
11 that was an individual retirement account.

12 Q And what, if anything, can you tell me about why
13 those accounts did not list Patricia, Christina, and Michael
14 as the beneficiaries?

15 A Well, Mrs. Ellison was named as the beneficiary on
16 the account at the time the account was opened. And
17 Mr. Ellison believed that he had taken care of the asset
18 transfer that would occur at his death so that in his will
19 those assets were to go to Michael, Christina, and Patricia.
20 He believed he had that taken care of in the will that he
21 drafted.

22 MR. HAWKES: Objection; nonresponsive. No
23 foundation.

24 Q (By Ms. Wang) And what is the basis for your
25 understanding of what Mr. Ellison wanted?

1 A Personal conversation with Mr. Ellison.

2 Q And how long did you discuss his estate planning
3 with him?

4 A We talked about it at some point after
5 Mrs. Ellison passed away. He made it clear to me what his
6 wishes were, and he followed up with that with a will that
7 he did discuss with me.

8 Q Could you explain to me, based on your
9 expertise -- no, just your employment and your experience,
10 did Mr. Ellison take all reasonable steps to ensure that his
11 stepchildren would inherit the IRA account?

12 A I believe he thought he took care of everything
13 via the will.

14 Q Did he ever ask for your advice on passing these
15 funds to his stepchildren?

16 A No.

17 Q Did you ever offer advice in passing?

18 A When I talked to him -- and this was very close to
19 the point in time where he was passing away, heavily
20 medicated, very ill man -- I did ask him about it. And he
21 was convinced he had it taken care of based on the will he
22 had drawn. I did not see the will.

23 Q Okay. And what, if anything, did Mr. Ellison tell
24 you about his biological daughters?

25 A That he had no relationship with them. And I

1 think it had been 20 years or more since he had heard or had
2 any communication with them, that his relationships were
3 with Michael, Christina, and Patricia.

4 Q Can you describe for me any steps that you took to
5 help Mr. Ellison effectuate his intent to pass the IRA
6 account to his stepchildren?

7 A Well, I think the -- the assumption he was under
8 was that he had taken it -- taken care of it by will.

9 MR. HAWKES: Objection; unresponsive.

10 Q (By Ms. Wang) You can go ahead.

11 A Just in conversations, it was very clear that he
12 wanted the assets that he and Louise had accumulated
13 together, had together, were held in joint accounts, they
14 were each other's beneficiaries on their IRAs. And his
15 assumption was that if Louise was deceased, that the assets
16 would then transfer via his will to his three stepchildren.

17 Q And earlier you mentioned that you had met with
18 Elmore's three stepchildren shortly before his death.

19 A Correct.

20 Q Could you tell me --

21 A Sorry. (Cellular phone ringing.)

22 Q So you had mentioned that you had met with the
23 three stepchildren shortly before Mr. Ellison's death.

24 A Correct.

25 Q Would you tell me what the purpose of that meeting

1 not marked with the numbers. So can you identify them by
2 title or something like that?

3 MS. WANG: Sure.

4 Q (By Ms. Wang) Exhibit Number 1, which is titled
5 Edward Jones Traditional Individual Retirement Account
6 Custodial Agreement...

7 Mr. Anderson, even though I just read the title,
8 which is pretty descriptive in and of itself, can you
9 describe the document before you?

10 A It is a standard Edward Jones form. It is titled
11 "Traditional Individual Retirement Account Custodial
12 Agreement."

13 Q And what is Edward Jones' common practice in
14 regard to this document?

15 A This document is used and given to clients when
16 retirement accounts are opened.

17 Q Do clients take this document home and review it?

18 A Yes.

19 Q Is it common for clients to negotiate terms of
20 this contract?

21 A It's nonnegotiable.

22 Q Nonnegotiable?

23 A Nonnegotiable.

24 Q Is it fair to say it's a boilerplate contract?

25 A It is.

1 A And so she was just letting me know it doesn't
2 open until 10:00. And I'm saying, "Okay. I will see you
3 there."

4 Q All right. Let's move on to Exhibit Number 5.

5 A (Witness complies.)

6 Q Exhibit Number 5 is entitled the "Last Will and
7 Testament of Elmore."

8 Do you recognize the document in front of you?

9 A No.

10 Q Have you ever seen this document before?

11 A Not that I know of.

12 Q Have you discussed the content of the document
13 with Mr. Ellison at all?

14 A Yes.

15 Q But you never actually reviewed what is marked as
16 Exhibit 5?

17 A No.

18 Q Okay. And what, if anything, was your
19 understanding of Mr. Ellison's estate plan?

20 A Mr. Ellison's estate plan was to leave the assets
21 that he and Louise accumulated to Patricia and Michael and
22 Christina as well as a partial portion of the assets to go
23 to his granddaughter, which is Christina's daughter, because
24 they made a commitment to her. And I don't know the details
25 of the commitment, for a portion of her college education.

1 Q Okay. And what, if anything, was your
2 understanding of what Mr. Ellison intended to leave his
3 biological daughters?

4 A My understanding was they were to receive nothing.

5 Q Thank you. Okay. Let's look at what has been
6 marked as Exhibit Number 6.

7 A (Witness complies.)

8 Q Do you recognize the document before you?

9 A Yes.

10 Q Could you tell me what it is?

11 A Yeah. This an account -- again, it's an
12 authorization from Patricia authorizing us to open an
13 account in the name of the estate of Elmore Ellison.

14 Q And is this the account that you referred to
15 earlier that you had set up on behalf of the stepchildren
16 pursuant to Mr. Ellison's direction?

17 A This is -- when one of our clients passes away, we
18 set up what's called an estate account, and it is run by the
19 personal representative or executrix, whatever lawyer
20 terminology y'all use this day and age. And Patricia is the
21 executrix of Elmore's estate. She's the authorized person
22 on the account. So this account is where his nonretirement
23 account assets flowed upon his death.

24 Q I see. Okay. Let's look at Exhibit Number 7.

25 A (Witness complies.)

1 Elmore and we knew that the estate was to pass to his
2 stepchildren -- this isn't the sort of thing that goes in
3 and checks your accounts. It's the sort of thing that she
4 put "Estate" in, and I'm sure because it was on her mind
5 that we were working on the estate, and it generated a
6 report that shows how much needed to be taken out before the
7 end of the year.

8 Q Okay. So is it a fair statement to say that your
9 assistant put the estate designation in there based on your
10 understanding that that was the beneficiary of the IRA
11 account?

12 A Yes.

13 Q Okay. Thank you. Okay. And finally, I believe,
14 let's take a look at Exhibit Number 8.

15 A Mm-hm (answers affirmatively).

16 Q Does this letter look familiar to you?

17 A No.

18 Q Okay.

19 A May I tell you why?

20 Q Yes. Please do.

21 A Anytime there is any communication between a
22 financial adviser at Edward Jones and a law firm, the
23 communications are immediately faxed and scanned into the
24 computer to our legal department.

25 Q Okay.

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1 (Pause in proceedings.)

2 MS. WANG: Mr. Anderson, I want to thank you
3 so much for joining us today and taking the time to come
4 chat with me. This concludes my questioning. And I don't
5 know if Mr. Hawkes has any questions for you.

6 MR. HAWKES: I do, actually. Thank you.

7

8 EXAMINATION

9 BY MR. HAWKES:

10 Q Mr. Anderson, you know that I represent the
11 biological children of the decedent Mr. Ellison?

12 A Yes, sir.

13 Q Do you know that?

14 A I know that as of whenever we first got together
15 here.

16 Q You knew that today. Okay.

17 A I knew that today. Yes, sir.

18 Q All right. There are two documents that appear to
19 me to be logs of your contacts or attempted contacts with
20 Mr. Ellison.

21 A Okay.

22 Q I'm trying to identify the numbers here. Okay.

23 Exhibit 2 has the cover page entitled "Contact
24 Activity & Notes for Account" so-and-so, "Lawsuit: Ellison
25 vs. Edward Jones."

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1 records?

2 MS. WANG: Object to the form.

3 MR. LEMPRIERE: Memory of what?

4 Q (By Mr. Hawkes) Memory of actually meeting
5 Mr. Ellison to open an IRA account after his wife died.

6 A I remember Elmore Ellison bringing me Louise
7 Ellison's death certificate so that we could transfer assets
8 from Louise to Elmore upon -- he was the named beneficiary
9 on Louise's IRA account. So, yes, sir, I do have a memory
10 of meeting with Elmore and receiving the death certificate
11 from Elmore.

12 Q Okay. But according to your records that would
13 have been on or about 5/28/10, right?

14 A Yes.

15 Q And you would not have an independent recollection
16 of that specific date but your record reflects that?

17 A Sir, this is, what, over two years ago, and I
18 honestly don't remember my days, you know, 774 days ago.
19 I'm sorry. I don't remember what I was doing that day.

20 Q You actually calculated those days right now?
21 That's very impressive.

22 A I made it up.

23 Q Well, thank you.

24 MR. LEMPRIERE: At a convenient time,
25 Counsel, I would like to go off the record for a moment.

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1 clients', I assume, IRA account?

2 A Yes, sir.

3 Q Okay. And you are familiar with its contents?

4 A It's a boilerplate contract. I certainly don't
5 read it every time a client opens an account.

6 Q I would expect not. But you are trained in that
7 contract, I assume, when you start Edward Jones? They teach
8 you about those things?

9 A Yeah. Generally familiar with the terminology and
10 so forth in the contract. I'm not an expert on the contract
11 nor any other contract for that matter.

12 Q You are not an expert on any Edward Jones
13 contract?

14 A Sir, I'm not an attorney. I would think only
15 attorneys are experts on contracts.

16 Q Okay. So you would not expect that a client for
17 whom you are the financial adviser would expect you to know
18 boilerplate contracts like this?

19 MR. LEMPRIERE: I will object to the form of
20 the question, but you can answer.

21 THE WITNESS: I'm sorry. Would you tell me
22 that again, please.

23 Q (By Mr. Hawkes) I will just rephrase it.

24 Do you believe that clients who rely on you as a
25 financial adviser expect you to know the terms of the

1 Q Okay. What can you testify about remembering the
2 next time after the meeting at which he handed you a death
3 certificate? What can you remember about that meeting?

4 A I don't remember any specific meetings beyond the
5 meeting where I was handed the death certificate.

6 Q Okay. Do you know if Mr. Ellison executed any
7 further agreements with Edward Jones after Louise passed
8 away?

9 A Everything that was executed by Elmore you have in
10 your possession.

11 Q Again, I'm asking just about your memory. We do
12 have records.

13 But do you have any memory of him executing any
14 sort of agreement with Edward Jones after Louise passed
15 away?

16 A No.

17 Q Okay. You testified on direct exam today that it
18 was your understanding that he thought that his will gave
19 everything to his stepchildren and nothing to his bio
20 children; is that correct?

21 A Yes. That is correct.

22 Q Okay. Do you have any specific memory of
23 Mr. Ellison telling you verbally or in writing or any other
24 way telling you that at any particular time, any specific
25 memory of him saying, "This is what I want"?

1 A Yes.

2 Q How many such occasions were there?

3 A There was at least one occasion. It was an
4 occasion where we had discussed what he wanted to have
5 happen to his assets when he passed away. He believed he
6 had it taken care of by his will. He did not want any
7 assets to go to his children with whom he told me
8 specifically he had no relationship.

9 Q Did he tell you that his children had accused him
10 of abuse and that's why he had no relationship with them?

11 A I have no knowledge of that.

12 Q Did he tell you anything about why he had no
13 relationship with his bio children?

14 A No, sir.

15 Q Did you ask him?

16 A No, sir.

17 Q Did it seem odd to you that a client would not
18 want to leave something to his biological children?

19 A Not in the least.

20 Q That's common, in your experience?

21 A In my experience, people do all kinds of things.

22 Q Okay. Is it your testimony that you and Elmore
23 didn't have actually a conversation about why that was so?

24 A That's correct.

25 Q You just heard him say, "I want to leave

1 everything to my stepkids and nothing to my kids" and you
2 didn't question him about that; is that right?

3 A I did not feel it was my place to question him, so
4 I did not question him on that.

5 Q Why did that topic come up in your conversation?

6 A The topic came up because he wanted to make sure
7 that I understood what his wishes were for his assets, both
8 in the nonretirement account and in the retirement account,
9 he wanted those assets to go to his stepchildren with whom
10 he did have a relationship with.

11 Q What was the reason for the meeting at which he
12 said that?

13 A What was the purpose of the meeting?

14 Q Correct.

15 A I don't recall.

16 Q Do you recall where the meeting was?

17 A Yes.

18 Q Where?

19 A At his home in Bonney Lake.

20 Q Do you recall whether it was before or after
21 Louise died?

22 A It would have been after Louise died.

23 Q Would it have been before he opened the advisory
24 IRA account?

25 A I don't recall.

1 me than the assets they have. They're human beings. They
2 become friends. They become more than, you know, dollars
3 and cents, and Elmore was a lot more than dollars and cents,
4 and I valued that relationship.

5 Q Again, I agree with you. That's the way my life
6 is too.

7 My question, though, is, at any of the meetings
8 following Louise's death, did you have any discussion with
9 Elmore about his beneficiary designation, his will, or his
10 estate plan?

11 A Yes.

12 Q Specific memory?

13 A Specific memory. Yes.

14 Q Okay. Tell us what is the earliest specific
15 memory you have about such a conversation after Louise died?

16 A After Louise died and the death certificate was
17 delivered by Elmore in person to my office, he talked about
18 wanting to make sure that his stepchildren inherit the
19 assets that he and Louise had.

20 In subsequent conversation with Elmore, I have
21 described the last meeting I had with Elmore, which was a
22 few days before he passed away, the day that I met the three
23 stepchildren and got their information. In a prior
24 conversation that I had with Elmore -- this was after he
25 became sick but before he was basically on his death bed --

1 we talked about the assets that he had in his IRA at that
2 point, and he believed that he had the stepchildren covered
3 by that will.

4 And I think that will may be in these documents
5 here. I don't know. I don't remember what all is in here.
6 Y'all have had me flipping back and forth too much. But,
7 yes, I do remember specifically having that conversation.

8 Q Okay. Do you remember specifically what he said
9 that led you to that belief?

10 A Well, he said I need to meet with his three
11 stepchildren and get their information, which is what led to
12 my having a meeting with Patricia, Michael, and Christina --
13 And Christina's daughter was also at that meeting -- to get
14 the information so that we could open the account so that we
15 could transfer the assets when he died.

16 I mean, the guy knew he was going to die. Just
17 like the rest of us, we just don't know when. He knew when
18 was probably closer for him than the rest of us.

19 Q Did he give you, or do you know of the existence
20 of any writings that say that?

21 A That say what?

22 Q That say that he wanted the Edward Jones accounts
23 to go to his stepchildren?

24 A I'm not aware of anything in writing other than
25 the will that he -- that he had done in order to make that

1 happen. And he believed he had that covered. I asked him
2 specifically about it, and he said -- and he said, "Don't
3 worry about it. It's covered by the will."

4 Q What did you ask him specifically? You said that
5 you asked him specifically about it. What did you ask him
6 specifically?

7 A Beneficiary designations.

8 Q What did you say to him when you asked him about
9 it?

10 A Just that we need to -- that he -- I asked him
11 about making sure that he had things set up so that the
12 assets flowed the way he wanted them to flow.

13 Q Those are very close to the words you asked him?
14 I'm just saying, I know you can't remember the exact words,
15 but I want as close as you can.

16 A I can't remember exactly. I mean, if nothing is
17 clear from the questions these lawyers have asked me today,
18 Elmore wanted the assets that he and Louise had to go to his
19 stepchildren.

20 Q That's your belief?

21 A It's not my belief. It's the truth. I heard
22 Elmore say that. It's not a negotiable thing. It's not.
23 This is what he asked for. It's what he wanted.

24 Q Okay. And my question is, what did he say
25 specifically, and when did he say that?

1 A Again, sir, I met -- I talked to Elmore after he
2 found out he had Stage IV cancer. Before he was on his
3 deathbed, he asked me to meet with his stepchildren to get
4 their information so that they would have accounts to
5 receive the assets when he died, and asked me to open
6 inherited or decedent IRA accounts, which we did.

7 On that same day that I got the information from
8 the stepchildren, because Elmore asked me to get that
9 information from them and have a meeting with them and let
10 them know what was going to happen, I went and saw Elmore,
11 and he was on his deathbed at that time.

12 Q And is that at that time or the last time, or --

13 A The last time I saw him. And I think it was only
14 a few days, maybe a week before he did die.

15 Q And at that meeting he was not competent or what?

16 A I'm not a doctor, sir.

17 Q In your opinion, was he competent to make
18 decisions like that?

19 A What I think is that he was competent when he
20 asked me to get the information, which is probably a week or
21 ten days prior to me actually getting the information. But
22 his health deteriorated very rapidly. I don't know how else
23 to answer your question, sir.

24 Q I believe part of your statement was that he asked
25 you specifically about opening an IRA account with Edward

1 Jones for each of the three stepkids.

2 A He wanted -- I only had met Patricia at this
3 point.

4 Q Right.

5 A He asked me to have a meeting with the family to
6 open accounts so that when he died those accounts would be
7 up and running. The reason it was important for me to meet
8 with them all together is they are scattered out. Patricia
9 was living in Oregon at the time. It's not like I could,
10 you know, say, "Come swing by here and sign these
11 documents."

12 Q Okay.

13 A I mean, there was a reason I needed to see them
14 all together.

15 Q Now, the reason I'm probing is it seems unusual to
16 me that a client nearing death would suggest that his
17 children should open an IRA account with you rather than
18 some more general statement about what he wants to happen.
19 But I think you testified that he brought up that he wanted
20 you to meet them so you would get information to open
21 accounts for them with Edward Jones.

22 Is that your testimony?

23 A I believe I have been very specific about saying
24 that in my prior conversations with Elmore, after Louise's
25 death, that he made it extremely clear to me that the assets

1 were to go to his stepchildren. I believe I have said that
2 at least a half dozen times since we have been sitting here.
3 I also believe that Elmore had instructed them, asked them,
4 encouraged them to maintain their relationship with me and
5 with Edward Jones.

6 Q Okay. And why do you believe that?

7 A Because Patricia told me that.

8 Q Okay. Anybody else?

9 A Well, Elmore wanted that to happen, but I
10 didn't...

11 Q The reason I keep asking why is I want factual
12 stuff rather than conclusions. So I have just heard you say
13 for the first time Patricia is the one that told you that,
14 not Elmore.

15 A That's not what I said, sir.

16 Q Okay. Maybe I misunderstood. Why don't you say
17 it again in your own language.

18 A Elmore told me that he was going to encourage the
19 three children, three stepchildren, to stay with me and to
20 stay with Edward Jones.

21 Q Okay. And is it your testimony that he brought
22 that up or that you asked him that question?

23 A He brought that up to me.

24 Q Okay. And do you recall specifically that
25 meeting? That is, did you have a specific --

1 indicate that to you, correct?

2 A Correct.

3 Q Okay. And the first one after the death
4 certificate meeting at which he spoke to you about that, was
5 that when he was getting sick, or was that shortly after the
6 death certificate meeting? Roughly, when was that first
7 meeting that he spoke to you about that after the death
8 certificate meeting?

9 MS. WANG: Objection; form.

10 THE WITNESS: I don't recall.

11 Q (By Mr. Hawkes) Okay. What do you recall about
12 any meeting after the death certificate meeting at which he
13 spoke to you about where he wanted his assets to go when he
14 passed away?

15 A As I have testified earlier, Elmore came to my
16 office on at least a couple of occasions to deliver checks.
17 During one of those periods it was brought up. Elmore
18 expressed to me that he wanted the assets to pass to his
19 stepchildren.

20 Does that answer your question?

21 Q Well, is that all you remember about that meeting,
22 that he said, "I want my assets to go to my stepchildren
23 when I die?"

24 MS. WANG: Objection; form.

25 THE WITNESS: Elmore made it clear to me over

1 Mr. Ellison that the typical way for his IRA account, the
2 typical way to pass through inheritors would be through a
3 beneficiary designation, correct?

4 A Correct.

5 Q And you were aware that he had named his wife as a
6 beneficiary and no one else?

7 A Correct.

8 Q Okay. You were aware that he had agreed to the
9 terms of Exhibit 1 as his custodial agreement with Edward
10 Jones, correct?

11 A I agree that he was given that information.

12 Q Okay. Are you aware that this Exhibit 1, this
13 custodial agreement, are you now aware that this custodial
14 agreement identifies the biological children as the
15 inheritors of an IRA if there is no beneficiary designation
16 in writing?

17 A I am agreeing that's what the contract says.

18 Q Were you aware of that at the time that you had
19 this financial-adviser relationship with Mr. Ellison?

20 A No.

21 Q Did you become aware of that fact in relation to
22 this litigation?

23 A Yes.

24 MR. HAWKES: I have no other questions.

25 Thanks.

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D E C L A R A T I O N

I declare under penalty of perjury that I have read my within deposition, and the same is true and accurate, save and except for the changes and/or corrections, if any, as indicated by me on the Correction Sheet.

Dated this _____ day of _____, 2012,
at _____ (city/state).

WILLIAM VAUGHN ANDERSON

JOHANNA RAU, CCR
Court Reporter

189

OCTOBER 19, 2011

Edward Jones

REQUIRED MINIMUM DISTRIBUTION

PREPARED FOR: ESTATE

ACCOUNT NO: 870-96627-1-5

IRA OWNER AND BENEFICIARY DETAILS

Date of Birth of IRA Owner:	02/22/1931
Oldest Beneficiary Birth Date:	
Oldest Beneficiary Name:	ESTATE
Beneficiary Relationship:	ESTATE
Distribution is for the Year:	2011
Dec 31 Account Balance of Preceding Year:	\$255,080.94

RESULTS OF CALCULATION

Factor:	18.7
Required Minimum Distribution:	\$13,640.69
Distributions Taken Year-To-Date:	\$5,000.00
Amount Still Needed:	\$8,640.69

This information is our interpretation of the Final I.R.S. regulations, which are subject to change without notice. This illustration is based solely from the assets that were in this IRA on December 31st of the previous year and/or the information you provided. Verification by a tax professional is recommended.



BILL ANDERSON
3727 CALIFORNIA AVE SW 1D, SEATTLE, WA 98116

PHONE: (206) 937-9613

1970

Appendix 4

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

The Estate of
ELMORE E. ELLISON,
Deceased.

Case No.: 11-4-03139-7 KNT
ESTATE'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

The decedent, Elmore E. Ellison, intended his step-children to inherit his entire estate, including his Edward Jones account. He signed a will that clearly indicated his intent that all of his assets go to his three step-children. He told his Edward Jones broker that he wanted his Edward Jones account to go to his step-children and that he specifically did not want it to go to his biological children with whom he had no relationship. In fact, Mr. Ellison's will specifically disinherited his biological children, by name. When Mr. Ellison died, the boilerplate Edward Jones Custodial Agreement provided that in the absence of a beneficiary designation (his wife Louise had been the named beneficiary, but she predeceased him by approximately one year), his "descendants" were to receive his assets so his biological daughters have since petitioned the Court to allow them to have the proceeds.

But Mr. Ellison "substantially complied" with changing his beneficiary designations from his wife of thirty years (the mother of his step-children) to his step-children when he told his broker this is what he wished to do. Mr. Ellison instructed his broker set up three "inherited"

COPY

1 IRA accounts, one for each of his step-children, so that his assets would flow seamlessly to them
2 at his death. The Edward Jones internal documentation showed the beneficiary as Mr. Ellison's
3 "Estate". Therefore, his estranged biological daughters are not entitled to the proceeds of his
4 Edward Jones account.

5 In the alternative, the Estate argues that Mr. Ellison had a "super will" that permitted him
6 to transfer all of his non-probate assets, specifically including his "investment" account, pursuant
7 to his Last Will and Testament ("Will").

8 The facts are not in dispute.

9 Thus, the Estate of Elmore Ellison ("Estate") respectfully requests the Court enter
10 summary judgment in favor of the Estate and order all proceeds of the Edward Jones account be
11 paid to the beneficiaries named in Mr. Ellison's Will.

12 II. UNDISPUTED FACTS

13 On August 31, 2012, Elmore Ellison's broker at Edward Jones was deposed. Declaration
14 of Theresa Wang, Exhibit A. He testified, in pertinent part by page and line, as follows:

15 EXAMINATION BY THERESA WANG [Counsel for the Estate]

16 15:6-13 Q What is the procedure for filling out the application form?

A That's filled out with the client.

17 Q So the Edward Jones agent -- a company is supplying it and filling it out?

18 A No. **The client gives us the information that they want as their beneficiary designations. I actually put it on the form.**

19 ...

20 17:11-17 Q Okay. What, if anything, did Mr. Ellison tell you about Patricia Harmon,
Christine Baklund, and Michael Golden?

21 A Those were his stepchildren, Louise's children. And he explained to me
22 how good those children had been to him and that **his assets were supposed to transfer to those children.** Also a grandchild.

23 ...

24 19:12-21 Q And what, if anything, can you tell me about why those accounts did not list
Patricia, Christina, and Michael as the beneficiaries?

25 A Well, Mrs. Ellison was named as the beneficiary on the account at the time
26 the account was opened. **And Mr. Ellison believed that he had taken care of the asset transfer that would occur at his death so that in his will**

1 those assets were to go to Michael, Christina, and Patricia. He believed
2 he had that taken care of in the will that he drafted.

3 ...

- 4 20:8-13 Q Could you explain to me, based on your expertise -- no, just your
5 A employment and your experience, did Mr. Ellison take all reasonable steps
6 A I believe he thought he took care of everything via the will.

7 ...

- 8 20:23-21:16 Q Okay. And what, if anything, did Mr. Ellison tell you about his biological
9 A daughters?
10 A That he had no relationship with them. And I think it had been 20 years or
11 A more since he had heard or had any communication with them, that his
12 A relationships were with Michael, Christina, and Patricia. ... Just in
13 A conversations, it was very clear that he wanted the assets that he and Louise
14 A had accumulated together, had together, were held in joint accounts, they
15 A were each other's beneficiaries on their IRAs. And his assumption was that
16 A if Louise was deceased, that the assets would then transfer via his will to his
17 A three stepchildren.

18 ...

- 19 25:19-25 Q Is it common for clients to negotiate terms of this contract?
20 A It's nonnegotiable.
21 Q Nonnegotiable?
22 A Nonnegotiable.
23 Q Is it fair to say it's a boilerplate contract?
24 A It is.

25 ...

- 26 37:18-38:4 Q Okay. And what, if anything, was your understanding of Mr. Ellison's estate
27 A plan?
28 A Mr. Ellison's estate plan was to leave the assets that he and Louise
29 A accumulated to Patricia and Michael and Christina as well as a partial
30 A portion of the assets to go to his granddaughter, which is Christina's
31 A daughter, because they made a commitment to her. And I don't know the
32 A details of the commitment, for a portion of her college education.
33 Q Okay. And what, if anything, was your understanding of what Mr. Ellison
34 A intended to leave his biological daughters?
35 A My understanding was they were to receive nothing.

36 ...

- 37 40:6-11 Q Baklund. To the best of your knowledge, as Mr. Ellison's financial adviser
38 A for over two years, was Mr. Ellison aware of boilerplate language in what
39 A we previously referred to as Exhibit 1?

1 A I would suggest that very few, if any, clients read those documents
2 thoroughly.

3 40:20-41:12 Q [Referencing Exhibit 7] So on the third line, under "Oldest Beneficiary
4 Name" this form lists "Estate."

5 A Mm-hm (answers affirmatively).

6 Q Can you tell me how that came about?

7 A This is a form that would have been generated by my assistant. And
8 because we were working on the estate of Elmore and we knew that the
9 estate was to pass to his stepchildren -- this isn't the sort of thing that goes
10 in and checks your accounts. It's the sort of thing that she put "Estate" in,
11 and I'm sure because it was on her mind that we were working on the estate,
12 and it generated a report that shows how much needed to be taken out before
13 the end of the year.

14 Q Okay. So is it a fair statement to say that your assistant put the estate
15 designation in there based on your understanding that that was the
16 beneficiary of the IRA account?

17 A Yes.

18 44:8-9 EXAMINATION BY MR. HAWKES [Counsel for Petitioners]:

19 56:6-11 A I remember Elmore Ellison bringing me Louise Ellison's death certificate so
20 that we could transfer assets from Louise to Elmore upon -- he was the
21 named beneficiary on Louise's IRA account. So, yes, sir, I do have a
22 memory of meeting with Elmore and receiving the death certificate from
23 Elmore.

24 60:3-5 Q Okay. And you are familiar with its contents [of the Edward Jones custodial
25 agreement]?

26 A It's a boilerplate contract. I certainly don't read it every time a client
opens an account.

27 70:17-71:8 Q Okay. You testified on direct exam today that it was your understanding
28 that he thought that his will gave everything to his stepchildren and nothing
29 to his bio children; is that correct?

30 A Yes. That is correct.

31 Q Okay. Do you have any specific memory of Mr. Ellison telling you verbally
32 or in writing or any other way telling you that at any particular time, any
33 specific memory of him saying, "This is what I want"?

34 A Yes.

35 Q How many such occasions were there?

36 A There was at least one occasion. It was an occasion where we had discussed
what he wanted to have happen to his assets when he passed away. He
believed he had it taken care of by his will. He did not want any assets to

1 go to his children with whom he told me specifically he had no
2 relationship.

3
4 72-5-12 Q Why did that topic come up in your conversation?

5 A The topic came up because he wanted to make sure that I understood
6 what his wishes were for his assets, both in the nonretirement account
7 and in the retirement account, he wanted those assets to go to his
8 stepchildren with whom he did have a relationship with.

9
10 87:14-88:15 Q Okay. Tell us what is the earliest specific memory you have about such a
11 conversation after Louise died?

12 A After Louise died and the death certificate was delivered by Elmore in
13 person to my office, he talked about wanting to make sure that his
14 stepchildren inherit the assets that he and Louise had. In subsequent
15 conversation with Elmore, I have described the last meeting I had with
16 Elmore, which was a few days before he passed away, the day that I met the
17 three stepchildren and got their information. In a prior conversation that I
18 had with Elmore -- this was after he became sick but before he was basically
19 on his death bed -- we talked about the assets that he had in his IRA at that
20 point, and he believed that he had the stepchildren covered by that will.
21 And I think that will may be in these documents here. I don't know. I don't
22 remember what all is in here. Y'all have had me flipping back and forth too
23 much. But, yes, I do remember specifically having that conversation.

24 Q Okay. Do you remember specifically what he said that led you to that
25 belief?

26 A Well, he said I need to meet with his three stepchildren and get their
 information, which is what led to my having a meeting with Patricia,
 Michael, and Christina -- And Christina's daughter was also at that
 meeting -- to get the information so that we could open the account so
 that we could transfer the assets when he died.

19 89:16-90:11 A I can't remember exactly. I mean, if nothing is clear from the questions
20 these lawyers have asked me today, Elmore wanted the assets that he and
21 Louise had to go to his stepchildren.

22 Q That's your belief?

23 A It's not my belief. It's the truth. I heard Elmore say that. It's not a
24 negotiable thing. It's not. This is what he asked for. It's what he
25 wanted.

26 Q Okay. And my question is, what did he say specifically, and when did he
 say that?

 A Again, sir, I met -- I talked to Elmore after he found out he had Stage IV
 cancer. Before he was on his deathbed, he asked me to meet with his
 stepchildren to get their information so that they would have accounts
 to receive the assets when he died, and asked me to open inherited or
 decedent IRA accounts, which we did. On that same day that I got the
 information from the stepchildren, because Elmore asked me to get that

1 information from them and have a meeting with them and let them know
2 what was going to happen, I went and saw Elmore, and he was on his
3 deathbed at that time.

...

4 91:23-92:5 A I believe I have been very specific about saying that in my prior
5 conversations with Elmore, after Louise's death, that he made it extremely
6 clear to me that the assets were to go to his stepchildren. I believe I
7 have said that at least a half dozen times since we have been sitting here.
8 I also believe that Elmore had instructed them, asked them. encouraged
9 them to maintain their relationship with me and with Edward Jones.

...

8 95:11-19 Q (By Mr. Hawkes) Okay. What do you recall about any meeting after the
9 death certificate meeting at which he spoke to you about where he wanted
10 his assets to go when he passed away?
11 A As I have testified earlier, Elmore came to my office on at least a couple of
12 occasions to deliver checks. During one of those periods it was brought up.
13 Elmore expressed to me that he wanted the assets to pass to his
14 stepchildren.

...

13 98:12-23 Q Okay. Are you aware that this Exhibit 1, this custodial agreement, are you
14 now aware that this custodial agreement identifies the biological children as
15 the inheritors of an IRA if there is no beneficiary designation in writing?
16 A I am agreeing that's what the contract says.
17 Q Were you aware of that at the time that you had this financial-adviser
18 relationship with Mr. Ellison?
19 A No.
20 Q Did you become aware of that fact in relation to this litigation?
21 A Yes.

22 The relevant portions of Mr. Anderson's deposition and "Exhibit 7" to his declaration are
23 collectively attached to the Declaration of Theresa Wang ("Wang Decl.") as Exhibit A. The
24 selections above have been highlighted in the transcript for the convenience of the Court.

25 Elmore Ellison did have a Last Will and Testament, dated April 19, 2011 ("Will"), which
26 specifically disinherited his two biological children, Petitioners herein. Wang Decl., Exhibit B.
His will specifically bequeaths his entire estate to his step-children: Patricia Harmon, Michael
Golden, and Christine Backlund. *Id.* Specifically, his will provides as follows:

1 After payment of all just, lawful and proper charges against my estate during the
2 usual course of the probate thereof, **I hereby give, devise and bequeath, all the**
3 **rest, residue and remainder of my estate for distribution, whatsoever be its**
4 **nature and wheresoever found, in equal shares, share and share alike, unto**
5 **my stepdaughters, CHRISTINE SUE BAKLUND, PATRICIA MARIE**
6 **HARMON, and my stepson MICHAEL DEAN GOLDEN**, all to be their sole
7 and separate estates per stirpes, provided Forty Thousand Dollars (\$40,000.00)
8 PLUS the balance of the existing care loan on behalf of CHRISTINE SUE
9 BAKLUND with Boeing Credit Union shall be deducted from the distributive
10 share of CHRISTINE SUE BAKLUND and distributed equally between the
11 beneficiaries of the LAST WILL AND TESTAMENT

12 Wang Decl., Ex. B, Will, at 1-2 (emphasis added). In the very next paragraph, the Will provides:

13 **“I have specifically and intentionally excluded my own children and their lineal**
14 **descendants as beneficiaries of my estate.”** *Id.* at 2 (emphasis added). The Will’s

15 “Identification of Family” provision identifies Mr. Ellison’s biological daughters by name and
16 describes them as “children born to or adopted by me as a result of a former marriage.” *Id.* at 1.

17 The Will also identifies Mr. Ellison’s stepchildren by name and designates them as the only
18 beneficiaries of the Estate. *Id.* at 1-2. Mr. Ellison’s Will also includes the following clause, in
19 bold and all caps:

20 **IN THE EVENT I HAVE ADDED ONE OR MORE NAMES TO**
21 **ANY BANK ACCOUNTS, INVESTMENTS, OR OTHER ASSETS, I**
22 **HAVE DONE SO FOR CONVENIENCE PURPOSES ONLY WITH**
23 **THE EXPRESS UNDERSTANDING THAT ALL OF MY ASSETS**
24 **SHALL BE DISTRIBUTED PURSUANT TO THE TERMS AND**
25 **CONDITIONS OF THIS LAST WILL AND TESTAMENT.**

26 Wang Decl., Exhibit B.

Page 4 of Edward Jones’ Custodial Agreement contains a default boilerplate provision,
entitled, “Absence of Designation of Beneficiaries,” which provides that if no beneficiary
survives the depositor, the beneficiaries of the account shall be deemed to be designated in the
following order: “Depositor’s surviving spouse; or if none, then Depositor’s descendants, per

1 stirpes, or if none, then Depositor's estate." Wang Decl., Exhibit C (Custodial Agreement). The
2 word "Descendant" is defined earlier in the document as a child or grandchild "but not a foster
3 child or stepchild." *Id.* at page 3. Based on the inclusion of this standard form provision in the
4 Custodial Agreement, Petitioners argue that they are entitled to receive the proceeds of Mr.
5 Ellison's IRA. Their argument ignores that a more specific Edward Jones document identifies
6 the "beneficiary" of the account as the "Estate." Wang Decl., Ex. A at 40:20-41:12, and "Exhibit
7 7" attached thereto.

8 All of the facts stated above are undisputed.

9 III. EVIDENCE RELIED UPON

10 This Motion for Summary Judgment relies upon Exhibit A-C attached to the Declaration
11 of Theresa Wang.

12 IV. ISSUE PRESENTED

13 1. Whether the Court should give effect to Elmore Ellison's intent and find that his
14 step-children should inherit his Edward Jones account;

15 *or*

16 2. Whether Elmore Ellison "substantially complied" with changing his beneficiary
17 designations where it is undisputed he told his broker that he wanted his step-children to inherit
18 his Edward Jones account, the Edward Jones internal documents indicated the "Estate" was the
19 beneficiary, and his broker set up three "inherited" accounts for the funds to seamlessly transfer
20 to the three step-children; or

21 *In the alternative,*

22 3. Whether Elmore Ellison's Last Will and Testament contains a "super will"
23 provision which require his investment account to pass pursuant to his Will, which gives "all of
24 his assets" to his three step-children.

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V. AUTHORITY

A. **The Paramount Duty of Courts In Probate Matters is to Give Effect to the Decedent's Intent**

The intent of the testator is the controlling factor in all estate matters. It is the Court's paramount duty to ascertain, if possible, from the terms of the will or estate plan, the true intent of the testator and give it effect, if legally permissible. *In re Lidston's Estate*, 32 Wn.2d 408, 414-16, 202 P.2d 259 (1949). *Matter of Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985) ("When called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent.") (citing *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972)).

As the Will here provides (and as Mr. Ellison clearly expressed to his broker at Edward Jones), Elmore Ellison's intent was for his three stepchildren to inherit his entire Estate in three equal share (less the \$40,000 advance to Ms. Backlund for her daughter). As part of this estate plan, Mr. Ellison intended for his stepchildren to receive the proceeds of his IRA at Edward Jones. He told his broker on multiple occasions and in no uncertain terms that he wanted his step-children to inherit his Edward Jones account. He directed his broker to set up three new "inherited or decedent IRA" accounts for each of his three step-children so they could seamlessly inherit his investment account. As his broker testified, it was Edward Jones's responsibility to enter the information provided by Mr. Ellison on the beneficiary designation form. Wang Decl., Ex. A at 15:6-13. Edward Jones' internal documentation indicated the "Estate" was the beneficiary of Mr. Ellison's account. Wang Decl., Ex. A (final page, "Exhibit 7" to Anderson Deposition).

Mr. Ellison clearly intended to disinherit his biological daughters and their descendants as provided in the Will. These facts are uncontroverted.

Where the Court's paramount duty in estate matters is to give effect to the decedent's intent, a boilerplate provision in the Edward Jones Custodial Agreement should not operate to frustrate Mr. Ellison's estate plan and give his assets to the very two and only two individuals

1 that he specifically disinherited in his Will. Allowing Mr. Ellison's disinherited biological
2 daughters to receive his Estate funds would be diametrically opposed to his intent for them to
3 receive nothing from his estate. Accordingly, because Mr. Ellison intended for his stepchildren
4 to receive the proceeds of his Edward Jones account, this Court should order that the Edward
5 Jones proceeds be distributed to his three step-children.

6 **B. Courts May Enforce Attempted Changes in Beneficiaries**

7 Washington permits courts to enforce attempted changes in beneficiaries of non-probate
8 assets. *Estate of Freeberg*, 130 Wn. App. 202, 205, 122 P.3d 741 (2005); *Rice v. Life Ins. Co.*,
9 25 Wn. App. 479, 482, 609 P.2d 1387, *review denied*, 93 Wn.2d 1027 (1980); *Allen v.*
10 *Abrahamson*, 12 Wn. App. 103, 105, 529 P.2d 469 (1974) (and cases cited therein). The general
11 rule as to attempted changes of beneficiaries is that courts of equity will give effect to the
12 intention of the decedent when the decedent has substantially complied with the provisions of the
13 policy regarding that change. *Estate of Freeberg*, 130 Wn. App. at 205; *Allen*, 12 Wn. App. at
14 105. Substantial compliance requires that the decedent has manifested an intent to change
15 beneficiaries and done "everything reasonably possible to make that change." *Estate of*
16 *Freeberg*, 130 Wn. App. at 205; *Allen*, 12 Wn. App. at 105 ("Substantial compliance with the
17 terms of the policy means that the insured has not only manifested an intent to change
18 beneficiaries, but has done everything which was reasonably possible to make that change.").

19 It is undisputed that Mr. Ellison intended for his stepchildren to be the beneficiaries of the
20 funds in his Edward Jones IRA. This is demonstrated in his Will, and was recounted multiple
21 times by William Anderson, his broker, at his deposition. Wang Decl., Exhibit A as highlighted.
22 Mr. Ellison told his broker in no uncertain terms that he wanted his step-children to inherit his
23 Edward Jones account. *Id.* Mr. Ellison also directed his broker to establish individual
24 "inherited" accounts with each of his stepchildren so they could seamlessly receive their shares
25 of Mr. Ellison's IRA directly from Edward Jones at the time of Mr. Ellison's death. *Id.* Mr.
26 Ellison believed his Will was sufficient to effect this change; in fact, it was Edward Jones's

1 responsibility to enter the information provided by Mr. Ellison on the appropriate forms, not Mr.
2 Ellison. *Id.* Mr. Ellison and his broker were so convinced he had taken all the steps necessary to
3 transfer his IRA account to his step-children that Edward Jones' internal office memorandum
4 names the "Estate" as the beneficiary of the account on its internal forms. These facts are
5 precisely the facts that require a Court to enforce a decedent's attempt to designate his
6 stepchildren as beneficiaries.

7 In *Estate of Freeberg*, Ms. Freeberg testified that the couple had instructed their **Edward**
8 **Jones** agent to change the beneficiaries by removing their respective children in favor of each
9 other. *Id.* at 204. She also remembered signing some type of paperwork. *Id.* An employee at
10 Edward Jones corroborated this testimony and testified herself that she was present when the
11 Freebergs came to change their beneficiaries, and that Mr. Freeburg directed the office to change
12 his beneficiary to Ms. Freeburg on all of his investments, including his IRA. The Edward Jones
13 employee could not explain why the change had not been made on the IRA, and that she knew it
14 was Mr. Freeberg's intent to have his wife as the beneficiary of his IRA. *Id.* at 204-05. Noting
15 the Edward Jones agent could not explain why the intended change was not made on the IRA
16 account, the trial court found Mr. Freeberg had substantially complied with the requirements to
17 change the beneficiary and enforced his intent for Ms. Freeberg to become the beneficiary of the
18 IRA. *Id.* at 207. The appellate court affirmed. *Id.* The *Freeberg* case is controlling.

19 In the present case, Mr. Anderson from **Edward Jones** testified:

20 15:6-13 Q What is the procedure for filling out the application form?
A That's filled out with the client.
21 Q So the Edward Jones agent -- a company is supplying it and filling it out?
A No. The client gives us the information that they want as their
22 beneficiary designations. I actually put it on the form.

23 40:20-41:12 Q [Referencing Exhibit 7] So on the third line, under "Oldest Beneficiary
24 Name" this form lists "Estate."
A Mm-hm (answers affirmatively).
25 Q Can you tell me how that came about?
A This is a form that would have been generated by my assistant. And
26 because we were working on the estate of Elmore and we knew that the
estate was to pass to his stepchildren -- this isn't the sort of thing that goes

1 in and checks your accounts. It's the sort of thing that she put "Estate" in,
2 and I'm sure because it was on her mind that we were working on the estate,
and it generated a report that shows how much needed to be taken out before
the end of the year.

3 Q Okay. So is it a fair statement to say that your assistant put the estate
4 designation in there based on your understanding that that was the
beneficiary of the IRA account?

5 A Yes.

6 89:16-90:11 A I can't remember exactly. I mean, if nothing is clear from the questions
7 these lawyers have asked me today, Elmore wanted the assets that he and
Louise had to go to his stepchildren.

8 Q That's your belief?

9 A It's not my belief. It's the truth. I heard Elmore say that. It's not a
negotiable thing. It's not. This is what he asked for. It's what he wanted.

10 Q Okay. And my question is, what did he say specifically, and when did he
11 say that?

12 A Again, sir, I met -- I talked to Elmore after he found out he had Stage IV
13 cancer. Before he was on his deathbed, he asked me to meet with his
stepchildren to get their information so that they would have accounts to
receive the assets when he died, and asked me to open inherited or decedent
IRA accounts, which we did. On that same day that I got the information
from the stepchildren, because Elmore asked me to get that information from
them and have a meeting with them and let them know what was going to
14 happen, I went and saw Elmore, and he was on his deathbed at that time.

15 ...
16 91:23-92:5 A I believe I have been very specific about saying that in my prior
17 conversations with Elmore, after Louise's death, that he made it extremely clear
to me that the assets were to go to his stepchildren. I believe I have said that
at least a half dozen times since we have been sitting here.

18 As described above and elsewhere in his deposition, Mr. Anderson made it abundantly
19 clear that Mr. Ellison wanted his step-children to inherit his account. As with the decedent in
20 *Estate of Freeberg*, Mr. Ellison conveyed his intent to his broker at Edward Jones. Unlike the
21 *Freeberg* case, Mr. Ellison even went an extra step and had his broker set up "inherited or
22 decedent IRA accounts" for each of the three step-children. *Id.* Mr. Ellison's broker and
23 Edward Jones all reasonably believed that Mr. Ellison had taken all necessary action to pass his
24 IRA account to his step-children, as reflected by Edward Jones's internal documents indicating
25 the "Estate" as the account beneficiary. Wang Decl., Ex. A. Mr. Ellison "substantially
26 complied" with changing his beneficiary designation from his deceased wife to his step-children;

1 he did "everything reasonably possible to make that change." *Estate of Freeberg*, 130 Wn. App.
2 at 205.

3 Likewise, in *Sun Life Assurance Company v. Sutter*, 1 Wn.2d 285, 287-89, 95 P.2d 1014
4 (1939), the insured died without having returned a form that was sent to him by the insurance
5 company with the requirement that he sign and return the form to effect a change in beneficiary.
6 Because he had previously sent an unsigned form to the insurance company that made his intent
7 clear, our Supreme Court held that this constituted substantial compliance, sufficient to effect the
8 intended change.

9 The test in all the substantial compliance cases is whether the intent was clear and the
10 decedent did what was reasonably possible to make the change. In the present case, Mr. Ellison
11 told his broker in no uncertain terms who he wanted his beneficiaries to be, and instructed his
12 broker to set up three new "inherited or decedent IRA accounts" for his three step-children. It is
13 **undisputed** that Mr. Ellison wanted his stepchildren were to inherit his Edward Jones account.
14 He did "everything reasonably possible" to make sure the assets would go to his step-children.
15 The boilerplate language, which provision the broker admitted he did not even know was there¹,
16 should not serve to completely frustrate Elmore Ellison's estate plan and specifically his plan as
17 conveyed to his broker about who the beneficiaries on his Edward Jones account should be.
18 Moreover, the Edward Jones boilerplate language should not serve to supersede the Edward
19 Jones document indicating the "Estate" is the beneficiary.

20 **C. Elmore Ellison Also Had a "Super Will" Provision in his Will**

21 In Washington, a decedent may change the beneficiary on a nonprobate asset through
22 their will. RCW 11.11.020. The statute provides, in pertinent part:

23 (3) A disposition in a will of the owner's interest in "all nonprobate
24 assets" or of all of a category of nonprobate asset under RCW
25 11.11.010(7), such as "all of my payable on death bank accounts"
or similar language, is deemed to be a disposition of all the

26 ¹ Wang Dep., Exhibit A (98:12-23).

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1 nonprobate assets the beneficiaries of which are designated before
2 the date of the will.

3 Mr. Ellison's Will contained a provision that instructed that all his "bank accounts,
4 investment, or other assets" shall be distributed "pursuant to the terms and conditions of this last
5 Will and Testament." Wang Decl., Ex. B. The Estate submits that this language is sufficient to
6 include the Edward Jones investment account that Elmore Ellison (and previously Louise
7 Ellison² jointly) owned as of Mr. Ellison's date of death.

8 VI. CONCLUSION

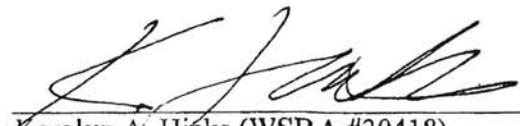
9 Before the Court on this Motion are purely legal issues which can be decided without a
10 trial. The facts in this case are not in dispute. The Estate respectfully requests that the Court
11 find the Estate and/or the three step-children are the beneficiaries of Elmore Ellison's Edward
12 Jones IRA account. There are three independent legal basis, any single one of which allow the
13 Court to rule in the Estate and/or step-children's favor: (1) a Court's paramount duty in estate
14 cases is to give effect to the testator's intent -- here it is undisputed Mr. Ellison wanted his three
15 step-children to inherit his Edward Jones account (indeed his entire estate); (2) Mr. Ellison
16 "substantially complied" with a change in his beneficiary when he informed his broker of what
17 he wanted, the broker's internal files indicate the "Estate" is the beneficiary, and the broker -- at
18 Mr. Ellison's instruction -- had the three step-children fill out forms and open inherited IRAs;
19 and/or (3) Mr. Ellison's Will contains a "super will" provision, which under RCW 11.11.020(3)
20 allowed him to dispose of his Edward Jones investment account through his Will.

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22
23
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25
26 ² Louise Ellison (the mother of Elmore's step-children to whom he left all their joint assets) predeceased Elmore by
approximately one year.

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1 DATED this 19th day of October, 2012.

2 STOKES LAWRENCE, P.S.

3
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