

FILED

AUG 26 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

In the Matter of the Estate of:

MARIA PRIMIANI,

Deceased.

FRANK PRIMIANI,

Petitioner,

v.

ESTATE OF MARIA PRIMIANI,  
Deceased, and ANNA ILIAKIS as  
Personal Representative and ANNA and  
MICHAEL ILIAKIS,

Respondents.

Appeals Case No. 342000

Superior Court Case No. 15-4-00097-9

---

APPELLANT'S BRIEF

---

Steven Schneider  
WSBA # 22622

**TABLE OF CONTENTS**

ASSIGNMENTS OF ERROR..... 5

STATEMENT OF THE CASE..... 7

ARGUMENT..... 9

    I.    WILL CONTEST..... 9

        A.    FACTS AND PROCEDURE..... 9

        B.    GOOD FAITH AND PROBABLE CAUSE..... 10

        C.    SUBSTANTIAL EVIDENCE..... 13

        D.    EXPLOITATION OF VULNERABLE ADULT AND  
            INHERITANCE RIGHTS OF ABUSERS..... 19

        E.    STANDING..... 24

    II.   SERVICE OF PROCESS AND IRREGULARITY OF  
    PROCEDURE..... 28

        A.    SUBSTANTIAL COMPLIANCE WITH SERVICE STATUTES  
            28

        B.    RELIANCE ON REPEALED STATUTE..... 30

        C.    ARGUMENT ON THE MERITS OF THE JEPSSEN CASE..... 32

        D.    APPEARANCE OF FAIRNESS..... 35

    III.  MOTION FOR PROTECTIVE ORDER..... 36

        A.    THE MEDICAL RECORD PRIVILEGE CANNOT BE USED  
            AGAINST THE INTERESTS OF THE DECEDENT..... 37

        B.    RCW 70.20.17 DOES NOT PROVIDE A CIVIL REMEDY  
            AGAINST PERSONS WHO ARE NOT HEALTH CARE  
            PROVIDERS OR FACILITIES..... 37

        C.    SUBPOENA FOR MEDICAL RECORDS..... 40

## TABLE OF AUTHORITIES

### Cases

<i>A &amp; W Farms v. Cook</i> , 168 Wn.App. 462 (2012).....	22
<i>Batten v. Abrams</i> , 28 Wn.App. 737, 626 P.2d 984 (1981) .....	13
<i>Codd v. Westchester Fire Ins. Co.</i> , 14 Wn.2d 600, 605, (1942).....	34
<i>Davis v. Microsoft Corp.</i> , 149 Wn.2d 521, 70 P.3d 126 (2003).....	14
<i>Estate of Jepsen</i> , 184 Wn. 2d 376 (2015).....	passim
<i>Fisher v. State ex rel. Dept. of Health</i> , 125 Wn.App. 869, 106 P.3d 836 (2005).....	40
<i>Hines v. Todd Pacific Shipyards Corp.</i> , 127 Wn.App. 356, 112 P.3d 522 (Div. 1 2005).....	39
<i>In Cummings v. Guardianship Services of Seattle</i> , 128 Wn.App. 742 (2005).....	26
<i>In re Chapman's Estate</i> , 133 Wash. 318, 233 P. 657 (1925).....	12
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004).....	13
<i>In re Estate of Jones</i> , 152 Wn. 2d 1 (2004) .....	25, 26
<i>In re Estate of Kessler</i> , 95 Wn.App. 358, at 377, 977 P.2d 591 (1999) ...	10
<i>In re Estate of Palucci</i> , 810 P.2d 970 412 (1991).....	34
<i>In re Estate of Peterson</i> , 102 Wn. App. 456 (2000) .....	33
<i>In re Estate of Toth</i> , 138 Wn.2d 650, 653 (1999).....	33
<i>In re Riley's Estate</i> , 78 .....	12
<i>Jeckle v. Crotty</i> , 120 Wn.App. 374, 85 P.3d 931 (2004).....	38, 39
<i>Protect Peninsula's Future v. City of Port Angeles</i> , 175 Wn.App. 201, 304 P.3d 914 (2013) .....	32
<i>Quality Rock Prods., Inc. v. Thurston County</i> , 126 Wn.App. 250, 264, (2005).....	34
<i>State ex rel. Wood v. Superior Court</i> , 76 Wash. 27 (1913) .....	33
<i>State v. Dyer</i> , 61 Wn.App. 685, 811 P.2d 975 (1991) .....	36
<i>Tatham v. Rogers</i> , 170 Wn.App. 76, 283 P.3d 583 (2012).....	35, 36
<i>Weber v. Biddle</i> 4 Wn.App. 519 (1971).....	48

### Statutes

11.24 RCW .....	28
11.84 RCW .....	8, 20
4.20 RCW .....	22
70.02 RCW .....	40, 41
74.34 RCW .....	8, 19
RCW 11.24.010 .....	28, 29

RCW 11.24.020 .....	6, 29, 30
RCW 11.48.010 .....	25
RCW 11.68.060 .....	28
RCW 11.84.010 .....	22, 23
RCW 5.20.060 .....	17
RCW 70.02.170 .....	7
RCW 70.02.170 (2).....	39
RCW 70.20.170 .....	37
RCW 74.34.020 .....	21
RCW 74.34.210 .....	22, 24

## **ASSIGNMENTS OF ERROR**

1. The Court erred when it enforced the No Contest Term of the Will of Maria Primiani without making any findings of fact regarding bad faith and probable cause, as required by applicable case law. CP 186
2. The Court erred when it ignored substantial evidence of probable cause and lack of bad faith when it enforced the No Contest Term.
3. The Court erred when it ignored substantial evidence of probable cause comprising evidence that Respondents violated the Exploitation of Vulnerable Adults Act and Inheritance Rights of Slayers and Abusers Act when the Court enforced the No Contest Term.
4. The Court erred when it allowed the Estate to argue and discuss with the Court, *Estate of Jepsen*, 184 Wn. 2d 376 (2015) when the Estate had not filed a Brief on *Jepsen* and never disclosed the Estate's reliance on *Jepsen* prior to the hearing. CP 185
5. The Court erred when it denied the Petitioner the right to have his brief on *Estate of Jepsen, supra.* considered after the hearing, even though the Estate's reliance on *Jepsen* was not disclosed to Petitioner until the day of the hearing and the Court relied upon *Jepsen* in its decision. CP 245 - 246

6. The Court erred when it adopted dicta from *Jepsen* that “Washington courts have always strictly enforced the requirements for commencing Will Contest actions.” and then applied that dicta to the facts in this case.  
CP 184
7. The Court erred when it concluded that substantial compliance with service rules does not apply to statutes regarding personal service of a Will Contest Petition. CP 184
8. The Court erred in relying upon a repealed version of RCW 11.24.020 when it erroneously stated that a citation was required to commence a Will Contest. CP 184
9. The Court erred and violated public policy in allowing the Personal Representative of the Estate to assert privacy rights of the decedent under RCW 70.02.140 for the purpose of shielding the Personal Representative and her husband from claims that the decedent had against them on the date of death.
10. The Court erred and violated public policy and legislative intent, when it enforced the personal service requirement in spite of substantial compliance when such personal service had been abrogated by the amendment to RCW 11.24.020.
11. The Court erred in when it found that Petitioner and co-counsel acted in bad faith regarding the subpoena for medical records without substantial

evidence of insincerity, dishonesty, disloyalty, duplicity or deceitful conduct, fraud or concealment required by applicable case law.

12. The Court erred in awarding sanctions against Petitioner under RCW 70.02.170 without a civil action being brought against Providence Home Health Care.
13. The Court erred when it ignored the fact that the confidentiality of the medical records was waived by the Decedent before the date of death as to Frank Primiani as Attorney in Fact for the Decedent and as to Maria Tiberio who was present at consultations between the Decedent and health care personnel.

### STATEMENT OF THE CASE

The Petitioner is asking this Court to review a decision by the Honorable Annette Plese rendered in writing, denominated Court's Opinion on Motions and entered on March 10, 2016, in in Spokane County Superior Court Case No: 15-4-00097-9, *Frank Primiani, Petitioner, v. Estate of Maria Primiani, Deceased, and Anna Iliakis as Personal Representative and Anna and Michael Iliakis, Respondents*, CP 180 - 187

This is a Probate case which involves a Petition brought under Chapter 11.96A RCW the Trust and Estates Dispute Resolution Act alleging undue

influence, monetary claims of the Decedent against the Personal Representative, Anna, and her husband Michael Iliakis (“Iliakis”), financial exploitation of a vulnerable adult under Chapter 74.34 RCW (“Vulnerable Adult Act”) and violation of the Inheritance Rights of Abusers Act, Chapter 11.84 RCW 11. (“Abusers Act.”)

The Decision appealed from found that the Will Contest portion of the Petition was barred due to lack of personal service on the Personal Representative. Further, the Court enforced the No Contest Term of the Will and reduced Petitioner’s inheritance under the Will to \$1.00.

CP 180 -187

In the same decision, the Court quashed subpoenas for medical records of the Decedent and for the deposition of a social worker, ruled that the Petitioner and co-counsel had acted in bad faith in obtaining the records and awarded attorney fees to the Estate for its Motion for Protective Order. CP 186 - 187

The other causes of action in the Petition remain undecided. However, in light of the reduction of Petitioner’s inheritance to \$1.00, and all the residue of the Estate now to be inherited by the Personal Representative, the case is constructively without further value to the Petitioner.

## **ARGUMENT**

### I. WILL CONTEST

#### A. FACTS AND PROCEDURE

Initially, the Petitioner and Respondents agreed to an extension of the period within which Creditors' Claims and Will Contests could be filed, expressly in order to give the parties more time to obtain and review an appraisal of estate real property. CP 32-33

At the end of the extension, August, 2015, the appraisal had still not been completed. Petitioner therefore, requested a further extension, again in order to allow the appraisal to be completed and reviewed. The Estate refused a further extension. Because of this refusal, a TEDRA Petition was filed in order to preserve claims ranging from the Will Contest to Petitioners administrative and creditors' claims.

The facts stated in the Petition were relevant to allegations of undue influence in the making and execution of the Will and Quit Claim Deed. These include lack of independent legal counsel, self-dealing, the nature of the bequests and other terms in the Will favoring Mrs. Iliakis and further, the ejection of the 104 year old Decedent from the house in which she had a life estate. CP 1 - 4

These facts were sufficient, if proven, to establish a presumption of undue influence, prima facie:

[C]ertain facts and circumstances bearing upon the execution of a will may be of such nature and force as to raise a suspicion, varying in its strength, against the validity of the testamentary instrument. The most important of such facts are (1) that the beneficiary occupied a fiduciary or confidential relation to the testator; (2) that the beneficiary actively participated in the preparation or procurement of the will; and (3) that the beneficiary received an unusually or unnaturally large part of the estate. Added to these may be other considerations, such as the age or condition of health and mental vigor of the testator, the nature or degree of relation-ship between the testator and the beneficiary, the opportunity for exerting an un-due influence, and the naturalness or the unnaturalness of the will[.]

The combination of facts shown by the evidence in a particular case may be of such suspicious nature as to raise a presumption of fraud or undue influence and, in the absence of rebuttal evidence, may even be sufficient to overthrow the will.

The existence of the presumption imposes upon the proponents of the will the obligation to come forward with evidence that is at least sufficient to balance the scales and " 'restore the equilibrium of evidence [regarding] validity of the will.' "

*In re Estate of Kessler*, 95 Wn.App. 358, at 377, 977 P.2d 591 (1999)

Declarations that were before the Court set forth evidence relevant to these claims. CP 124 -136

#### B. GOOD FAITH AND PROBABLE CAUSE

‘No Contest Term’ refers to a provision in a will that penalizes a party for contesting the will. In this particular case, the term reads:

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

(Will of Maria Primiani, Supplemental Clerk's papers to be filed)

The Court made only these findings regarding the No Contest

Term:

“The Court found that the will is final and binding and, also, finds the no contest provision is clear.”

CP 186 - 187

To make this utterly clear, the Court made two and only two findings regarding the No Contest Term:

1. The will is final and binding.
2. The No Contest Term is clear.

This is unrefutable error.

**In order to enforce a No Contest Term in a Will, a court must find that the Will Contest was prosecuted in bad faith and without probable cause.**

. . .the no contest or forfeiture clause does not operate where the contest is brought in good faith and with probable cause. . . . If a contestant initiates an action on the advice of counsel, after fully and fairly disclosing all material facts, she will be deemed to have acted in good

faith and for probable cause as a matter of law. . *In re Estate of Mumby*, 97 Wn.App. 385 (1999 ) (internal citations omitted)

If the contestant makes a *prima facie* case that, if proven, would invalidate the Will, there is probable cause and good faith, *In re Riley's Estate*, 78 Wn.2d 623 (1970.)

In the case of *Preuss v. Berg*, 102 Wash. 497, 173 P. 435, we held that, where a person in good faith brings an action to contest a will and makes a *prima facie* case, attorney's fees should not be awarded against him in the event his action fails. That the contestants brought this action in good faith and in the firm belief that undue influence had been used in the making of the final will we have no doubt. It was doubtless the legislative intent that, if the contest of the will was instituted in good faith and under a fair degree of discretion concerning the facts, attorney's fees ought not to be imposed. It is our opinion that the imposition of the attorney's fee in this case was erroneous. *In re Chapman's Estate*, 133 Wash. 318, 233 P. 657 (1925)

Although *Chapman's Estate*, *supra* deals with an award of attorney fees, the same standard is used as is required for probable cause. The *Chapman* Court ultimately dismissed the Will Contest, finding that the contestants did not prove their *prima facie* case. All issues were resolved against the *Chapman* contestants, i.e the contestants lost their Will Contest action on the merits. Nonetheless, the *Chapman* court found that “the contestants brought this action in good faith and in the firm belief that undue influence

had been used in the making of the final Will.” *Id* Therefore the No Contest Term cannot be enforced.

Further, the lack of findings on the material elements needed to support a legal conclusion is presumptively a negative finding:

The absence of a finding on a material issue is presumptively a negative finding entered against the party bearing the burden of proof on that issue. *Batten v. Abrams*, 28 Wn.App. 737, 626 P.2d 984 (1981)

Therefore, the lack of specific findings constitutes a presumptive finding that the Petitioner acted in good faith with probable cause.

The fact that the Court relied only on erroneous findings also constitutes an abuse of discretion.

Under an abuse of discretion standard, the trial court's decision should be upheld unless it is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *In re Estate of Black*, 153 Wn.2d 152, 102 P.3d 796 (2004)

The Court enforced the No Contest term on untenable grounds and presumptively found that there was good faith and probable cause.

Therefore, this court must reverse the trial Court and deny the request to enforce the No Contest Term.

### C. SUBSTANTIAL EVIDENCE

In addition to the above errors, the Court also ignored substantial evidence that, if considered, would have met the Petitioner's evidentiary burden and prevented the Court from enforcing the No Contest Term. A party that does not prevail can nonetheless have acted in good faith, i.e., the Court could not have enforced the No Contest Term without finding substantial evidence that there was bad faith and no probable cause. Such evidence was not presented to the Court.

The definition of "substantial evidence" has deep roots in our case law:

**. . . a disputed question of fact, by whatever character of evidence it is sought to be proven, must have in its support that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact,** before it can be said to be established.

. . . "Substantial evidence" has likewise been described as evidence "**sufficient ... to persuade a fair-minded, rational person of the truth of a declared premise.**" *Helman v. Sacred Heart Hosp.*, 62 Wash.2d 136, 147, 381 P.2d 605 (1963).

..

. . . we must determine whether Davis presented sufficient evidence to persuade a rational, unbiased person . . . *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 70 P.3d 126 (2003) *emphasis added.*

The Petition here, (CP 1 – 4) was supported by substantial evidence, sufficient to persuade a rational unbiased person that Frank Primiani

believed that there was probable cause to find undue influence and exploitation. Therefore, Primiani filed the Will Contest in good faith.

1. The Petition included this cause of action:

Page 2, ll 18-21,

7. Undue influence, misrepresentation, or concealment involving making or execution of Will and or Quit claim Deed, and in the wrongful appropriation of Decedent's property and funds.

CP 1 - 4

2, The Petition also stated the following facts:

Page 3, ll 16 – 22

1. During that time, Anna Iliakis and Michael Iliakis had exclusive control over the rents and profits of the assets of this estate, largely using such assets for their own benefit and depriving the Decedent of the benefit of such assets.
2. Decedent had no independent legal counsel representing her during any transaction pertinent to the herein Petition.
3. Petitioner reserves the right to allege details of undue influence in the making and execution of the Will and Quit Claim Deed and in the exclusive management of the property of the Decedent.

CP 1 - 4

Testimony was before the Court by Declaration that the Decedent was 104 years old when she died, had impaired in hearing and vision, and had difficulty understanding, writing and speaking English at all times material to the Petition. (CP 279) Maria Primiani was ousted from her home (even

though she had a life estate entitling her to reside there.) in September of 2014. After the ouster, the Decedent first resided with Petitioner in Kent, Washington and then with her granddaughter, Maria Tiberio in Spokane. CP 275-291

In December of 2014, Petitioner acted as Attorney in Fact under a Power of Attorney (CP 288 - 291) authorizing him to interact with health care providers and authorize treatment, procedures, and services. Petitioner interacted directly with employees of Providence Home Health Care (sometimes referred to in the record as VNA, referred to here as “Providence.”), a visiting nurse service. CP 275-291

Petitioner was told, in his capacity as Attorney in Fact, that Maureen Benson, a social worker employed by Providence had met with Maria Tiberio and the Decedent, and that the topic of the discussion was the Decedent’s distress regarding her mistreatment over many years while living with Anna and Michael Iliakis. CP 278

Testimony of Maureen Benson was however, excluded in the part of the decision dealing with the Protective Order. Ms. Benson’s testimony should not have been excluded to the extent that the exclusion protected only the interests of Anna and Mike Illiakis in conflict with the interests of the Decedent. Both Maureen Benson and Maria Tiberio could testify as to their own knowledge of this meeting and as to what the Decedent said.

Neither has an interest that would trigger exclusion of their testimony under the Dead Man Statute, RCW 5.20.060. Such testimony is also a hearsay exception, being the Decedent's statement of her then current mental state, emotion, etc. ER 803. These witnesses were disclosed in filed witness lists (CP 117) and in Petitioner's Declaration CP 125.

Also in evidence was the fact that at the time of the meeting with Ms. Benson, Frank Primiani was Maria Primiani's Attorney in Fact. He received medical information from Maureen Benson and Providence in his capacity as Attorney in Fact. Frank Primiani could therefore, testify, as he did in his Declaration, as to what he was told by Ms. Benson. CP 124-128

The Decedent's reports of her abuse made to Ms. Benson and Ms. Tiberio included financial exploitation, restricting her interaction with family, restricting her movements in the house and ousting her from her home in violation of her life estate. (CP 278) In her letters to her daughter written in Italian, the Decedent also reported an incident where Michael Iliakis crushed her in a 'bear hug' which she referred to as his attempt to "suffocate" her. CP 278

These letters were submitted to the Court in their original Italian together with English translations certified by the translators. Testimony of the translators as to the nuances of the meaning may be necessary but

they do, prima facie, support the allegations of exploitation and abuse,  
specifically:

Dear Daughter,

**. . . With so much chagrin and ugly words that I didn't deserve, you were the owners of everything and I was the foreigner, I couldn't do anything with my property and my money, I couldn't put in a back door, you didn't have the conscience to make me content, and I had to suffer and remain under your command. How many nights I feared that there will be a fire and I'd have to jump out of the window at my age, but you remained the owners and enlarged your bedroom without my permission, but with my money, against all reasoning, there's no reasoning with force, and you took advantage of my weakness. You always did what you wanted and I never prohibited it, but you to me, yes, I am not talking about you so much, I can't complain, but you had him behind you who gave the orders and you obeyed and followed them. Maki, I never was even the owner of the garden, always under command and law, . . .**

Love Mom

Goodbye

Maria G. Primiani

**. . . I was no longer the owner of anything, as I repeat, it really really displeased me how you insisted on not letting me put in a back door and you had no respect for who left them, I'm not talking about you. Your husband and Frank not once responded with a mean word but from your husband I had to hear of**

**the heavy one that made my heart close, that I cannot forget.**

Maria G Primiani

**. . . I loved Mike like my son but from the time he wanted to suffocate me he made me feel so bad that I have suffered so much, even to think about it.**

Maria G Primiani

---

I, Sandra C Duncan, hereby certify that I am a professional translator familiar with Italian and English and the above is a true and correct translation of the original Italian documents as to my knowledge, ability and belief. 10/14/2015 (emphasis added)

It cannot be disputed that the letters describe what Maria Primiani perceived to be financial exploitation and physical and mental abuse. This type of evidence, especially the words of the decedent, is the character of evidence which *could* persuade a rational unbiased person. The evidence therefore, was probable cause and contrary to the Court's decision to enforce the No Contest Term.

#### D. EXPLOITATION OF VULNERABLE ADULT AND INHERITANCE RIGHTS OF ABUSERS

The Petition alleged financial exploitation of a vulnerable adult under Chapter 74.34 RCW ("Vulnerable Adult Act") and violation of the

Inheritance Rights of Abusers Act, Chapter 11.84 RCW 11. (“Abusers Act.”) Under both acts, the Personal Representative has a duty to bring these claims of the estate against the perpetrators. It is not, however, reasonable to expect the Personal Representative to bring these actions against herself and her husband.

The actions are therefore, derivative actions, in part based on Frank Primiani’s status as successor Personal Representative. But also, as the only other heir to the bulk of the Estate, his portion would have increased to the extent damages are imposed on Anna and Mike Iliakis. The same substantial evidence set forth above also support these claims independent of the Will Contest action.

But, by enforcing the No Contest Term, the Court gives the Personal Representative a windfall. The Petitioner, having been awarded \$1.00, sees these other legitimate claims eviscerated. They are not moot but there is no incentive to pursue them no matter how much the Personal Representative might owe the estate for alleged wrongful action or be barred from inheritance.

The Vulnerable Adult Act and Abusers Act have a unique relationship to the question of undue influence. Under both Acts, financial exploitation at any time that the person met the definition of a “Vulnerable Adult” is a violation. Also, by definition, a case under the *Inheritance Rights of*

Slayers Abusers Act does not accrue until the death of the vulnerable adult. This means that there is no real limitation to the relevancy of proof that Decedent was a Vulnerable Adult at any age when she met the definition.

RCW 74.34.020, defines "Vulnerable Adult" as follows:

"Vulnerable adult" includes a person:

- (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself;
- or
- (b) Found incapacitated under Chapter 11.88 RCW; or
- (c) Who has a developmental disability as defined under RCW 71A.10.020; or (d) Admitted to any facility; or
- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (f) Receiving services from an individual provider; or
- (g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.

RCW 74.34.020 defines "financial exploitation" as

"Financial exploitation" means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage. "Financial exploitation" includes, but is not limited to:

- (a) The use of deception, intimidation, or undue influence by a person or entity in a position of trust and confidence with a vulnerable adult to obtain or use the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

- (b) The breach of a fiduciary duty, including, but not limited to, the misuse of a power of attorney, trust, or a guardianship appointment, that results in the unauthorized appropriation, sale, or transfer of the property, income, resources, or trust funds of the vulnerable adult for the benefit of a person or entity other than the vulnerable adult;

...

Pursuant to RCW 74.34.210, the Personal Representative has the right to maintain an action under the Abusers Act, but only for the benefit of the decedent's beneficiaries.

Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in chapter 4.20 RCW

Under this statute therefore, a right of action requires that the person alleged to be a vulnerable adult meet those statutory criteria at the time of the transaction or event that constituted financial exploitation. *A & W Farms v. Cook*, 168 Wn.App. 462 (2012)

In this case, Maria Primiani was over the age of 60, legally blind, hard of hearing, and had limited understanding of English when the Quit Claim Deed was signed in 1990, and when the 2008 Will was signed. She was therefore, a Vulnerable Adult when the Quit Claim Deed and Will were signed.

RCW 11.84.010, of the Abusers Act, incorporates the Vulnerable Adult Act definitions and adds.

(1) "Abuser" means any person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult.

(2) "Decedent" means:  
Any deceased person who, **at any time during life** in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser. (emphasis added)

Taking the definitions together, it is clear that there is no time limit applicable to either of these statutes, because the cause of action doesn't accrue under RCW 11.84.010 until the abused vulnerable adult dies. If the decedent was a vulnerable adult *at any time during life* then transactions and events during that time may support an action under either act.

Bear in mind that Maria Primiani was 104 at her death, meaning that she was 60 years old in 1970. Any evidence from 1970 forward would therefore, be potentially relevant to prove financial exploitation and therefore, undue influence. The Quit Claim Deed was recorded in 1990 and the Will was executed in 2008. Evidence admissible to show financial exploitation would also be relevant to support a finding of undue influence in 1990 and 2008. The Court abused her discretion by ignoring this substantial evidence.

Further, the same evidence supports a civil action for damages under the Vulnerable Adult Act:

In addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. RCW 74.34.200 –

Again, the Personal Representative here cannot be expected to pursue such an action against herself, but does have the fiduciary duty to pursue such actions for the benefit of the heirs, i.e. bring money back into the Estate for the heirs. RCW 74.34.210. A finding of financial exploitation also satisfies the Abusers Act, the result of which would be to prevent Anna Iliakis from inheriting from the Estate. Again, we cannot expect Anna to pursue this claim though she has a fiduciary duty to do so. The Court, by ignoring this evidence and the operation of law, robbed the Estate of its legitimate claims, whether or not the Will Contest Term was enforced.

#### E. STANDING

The Court places great emphasis on a holding that Frank Primiani did not have standing to bring claims of abuse and financial exploitation because he was not the Personal Representative and therefore, did not own the claims. (VRP 13 -14) Frank Primiani is however, the successor Personal

Representative, (CP 125) and had included in the TEDRA Petition a request that Mrs. Iliakis be removed as Personal Representative.

The Estate argues that the Petitioner does not have standing to bring claims of the Decedent against the Personal Representative and her husband. The Estate argues this because it is the Personal Representative who has the right and duty to prosecute such claims of the Decedent.

RCW 11.48.010 provides in pertinent part as follows:

The personal representative shall collect all debts due the deceased and pay all debts as hereinafter provided. The personal representative shall be authorized in his or her own name to maintain and prosecute such actions as pertain to the management and settlement of the estate, and may institute suit to collect any debts due the estate or to recover any property, real or personal, or for trespass of any kind or character.

Although it seems too obvious to state, Anna Iliakis will never perform this duty against herself and her husband. She therefore, cannot perform her duty as Personal Representative regarding these claims. Because she cannot perform this duty, she is in breach of her fiduciary duty to the Petitioner.

Where a conflict of interest exists which would contravene the rights of the beneficiaries and result in waste of the estate, a potential representative should be disqualified. . . . In re Estate of Rohrback, 152 Or.App. 68, 72, 74, 952 P.2d 87 (1998) (holding that where a conflict of interest exists, a person may be removed as a personal representative. *In re Estate of Jones*, 152 Wn.2d 1 (2004)

*In Cummings v. Guardianship Services of Seattle*, 128 Wn.App. 742

(2005), a negligence claim against the Personal Representative who had been the guardian of the decedent:

Because potential claims against him gave Watkins (the PR) a conflict of interest, the GAL recommended that a new personal representative be appointed and be authorized to investigate a potential suit for damages.

The *Cummings* court appointed a successor personal representative who brought a lawsuit against the former guardian. As in the instant case, the inability of the Personal Representative to prosecute actions against himself was a clear conflict of interest.

It is in fact one of the more common problems encountered in probate jurisprudence. A Personal Representative with non-intervention powers is accused of exploiting the decedent before and after death, and then proceeds to use the estate's assets as his own. *In re Estate of Jones*, 152 Wn. 2d 1 (2004) Whether or not the claim is of the Decedent or of the Estate against the Personal Representative, the PR cannot serve without administering those claims. Therefore, Anna Iliakis may not serve as Personal Representative when she is subject to claims of the decedent.

The Petitioner is the Personal Representative if Anna Iliakis has ceased to act or is disqualified. A conflict of interest is sufficient to disqualify her. This gives Petitioner standing to prosecute those claims if Ms. Iliakis is

unwilling to act as Personal Representative with regard to those claims..

Also, this failure has a cost to the Estate and the heirs of the estate.

Mrs. Iliakis's attorney, Mr. Hughes and Petitioner had both acknowledged that Mrs. Iliakis's health (terminal cancer) would support the appointment of a neutral Personal Representative. Indeed, it is likely that, before this appeal is heard, Mrs. Iliakis will have ceased to be able to act as Personal Representative because of the state of the illness or her death.

The Estate however, piggybacked a Motion to Dismiss the Petition on top of the Motion for Protective Order, which had consumed the parties and Court before the merits of the case could be heard. Those motions involved allegations of defective service of the Petition and allegations of violation of the Medical Records Act. In attempting to show probable cause in bringing the Will Contest, Petitioner made a *prima facie* showing that there were claims of the decedent against Mrs. Illiakis. A *prima facie* showing, not a trial on the merits, is all that is required to prove probable cause. The Court's error here was to rule that Petitioner had no standing to proffer evidence of a *prima facie* case. VRP 42 - 43

This is patently absurd because Petitioner would have had to make the very same showing in order to avoid a dismissal of the request to remove the Personal Representative. In other words, the Estate's claims against Mrs. Iliakis are one of the sufficient bases to remove her pursuant to RCW

11.68.060 The Court could not have prevented proof of grounds for removal on the basis that the PR had not yet been removed.

II. SERVICE OF PROCESS AND IRREGULARITY OF PROCEDURE

A. SUBSTANTIAL COMPLIANCE WITH SERVICE STATUTES

If the No Contest Term had not been enforced, the outcome of the Motion to Dismiss the Will Contest would have not been as devastating. The right of the Petitioner to inherit under the Will would not have been destroyed. Nonetheless, the procedure and authorities used by the Judge to decide the issue of adequacy service were in error. In general, these have to do with service requirements in TEDRA and in the Will Contest Statute Chapter 11.24 RCW

RCW 11.24.010 reads as follows:

If any person interested in any will shall appear within four months immediately following the probate or rejection thereof, and by petition to the court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he or she shall file a petition containing his or her objections and exceptions to said will, or to the rejection thereof. Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of the last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a part of it, shall be tried and determined by the court.

For the purpose of tolling the four-month limitations period, a contest is deemed commenced when a petition is filed with the court and not when served upon the personal representative. The petitioner shall personally serve the personal representative within ninety days after the date of filing the petition. If, following filing, service is not so made, the action is deemed to not have been commenced for purposes of tolling the statute of limitations.

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

RCW 11.24.020 reads as follows:

Upon the filing of the petition referred to in RCW 11.24.010, notice shall be given as provided in RCW 11.96A.100 to the executors who have taken upon themselves the execution of the will, or to the administrators with the will annexed, to all legatees named in the will or to their guardians if any of them are minors, or their personal representatives if any of them are dead, and to all persons interested in the matter, as defined in RCW 11.96A.030(5).

*In Re Estate of Jepsen* 184 Wn. 2d 376 (2015) was decided on September 24, 2015, and was unpublished at the time of the hearing on sufficiency of service January, 2016. This in itself is a fact that should have prevented it from being considered by the Court at that time.

*Jepsen* contains the following:

*Washington courts have always strictly enforced the requirements for commencing will contest actions, and we do so again today. See, e.g., . . . In re Estate of Jepsen, 90874-5 (emphasis added)*

The above emphasized language from *Jepsen* was read into the record by the Court and forms the basis for the Court's decision to dismiss the Will Contest. VRP 30

#### B. RELIANCE ON REPEALED STATUTE

The Court erred in relying upon a repealed version of RCW 11.24.020, *supra*, when it erroneously stated that a Citation was required to commence a Will Contest. (CP 183) The Court's Decision states that a Citation must be served on the Personal Representative pursuant to 11.24.020. (CP 183 – 186) The Estate makes the same error (CP 85 – 88) This is an obvious error. Specifically, the Court and the Estate treat the repealed requirement of personal service of a Citation in a Will Contest as identical to the present statute regarding personal service of the Petition. Much of the case law relied upon by the Estate and the Court therefore, deals with the requirement of a Citation in a Will Contest even though this was only a requirement before TEDRA became the law. The prior version of RCW 11.24.020 was repealed when Title 11 was revised to try to accommodate TEDRA and case law. Now, RCW 11.24.020 the Will Contest statute incorporates the TEDRA notice provisions. Also, and unfortunately, the legislature has not resolved all of the confusion in prior case law which prompted the change that removed the

requirement of a Citation. There is still the same confusion between TEDRA and the rest of Title 11 if it now requires Notice by mail but also requires personal service on the Personal Representative. Cases cited by the Respondent and the Court which are based on the repealed law are confused with newer authority without analysis. This renders the Court's Conclusions of Law regarding what constitutes effective service, and whether substantial compliance applies, in doubt.

The legislative intent of TEDRA is clearly stated

The overall purpose of this chapter is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates in a single chapter under Title 11 RCW. The provisions are intended to provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement. The [This] chapter also provides for judicial resolution of disputes if other methods are unsuccessful. RCW 11.96A.010 – Purpose

If the legislative purpose is to provide a method for resolution of disputes in trusts and estates in “a single chapter,” then the requirement of Personal Service does not serve that legislative purpose, especially if all parties are already before the court. The Will Contest Statue expressly incorporates the Notice provisions of TEDRA so that Will Contests fall under the ‘single chapter’ with all other disputes. No matter how tortured the explanation is, the legislature could not have meant to preserve old methods of service that do not serve the stated legislative purpose.

It is highly relevant therefore, that the trial Court and Estate confuse the repealed and present statutes, again in contradiction of the expressed legislative intent. Cases based on service of a Citation or Petition in effect prior to TEDRA simply cannot be precedential.

C. ARGUMENT ON THE MERITS OF THE JEPSSEN CASE

Response to the use of the *Jepsen* case, *supra*. Petitioner asked the Court for permission to file a supplemental brief on *Jepsen* and asked the Court to consider the brief. (CP 245) The Court's Clerk relayed the Court's message by e-mail that the brief was "untimely and inappropriate and Judge Plese will not be reviewing it." CP 246

The Court adopted from *Jepsen*: Washington courts have always strictly enforced the requirements for commencing will contest actions." *Jepsen supra*. This is dicta at best, and an error of law at worst, because courts have *not* always strictly enforced service requirements.

A statement is dicta when it is not necessary to the court's decision in a case. . . . Dicta is not binding authority. . . . *Protect Peninsula's Future v. City of Port Angeles*, 175 *Wn.App.* 201, 304 P.3d 914 (2013) internal citations omitted

All of the cases cited by the *Jepsen* Court to support that dicta however, deal only with the defect of filing the Petition late, not late personal service and are therefore, readily distinguishable.

For example, *In re Estate of Toth*, 138 Wn.2d 650, 653 (1999) held that Civil Rule 6(e) did not extend the time limit for filing the Petition by three days because the Notice of Probate was received by mail. *Toth* did not deal with issues regarding *service* of the Petition.

*In re Estate of Peterson*, 102 Wn. App. 456 (2000) held that the discovery rule did not apply to the late filing of a Will Contest Petition. Likewise *State ex rel. Wood v. Superior Court*, 76 Wash. 27 (1913) found that a Will Contest Petition filed after the prior one year statute of limitations was too late.

In contrast, *Jepsen* and the instant case deal with the service of the Petition after timely filing. A substantial compliance argument was therefore, never raised in the authorities cited by the *Jepsen* Court and relied upon by the Trial Court here. These cases are in turn used to support the statement “Washington courts have always strictly enforced the requirements for commencing will contest actions.” CP 184

That statement is not true if personal service is necessary for commencement of a case. In cases where personal service is necessary for commencement, substantial compliance will apply.

Statutes authorizing service by means other than personal service, that is, constructive and substituted service, require strict compliance and must be strictly construed as in derogation of the common law. See, e.g., *Martin v. Meier*, 111 Wash.2d 471, 479, 760 P.2d 925 (1988) (statute covering resident motorists who have departed the state, authorizing service on the secretary of state); *Painter v. Olney*, 37 Wash.App. 424, 427, 680 P.2d 1066, [810 P.2d 973] review denied, 102 Wash.2d 1002 (1984) (service by publication). Personal service statutes, on the other hand, require only substantial compliance. *Thayer v. Edmonds*, 8 Wash.App. 36, 39, 503 P.2d 1110 (1972), review denied,

82 Wash.2d 1001 (1973). *In re Estate of Palucci*, 810 P.2d 970 412 (1991)

In *Palucci*, a citation (required under prior law) was held to be the equivalent of a Summons and sufficient if it gave notice of the Show Cause hearing contemplated by the Will Contest Statute. The requirement of a citation was removed by amendments to that statute in order to make it consistent with TEDRA because now, a TEDRA notice is sufficient. TEDRA also provides for an expedited hearing or the right to object to a Notice of Mediation.

The function of a summons or its equivalent is: giv[ing] certain notice of the time prescribed by law to answer and to advise the defendant of the consequences of failing to do so "*Quality Rock Prods., Inc. v. Thurston County*, 126 Wn.App. 250, 264, (2005)

Further:

[a]ny summons . . . which definitely and certainly gives notice of these things must be held a substantial, hence a sufficient, compliance with that form. *Codd v. Westchester Fire Ins. Co.*, 14 Wn.2d 600, 605, (1942)

In this case, a Summons was not required. Personal service was required with a TEDRA notice.

The issue before the Court here is then: Is strict application of the personal service requirement mandatory or is substantial compliance sufficient? *Jepsen, supra*, did not rely on any cases that involved a timely filed petition and lack of personal service.

As argued above in *Palucci, supra* however, a personal service requirement is subject to substantial compliance. The law favors

preservation of legitimate claims to be heard on their merits. *Palucci, supra*. Finally, the Estate was given timely Notice of Petitioner's claims. In the instant case, the Petition was actually personally served on Michael Illiakis, according to the Certificate of Service. This fact also makes this case distinguishable from the cases relied on by the court. Specifically, in cases where filing was not an issue, service either occurred not at all or at a much greater time after filing than in the instant case. The Court must therefore, decide that these cases where the Petition was served one year from filing, or not at all, can be distinguished. In other words, is service seven months after filing sufficient service? The Trial Court did not make this distinction.

#### D. APPEARANCE OF FAIRNESS

The Court cannot appear to be unfair. *Tatham v. Rogers, infra*. In the instant case, the Court allowed one party to discuss a case that had never been provided to Appellant's counsel or contained in the Estate's briefing. (At hearing, counsel for the Estate said that the lack of a brief and a discussion of Jepsen was due to his Associate being sick. VRP 29-30) Not only that, but the Court discussed the case without allowing Appellant's counsel to review the case or respond. Appellant then provided a Brief on the Jepsen case to the Court and asked permission to file the Brief. The request was denied.

This is very different from the Court conducting independent research. Here, the facts show actual bias because the Court actually favors one party over another in open court as follows:

1. Respondent does not file a Reply Brief.
2. *Jepsen* is not cited prior to the hearing.

3. Respondent provides *Jepsen* to Court at the hearing
4. Court discusses *Jepsen* with Respondent but does not give Petitioner time to review the case.
5. Petitioner asks the Court to allow filing of a supplemental brief on *Jepsen*.
6. The Court denies permission, and then;
7. The Court's decision is based on *Jepsen*. CP 185

The Court here violated the appearance of fairness doctrine, described as follows:

A Judicial proceeding satisfies the appearance of fairness doctrine only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *Tatham v. Rogers*, 170 Wn.App. 76, 283 P.3d 583 (2012)

This violation amounted to an abuse of discretion. The issue under that analysis is:

. . . was the trial court's conclusion the product of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons? *State v. Dyer*, 61 Wn.App. 685, 811 P.2d 975 (1991)

The Court's decision to discuss *Jepsen* without review by Petitioner and her decision not to allow Petitioner to file a brief on *Jepsen* were manifestly unreasonable, because not only did it violate the appearance of fairness doctrine but, as a practical matter, is unfair on its face.

### III. MOTION FOR PROTECTIVE ORDER

A. THE MEDICAL RECORD PRIVILEGE CANNOT BE USED AGAINST THE INTERESTS OF THE DECEDENT.

Privilege is not absolute. It cannot be used against the interests of the patient. The Court erred in when it found that Petitioner and co-counsel acted in bad faith regarding the subpoena for medical records without substantial evidence of insincerity, dishonesty, disloyalty, duplicity or deceitful conduct, fraud or concealment required by applicable case law. The Court erred in awarding sanctions against Petitioner under RCW 70.20.170 without a civil action being brought against Providence Home Health Care.

The Court erred when it ignored that fact that the confidentiality of the medical records was waived by the Decedent before the date of death as to Frank Primiani as Attorney in Fact for the Decedent and as to Maria Tiberio who was present at consultations between the Decedent and health care personnel.

B. RCW 70.20.17 DOES NOT PROVIDE A CIVIL REMEDY AGAINST PERSONS WHO ARE NOT HEALTH CARE PROVIDERS OR FACILITIES

RCW 70.20.170(1) provides for a civil remedy against a health care provider or facility that violates the statute by releasing medical records without permission of the patient:

A person who has complied with this chapter may maintain an action for the relief provided in this section against a health care provider or facility who has not complied with this chapter.

Division III of the Court of Appeals heard a case regarding the same issue that was before the trial court here, *Jeckle v. Crotty*, 120 Wn.App. 374, 85 P.3d 931 (2004) In *Jeckle*, an Assistant Attorney General turned over patient records to an attorney representing clients against the doctor who created the records. The doctor sued the attorneys for violations of the Act and did not prevail:

The issue is whether the trial court erred in deciding no cause of action exists under CR 12(b)(6) based upon Dr. Jeckle's allegation the defendants violated the Uniform Health Care Information Act (UHCIA), chapter 70.02 RCW, when they obtained and used the investigatory records of the Medical Quality Assurance Commission in aid of their private lawsuits against Dr. Jeckle. The UHCIA sets strict guidelines for the disclosure of patient information by a health care provider. RCW 70.02.050. A health care provider may disclose health care information . . . The sole remedy provided in the UHCIA is an action against a health care provider or facility for actual, but not consequential, damages. RCW 70.02.170(1), (2). The defendants here, attorneys, are not health care providers. Hence, Dr. Jeckle has no remedy under the UHCIA against the lawyers and their law firms. *Jeckle v. Crotty*, 120 Wn.App. 374, 85 P.3d 931 (2004)

The statute does not mention a right to sue or sanction any other class of violators. Based on this fact, courts have held as follows:

. . .an action against a health care provider or facility is a condition precedent to the provision in RCW 70.02.170(2) that allows a court to order the health care provider "or other person" to comply with the HCDA. *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn.App. 356, 112 P.3d 522 (Div. 1 2005)

This condition precedent applies to the whole of RCW 70.02.170 (2)

which includes attorney fees and other relief:

The court may order the health care provider or other person to comply with this chapter. Such relief may include actual damages, but shall not include consequential or incidental damages. The court shall award reasonable attorneys' fees and all other expenses reasonably incurred to the prevailing party.

In a companion case to *Crotty, supra*, this Court went further and found legislative intent that the attorney could not be the subject of such a civil action.

We held that the plain language of the statute does not provide Dr. Jeckle with a right of action because an attorney is not a health care provider or facility. *Id.* at 385-86, 85 P.3d 931.

We cannot rewrite the Act. The language is unambiguous.

And, if that were not enough, the legislature changed this language from the original (and more expansive) language of the uniform law. The uniform law creates a right of action for any aggrieved person to seek the relief provided. It does not restrict the class of potential defendants. Our legislature deleted this open-ended language and substituted the more restrictive language at issue here. And this is important. Legislative changes to the language of a uniform law lead "conclusively" to the view that the language was changed in order to effect the resulting substantive change. *State v. Cleppe*, 96 Wash.2d 373, 378, 635 P.2d 435 (1981). The substituted language, not the

rejected language, then expresses the true legislative intent. Id. at 380, 635 P.2d 435. *Fisher v. State ex rel. Dept. of Health*, 125 Wn.App. 869, 106 P.3d 836 (2005)

Our legislature expressly restricted the possible defendants to exclude any person but health care workers and facilities. There is therefore, no ambiguity or doubt that the Act provides no civil remedy against Mr. Primiani and counsel. Even the section related to the Subpoena sanctions the Health Care Provider for releasing records, not the attorney requesting the records.

Without the written consent of the patient, the health care provider may not disclose the health care information sought under subsection (1) of this section if the requestor has not complied with the requirements of subsection (1) of this section. RCW 70.02.060

It is therefore, error, based on established case law, to penalize the attorney when it was Providence who violated the statute. Further, a cause of action against Providence is a prerequisite for the Court to take action against any other person. Finally, regardless of whether Providence was joined or not, the Court could not award attorney fees to the Estate against Petitioner under any provisions of the Chapter 70.02 RCW.

### C. SUBPOENA FOR MEDICAL RECORDS

In order to support claims under the Vulnerable Adult Act and Abusers Act, Petitioner sought to subpoena records from Providence, including records of the meeting of Maureen Benson with Decedent and Maria Tiberio. The content of that meeting had already been discussed by Petitioner with Maureen Benson. CP 278

Petitioner requested copies of the records in January, 2015, soon after Decedent's death. Providence refused to provide the records at that time. Petitioner requested the same records from Providence in August 2015. At that time, Providence produced the records, but later denied giving the records, according to Counsel for the Estate. CP 279

When the same records were subpoenaed in December 2015, Providence made them available to Petitioner's Co-Counsel, Steven Schneider, after confirming that no Protective Order had been issued. Mr. Schneider then set the deposition of Maureen Benson for December 23, 2015. CP 228-229

Mr. Schneider later truthfully informed the Court on the record that he was not familiar with Chapter 70.02 RCW (Uniform Health Care Information Act) and was mistakenly acting according to the Civil Rules in receiving the records because a Protective Order had not been sought. CP 236

Before the records were received, Mr. Schneider sent the following e-mail to Mr. Stevens on December 14, 2015, wherein he described to Mr. Stevens the relevancy of the 2014, record of social worker Maureen Benson's conversation with Maria Primiani and Maria Tiberio to prior time periods that were discussed then:

The only records I am interested in deal with what was told to visiting nurses and social workers by Maria about her living conditions and concerns her treatment by her daughter. This relates to undue influence as it describes her treatment as consistent over time. It corroborates document production which includes translated letters written in Italian by Maria describing her treatment by her daughter. It also relates to breach of the conditions of the Quit Claim Deed which reserved a life estate. The abuser statute also applies regarding a vulnerable adult. The records corroborate Maria's concerns in this regard.

I don't intend to make medical records public but I also don't think Anna can legitimately invoke the privacy of Maria when the information is adverse to her. We can have an *in camera* with the judge if necessary. Some of these records were already in Frank's possession. CP 229

Mr. Schneider then suggested an *in camera* review which was agreed to by Steven Hughes, Counsel for Anna and Michael Iliakis, by e-mail dated December 14, 2015:

I think we should have an "in camera" conference with the Judge on the privilege.

Thanks,

***Steven W. Hughes***

CP 229 -230

On Wednesday, December 16, 2015, Brant Stevens, attorney for the Estate, stated to the Judge's Clerk by e-mail:

Mr. Schneider has agreed to strike Monday's hearing to have this matter heard in due course, on the condition the he will keep the VNA records confidential until further order of the court, and has agreed to continue his deposition of Ms. Benson until this matter can be heard.

The next available court date in front of Judge Plese is January 8, 2015 at 3:00 p.m.

Mr. Schneider, please advise if these terms are acceptable. .

Mr. Schneider responded on December 16<sup>th</sup>:

Yes. I can do it then.

Mr. Stevens responded:

And you agree to continue your deposition of Ms. Benson and keep the VNA records confidential until further court order?

Mr. Schneider responded:

Yes. I will reschedule the deposition after the hearing date.

There are only a few pages that I would use and would include them in the document production requested by Mr. Hughes. Do you object to me providing those pages to you and Mr. Hughes?

Mr. Stevens responded:

Please keep the VNA records confidential until our hearing on this matter. I am going to ask the court to order you to return them to VNA.

Mr. Schneider responded:

The Judge will need to see the records before the hearing. I intend to provide them to the Judge sealed. She can review them or not. There is no blanket privilege on the material. Out of about 100 pages, I have a total of 4 pages that I need to use. You will need to explain to the Judge why these particular pages need to be excluded.

These are pages that relate to Maureen Benson who is a social worker not a physician. They relate Maria's concerns as told to Ms. Benson. They describe Maria's treatment by Anna and Mike from her point of view. This relates directly to the undue influence issue. Maria Tiberio and Ms. Benson will be called to corroborate the same information. Letters written in Italian which we have had translated tell the same concerns. The evidence is also relevant to the breach of the conditions of the Quit Claim Deed.

RCW 11.84.010 defines 'decedent' for purposes of the slayer and abuser statute as "Any deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser." Evidence of financial exploitation at any time Maria was a vulnerable adult will trigger the statute.

Any statement by Maria that is not restricted by the Dead Man's Statute is relevant to the above issues.

So, I will agree to use only the 4 pages I need and return the rest to VNA or shred them. Let me know if that is agreeable.

Mr. Stevens responded:

I would object to you filing them as sealed documents as well. I don't know if they are privileged medical records or

not. I do know that you jumped the gun on your subpoena, and never should have received those documents, and retrieved them in light of the fact that I had sent you a letter to VNA instructing them not to release those records until further instruction from my office. Now I have time and expense dealing with this issue, because you retrieved medical records over my objection, unlawfully, and prematurely under your subpoena.

Mr. Schneider responded:

I can return them and subpoena them again and you would still have to file a Motion for Protective Order. Apparently you do not want the court to see them, you do not want to see them, that is the real issue. You should be working to solve the problem which is to have the judge determine if the records are relevant and admissible with restrictions.

Mr. Stevens responded

You should give those documents back to VNA, and subpoena them properly. Until then, I am leaving Monday's hearing at 8:30 a.m. on the docket.

CP 238-243

Mr. Schneider had agreed to continue the deposition in consideration for continuing the hearing. Their agreement would have resolved the matter except that Mr. Stevens changed his mind and then did not want the documents sealed and provided to the Judge.

At the hearing however, as Mr. Schneider promised, he brought the records and gave them to the Judge sealed. VRP 27-28. The hearing was absolutely unnecessary because Mr. Stevens did not object to him

providing the documents to the Judge, exactly what he had agreed to on December 16<sup>th</sup>.

Mr. Stevens, for his part, never mentioned the applicable statutes until he filed his brief. Mr. Schneider responded based on the Physician-Patient privilege and Civil Rules, not the Health Care Records Act or HIPAA.

CP 258 - 260

At this point, Mr. Stevens' Brief in support of Protective Order, filed January 8, 2016, stated:

Page 4, ll 1-7

The VNA medical records are unrelated to any of the claims which Mr. Primiani has standing to raise in his Petition. The Estate discusses each in detail below. Mr. Schneider and Mr. Primiani have both accused the Estate of trying to conceal the VNA medical records for self-serving purposes. The Estate and Anna Iliakis, as Personal Representative, are not hiding or concealing any information, but rather dutifully following the legal rules, regulations, and parameters in order to protect Maria Primiani's doctor-patient privilege and Federal and State privacy rights afforded to her by law even after death.  
(Emphasis added)

CP 80

It was more than ingenuous for Mr. Stevens to state that he was "dutifully following legal rules, regulations and parameters in order to protect Maria

Primiani's doctor-patient privilege and Federal and State privacy rights afforded to her by law, even after death."

While the statute gives the Decedent's rights of privacy to the Personal Representative, the stated public policy of the statute is to protect the Patient. No privilege can be invoked *against* the rights of the person holding the privilege.

The bottom line is that the medical records described herein contain the Decedent's description of exploitation and abuse by the Personal Representative.

There are no other heirs to the bulk of the Estate, only Frank Primiani and Anna Iliakis. Mr. Primiani alleges his mother's claims against his sister in the Petition. If those claims prevail then Anna may owe the Estate money or be prohibited from inheriting. Mr. Stevens is only dutifully protecting the medical records for the wrongful purpose of shielding the personal interests of Anna Iliakis.

Without question, the Decedent's own statements and memories as to what happened to her at the time the Will was signed, and at other times when abuse and financial exploitation occurred, as reported to Ms. Benson and her granddaughter Maria Tiberio, are relevant to allegations of undue influence and financial exploitation occurring over a large expanse of time.

After that first hearing, Mr. Schneider complied with the Court's order to destroy all copies of the files. At a hearing on January 22, 2016, the Court heard argument on the medical records issue and the Motion to Quash the Subpoena for Ms. Benson's deposition. In these two hearings, the Court stated that there was no knowledge of the receipt of records by Mr. Schneider until the first hearing. This was untrue because Mr. Stevens, Mr. Hughes, and the Court's Clerk all knew that the receipt of records by Mr. Schneider was the subject of the expedited Motion held on December 21.

The Court also decided that the records were obtained in "bad faith" by Mr. Schneider, and based on that finding, the Court awarded attorney fees to the Estate. But there was no substantial evidence of bad faith, which has been defined as:

involving insincerity, dishonesty, disloyalty, duplicity or deceitful conduct; it implies dishonesty, fraud or concealment. An honest mistake of judgment is not in and of itself bad faith and no single fact is necessarily decisive of this issue. *Weber v. Biddle* 4 Wn.App. 519 (1971)

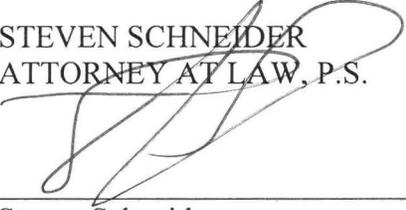
Therefor there should have been no findings of bad faith and no award of attorney fees.

## CONCLUSION

The most egregious error here is that the court enforced the No Contest Term without the required findings regarding bad faith and probable cause, and ignored substantial evidence constituting probable cause. The court could not have enforced the No Contest Term if it had no ignored the substantial evidence before it. This in itself destroyed the Petitioners inheritance and gave Mrs. Iliakis a windfall.

DATED this 26 day of August, 2016.

STEVEN SCHNEIDER  
ATTORNEY AT LAW, P.S.



---

Steven Schneider  
WSBA No. 22622  
Attorney for Petitioner