

X

NO. 87544-8

SUPREME COURT OF THE STATE OF WASHINGTON

In Re the Estate of

VIRGIL V. BECKER, JR.,
Deceased

CATHERINE JANE BECKER, CAROL-LYNNE JANICE BECKER,
AND ELIZABETH DIANE MARGARET BECKER,

and

JENNIFER WHITE, in her capacity as Personal Representative of the
Estate of Virgil V. Becker, Jr.

Respondents
v.

NANCY BECKER,

Petitioner.

OPPOSITION TO PETITION OF NANCY BECKER FOR
DISCRETIONARY REVIEW TO THE SUPREME COURT

Bruce A. McDermott, WSBA #18988
Teresa Byers, WSBA #34388
GARVEY SCHUBERT BARER
Attorneys for Respondents

Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
206 464 3939

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2012 JUL 23 P 2:45
BY RONALD R. CARPENTER
CLEAR

TABLE OF CONTENTS

	<u>Page</u>
I. IDENTITY OF RESPONDENTS.....	1
II. ISSUES PRESENTED FOR REVIEW	1
III. RESTATEMENT OF THE CASE.....	2
A. Decedent’s Death and the Estate Administration.	2
B. The Sole Beneficiary, the Contestants, and the PR Mediate.	2
C. Nancy Is Removed as PR.....	4
D. The Trial Court Determines that Nancy Lacks Standing to Thwart Settlement and the Court of Appeals Affirms.....	5
A. The Court of Appeals Decision Deprives Nancy of Nothing, as She has No Current Beneficial Interest in Her Husband’s Estate, and Has Readily Acknowledged that Decedent Did Not Intend for Her to Have an Interest.	8
1. Standing is Granted Only to Real Parties in Interest.....	10
2. Nancy Cannot Inherit Intestate in this Estate.....	14
a. <u>An Omitted Spouse Claim is Not Ripe While the 1999 Will Remains in Probate</u>	15
b. <u>Nancy is Estopped from Challenging the Will and Claiming an Omitted Spouse Share</u>	17
B. This Case Does Not Involve A Substantial Public Interest.....	17
C. There Is no Question of Who Heard Oral Argument and Decided the Case.....	18
V. CONCLUSION.....	19

TABLE OF AUTHORITIES

	<u>Page</u>
Cases	
<i>Christiansen v. Dep't of Soc. Sec.</i> , 15 Wn.2d 465, 131 P.2d 189 (1942).....	12
<i>Findley v. Findley</i> , 193 Wash. 41, 74 P.2d 490 (1937)	14, 15
<i>In Re Barr's Estate</i> , 76 Wash.2d 59, 455 P.2d 585 (1969).....	20
<i>In re Estate of Bowers</i> , 132 Wn. App. 334, 131 P.3d 916 (2006).....	15
<i>In re Estate of Kordon</i> , 157 Wash.2d 206, 137 P.3d 16, 20 (2006).....	19
<i>In re Estate of Moi</i> , 136 Wn. App. 823, 151 P.3d 995, 997 (2006).....	4, 10, 17
<i>In re Kerckhof's Estate</i> , 13 Wash.2d 469, 125 P.2d 284 (1942).....	15
<i>In Re O'Brien Estate</i> , 13 Wn. 2d 581 (1942)	12, 13, 14
<i>In re Riemcke's Estate</i> , 80 Wash.2d 722, 497 P.2d 1319 (1972).....	16
<i>Mack v. Armstrong</i> , 147 Wn. App. 522, 195 P.3d 1027 (2008).....	11
<i>McFadden v. McFadden</i> , 257 P.2d 146, 174 Kan. 533 (Kan. S. Ct. 1953)	17
<i>Miller v. Campbell</i> , 164 Wn.2d 529, 192 P.3d 352 (2008).....	11
<i>Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County</i> , 135 Wash.2d 542, 958 P.2d 962 (1998).....	11
<i>Sprague v. Sysco Corp.</i> , 97 Wn. App. 169, 982 P.2d 1202 (1999).....	12
<i>Thomas v. Best</i> , 209 Va. 103, 161 S.E.2d 803 (Va. S. Ct. 1968)	17, 18
Statutes	
RCW 11.04.015	16
RCW 11.12.095	15, 16
RCW 11.12.095(1).....	9, 15

RCW 11.24.010	18
RCW 11.96A.....	1, 6, 8
RCW 11.96A.030(5).....	6, 7
RCW 11.96A.210.....	7

Rules

RAP 13.4.....	8, 12, 19
RAP 13.4(b)	8
RAP 13.4(b)(2)	8
RAP 13.4(b)(3)	8
RAP 9.6.....	4

I. IDENTITY OF RESPONDENTS

Catherine Jane Becker, Carol-Lynne Janice Becker, and Elizabeth Diane Margaret Becker are Decedent's children from his first marriage and petitioners in the Will Contest and creditor claims against the Estate.

II. ISSUES PRESENTED FOR REVIEW

1. When the sole beneficiaries of Decedent's prior Will filed a Will Contest challenging the Will in probate, a Will which benefits *only* Decedent's youngest child and purposefully disinherits his surviving spouse, and the beneficiary of the Will in probate and the contestants seek to enter into a settlement under RCW 11.96A *et seq.* which does not invalidate the Will in probate:

a. Does Decedent's surviving spouse, who is not a creditor of the estate or a beneficiary of the Will in probate, and did not timely contest the Will (but rather vigorously defended it), have standing to object to a proposed settlement between the sole beneficiary of the Will in probate and the only contestants of that Will?

b. Is the surviving spouse an interested party to a settlement under RCW 11.96A *et seq.* because of a contingent, unripe claim which has not been and could not be asserted unless and until the Will in probate were invalidated, and then only if the surviving spouse could support a claim that the omitted spouse statute should apply despite her repeated statements that Decedent had no intention to benefit her upon his death?

2. When the same panel who heard oral argument signed the final decision issued by the Court of Appeals does it serve justice or

judicial economy to order a rehearing because of a clerical error that was promptly corrected?

III. RESTATEMENT OF THE CASE

A. Decedent's Death and the Estate Administration.

Decedent died on July 27, 2008. Nancy, his surviving spouse and PR, admitted to probate a Will which named Barbara Becker, his youngest daughter, as his *sole* beneficiary.¹ Decedent's Adult Children challenged the Will as invalid and fraudulent.² In addition, they asserted fourteen creditors claims. Nancy rejected every claim. She also vigorously defended the Will in probate, affirming that she believed that Decedent intended for Barbara to receive the *entirety* of his probate estate.³

B. The Sole Beneficiary, the Contestants, and the PR Mediate.

Through documents produced in discovery, the Adult Children learned that as PR Nancy undervalued the Estate by several million dollars, claiming for herself both separate and community interests in property wholly without legal basis. Discovery showed that the characterization of those interests sprung merely, and literally, from what Nancy and her accountant made up.⁴ The Adult Children first became

¹ CP:1-11.

² CP:15-29.

³ CP:44. Nancy included this declaration in the clerk's papers; however, it is and has been the subject of an as yet undecided motion to strike under Washington's Dead Man's Statute filed by Respondents on February 8, 2009. Consequently, Respondents refer only to the specific portions of the declaration which are not barred by the Dead Man's Statute and do not waive any pending objections to the admission and use of the document as competent evidence in this litigation. *See also* Petition of Nancy Becker for Discretionary Review of Supreme Court, p. 10 ("Nancy did not believe that the will executed by her husband and admitted to probate was invalid and she did not...file a will contest.")

⁴ The effect of Nancy's mischaracterization was to claim as her own millions of

concerned about this mischaracterization of assets in the Summer of 2009, primarily because of the LLC Operating Agreement and publically recorded deeds. However, in the Spring of 2009, prior to obtaining any of this information, the Adult Children had agreed to mediate following discovery. Thus, despite the Adult Children's concerns about the mischaracterized assets, in December 2009, Barbara (via her court-appointed GAL), Nancy, *as the PR*, and the Adult Children mediated their disputes. At that time the Adult Children were aware of some aspects of Nancy's malfeasance, but nonetheless hoped for a global settlement.

Although Nancy, in her role as PR, refused to actively participate in the mediation, the GAL and the Adult Children negotiated a settlement that encompassed the Will Contest and the creditors claims.⁵ A CR 2A Agreement memorialized the settlement, and by agreement between the *only* beneficiary of the Will in probate and its *only* contestants, divided the Estate into two equal shares, with one share for Barbara and the other share to be further subdivided among the three Adult Children. The settlement agreement did not invalidate the Will in probate or admit any of Decedent's prior Wills to probate. Rather, it recognized the possibility that the trial court might grant one or more creditors claims and that the Will contest might be successful - then assigned value to those possible

dollars of assets that otherwise passed to *her daughter* under the Will in probate that she purported to vigorously defend. Her protestations that such defense, and repeated appeals thereafter, were and are for her *daughter's* sake therefore ring increasingly hollow to this day. CP:121 (p. 50-51); CP:123 (p. 141:21-23); CP:124-125; CP:156; and CP:79.

⁵ CP:258-264 & Appendix to Nancy's Initial Court of Appeals Brief, filed 12/08/2010, 6-11.

outcomes. In exchange for settlement, the Adult Children agreed to dismiss both the Will contest and the creditors claims.⁶

C. Nancy Is Removed as PR.

Nancy refused to execute the Agreement *in her role as PR*. The GAL and Respondents asked the Court for a court-appointed limited Co-PR to review and approve the agreement. Meanwhile, Nancy attempted to remove the GAL.

Briefing surrounding approval of the CR 2A Agreement and the GAL's removal crystallized Nancy's conflicts of interest and mismanagement of the Estate. Accordingly, the GAL filed a Petition to Remove Nancy as PR. On March 12, 2010, the Court found that Nancy had four direct, irreconcilable conflicts with the Estate and removed her.⁷ At the same hearing, the Court held that with Nancy's removal as PR, there was effectively no longer a pending motion to remove the GAL.

On April 9th, the Court appointed Ms. White as successor PR.⁸ The Court also set a hearing on June 11th, anticipating presentation of "a CR 2A Agreement". Despite Nancy's removal as PR, and the fact that

⁶ At this point in her "statement of the case", Nancy's brief carefully sets forth presumptive interests under Washington's omitted spouse statute. However, she fails completely to mention that the omitted spouse statute only comes into play in the event that a Will, which Decedent signed prior to his marriage, is admitted to probate. Nothing in the settlement agreement contemplates admitting an earlier Will of Decedent, signed prior to his marriage to Nancy, to probate. The Will in probate names Nancy and expressly does not provide for her, as she has allegedly repeatedly was Decedent's intent – the omitted spouse statute cannot apply to her. "If the spouse is named and provided for, then the spouse is not omitted *and the inquiry ends.*" *In re Estate of Moi*, 136 Wn. App. 823, 829, 151 P.3d 995, 997 (2006).

⁷ CP: 920-924.

⁸ CP:746-749.

Decedent did not name her as a beneficiary of the Will that she vigorously defended, Nancy insisted that she participate in any settlement agreement involving the Estate. This meant that Nancy could thwart any attempt between the Adult Children and the Estate to settle.

Unbeknownst to the Adult Children, throughout the month of May 2010, Nancy's counsel purported to *simultaneously* represent the successor PR.⁹ This conflicting representation ensured that the successor PR could not possibly receive independent advice about the terms of the proposed CR2A Agreement that would settle all of the Adult Children's claims against the Estate or Nancy's purported ongoing role in the probate. It was during this period of time that the successor PR executed the declaration supporting Nancy's standing claim, which is referenced in Nancy's motion to this Court.¹⁰

D. The Trial Court Determines that Nancy Lacks Standing to Thwart Settlement and the Court of Appeals Affirms.

Nancy's repeated attempts to insinuate herself into the settlement process, despite the fact that she was not a beneficiary under the Will in probate, had not contested the Will in probate and was not a creditor of the estate, forced the GAL to petition the Court for a determination of Nancy's standing with regard to the approval of a CR2A Agreement that settled the claims of the Adult Children.¹¹ The trial court received extensive briefing on the roles of each of the parties and parsed thoroughly

⁹ According to CR 71, Mr. Van Sielen, Nancy's counsel could not, in fact, withdraw from his representation of her until June 7, 2010, a mere four days before the hearing on approval of the CR2A Agreement. CP: 925-926.

¹⁰ CP 189-90.

¹¹ CP:173-183.

the basis for standing under the statute.¹² Nancy was represented by counsel throughout that litigation and had every opportunity to argue the alleged bases for her standing. The trial court found her arguments unpersuasive and determined that Nancy lacked standing to participate in the negotiations of a CR2A Agreement that resolved the Will Contest brought by the Adult Children, resolved the creditors claims of the Adult Children and distributed Decedent's Estate.¹³

Nancy filed a Notice of Discretionary Review of the Order Denying Standing and, ultimately, a Motion for Discretionary Review in the Court of Appeals. The Adult Children agree with the recitation of facts set forth in Nancy's brief as to that process.

On March 12, 2012, the Court of Appeals issued its first unanimous, unpublished opinion upholding the Order on Standing and finding that "neither general principles of standing nor the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, confer upon Nancy standing to participate in the settlement agreement proceedings." App. 31. The Court of Appeals specifically analyzed the language of TEDRA and confirmed that a "party" under that statute is not merely one of an enumerated list of possible parties under RCW 11.96A.030(5), but that to have standing a party must also have "an interest in the subject of the particular proceeding." RCW 11.96A.030(5). The court went on to note that Nancy was not a beneficiary under the Will, that she had not challenged the validity of the Will (unlike the Adult

¹² CP:189-190, CP:204-214, & CP:215-229.

¹³ CP:230-232.

Children), and that she could not now challenge the Will because the applicable statute of limitations had long since passed. App. 38-41. The Court of Appeals then separately analyzed Nancy's arguments as an alleged omitted spouse and clearly stated that such a claim could be brought only if the Will in probate were invalidated. The settlement agreement does not take that action. Noting that RCW 11.96A.210 is intended as a dispute resolution mechanism, the Court of Appeals held that Nancy is not personally involved in the current dispute between the Estate and the Adult Children, and confirmed that she therefore had no right to participate in such settlement, or more precisely to thwart settlement between beneficially interested parties seeking to settle. Judge Dwyer, Judge Leach and Judge Grosse signed the Order.

Nancy filed a motion for reconsideration of the Court of Appeals unpublished opinion. One basis for that motion, along with those repeating and recasting the arguments already considered by the Court, was that Judge Grosse, who did not attend the hearing, signed the Order and that Judge Spearman, who did, had not. Recognizing what appeared to be a mere clerical error, the Court of Appeals entered an order withdrawing the unpublished opinion. App. 50. The Court of Appeals issued a second unpublished opinion, *identical to the first*, this time signed by Judge Dwyer, Judge Leach and Judge Spearman – all three of the judges who were present at oral argument. App. 1-15.

Nancy again filed a motion to publish and a motion for reconsideration. Both were denied. App. 51-52.

IV. THIS COURT SHOULD DENY REVIEW

Nancy's Motion for Discretionary Review attempts to cobble together a basis for review under RAP 13.4, but fails. RAP 13.4(b) sets forth four bases for review by this Court, and none apply here. First, the Court of Appeals decision, for reasons discussed in detail below, is not in conflict with prior Supreme Court precedent. To the contrary, the decision is supported by such precedent. Nancy does not even attempt to argue that RAP 13.4(b)(2) & (3) apply to this matter. Finally, she tries to elevate the issues raised into this matter to the level of "substantial public interest", but utterly fails to explain how a unanimous unpublished decision consistent with Washington case law and effectuating the legislative intent expressed in the applicable statute, RCW 11.96A.010, involves a matter of substantial public interest. There is no basis for review of the Court of Appeals decision and Nancy's motion for such review should be denied.

A. The Court of Appeals Decision Deprives Nancy of Nothing, as She has No Current Beneficial Interest in Her Husband's Estate, and Has Readily Acknowledged that Decedent Did Not Intend for Her to Have an Interest.

The entirety of Nancy's argument rests on a basic fallacy, namely that the Adult Children will receive assets that otherwise would pass to Nancy. This is not true. Under the Will in probate, the sole beneficiary of Decedent's estate is his youngest daughter Barbara – not Nancy. The Will in probate specifically names Nancy and *makes no provision for her*. Nancy has unfailingly asserted that this Will expressed Decedent's testamentary intent.

The Adult Children disagree. They believe that the Will in probate

does *not* express their father's testamentary intent and timely challenged that Will. In addition, they filed multiple creditors claims. In conjunction with either lawsuit, the Adult Children could receive a significant portion of Decedent's estate. The settlement proposed between the Adult Children and Barbara settles both sets of claims. With the current Will in probate, only *Barbara's* share of the Estate is reduced by settling with the Adult Children. Nancy loses nothing.

It requires a deeply contorted reading to find any standing for Nancy under these facts and Washington law. Nancy has tried various legal theories to confer such standing upon herself, but the proverbial last theory standing seems to be the following: first, she looks to the future, and assumes the Adult Children are successful in their Will Contest and the Will in probate is thrown out. *Absent this first step, Nancy's legal theory that she is an omitted spouse is not even ripe for consideration.*¹⁴ Second, she posits that Decedent's earlier Will benefiting his Adult Children will then be admitted to probate. Third, she asserts that she will then file a will contest, or make a claim as an omitted spouse. *Fourth, despite her repeated statements under oath that her husband did not intend for her to inherit upon his death,* Nancy must then successfully argue that the presumption in favor of a surviving spouse should apply. How Nancy can reasonably argue that Decedent intended for her to receive any portion of his estate, when the record shows Nancy has never been a beneficiary of one of Decedent's Wills, and when she has

¹⁴ See *In re Estate of Moi*, 136 Wn. App. 823, 829, 151 P.3d 995, 997 (2006).

consistently argued the opposite, simply defies logic.

A more astute summary of Nancy's argument, consistent with her actions as PR which resulted in her removal, is "I want it all." Nancy's entire theory rests on the idea that whatever assets she could not misappropriate from Decedent's estate should pass to her daughter, but if her daughter wants to settle, recognizing the very real possibility that she could lose on one or more of the claims brought by the Adult Children and thereby lose a significant portion of her inheritance, then Nancy feels compelled to challenge her own daughter's interest rather than let any portion of the Estate pass to her stepdaughters. This argument is not a legal theory - it is a statement of Nancy's *raison d'etre* in this matter. The actual legal theories underpinning claims of standing, which were thoroughly briefed and considered by the trial court and the Court of Appeals, are discussed below.

1. *Standing is Granted Only to Real Parties in Interest.*

Underpinning each of Nancy's arguments is a misguided understanding of what confers standing in litigation. By law, standing to sue requires the potential party to possess sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy, i.e., a *legally protected right*. See *Miller v. Campbell*, 164 Wn.2d 529, 192 P.3d 352 (2008), (wherein a debtor has no standing to sue to enforce a claim that belongs to his bankruptcy estate); *Mack v. Armstrong*, 147 Wn. App. 522, 195 P.3d 1027 (2008) (wherein a property owner was given standing to sue to enforce covenants in the plain language of the

covenants). “Absent standing, [the court is] without subject matter jurisdiction to entertain the taking claim.” *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wash.2d 542, 556-57, 958 P.2d 962 (1998).

Consistent with standing, albeit the product of a distinct legal theory, CR 17(a) requires that “every action shall be prosecuted in the name of the *real party in interest*.” The “real party in interest” is the person who possesses the right sought to be enforced. *Sprague v. Sysco Corp.*, 97 Wn. App. 169, 982 P.2d 1202 (1999).

TEDRA defines “[p]ersons interested in the estate or trust” as “*all persons beneficially interested in the estate or trust*, persons holding powers over the trust or estate assets...” (emphasis added). Under Washington law, a “[b]eneficial interest has been defined as the profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.” *Christiansen v. Dep’t of Soc. Sec.*, 15 Wn.2d 465, 467, 131 P.2d 189 (1942) (finding that a husband had no beneficial interest in his wife’s separate property that would preclude him from qualifying for government assistance). Nancy does not fit within TEDRA’s definition of a real party in interest because she lacks a beneficial interest.

Nancy tries to shoehorn herself in to the definition of an “interested person” under *In Re O’Brien Estate*, 13 Wn. 2d 581 (1942). However this is an example of cherry-picking text and ignoring portions of the opinion which are favorable to the opposite side. *In Re O’Brien*

involved an individual named in a prior Will of the decedent as the PR; on the basis of his former role as PR, he attempted to contest the Will in probate. The contesting individual was not a beneficiary of either the Will in probate or any prior known Will of the decedent. This Court held that the individual lacked standing to bring a will contest since he was *not* an interested party. It is important to recognize that the *O'Brien* court did not interpret “interested party” broadly. When looking to what is necessary to be an “interested party”, the Court held that an “‘interest’ which gives one standing to contest a will must be direct and pecuniary. *It must also be an existing interest, and not merely one which may subsequently be acquired.*” *In re O'Brien's Estate*, 13 Wn.2d 581, 583, 126 P.2d 47, 48 (1942) (emphasis added) (internal citations omitted).

Nancy has no interest under the Will in probate. A claim as an omitted spouse under an earlier Will *not admitted to probate* is merely contingent, *i.e.*, an uncertain interest which may or may not be subsequently acquired. The *O'Brien* case, which Nancy cites as her argument for review under RAP 13.4(b)(1), is explicit that “a ‘person interested’ is one who has a *direct, immediate, and legally ascertained pecuniary interest* in the devolution of the testator's estate, such as would be impaired or defeated by the probate of the will or benefited by the declaration that it is invalid. *The pecuniary interest must be direct* and not of a sentimental nature, and it must have the characteristics of a property right and not of a mere personal privilege.” *Id.*, at 583 (emphasis added). There is nothing direct *or* immediate about Nancy's alleged interest. As

set forth above, there is at least a four-stage contingent process--none of which is ripe while the current Will remains in probate--which must occur before Nancy can even file a claim as an omitted spouse. Rather, Nancy seems to have a "sentimental" attachment to her husband's estate, or more precisely a "sentiment" that her stepdaughters take nothing, regardless of their claims.

Similarly, Nancy's reliance on *Findley v. Findley*, 193 Wash. 41, 74 P.2d 490 (1937) is misplaced. That matter involved convoluted transfers of property between two brothers, Herbert and Clarence, and their respective wives. It was a case of "hot potato," where the property was ultimately owned by one brother, Clarence, at the time of his death. The property was included in Clarence's estate, along with bonds and a joint account. The Herbert, his wife and Clarence's wife purported to enter into a contract dividing Clarence's estate. Clarence died intestate, although the parties to the contract believed a Will existed. When the contract was executed, the parties thereto excluded Clarence's other brother, Robert, whose claim to any interest in Clarence's estate would have been identical to Herbert's claim. Thus, *Findley* is distinguishable from the case at hand. Robert and Herbert could make *immediate, equal* claims to their brother's estate and, consequently, if one was a party to the estate settlement, the other must be as well. That is not the case here. Nancy did not file a Will Contest. She did not file a creditors claim. At present, she has no claim whatsoever to Decedent's estate under the Will in probate and because of the applicable statute of limitations could not

now raise such a claim. *Findley* does not stand for the proposition that any individual contingently interested in an estate, assuming a wholly unripe set of circumstances, and now time-barred, is a necessary party to settlement. Thus, Nancy's arguments that *Findley* decision conflicts with the Court of Appeals' ruling are lacking. The case is distinguishable from the facts before us and does not stand for a position inconsistent with the Court of Appeals ruling.

2. *Nancy Cannot Inherit Intestate in this Estate.*

Nancy's unending arguments that she could inherit intestate in this matter are not only tiresome, but baseless. The parties already filed with the Court multiple original prior valid Wills of the Decedent. If the Adult Children's Will Contest is successful, the doctrine of dependent relative revocation would apply and the Estate will pass under the terms one of those prior Wills. *In re Kerckhof's Estate*, 13 Wash.2d 469, 473, 125 P.2d 284, 286 (1942) and *In re Estate of Bowers*, 132 Wn. App. 334, 345, 131 P.3d 916, 922 (2006). Washington courts explicitly disfavor intestacy, and there are multiple prior valid Wills of the Decedent on file with the Court. Therefore, Nancy cannot inherit intestate. *In re Riemcke's Estate*, 80 Wash.2d 722, 728, 497 P.2d 1319, 1323 (1972) ("There is a presumption in favor of testacy and against intestacy.")

3. *Nancy Cannot Claim She is an Omitted Spouse.*

The heart of Nancy argument to this Court seems to be that if the Adult Children's Will Contest were successful and a prior Will admitted to probate, she would be entitled to her "omitted spouse" share and thus

she should participate in the settlement between the Adult Children and the Estate. RCW 11.12.095 gives a spouse who is not mentioned in a Will executed prior to the date of marriage a rebuttable presumption that he or she is entitled to his or her intestate share. That presumption may be overcome by evidence that Decedent intended an alternate result. There is no possibility of Nancy successfully asserting a claim as an omitted spouse: first, because the claim is not ripe; and second, because Nancy is estopped by her prior pleadings from claiming such an interest.

a. *An Omitted Spouse Claim is Not Ripe While the 1999 Will Remains in Probate.*

Nancy admitted Decedent's 1999 Will to probate, where it remains. Nancy has not challenged the 1999 Will and the statute of limitations passed long ago. The 1999 Will specifically identifies her as Decedent's spouse but it makes no provision for her. Thus, Nancy is not an omitted spouse: "[i]n performing an analysis under RCW 11.12.095, we first ask if the will names or provides for a spouse. *See* RCW 11.12.095(1). If the spouse is named and provided for, then the spouse is not omitted *and the inquiry ends.*" *In re Estate of Moi*, 136 Wn. App. 823, 829, 151 P.3d 995, 997 (2006)(emphasis added). Thus, under Washington law, the Court need only determine whether Nancy is named in the Will in probate. She is. The analysis under the omitted spouse statute stops there.¹⁵ Nancy cannot claim standing under it.

¹⁵ Nancy cites to several out-of-state cases to support her position that she is an interested party under RCW 11.04.015 and RCW 11.12.095. However, those cases cannot be applied to overcome existing Washington law that is directly on point. Furthermore, each of those cases is distinguishable. In *Thomas v. Best*,

Furthermore, the 1999 Will will remain in probate if the CR2A Agreement proposed to the Court, or one substantively similar to it, is approved. Unless and until the 1999 Will is removed from probate, in fact, a claim as an omitted spouse will *never* be ripe.

The Adult Children's claims are readily distinguishable from Nancy's *contingent* claims. The Adult Children filed a timely Will Contest. They have a current dispute with the Estate. Nancy did not file a Will Contest and is now time-barred from doing so. It is left to the Estate to decide how to address the Adult Children's challenge to the Will in probate, whether it be by further litigation or settlement. Nancy cannot claim she is entitled to participate in that process when she has no current interest in the dispute. Furthermore, the Adult Children have standing in the Estate arising from their role as creditors. Nancy has already admitted

209 Va. 103, 161 S.E.2d 803 (Va. S. Ct. 1968), which has been cited only by Virginia courts, the appellate court remanded to the trial court to reinstitute a Will Contest and terminate a settlement agreement entered into by some of the parties because not all the parties, *in the same statutory class*, received notice of the suit and, consequently, due process rights were invoked. In *McFadden v. McFadden*, 257 P.2d 146, 174 Kan. 533 (Kan. S. Ct. 1953), the party initiating the suit inexplicably failed to serve two of the seven siblings and the Court found it lacked jurisdiction over those individuals. In each of those cases, individuals who were not served were unaware of the suit and were members of the same class as parties that were served, and the argument before the Court was based upon due process and jurisdiction. First, there is no jurisdictional or due process argument before this Court. Unlike each of the examples above, Nancy was not unaware of the pending litigation. She was personally served with the pleadings. After defending the 1999 Will and the creditors claims for over a year as PR, she can hardly claim ignorance of the suits. Second, all of the parties in *Thomas* stood on equal footing and their claims were ripe. Nancy and the Adult Children are not on equal footing. Unlike the Adult Children, Nancy is not a petitioner in the Will Contest and has not filed a creditors claim against the Estate. Moreover, she is time-barred from either action now. And again, under Washington law, Nancy's claim that she is an omitted spouse is not ripe. *In re Estate of Moi*, 136 Wn. App. 823.

that she does not have standing as a creditor and is not seeking to assert standing in that litigation.¹⁶ Looking at the current status of the Estate, it is clear that Nancy cannot assert a direct and immediate interest in the attempts between the sole beneficiary of the estate under the Will in probate and the sole challengers of the same.

b. *Nancy is Estopped from Challenging the Will and Claiming an Omitted Spouse Share.*

Assuming that the 1999 Will were overturned, Nancy would be estopped from claiming any rights as an intestate heir or omitted spouse. For three years, Nancy unswervingly stated that her husband intended to leave her nothing. She has vigorously defended a Will which grants her nothing and has stated in her own briefing that he intended for her to inherit nothing from his estate.¹⁷ Thus, *Nancy* has rebutted the presumption that the omitted spouse statute could apply. She is estopped from claiming standing as an omitted spouse in the pending Will Contest.

B. This Case Does Not Involve A Substantial Public Interest.

Nancy cites the same cases discussed above to argue that there is a substantial public interest in this case. There is not. This is a unanimous unpublished opinion which upholds longstanding Washington law. Nancy's argument boils down to an allegation that a surviving spouse should be exempt from the four month statute limitations for filing a will contest. RCW 11.24.010. This is not the state of the law. The Court "has no jurisdiction to hear and determine a contest begun after the expiration

¹⁶ Nancy's Initial Brief to the Court of Appeals, filed 12/08/2010, fn. 12.

¹⁷ *Id.*, fn. 11.

of the time fixed in the statute; neither does a court of equity have power to entertain such jurisdiction.” *In re Estate of Kordon*, 157 Wash.2d 206, 214, 137 P.3d 16, 20 (2006). *See also In Re Barr’s Estate*, 76 Wash.2d 59, 455 P.2d 585 (1969). There is no surviving spouse exception to the statute of limitations. As long as the Will is in probate, Nancy is not an omitted spouse, nor can she now contest the Will.

Nancy’s parade of horribles is mere fiction and readily distinguishable under the facts of the case at bar. Nancy, unlike the charities named in her example, is *not* a beneficiary of the Will in probate or the Decedent’s prior Wills. Thus, this is not a situation where the Decedent expressed his intent in a Will to leave his estate equally to the Adult Children and Nancy and Nancy is being “pushed out”. By her own admission, Decedent intended for her to have nothing and for that reason she could not “ethically” file a Will Contest within the statute of limitations. Nancy does not stand on equal footing with the Adult Children – she has no pending claim *at all in the probate*, she is not named in any of Decedent’s prior Wills, and has no ripe interest under the Will in probate. This is not a matter of substantial public policy; it is instead Nancy’s request for a personal and specific exception from the statutes and long standing common law.

C. There Is no Question of Who Heard Oral Argument and Decided the Case.

Nancy’s final argument is a true stab in the dark. She admits that the panel that heard oral argument issued the final decision in this matter and that all three of the judges who heard that argument signed that

decision. There is nothing to indicate that the initial opinion, which was promptly withdrawn and replaced with an identical opinion, is more than a clerical error, rather like the clerical error recognized in footnote 4 of the Motion for Discretionary Review. This same argument was raised in the Motion for Reconsideration before the Court of Appeals and denied. The Court of Appeals panel, in full, issued a final and complete decision with all the necessary signatures. Judicial economy will not be served by rebriefing for the third time in the Court of Appeals the same issues, or by arguing the same matter a second time. If the Court of Appeals believed that the withdrawn opinion were anything other than a clerical error, it would not have re-issued an identical opinion mere days later. There is simply nothing more to be said: this argument is a dead letter.

V. CONCLUSION

There is no basis to review this matter under RAP 13.4. The issues raised have been briefed before the trial court and twice before the Court of Appeals. The law is settled and consistent in its interpretation. This unanimous unpublished decision needs no further attention from this Court.

DATED this 23rd day of July, 2012.

GARVEY SCHUBERT BARER

By



Bruce A. McDermott, Bar #
18988

Teresa Byers, Bar # 34388

DECLARATION OF SERVICE

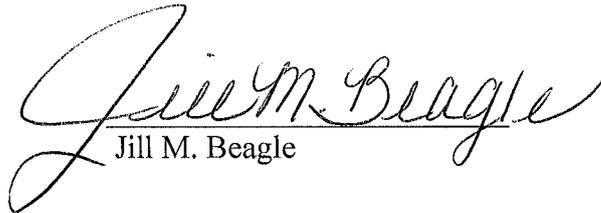
I declare under penalty of perjury that on this day I caused a copy of the foregoing document to be served upon the following counsel of record via the means indicated:

Ladd Leavens
Davis Wright Tremaine LLP
1201 Third Avenue, #2200
Seattle, WA 98101
Via Hand Delivery

Richard P. Lentini
Ryan Swanson & Cleveland
Seattle, WA 98101-3034
Via Hand Delivery

Patricia H. Char
K&L Gates LLP
925-4th Avenue, Suite 2900
Seattle, WA 98104-1158
Via Hand Delivery

Dated at Seattle, Washington this 23rd day of July, 2012.


Jill M. Beagle