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No. 65578-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In the Matter of the Estate of VIRGIL V. BECKER, Deceased

(King County Superior Court Cause No. 08-4-04979-2 KNT)

NANCY BECKER,

Petitioner,

v.

JENNIFER C. RYDBERG, as Guardian ad Litem for Barbara Becker, a
minor child; CATHERINE JANE BECKER, CAROL-LYNNE JANICE
BECKER, and ELIZABETH DIANE BECKER,

Respondents.

REPLY BRIEF OF PETITIONER

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I. INTRODUCTION

This appeal is from an order (the “Order Denying Standing”) entered on the motion of the GAL Jennifer Rydberg to deny Nancy Becker standing with respect to a motion to approve a so-called CR2A Agreement between the GAL and the Bulger Parties. The GAL’s motion itself sought only an order denying standing as to the motion for review or approval of the CR2A Agreement. CP 174 (ll. 11-13); CP 177 (ll. 2-4). In her proposed order, however (CP 230-33), and in her reply (CP 214, ll. 16-19), the GAL sought (and ultimately was awarded) far broader relief – in effect, an order determining that Nancy is not a party under TEDRA for *any* purpose, and has no standing with respect to any issue arising in the estate (even, literally interpreted, whether assets in which Tory had an interest as of the date of death were his separate property, or community property).

All parties had long known that Nancy asserted (as she continues to assert) that she and Tory (the decedent) held community property, and that each also held separate property. *See, e.g.*, CP 37-45. The GAL’s motion was *expressly premised* on the proposition that “Nancy and Decedent jointly owned certain items of community property in which Nancy retains a community property interest and/or has claimed a separate property interest” CP 180 (ll. 1-3). The GAL thus assumed, for

purposes of the motion, that Nancy and Tory had held community property, because under her theory of standing, the character of the property made no difference.

Strangely, the only parties who actively oppose Nancy Becker in this appeal are the Bulger Daughters, who themselves have yet to establish that they have any interest in Tory's estate. Jennifer White, the new PR, agrees that Nancy has standing. Brief of Jennifer White at 1-3. The GAL filed no substantive response, choosing instead to rely on the briefing of the Bulger Daughters. Brief of Respondent Rydberg ("Rydberg Br.") at 8. The Bulger Daughters in their Brief of Respondents ("Br.") offer a variety of arguments, relying in large measure on their own untested factual contentions regarding (a) whether Nancy and Tory held community property, (b) what Will (if any) would be admitted to probate if their will contest were successful, and (c) whether Nancy would be estopped from asserting her rights as an omitted spouse in the event a will predating her marriage to Tory were admitted to probate. None of these factual issues has been litigated. The Bulger Daughters also rely on their legal interpretation of the LLC Agreement, which at the time they wrote their brief had not been construed under the LLC agreement arbitration clause (CP 113-14), and which (they now know) has subsequently been

construed in arbitration in a manner contrary to the construction that they give it in their brief.

Nancy asserts standing on two separate grounds. First, she asserts (as she always has) that she and Tory held community property, and that she currently holds an undivided interest in property in which she and Tory held – and she and the estate now hold – an undivided interest. As noted above, the GAL assumed this to be true for purposes of her standing motion. Nancy has standing under TEDRA as a consequence of such co-ownership. She is entitled to participate in the probate proceedings to the extent that such proceedings may affect her interest in such property.

Second, Nancy also has an interest in her husband's estate as surviving spouse and heir, so that she has standing as a party to the will contest within the meaning of TEDRA. The CR2A Agreement itself provides the clearest illustration of this point. The CR2A Agreement, if approved, would give the Bulger Daughters more than they would be entitled to receive if they prevailed in the will contest, and that "extra" distribution would come from Nancy's intestate share, whether under intestacy or as an omitted spouse. *See* Amended Opening Brief ("AOBr.") at 26-27.

The CR2A Agreement implicates both of these bases for standing. The Agreement would permit the Bulger Parties and the GAL to make

distributions of property (including the estate's share of community property) to the Bulger Parties, without input from either Nancy or the PR (CP 258-64), and would, as noted, impair Nancy's rights as an intestate heir and omitted spouse.

The trial court's order has not only deprived Nancy of her right to be heard, it has left her (and the record) in a state of uncertainty, in which the parties sometimes do and sometimes do not give her notice of proceedings, and in which the trial court may or may not consider her papers or let her speak.

II. BRIEF STATEMENT REGARDING FACTS

The Bulger Daughters devote considerable energy to allegations that have no relevance to the issues in this appeal and appear intended only to impugn Nancy's character. Br. 9-18. These *ad hominem* attacks had no bearing on the question of Nancy's standing before the trial court (CP 215-16), and have no bearing now. As before, Nancy will not address these attacks further, other than to deny the truth of these allegations, and to observe that in many cases there is not even a nod toward any portion of the record that would provide factual support. Nancy also explained in her response to the RAP 9.11 motion the circumstances under which the prenuptial agreement was discovered. She will not respond to the Bulger Daughters' mischaracterizing accusations further.

The Bulger Daughters also argue, or more accurately assert without arguing, that upon Tory's death, Doctors Becker LLC – which held title to Nancy and Tory's residence, the medical building and the San Juan property – became obligated to “pay out Decedent's interests in the [Doctors Becker LLC] to his estate within six months of his death.”

Br. 10. From this proposition they conclude that “there is no ongoing joint ownership of the LLC interests.” The meaning of the LLC Agreement had not been litigated when the GAL filed her standing motion, and the trial court was not asked to construe it when it decided the motion. There is nothing in the record on this appeal establishing, as law of the case, whether Doctors Becker LLC was obligated to buy out Tory's interest in the LLC assets within six months after the date of death.¹

¹ This very issue was arbitrated between Nancy and the estate in July 2011. The arbitrator concluded, contrary to the Bulger Daughters' construction, that the LLC dissolved upon the death of Tory, and that its affairs must be wound up and its assets distributed to the members. App. 1-2. As Nancy and Tory in some measure jointly contributed the real property assets to the LLC (*see* CP 37-45, 156), it is likely that when Nancy distributes the assets of the dissolved LLC to its members, she will distribute the properties jointly to herself and the estate (or jointly to herself and Barbara, if the estate is not open) rather than sell the assets (which include her home, for example) and distribute cash. For purposes of this appeal (as was the case on the standing motion itself), however, no decision regarding the meaning of the LLC Agreement is part of the record.

III. ARGUMENT

A. **Nancy Has Standing in the Probate Because Decisions in the Probate May Affect Her Interest in Property in Which the Decedent Had, and in Which the Estate Now Has, an Interest.**

Nancy asserts (and has always asserted, *see, e.g.*, CP 37-45, 156, 226-27, 299-300) that she and Tory together held community property as of the date of Tory's death, and that she and the estate now hold an indivisible interest in such property. All such assets are under administration in the probate, including Nancy's interest in the assets. RCW 11.02.070. A multitude of different actions in the estate, including both distribution decisions and interim decisions, such as the decision to appoint a GAL or to permit the GAL to hire lawyers, may have a pecuniary or other impact on Nancy's interest in these assets. Nancy has standing in connection with these and similar issues, both under RCW 11.96A.030(5)(f) (a "party" includes the "surviving spouse . . . of a decedent with respect to . . . her interest in the decedent's property") and RCW 11.96A.030(5)(i) (a "party" includes "[a]ny other person who has an interest in the subject of the particular proceeding").

The Bulger Daughters' various efforts to avoid this conclusion fail.

1. Nancy Has Not Admitted That Community Property Cannot Be a Basis For Standing.

The Bulger Daughters argue that Nancy has admitted that “alleged community property cannot be her basis for standing in this matter.” Br. 23; *see also* Br. 2-3. They base this contention on a misreading of a statement in Nancy’s Response to Motion for Admission of Additional Evidence Per RAP 9.11. In that brief, Nancy stated only that the community or separate character of the property under administration had no bearing on the question of her standing in the *will contest*, as distinguished from her standing on other probate administration and distribution issues generally under TEDRA. *Id.* at 11. Nancy was pointing out that she has standing for reasons *unrelated* to the character of property (which she argued below and to this Court), and that the trial court did *not* consider the character of property in denying her standing in any event. *Id.* at 11-12, 14-15. And as the Bulger Daughters’ own case law makes clear, Nancy has not waived her argument she has standing on multiple legal grounds—her property and intestate interests—nor is she estopped from continuing to so argue. Br. 23 (citing *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009) (reversing judicial estoppel finding where no clear and intentional inconsistent factual position taken, and no perception court was misled; judicial estoppel does not apply to legal positions)).

**2. The Trial Court Has Not Made Any
Determination Whether Nancy and Tory Held
Community Property as of the Date of Death.**

The Bulger Daughters argue that “under the facts in the record, Nancy has no community property with Decedent.” Br. 25. In fact, however, the issue of what property is community and what is separate has not been litigated or decided. Nancy has always asserted that she and Tory owned community property.² *See, e.g.*, CP 37-45, 156, 226-27, 299-300. When the GAL filed the standing motion, the GAL expressly asserted, for purposes of the motion, that Nancy and Tory owned community property. CP 180. The parties therefore had no call to litigate the issue, and the Court was not asked to decide it. Property characterization raises factual issues. *See, e.g., In re Marriage of Martin*, 32 Wn. App. 92, 94, 645 P.2d 1148 (1982). Yet no witness has been examined or cross examined, no item of evidence inspected and admitted under the ERs, and no court has made any finding of fact.

Even the “facts” to which the Bulger Daughters selectively refer reveal the factual nature of any characterization of property in this estate. For instance, the Bulger Daughters claim a certain residence was Tory’s separate property because Nancy executed a quitclaim deed of it to him.

² Indeed, the GAL and Bulger Daughters vigorously argued to remove Nancy as personal representative *because* she had claimed both separate and community property interests in the estate. *See* Mot. for Admission of Additional Evidence Per RAP 9.11, at App. 10,

Br. 22. But the mere fact Nancy executed this deed to her husband is not determinative of the property's community or separate nature. Br. 22. "[T]he name on a deed or title does not determine the separate or community character of property, or even provide much evidence." *In re Estate of Borghi*, 167 Wn.2d 480, 488, 219 P.3d 932 (2009) (quoting Harry M. Cross, *The Community Property Law*, 61 Wash. L. Rev. 13, 30 (1986)).

In addition, more than just real property is at issue. The purported CR2A Agreement actually contemplates that the Bulger Daughters and the estate would distribute tangible personal property—household furniture, kitchen equipment, art, animals, and so forth—by “mutual agreement,” on a non-prorata basis. CP 260. The Order Denying Standing would prohibit Nancy from being heard on whether Tory's interest in their household furniture – the bed they slept in, to use an extreme example – could be distributed to the Bulger Daughters.

Similarly, although the Bulger Daughters now rely on the existence of the prenuptial agreement to argue Nancy lacks a community property interest, the mere existence of a prenuptial agreement is not conclusive on the character of property. *See, e.g., In re Marriage of Bernard*, 165 Wn.2d 895, 902-03, 165 Wn.2d 895 (2009) (party seeking to enforce prenuptial

21-26, 35; *see also id.* at 29 (“[Nancy] has not said in any court pleading, hey, I am

agreement must show substantive and procedural fairness). Indeed, parties to a prenuptial agreement can abandon it by conduct inconsistent with it. *See In re Marriage of Fox*, 58 Wn. App. 935, 938, 795 P.2d 1170 (1990). Moreover, other factual issues would likely be raised about the prenuptial agreement, including whether Nancy consulted a lawyer before signing it, when she signed it, and who drafted it.

In any event, the GAL in her motion did not ask the trial court to decide property characterization issues, the trial court did not do so, and the Bulger Daughters' version of the unlitigated "facts" may not appropriately be the basis for review in this Court. *See Casco Co. v. Pub. Util. Dist.*, 37 Wn.2d 777, 784, 226 P.2d 235 (1951); *LaMon v. City of Westport*, 22 Wn. App. 215, 220, 588 P.2d 1205 (1978).

The Bulger Daughters also argue that the Deadman Statute, RCW 5.60.030, would bar Nancy from testifying about the circumstances of the prenuptial agreement's execution. Br. 28. The statute would not, however, bar all testimony relevant to the agreement's enforceability. The statute does not, for example, bar testimony about actions of the witness. *See Thor v. McDearmid*, 63 Wn. App. 193, 201, 817 P.2d 1380 (1991); *Richards v. Pac. Nat'l Bank of Wash.*, 10 Wn. App. 542, 548, 519 P.2d 272 (1974). Thus, Nancy could, by way of example, testify about whether

giving up my community property claim. That's the problem."); Rydberg Br. at 5.

she signed the document, whether she talked to a lawyer before signing it, and when she signed it. Nor does the statute bar the admission of documents. *Thor*, 63 Wn. App. at 202. The PR could also waive the protection of the statute, either intentionally or inadvertently. *Id.* (citing *McGugart v. Brumback*, 77 Wn.2d 441, 451, 463 P.2d 140 (1969)).

In the end, the prenuptial agreement is just one more piece of evidence, in what will likely be a mountain of evidence bearing on whether property in the estate was community property or the separate property of Tory as of the date of death. The GAL did not ask the trial court to decide that issue (and as a practical matter the court could not have decided the issue because no evidence was before it) when she filed her 6-day motion on standing. If and when the court decides the issue, the decision may affect Nancy's standing on issues that pertain only to property determined to have been Tory's separate property. The result of that factual inquiry, however, is at this point a matter of pure speculation, and how Nancy's standing will be affected will depend entirely on the substance of that decision and the nature of issues thereafter presented to the trial court.

3. If Nancy and Tory Held Community Property at the Date of Death, Nancy Currently Holds “an Interest in the Decedent’s Property” With Respect to That Community Property, Within the Meaning of RCW 11.96A.030(5)(f).

The Bulger Daughters argue that the marital community is dissolved on death, and therefore that Nancy could not now hold “an interest in the decedent’s property” that would give her standing with respect to such property under RCW 11.96A.030(5)(f). Br. 24-25. The argument is pure semantics. It does not matter whether the surviving spouse is deemed to hold an undivided interest with the estate in the “community property,” or an undivided interest with the estate in property that was jointly owned property before death. RCW 11.96A.030(5)(f) provides that a “Party” includes “[t]he surviving spouse . . . of a decedent with respect to his or her interest in the decedent’s property,” without specifying whether the interest is in community property, or in property that was formerly community property. Nancy’s reference to community property adopts the convention used in Title 11 RCW and elsewhere. *See, e.g.*, RCW 11.02.070 (“The whole of the community property” is subject to probate administration); RCW 11.04.015(1)(a) (in intestacy, surviving spouse receives all of the “net community estate”); RCW 11.10.030(1) (community debt is charged against the “entire community property”); RCW 11.28.030 (surviving spouse entitled to administer upon the “community property”); *Graham v. Radford*, 71 Wn.2d 752, 755, 431 P.2d 193 (1967) (“It is well established that the whole of the community property shall be administered for the purpose of collecting the community

assets and paying the community debts.”). The Bulger Daughters do not suggest what RCW 11.96A.030(5)(f) could be referring to, if not property that was community at death.³

4. Nancy’s Concern Regarding Joint Ownership of Property with the Bulger Daughters Is Not Fictitious.

The Bulger Daughters argue that Nancy’s concern about joint ownership of property with the palpably hostile Bulger Daughters is both fictitious and has already occurred. Br. 30-32. Their argument that the fear is unfounded is based on the Bulger Daughters’ view of the facts, and, apparently, on the unproven (and erroneous, *see* n. 1, *supra*) premise that the LLC Agreement requires that the estate’s interest in the LLC be liquidated and paid to the estate in cash. It is entirely possible – likely, in fact – that the real properties held in the LLC will have to be distributed as joint undivided interests to Nancy and the estate. A court may decide that the nanny house, which is not held within the LLC, is community property. While it is true that the CR 2A Agreement does not grant to the Bulger Parties an interest in any particular real property, it also does not exclude the possibility that an interest in jointly owned property would be

³ The argument that the community ceases to exist on death also proves too much. The statute refers to the surviving spouse’s interest in the decedent’s property, but the decedent, like the community, ceased to exist on death.

distributed to the Bulger Parties.⁴ The point, however, is not whether such distributions are likely or possible, an issue this Court is not in a position to decide. The point is that Nancy has standing to participate and be heard in connection with any proposed action that would threaten her with such joint ownership.⁵

The Bulger Daughters appear to argue alternatively (Br. 31-32) that Nancy has no standing in connection with proposed distributions of jointly owned property because if Nancy and Tory had any community property, Tory's undivided one-half interest vested in his beneficiaries immediately upon death, under RCW 11.04.250, so that any co-ownership of property has "already occurred." Br. 31-32. By that statute's own terms, however, vesting does *not* occur as against "the personal representative when appointed, and persons [such as distributees] lawfully claiming under such personal representative" RCW 11.04.250. Moreover, *nothing* has vested in the Bulger Daughters, whose only potential interest in the assets of the estate would arise if the probate of the 1999 Will were revoked.

⁴ The CR2A Agreement expressly contemplates non-pro rata distributions, and would permit the Bulger Parties and the GAL to make all decisions regarding distribution of both real and personal property, without input from Nancy or (incredibly) even the PR. CP 258-64.

⁵ The fact that Nancy would have the right to terminate that joint ownership through a partition action does not, as the Bulger Parties suggest, Br. 32, alleviate the prejudice. To the contrary, the fact that such a partition action might be necessary is a convincing illustration of the prejudice to Nancy of such ownership.

5. Nancy Is Not Attempting to Subvert the Rights of Creditors.

The Bulger Parties argue that by asserting her right to be heard, Nancy is trying to prevent payments to creditors. Nancy does not seek to deprive creditors of recovery. Rather, she seeks the right to be heard in connection with, for example, decisions regarding which estate assets (in which she has unresolved community interests) should be sold to generate cash to pay creditors.

6. TEDRA Standing Is Not Limited to Persons With Beneficial Interests.

The Bulger Daughters' effort (Br. 19-20, 34) to limit standing under TEDRA to "beneficial interests" fails. TEDRA does not confer standing only on persons with "beneficial interests." A creditor, for example, has standing under TEDRA if a creditor "has an interest in the subject matter of the particular proceeding" *See* RCW 11.96A.030(5)(h). RCW 11.96A.030(5)(i) confers standing on "[a]ny other person who has an interest in the subject of the particular proceeding . . .," again without any reference to beneficial interests, pecuniary interests, or any other particular kind of interest. In any event, because Nancy is the surviving spouse and an intestate heir, and because the Bulger Daughters allege that the current will is invalid, Nancy does in fact have a beneficial interest in the estate with respect to the will contest.

B. Nancy Has Standing in the Will Contest and CR2A Agreement Proceedings Because She Has an Intestate Interest in Decedent's Estate.

Nancy has standing as a party in the will contest because its outcome may affect her interest in the estate as an heir and as surviving spouse. If the 1999 Will is not valid, Nancy will be entitled to her beneficial interest under the laws of descent and distribution or, if an earlier will is admitted to probate, under the omitted spouse statute. The will contest statute, RCW 11.24.020, requires notice at the outset to her as a "person interested in the matter, as defined in RCW 11.96A.030(5)." RCW 11.96A.030(5) (since renumbered (6)), provides that a person interested in an estate or trust includes "all persons beneficially interested in the estate" Nancy as surviving spouse is beneficially interested in the estate, where the will is under challenge, both under the laws of descent and distribution and under the omitted spouse statute.

In addition, Nancy would in any event have standing under the existing RCW 11.96A.030(5)(d), (f), and (i), as an heir, surviving spouse as to community property, and as a "person who has an interest in the subject of the particular proceeding." See *In re Estate of Kordon*, 157 Wn.2d 206, 211, 137 P.3d 16 (2006) ("While TEDRA applies to will contests, it 'shall not supersede, but shall supplement, any otherwise applicable provisions and procedures contained in this title,' including

chapter 11.24 RCW.”). As a practical matter, nothing could demonstrate Nancy’s interest in the proceeding more convincingly than the CR2A Agreement itself, under which the Bulger Parties would take, *from what would otherwise be Nancy’s share of the estate*, substantially more than the three-eighths of Tory’s separate property to which they would be entitled under RCW 11.04.015, if they won the will contest. *See* AOBBr. 26-27.

In response, the Bulger Parties argue that even if the will contest is successful, Nancy will have no interest in the estate, because (a) the revocation of Tory’s 1999 Will would revive an earlier will executed before Tory and Nancy married, and (b) Nancy will have no rights under RCW 11.12.095 as an omitted spouse. The argument lacks merit.

1. Whether Revocation of the 1999 Will Would Revive a Prior Will Has Not Been Decided.

Whether the revocation of a will revives a prior will is a question of fact – that is, of the decedent’s intent. *See In re Estate of Bowers*, 132 Wn. App. 334, 344, 131 P.3d 916 (2006). Under the doctrine of dependent relative revocation, a prior will is revived only if clear, cogent, and convincing evidence demonstrates that the decedent would have intended, had he known that his new will was invalid, that his estate pass by the prior will. *Id.* at 344-46; *In re Estate of Hall*, 7 Wn. App. 341, 343, 499 P.2d 912 (1972); *see generally* 2 PAGE ON THE LAW OF WILLS §§

21.57-.65 (2003); 79 AM. JUR. 2D *Wills* § 531 (2d ed. 2002) (testator's intent controls).

While courts often indulge a presumption that a decedent does not wish to die intestate, the presumption may be overcome by evidence that the decedent would have preferred intestacy over the revival of his prior will. See *In re Estate of Bergau*, 103 Wn.2d 431, 435, 693 P.2d 703 (1985) (“the paramount duty of the court is to give effect to the testator’s intent”); 79 AM. JUR. 2D *Wills* § 531 (“The presumption recognized by the doctrine [of dependent relative revocation] is not conclusive; it does not prevail as against actual evidence of the testator’s intent.”).

Tory executed his 1999 Will when he had a new wife and new baby. It is unlikely that a court would ever find that he would have intended that a prior will omitting his new daughter and leaving his estate to his adult children should be revived. See, e.g., *In re Estate of Deoneseus*, 128 Wn.2d 317, 319, 906 P.2d 922 (1995) (prenuptial will naming future wife as executor revoked because failed to show testator intended not to provide for future wife). The parties in any event have not litigated these issues, and no court has decided them.

2. If a Prior Will Were Revived, Nothing Would Bar Nancy From Asserting Her Rights as an Omitted Spouse.

Even if a prior will were revived, the Bulger Parties cannot

credibly argue that this Court should assume that Nancy would not be entitled to exercise her rights as an omitted spouse under RCW 11.12.095. The Bulger Parties first argue that this issue is not ripe. They are correct in the sense that the probate of the 1999 Will has not been revoked; but the problem raised by the CR 2A Agreement is that if approved, Nancy's rights under intestacy and her rights as an omitted spouse could never become ripe. Yet at the same time, the Bulger Parties would receive, under the CR 2A Agreement, a minimum of 50% of both the community and separate property – a distribution in excess of their intestate share of three eighths of Tory's separate property. The extra distribution would come (as would Barbara's reduced distribution) from the intestate share to which Nancy would be entitled in the event of revocation of the 1999 Will. Nancy made this point in her Amended Opening Brief, at 26-27. The Bulger Parties have not offered any refutation of it.

The Bulger Daughters also argue that Nancy would be estopped from asserting her rights as an intestate heir or omitted spouse. Br. 41. They offer little or nothing in the way of either factual or legal support for this argument. A claim of estoppel raises an issue of fact that has obviously not been litigated or decided, and cannot support a conclusion that Nancy lacks standing.

3. Respondents Do Not Distinguish the Cases Cited by Petitioner.

The Bulger Daughters fail in their effort (Br. 39 n.50) to distinguish the three out-of-state cases cited by Nancy in her opening brief. They do *not* argue that the cases do not stand for the proposition that a person who would take by intestacy is a necessary party in an action to contest a will. They argue instead, first, that the omitted parties in those cases were not aware of the will contests, and therefore could make a due process argument. They contend that Nancy by contrast does not make a due process argument and is aware of the will contest. The distinction is both incorrect and immaterial. Nancy does make a due process argument. *See* AOB. 24 (“notice and the right to be heard” is a “fundamental element of . . . due process); *see In re Marriage of Leslie*, 112 Wn.2d 612, 617, 772 P.2d 1013 (1989) (due process requires notice and an opportunity to be heard). It is certainly true that Nancy is aware of the will contest; but the Order Denying Standing prevents her from protecting her rights just as effectively as lack of notice. The Bulger Daughters also argue that the settling and the omitted parties in *Thomas v. Best*, 209 Va. 103, 161 S.E.2d 803 (Va. S. Ct. 1968), were on “equal footing,” and contend that Nancy and the Bulger Daughters are not, because Nancy did not file a will contest. The omitted parties in *Thomas* also had not filed a will contest, *see id.* at 109-10; but more to the point, under both RCW 11.24.010 *et seq.*

and TEDRA, a person is a party and has standing if her rights may be impaired in the action, whether or not she files a will contest or is on “equal footing” with those who have.

C. Nancy Is an Heir Under RCW 11.02.005.

Nancy is an heir as a matter of law. RCW 11.02.005(6). Contrary to the Bulger Daughters’ contention, the addition of the phrase “in this estate action” in the Order Denying Standing does not meaningfully limit the scope of the finding. If the probate of the 1999 Will were revoked, the distribution of the assets would still be determined “in this estate action.” Nancy doubts that the trial court in its order intended to cut her off from all potential rights as an heir, but the Bulger Daughters apparently will not concede the point. This error must be corrected to ensure that, if the 1999 Will is revoked, or if the Bulger Parties pursue approval of the CR2A Agreement, no party can argue that Nancy is not an “heir” and therefore is not entitled to her intestate or omitted spouse share.

D. The Court Should Vacate the Subsequent Orders Because They Affect Nancy’s Interests.

Contrary to the assertions of the Bulger Daughters (Br. 35-36), the trial court has indisputably taken actions since entering the Order Denying Standing that will affect Nancy’s interests. For instance, the GAL admits the order appointing her “did not define her role and responsibilities,” Rydberg Br. at 3, yet in the June 11 hearing, the trial court entered orders

regarding the legitimacy and scope of the GAL's role. *Id.* at 7; Amended OB 11-12; CP 280. The trial court also found the GAL was entitled to be paid her fees, and was entitled to hire a lawyer, again without a motion and without notice to Nancy. AOB. 11-12; VRP 32-33; CP 277.⁶ Subsequently, the trial court entered another order authorizing the GAL to engage two lawyers at Ryan Swanson and a third at Lee Smart, and to pay Ryan Swanson from estate assets. CP 342-350. The trial court also entered "agreed" orders that in effect permitted the GAL to submit written statements to the trial court in camera and then to withdraw them, without making any precautions to preserve, for the record, the documents that the court and its staff reviewed. AOB. 10-14.

These rulings directly affect Nancy's interests. If, for example, the estate does not have enough cash to pay the fees of the successor PR and GAL and their attorneys, the estate will have to liquidate real or tangible personal property. Nancy asserts community property interests in virtually all of such property. These orders directly affect Nancy, and the court entered them without notice to Nancy or an opportunity to be heard. This Court should vacate them.

⁶ The Bulger Parties argue that Nancy, "with counsel in tow," . . . attended each hearing subsequent to the entry of the Order [on standing]." Br. 35. There was only one such hearing, on June 11, 2010. Nancy was not given notice of this hearing (CP 770-71). Although her lawyer was present, he was denied permission to speak. VRP 33.

E. The Court Should Award Nancy Her Fees, and Should Deny the Fee Requests of the GAL and Bulger Parties.

Nancy sought discretionary review of the Order Denying Standing because it deprived her of the ability to object to a CR 2A Settlement Agreement that would impair her rights as an intestate heir, giving the Bulger Parties (at Nancy's expense) more than they would ever receive if they proved the 1999 Will to be invalid, and because the order would deprive (and has deprived) her of the opportunity to be heard on other issues that would directly affect her property interests. The GAL argues that fees should not be awarded against her on this appeal because other, unrelated actions the GAL has taken in the probate were reasonable or beneficial. Rydberg Br. 8-10. She defends her execution of the CR 2A Agreement, as giving more to Barbara than Barbara would receive in intestacy (id. 11-12), ignoring the fact that it also gives the Bulger Daughters more than *they* would receive in intestacy, that it does so at the expense of Nancy's intestate share, and that the GAL's standing motion was an attempt to deprive Nancy of the ability to bring these facts to the trial court's attention. Whether the GAL had the authority to take these actions, and whether they were reasonable, is hotly contested, but actions below, unrelated to the Order Denying Standing, are not a basis to award or deny fees on appeal.

The GAL also argues, remarkably, that she should be awarded her GAL fees and her attorneys' fees for her work on appeal. *Id.* 13-15. The GAL has done **nothing** substantive on appeal. In what may be an implicit concession of the error of the Order Denying Standing, she did not oppose Nancy's motion for discretionary review, *see id.* 14 n.8, and she did not file a substantive brief of respondent, instead adopting the arguments of the Bulger Daughters. The only support the GAL cites for fees in this appeal are trial court orders entered after Nancy was denied standing, over her objections (or without giving her an opportunity to speak), for work done in the trial court, not on appeal. One of these orders was entered in violation of RAP 7.2 and was subsequently vacated by this Court. The GAL's unreasonable and frankly vindictive action in seeking to deny Nancy standing has cost Nancy a great deal of money, and has threatened to deprive Nancy of her rights, and the trial court of Nancy's input on important issues affecting her and the estate. Nancy should be awarded her fees against the GAL.

The Bulger Daughters base their request for fees largely on their contention that Nancy breached a discovery duty in connection with the prenuptial agreement. Br. 43-44. Nancy has explained the circumstance of the discovery and production of the document. *See* Decls. of Ladd B. Leavens and Nancy A. Becker In Support of Response to Motion for

Admission of Additional Evidence Per RAP 9.11. No sanction would be appropriate, and such a sanction in any event would be within the province of the trial court.

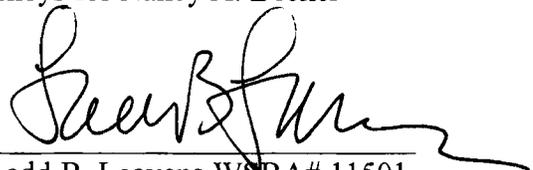
IV. CONCLUSION

For the foregoing reasons, Nancy Becker respectfully requests that the Court vacate the trial court's Order Denying Standing (CP 230-33), and these subsequent orders: Order Sealing Redacted Interim Report (CP 279-82), Order Regarding Minor Settlement (CP 276-78), and Order Approving Counsel for Guardian ad Litem, Approving Fee, and Directing Estate to Pay Fees (CP 342-50). Nancy Becker also requests that this Court order that Nancy is a party under RCW 11.96A.030 for all purposes in the probate action, including the will contest and any CR 2A Agreement proceeding, and that it remand for further proceedings not inconsistent with this Court's ruling.

DATED this 15th day of August, 2011.

Davis Wright Tremaine LLP
Attorneys for Nancy A. Becker

By



Ladd B. Leavens WSBA# 11501
Rebecca Francis, WSBA #41196

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:

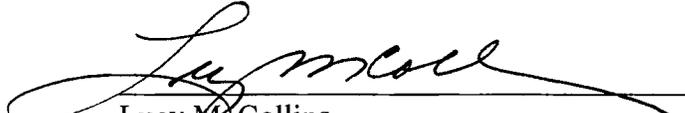
Bruce A. McDermott	()	By U.S. Mail
Teresa Byers	()	By Federal Express
Garvey Schubert Barer	()	By Facsimile
1191 Second Ave., 18 th Floor	(X)	By Messenger
Seattle, WA 98101-2939	()	By Email
Fax: (206) 464-0125		
Email: bmcdermott@gsblaw.com		
Email: tbyers@gsblaw.com		

Lance L. Losey	()	By U.S. Mail
Ryan Swanson & Cleveland PLLC	()	By Federal Express
1201 Third Ave., #3400	()	By Facsimile
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Dated at Seattle, Washington this 15th day of August, 2010.


Lucy M. Collins

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IN ARBITRATION AT
JUCICIAL DISPUTE RESOLUTION, LLC

In the Matter of: Doctors Becker Limited
Liability Company Operating Agreement
Arbitration

ARBITRATION AWARD

Jennifer White, Personal Representative of the
Estate of Virgil V. Becker, Jr., Deceased.

vs.

NANCY A. BECKER.

INTRODUCTION: An arbitration was held at Judicial Dispute Resolution (JDR) on July 20 & 21, 2011. After considering the testimony of the witnesses, exhibits admitted into evidence and the argument of counsel, the Arbitrator makes the following decision:

DECISION: The Arbitrator finds and concludes that under the objective manifestation theory of contracts, Hearst Communications, Inc. v. Seattle Times, 154 Wn.2d 493, 503-504, 115 P.3d 262 (2005), the Certificate of Formation (Ex. 14) and the LLC Agreement (Ex. 13) are clear and unambiguous. Under the plain language of these documents, the LLC dissolved on Virgil "Tory" Becker's death and must be would up and terminated.

1 The extrinsic evidence offered by the Estate is not admissible to contradict the intent of the
2 parties as expressed by the clear terms of the LLC Agreement and Certificate of Formation.

3 Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990).

4 IT IS SO ORDERED.

5 Dated this 2nd day of August, 2011.

6 
7 Judge Larry A. Jordan, ret.
8 Arbitrator