

No. 92305-1

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SUPREME COURT
OF THE STATE OF WASHINGTON

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON *CRF*

NO. 71742-1-I
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TERRI BLOCK
as guardian of SARAH BLOCK
Appellant,

v.

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC, a
Washington Professional Limited Liability Company, BEN F. BARCUS
and JANE DOE BARCUS, individually and the marital community
comprised thereof; LEGGETT & KRAM, a Washington Partnership;
PETER KRAM and JANE DOE KRAM, individually and the marital
community comprised thereof,
Respondents.

PETITION FOR REVIEW

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CLERK OF APPEALS DIV I
STATE OF WASHINGTON

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I. IDENTITY OF PETITIONER

The petitioner is Terri Block acting as guardian for her daughter Sarah Block. She is the plaintiff in the underlying action.

II. COURT OF APPEALS DECISIONS

Terri Block, as guardian for Sarah Block, seeks review of the unpublished decision by Division One of the Court of Appeals (Block, Slip Op.) terminating review on July 27, 2015. (App. A.) The Court of Appeals denied Block's Motion for Reconsideration (App. B and C) and her Motion to Publish (App. D) on August 27, 2015.

III. ISSUES PRESENTED FOR REVIEW

- A. Does RCW 11.96A.070(4) (TEDRA) eliminate the tolling protection of RCW 4.126.190(1) for the incompetent and disabled whenever a guardian or limitation guardian is appointed, in contravention of *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) and *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 264, 189 P.3d 753 (2008)?
- B. Is the broad interpretation by the Court of Appeals of the TEDRA tolling statute unconstitutional in that it denies the incompetent, disabled and minors, their constitutional right to bring actions in the state courts?

- C. Is the Court of Appeals' decision in direct conflict with *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014) when it denied Block the right to void the Barcus contingent fee contract because of significant ethical violations?
- D. Were statutes of limitations tolled by RCW 4.16.230 while Terri Block was prohibited from taking legal action by court orders?
- E. Does RCW 4.24.005 constitute a statute of limitations of 45 days for clients to ever challenge the reasonableness of attorney's fees?
- F. Does the three year statute of limitations apply to Block's claims involving her written fee agreement with Barcus?

IV. STATEMENT OF THE CASE

On September 12, 2005 Sarah Block ("Sarah") was a young woman with a bright future until she was severely injured by Rosalie Meeks, an intoxicated driver speeding the wrong way on a freeway at night. Since her injury, Sarah has been profoundly physically and mentally disabled. Sarah's mother, Terri Block, was appointed Sarah's guardian. CP 248-56. Terri acts here as guardian for the benefit of Sarah's special needs trust. Wells Fargo Bank is the trustee of Sarah's funds.

Terri signed a retainer agreement with the Law Office of Ben Barcus the day after Sarah's injuries. CP 22-3. Barcus selected his friend, Peter Kram, to serve as attorney for Terri and the guardianship. CP 1086, §7. Unknown to Terri, Kram and Barcus had a serious conflict of interest

because Kram also represented Barcus regarding Sarah's claims. CP 1204. Barcus' firm directed Terri to sign Kram's fee agreement naming both as his clients in the matter. CP 1086, 1201, 1204.

Barcus' office did little to obtain the \$2,100,000 in policy limits from Farmers Insurance, the UIM insurer for the car Sarah was driving. Barely two months after the accident, Kari Lester, Barcus' associate, prepared a 7 ½ page settlement letter to Farmers. The Barcus firm did not even know the total medical expenses for Sarah's care. Sarah's needs and damages were only beginning. CP 267-74. Lester sent the supporting medical records to the wrong address, nevertheless, within two weeks, Farmer's tendered its full limits without dispute or negotiation. CP 1329, 1330. Barcus claimed his one third contingent fees on the total settlement, less costs, and paid himself \$695,602.50 in fees directly from the UIM settlement. CP 1301. Barcus took the fee from the settlement funds without complying with SPR 98.16W, which requires review and court approval of attorney's fees charged to incompetent parties, and in violation of RPC 1.15A(h)(3).

Meeks' car insurance limit of \$100,000 was tendered to Barcus without a settlement demand on October 31, 2005. CP 346. Another \$100,000 was obtained by settlement from Meeks' estate. Barcus paid

himself an additional fee of \$66,666.67 from the Meeks settlement. CP 1201. Again, Barcus did not comply with SPR 98.16W.

When Terri learned of the nearly \$700,000 in attorney's fees Barcus took from Sarah's UIM settlement, she contacted her attorney, Peter Kram, to object. Kram verbally abused Terri, telling her to "shut up," and refused to consider her concerns regarding the reasonableness of the fees. CP 784. Over time, Terri became convinced that Kram was more interested in protecting Barcus than Sarah. Terri replaced Kram with Eileen Peterson of Gordon Thomas Honeywell on December 9, 2008. CP 777. Ms. Peterson immediately sought authorization to have Sarah's trust hire a lawyer to review of the reasonableness of Barcus' fees. CP 779-89.

The petition to seek review of the fees was provided to the then trustee of Sarah's funds, James Bush. Mr. Bush, a Tacoma attorney, notified Barcus of Terri's intention to seek a review of his fees. CP 1109. Without invitation or standing, Mr. Barcus appeared in the guardianship court to oppose any examination of his fees. CP 1253-59. In opposing the investigation, he threatened both Terri and Sarah's future financial well-being. CP 1257-8. The guardianship court denied the request for funds to investigate the fees, ordering that Terri could only proceed as a private person with her own funds, and that "Any add'tl legal steps in pursuing a cause of action must be explicitly approved by the Court." CP 658.

Terri was later able to raise personal funds for the review of Barcus' fees by selling some property. CP 933. Terri's new counsel requested copies of her files from both Barcus and Kram. CP 1140, 1143. Barcus and Kram not only refused to provide the files to which Terri was entitled under WSBA Ethics Opinion 181, but they took the unusual step of filing motions for protective orders to allow them to deny Terri her files. They also objected to Terri's lawyers requesting information regarding Sarah's claims from Farmers Insurance and other parties, and opposed any investigation into the reasonableness of their fees. CP 1152-67, 1216-51. Terri's counsel moved to require Barcus and Kram to produce their files, and for permission to obtain information from third parties regarding the handling of Sarah's claims. CP 1261-74. At the hearing on the matter, Barcus opposed any investigation into his fees. He asked "the Court to not allow this train to leave the station..." CP 1236.

On February 10, 2012, the guardianship court entered an order requiring Barcus and Kram to turn their files over to Terri's lawyers. However, at the urging of Barcus and Kram, they were allowed to remove whatever they considered "work product" without having to tell Terri's counsel what they removed. In addition, at the urging of Barcus, Terri's lawyers were prohibited from requesting any information regarding the underlying claims from Farmers Insurance Company, the guardian ad

litem, the trustee or any other third parties, or from conducting any discovery without the explicit order of the court. CP 1277-9.

Once Barcus and Kram finally turned their files over to Block's counsel, they were reviewed by Terri's lawyers. Michael Caryl, whose practice focuses on the reasonableness of attorney's fees, prepared a report and motion seeking authority to sue Barcus and Kram. CP 1181-1191, 918-933. On January 25, 2013 the guardianship court entered an order lifting the restrictions on discovery and removed the prohibition preventing Terri from taking legal action. The court authorized this suit by Terri as guardian for Sarah. CP 19-20.

V. ARGUMENT: REASONS FOR GRANTING REVIEW

A. The Court of Appeals' broad interpretation of RCW 11.96A.070(4), which effectively eliminates tolling of statutes of limitations for incompetent and minor persons, is in direct conflict with *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), and its progeny and raises issues of great public interest concerning the interplay of RCW 11.96A.070(4) and RCW 4.16.190(1). Review is warranted under RAP 13.4(b)(1),(4).

RCW 4.16.190(1) provides that if a person entitled to bring an action at the time the cause of action accrues is under the age of eighteen years, or incompetent or disabled to such a degree that he or she cannot understand the nature of the proceedings, the time of such disability shall not be a part of the time limit for the commencement of an action.

Appointment of a guardian does not eliminate the tolling provided by RCW 4.16.190(1). In *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) this Court held that, “The tolling statute's plain language indicates that the right it confers on the ‘person entitled to bring an action’ is not diminished by the appointment of a guardian.” *Young*, 112 Wn.2d at 221. Quoting the majority rule, the Court said:

In case of the appointment of a guardian ad litem for an infant, it is held that such guardian can sue within the prescribed period of limitation, but is not obligated to do so, and that if he fails to sue, or having instituted an action within the statutory period, discontinues it, the rights of the infant are not prejudiced thereby, and he may still take advantage of his disability.

Young, 112 Wn.2d at 223-224. The court held that the same rule applies to an incompetent. *Young*, 112 Wn.2d at 225.

This court reaffirmed *Young* in *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 264, 189 P.3d 753 (2008). The Court pointed out that the legislature had amended the guardianship statutes several times since *Young*, but had never showed disapproval of the *Young* opinion tolling statutes of limitations for those who have guardians.

Despite Sarah’s unquestioned disability, The Court of Appeals, held the provisions of RCW 4.16.190(1) did not toll the statute of limitations on her claims against the defendants based on its reading of RCW 11.96A.070(4). The statute says:

The tolling provisions of RCW 4.16.190 apply to this chapter except that the running of a statute of limitations under subsection (1) or (2) of this section, or any other applicable statute of limitations for any matter that is the subject of a dispute under this chapter, is not tolled as to an individual who had a guardian ad litem, limited or general guardian of the estate, or a special representative to represent the person during the probate or dispute resolution proceeding. [underline added]

The Court of Appeals construed RCW 11.96A.070(4) to provide that “when a person has a guardian ad litem or general guardian, his or her claims are not tolled for matters that are the subject of dispute under TEDRA.” *Block*, slip op., at 11. “Thus, the tolling exception applies whenever an individual is represented by a guardian ad litem or a general guardian – it is not necessary that the guardian represent the individual in a probate or dispute resolution proceeding.” *Block*, slip op., at 14.

The statute states the opposite of the Court of Appeals’ interpretation providing that, “The tolling provisions of RCW 4.16.190 apply to this chapter” [TEDRA], subject to the three limited exceptions. RCW 11.96A.070(4). The Court of Appeals ignored this provision, and eliminated RCW 4.16.190 tolling whenever a person has a guardian ad litem, limited or general guardian. It erred in doing so.

Neither the defendants nor the Court of Appeals point to a single claim brought by Block under TEDRA. None were. Block’s action does not arise under Title 11. Block makes no claims against Barcus, Kram or

any trustee concerning the administration of Sarah's special needs trust or any estate. Sarah's personal injury claims were not brought under TEDRA. The requirements for approving settlements and attorney's fees in SPR 98.16W are not part of Title 11 or subject to TEDRA. The requirements that fees claimed by attorneys be reasonable do not arise under TEDRA or Title 11, but RPC 1.5(a). Defendants' handling of Sarah's injury claims is unrelated to TEDRA, and Defendants did not utilize TEDRA or Title 11 in handling Sarah's Claims. Claims of legal malpractice, conflict of interest and breach of fiduciary duties do not arise under RCW Chapter 11.96A or Title 11. Plaintiff's claim seeking avoidance of the Barcus fee agreement is unrelated to TEDRA.

Nor do Plaintiff's claims involve the administration of Sarah's special needs trust.¹ There was no trust until after Barcus paid himself. Defendants circumvented the trust, by presenting an order to the court which allowed Barcus to pay himself directly from the settlement before it was part of Sarah's trust. CP 401-6, pg. 4. By doing so, the trustee had no involvement in the payment of fees. (The trustee's involvement would have entailed a report to the court addressing reasonableness and

¹ To the extent that the Court of Appeals determined otherwise, Terri respectfully suggests that it misread the record.

necessitating court approval. 11.96A.070(1)) Neither the trust nor the trustee is a party to this action.

The primary justification of the Court of Appeals for finding that TEDRA applies is that Block alleged TEDRA as alternative basis for jurisdiction and venue in her complaint. Block, slip op., at 12. Defendants denied these allegations in their answers. CP at 27 §2.1, 41 §2.1. The Court of Appeals made no attempt to analyze Block's causes of action to determine if or how TEDRA may apply to them and, as discussed above, none of Block's claims involve the administration of a trust.

Nor does the Court of Appeals provide any legal theory or justification for dismissing Block's claims based on the complaint's alternative allegations. Judicial estoppel would not apply since no court ever acted on or adopted the general TEDRA allegations. *Miller v. Campbell*, 137 Wn. App. 762, 769, 155 P.3d 154, 158 (2007).

The Court of Appeals refers to the broad definition of a "matter" under TEDRA. None of Block's claims fall under the definition of a matter to be litigated under TEDRA. However, even if a Block claim was a "matter" under TEDRA, that would not eliminate tolling for claims of an incompetent person as the tolling provisions of RCW 4.16.190 specifically apply to TEDRA.

The position of the Court of Appeals is in direct conflict with this

Court's clear decisions holding that the appointment of a guardian does not eliminate tolling. This is a matter of substantial public interest since the Court of Appeals' interpretation of the TEDRA statute, if adopted by other courts, would impact the right of every incompetent and minor to bring actions against third parties. Every incompetent or minor would have to bring an action through a guardian since they could not do so themselves, which under the Court of Appeal's opinion would negate the application of the general tolling statute.

B. Review is warranted because the Court of Appeals' reading of RCW 11.96A.070(4) ending tolling for incompetents with a guardian raises a significant question of law under the Washington State Constitution. Court of Appeals interpretation presents an issue of great public interest because if adopted by other courts, incompetents, the disabled and minors would be denied rights guaranteed by Article I, Sec. 12 of the Washington State Constitution as confirmed by this Court in *Schroeder v. Weighall*. Review is warranted under RAP 13.4(b)(1),(3),(4).

The application of RCW 11.96A.070(4) to Terri's claims raises significant questions of law under the Article I, Section 12 of the Washington State Constitution. In *Schroeder v. Weighall*, 179 Wn2d 566, 316 P.3d 482 (2014), this Court ruled that an exception to the tolling of statutes of limitations for medical malpractice claims' of minors under RCW 4.16.190(2) was unconstitutional. This court based its holding in *Schroeder* on its determination that the tolling exception "burden[ed] a

particularly vulnerable minority[‘s]” right to bring a common law action in court, abridging a *privilege* of state citizenship in violation of Washington’s privileges and immunities clause, Art. I, §12. *Schroeder*, 179 Wn.2d at 488, 486.

If this Court found it would violate the state constitution to deny a minor bringing a medical malpractice claim the benefits of the tolling statute, why would not the same be true for a completely incompetent person? The condition of a severely disabled-for-life person like Sarah Block presumably has a greater need for protection. The *Schroeder* court had no problem in determining that RCW 4.16.190(2) was unconstitutional. For even more important reasons, RCW 11.96A.070 (4) as applied by the Court of Appeals suffers the same constitutional defect. It would be unlikely that any incompetent, disabled or minor could sue without a guardianship. The Court of Appeals interpretation would eliminate the protections of the general tolling statute, and deny the most vulnerable their right to bring an action in court.

C. The Court of Appeals’ decision is in direct conflict with *LK Operating, LLC v. Collection Grp., LLC*, and raises issues of substantial public interest concerning a client’s right to challenge the validity of a contract which violates public policy as evidenced by the Rules of Professional Conduct. Review is warranted under RAP 13.4(b)(1),(4).

Block's first claim for relief seeks to void the Barcus' contingent fee agreement for violations of RPCs 1.4, 1.5, 1.7 and 1.8(a), and asks the court to determine the reasonable value of his services by *quantum meruit*. (CP 12-13) This claim is essentially the same as that upheld by this Court in *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 331 P.3d 1147 (2014). In *LK Operating* this Court held that "Contracts formed in violation of the RPCs are unenforceable to the extent that they contravene public policy." *Id.*, at 85, 1163. As in that case, the Barcus and Kram's RPC violations involve conflicts of interest and other ethical abuses. In this case, the conflicts are even more direct and egregious.

Terri signed a retainer agreement with the Barcus, Barcus selected Peter Kram to serve as attorney for Terri and the guardianship. CP 1086, §7. Terri Block was directed to sign the Kram retainer agreement by the Barcus firm. CP 1086, 1201. Unknown to Terri, Kram also represented Barcus regarding Sarah's claims, and Barcus was listed as Kram's client in the same retainer agreement. CP 1204.

The conflict of interest went beyond the face of the retainer agreement, and was reflected in the actions of the defendants. When Terri Block learned of the size of the fee taken by Barcus, she contacted Kram who she thought was her lawyer. He told her to "shut up" and refused to question Barcus' fees. CP 784. Later, when Terri Block thought her new

attorneys Michael Caryl and Lee Raaen sought to obtain her files from Barcus and Kram, both filed motions for protective orders to deny her access to her files in order to prevent a review of Barcus' fees. CP 1152-67, 1216-51. Kram and Barcus asserted Kram's representation of Barcus to deny Block her file since Barcus was also Kram's client and he had not consented to its release. CP 1212, ln 7; 1237, ln 22 - 1238, ln. 2.

Kram then went further and supported the interests of Barcus in opposing Block's efforts to determine the reasonableness of Barcus' fees. Kram attacked his client in a declaration supporting Barcus saying,

“Terri Block, Michael Caryl, Lee Raaen and Eileen Peterson now engage this smear campaign and an extortion plot to gouge more money out of lawyers who have done nothing but help her. This is nothing more than a racketeering extortion plot dreamed up by Terri Block and her complicit counsel, Mr. Caryl.” CP 1212. ln.1

Both lawyers had an obligation to avoid such gross conflicts of interest, and both had an obligation to disclose the conflict to Terri Block. Neither did. Their entire relationship with Terri and Sarah Block was contaminated by their serious violations of the RPCs.

Block argued for the application of *LK Operating* by the Court of Appeals to this case. The Court of Appeals completely ignored this Court's opinion, never citing it. The Court of Appeals refused to consider

a right to void a contract for RPC violations as delineated in *LK Operating* rendering its decision in conflict with the opinion of this Court.

D. The Court of Appeals did not acknowledge the tolling of the statutes of limitations by RCW 4.16.230 when Block was prohibited by court orders from taking any legal action against Barcus, raising an issue of significant public interest. Review is warranted under RAP 13.4(b)(4).

Block brought to the attention of Court of Appeals that due to the efforts of Barcus and Kram, Terri Block was prohibited by court orders from suing them, or even from obtaining information to learn whether she had a legal basis for doing so, from January 2009 until the prohibition was lifted in 2013. CP 19-20. (The orders are described on pages 4-6 above.) This action was filed shortly after the prohibition was removed. CP 1. When the commencement of an action is stayed by injunction, the time of the injunction or prohibition shall not be part of the time limited for the commencement of the action. RCW 4.16.230. The court's decision never mentioned the statute or the court ordered prohibitions against Terri taking legal action. Terri is accused of waiting too long to act, ignoring the fact that Barcus and Kram prevented her from doing so for years.

E. The Court of Appeals erroneously held that RCW 4.24.005 establishes a 45 day statute of limitations for all determinations of the reasonableness of attorney’s fees, in conflict with decisions of this Court and the Courts of Appeals. The opinion raises questions of substantial public interest regarding the policing of attorney’s billing practices and the severe limitations on the rights of clients in tort cases. Review is warranted under RAP 13.4(b)(1),(2),(4).

The Court of Appeals’ decision states, “Additionally, to the extent that Block challenges the reasonableness of Barcus’s fees, RCW 4.24.005 bars her claim.” *Block*, slip op., at 7. The Court went on to say, “This court has held that this statute functions as a 45 day statute of limitations on claims that an attorney charged an unreasonable fee.” *Block*, slip op. at 8 (citing *Barrett v. Freise*, 119 Wn.App. 823, 848-50, 82 P.3d 1179 (2003)). However, *Barrett* simply held that there is a 45 day limit for bringing actions under RCW 4.24.005, not that RCW 4.24.005 was a statute of limitations for all reasonableness determinations.

RCW 4.24.005 is in the RCW chapter providing Special Rights of Action and Special Immunities, not within RCW Chapter 4.16 where statutes of limitation are codified. The language of RCW 4.24.005 is critically different than that of statutes of limitations. Chapter 4.16 RCW creates time limits for the right to sue. RCW 4.24.005 creates a “special right of action.”

Did the legislature intended to shorten all statutes of limitations for suing tort lawyers to 45 days, giving such lawyers special protection from

suit regarding their fees – while allowing those lawyers six years to sue clients to enforce their written fee agreements? If so, such a limitation would violate the *Schroder* standards by granting special protections to tort lawyers while jeopardizing a vulnerable minority – injured plaintiffs.

The Court of Appeals ignores long standing law which allows a right to a reasonableness determination of attorney's fees without invoking RCW 4.24.005. Examples include: *In re Settlement/Guardianship of A.G.M.*, 154 Wn. App. 58, 223 P.3d 1276 (2010) reasonableness determination pursuant to SPR 98.16W and RPC 1.5(a); *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002) applied RPC 1.5(a) to determine the reasonableness of the attorney's fee over time; *Holmes v. Loveless*, 122 Wn. App. 470, 94 P.3d 338 (2004) applied RPC 1.5(a) to determine the reasonableness of attorney's fees over time; *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 859 P.2d 1210 (1993) reasonableness determination pursuant to RPC 1.5(a) in fee shifting case.

Block's request for a determination of reasonableness is based on a Barcus' failure to comply with SPR 98.16W which requires such a determination in cases involving incompetent individuals, RPC 1.5(a) which requires that all fees be reasonable, and Barcus' failure to comply with RPC 1.15A (h)(3) regarding the settlement and distribution of contingent fees. None of these claims involve either 4.24.005 or TEDRA.

F. The Court of Appeals incorrectly applied the three year statute of limitations to all of Block's claims. The time period for a client to seek a determination of the reasonableness of a fee under a written agreement is an issue of substantial public interest. Review is warranted under RAP 13.4(b)(4).

The Court of Appeals claimed that all of Block's claims were based on breaches of fiduciary duties, and that a three year statute of limitations applies to all such claims against an attorney. The court based its opinion on *Meryhew v. Gillingham*, 77 Wn. App. 752, 893 P.2d 692 (1995) which it contended made all fiduciary duty claims subject to the three year statute. However, *Meryhew* does not stand for that proposition. In *Meryhew* the court held that the three year statute applied to that legal malpractice claim for damages, not that all fiduciary duty claims were limited by the same statute of limitations.

The proper statute of limitations for Terri's claims is six years. RCW 4.16.040(1) states that the six year limitation applies in "An action upon a contract in writing, or liability express or implied arising out of a written agreement..." By contrast, the three year statute provides for a three year limitation for "...an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." RCW 4.16.080(3). [Underlining added.]

Barcus claimed a one-third fee on the \$2.1 million UIM settlement and on the \$200,000 recovery against Meeks based solely on his written contract with Terri. CP 22-3. This dispute is based on a written contract or arises out of the written agreement.

The appeal court's reliance on *Davis v. Davis Wright Tremaine*,

LLP, 103 Wn.App. 638, 14 P.3d 146 (2000) is also misplaced. *Davis* was a legal malpractice case in which the plaintiff asked the court to imply a duty to render a level of legal services not in the parties' written contract. In the *Block* case, *Barcus*' claim to attorney's fees is based entirely on the specific terms of the written fee agreement.

The Court of Appeals' argument that RPC requirements should not be considered in relationship to the written contract is contrary to this Court's recent opinion in *LK Operating, LLC v. Collection Grp., LLC*. In determining whether violations of the RPCs should be considered in deciding whether a contract tainted by ethical violations should be enforced, this Court held that "...a contract entered in violation of former RPC 1.8(a) may not be enforced unless it can be shown that notwithstanding the violation, the resulting contract does not violate the underlying public policy of the rule." *LK Operating*, 181 Wn.2ds at 89-90.

This Court distinguished the question of the enforceability of a contract which violates public policy as represented by the RPCs from the application of the rules in a legal malpractice action. *Id.* The Court of Appeals did not. *Block*'s claims are essentially the same as that in *LK Operating*, *i.e.* the enforceability of *Barcus*' contingent fee claim in light of violations public policy as represented by the RPCs.

In *Fetty v. Wenger*, 110 Wn. App. 598, 600, 36 P.3d 1123 (2001); review denied, 147 Wn2d 1011 the court of appeals considered whether a determination of fees by *quantum meruit* when a contingent fee agreement

was not enforceable was governed by the six or three year statute of limitations. While the court decided the case on an alternative basis, it stated that an action for fees in *quantum meruit* is an equitable claim arising out of the parties' written agreement, and therefore would be encompassed in the broad language of the six year statute of limitations, RCW 4.16.040(1). *Fetty*, 110 Wn. App. at 600, 1124.

In a companion decision to *LK Operating* cited above, this Court distinguished between that plaintiff's legal malpractice action and the forfeiture/disgorgement action in considering an award of attorney's fees, labeling the breach of fiduciary duty matter a contract action. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 121, 330 P.3d 190, 192 (2014). The Court of Appeals ignored both of this Court's *LK Operating* opinions, never mentioning either of them.

VI. CONCLUSION

This Court should grant review. The Court of Appeals decision not only denied Sarah Block, who is forever mentally and physically disabled, her right to bring her case to court, but the issues presented are of substantial public interest for all whose lives are subject to guardianships.

RESPECTFULLY SUBMITTED this 25th day of September, 2015.

LAW OFFICE G. LEE RAAEN


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CERTIFICATE OF SERVICE

The undersigned certifies that on this day I caused to be served via email transmission and US mail the attached Petition for Review on the following counsel of record:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 25th day of September, 2015.



G. Lee Raaen

COURT OF APPEALS
STATE OF WASHINGTON
2015 JUL 27 11:11:35

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRI BLOCK, as guardian of SARAH BLOCK,)	No. 71742-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC, a Washington professional limited liability company; BEN F. BARCUS and JANE DOE BARCUS, individually and the marital community comprised thereof; LEGGETT & KRAM, a Washington partnership; PETER KRAM and JANE DOE KRAM, individually and the marital community comprised thereof,)	UNPUBLISHED
)	FILED: <u>July 27, 2015</u>
Respondents.)	
)	

Cox, J. — Terri Block appeals the summary judgment dismissal of her claims for breach of fiduciary duty and legal malpractice against Ben F. Barcus, Peter Kram, their respective marital communities, and the respective law firms with which each lawyer is associated. Her claims accrued more than three years before she commenced this action. The applicable statutes of limitations were not tolled. And there are no genuine issues of material fact regarding her equitable tolling and estoppel claims. We affirm.

Terri Block brought this action as the guardian of her daughter Sarah Block. Sarah¹ was severely injured in a September 12, 2005 car accident. That same month, Terri entered into a fee agreement with Ben Barcus and his law firm (collectively "Barcus") to represent Sarah in litigation related to her car accident. Later that same month, Terri also entered into a fee agreement with Peter Kram and his law firm (collectively "Kram") to serve as the attorney for Sarah's guardianship. Barcus introduced Kram to Block.

By December 2005, Barcus obtained substantial settlements on Sarah's behalf from uninsured motorist claims against an insurer. In March 2006, the trial court entered an order approving a petition for disbursement of fees from the settlement fund. Early the following month, fees were disbursed to counsel based on this order.

Over seven years later, on May 3, 2013, Block commenced this action. She alleged four main claims. First, she sought to void the 2005 fee agreement with Barcus on the basis that he allegedly breached fiduciary duties to Sarah. Second, she sought a determination of the reasonableness of the attorney fees paid to Barcus in 2006. Third, she sought forfeiture or disgorgement of fees based on alleged misconduct of Barcus and Kram. Fourth, she claimed legal malpractice based on Kram's alleged negligence in representation.

Both Barcus and Kram moved for summary judgment dismissal on statute of limitations grounds. The court granted their motions and dismissed Block's claims in their entirety. The court also denied Block's motion for reconsideration.

Block appeals.

¹ Due to the similarity in names, we use first names for clarity.

STATUTES OF LIMITATIONS

Block argues that the trial court applied the wrong statutes of limitations to her claims. We disagree.

Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.² When reviewing a summary judgment decision, the court looks at the facts in the light most favorable to the non-moving party.³

This court reviews de novo a grant of summary judgment.⁴ This court also reviews de novo whether a statute of limitations bars a claim.⁵

Block's First and Third Claims

Block argues that a six-year statute of limitations applies to her first and third claims. She is wrong.

Claims against an attorney for breach of fiduciary duty fall under RCW 4.16.080's three-year statute of limitations.⁶

Block's first and third claims are for breach of fiduciary duty.

² Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014).

³ Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012).

⁴ Camicia, 179 Wn.2d at 693.

⁵ Bennett v. Computer Task Grp., Inc., 112 Wn. App. 102, 106, 47 P.3d 594 (2002).

⁶ Meryhew v. Gillingham, 77 Wn. App. 752, 755, 893 P.2d 692 (1995).

Block's complaint labels her first claim as a claim for "voiding the contingency fee agreement" entered into with Barcus.⁷ Her complaint alleges that Barcus and Kram owed her fiduciary duties, including duties to disclose conflicts of interests. She alleges that Barcus and Kram violated their "duties of disclosure to [Block] as required by RPC [Rules of Professional Conduct] 1.4 and 1.5."⁸ She also alleges that Barcus and Kram violated RPCs 1.7 and 1.8. Based on these violations, Block seeks to void her fee agreement with Barcus.

Because Block's claim is based on alleged violations of fiduciary and ethical duties, it is a claim for breach of fiduciary duty. This court has recognized that a trial court may "properly consider[] the RPCs to determine whether [an attorney] breached his fiduciary duty."⁹ But the relevant cause of action is for breach of fiduciary duty, not for violation of the RPCs. The fact that Block seeks voiding of the fee agreement as a remedy does not transform her breach of fiduciary duty claim into something else. Accordingly, the three-year statute of limitations for breach of fiduciary duty applies to this claim.

Block's complaint labels her third claim as one for disgorgement of fees. She alleges that Barcus and Kram violated multiple RPCs, and seeks disgorgement of fees on that basis.

This claim, like Block's first claim, is for a breach of fiduciary duties. "Under Washington law, disgorgement of fees is a *remedy*"—not a cause of

⁷ Clerk's Papers at 11.

⁸ *Id.* at 12.

⁹ Cotton v. Kronenberg, 111 Wn. App. 258, 266, 44 P.3d 878 (2002).

action.¹⁰ And it is clear that her cause of action sounds in the alleged breach of fiduciary duties under the RPCs. Thus, Block's characterization of this claim as something other than a remedy is unpersuasive. Because Block seeks disgorgement as "sanctions for breaches of fiduciary duty," the three-year statute of limitations for breach of fiduciary duty applies.

Here, the order approving the disbursement of funds to pay fees was entered in March 2006. That is when these claims accrued for purposes of the three-year statute. Yet, she did not commence this action until May 2013. Thus, Block's claims are barred as untimely.

Block argues that a six-year statute of limitations applies to her first and third claims because they are based on the breach of a written contract. Under RCW 4.16.040(1), parties have six years to commence "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement." But this statute does not apply to Block's claims.

This court has stated that RCW 4.16.040 applies to "liabilities which are either expressly stated in a written agreement or which follow by natural and reasonable implication from the promissory language of the agreement, as distinguished from liabilities created by fictional processes of the law or imported into the agreement from some external source."¹¹

¹⁰ Bertelsen v. Harris, 537 F.3d 1047, 1057 (9th Cir. 2008) (emphasis added).

¹¹ Davis v. Davis Wright Tremaine, LLP, 103 Wn. App. 638, 651, 14 P.3d 146 (2000) (quoting Bicknell v. Garrett, 1 Wn.2d 564, 570-71, 96 P.2d. 592 (1939)).

In this case, the “contractual terms” that Barcus allegedly violated do not come from the terms of the fee agreement. Rather, as pleaded, they come from an external source—the RPCs.

Block argues that RPC 1.5’s prohibition on charging an unreasonable fee is “implied in literally every attorney’s fee agreement in Washington.”¹² But even if we believed that Block is correct, which we do not, the RPCs would be terms “imported into the agreement from some external source.”¹³ Thus, a claim for the violations of the RPCs would not fall under the six-year statute of limitations.

Additionally, the RPCs apply to all attorney-client relationships, regardless of whether the attorney and client have a written contract.¹⁴ RCW 4.16.040 applies specifically to claims arising from *written* agreements.¹⁵ For these reasons, this argument is unpersuasive.

Block also argues that her claims were timely under the continuous representation rule. Under this rule, clients’ claims against their attorneys are tolled “during the lawyer’s representation of the client in the same matter from which the malpractice claim arose.”¹⁶ But even if Block’s argument were correct, which it is not, her claims would still be untimely under a three-year statute of limitations because more than three years passed between the end of Barcus’s

¹² Brief of Appellant at 26.

¹³ Davis, 103 Wn. App. at 651.

¹⁴ See RPC Scope [17].

¹⁵ RCW 4.16.040.

¹⁶ Janicki Logging & Const. Co. v. Schwabe, Williamson & Wyatt, P.C., 109 Wn. App. 655, 664, 37 P.3d 309 (2001).

representation and when Block commenced her suit. Barcus sent Block a letter withdrawing from her representation on July 29, 2008. Block did not commence her suit until May 2013. Thus, we do not consider this argument any further.

Block's Second Claim

Block's second claim is for a "determination of reasonableness of attorney fees under quantum meruit."¹⁷ This claim is dependent upon the voiding of the fee agreement under the Block's first claim. Block alleges that "[w]ith the voiding of the Barcus contingency fee agreement, Barcus' remedy for compensation is under the doctrine of quantum meruit."¹⁸ Because Block's first claim is time-barred, we need not address her request for a determination of reasonable attorney fees.

Additionally, to the extent that Block challenges the reasonableness of Barcus's fees, RCW 4.24.005 bars her claim.

Under RCW 4.24.005, a party has 45 days to challenge the reasonableness of attorney fees in a tort case. That statute reads: "Any party charged with the payment of attorney's fees in any tort action may petition the court not later than forty-five days of receipt of a final billing or accounting for a determination of the reasonableness of that party's attorneys' fees."¹⁹ This court

¹⁷ Clerk's Papers at 13.

¹⁸ *Id.*

¹⁹ RCW 4.24.005.

has held that this statute functions as a 45 day statute of limitations on claims that an attorney charged an unreasonable fee.²⁰

In this case, the guardianship court approved the fees Barcus and Kram received in an order entered March 31, 2006. At this time, Barcus presented an accounting of the fees and costs it charged, and the fees it paid to others, including Kram. But Block did not commence this action until May 2013, over seven years later. Thus, she failed to timely challenge the reasonableness of the fees.

Block's Fourth Claim

Block argues that the court incorrectly determined that her legal malpractice claim against Kram was barred by the three-year statute of limitations for legal malpractice. We disagree.

"In Washington, the statute of limitations period for a legal malpractice claim is three years."²¹ This period begins to run "when the plaintiff has a right to seek legal relief," meaning that the plaintiff "know[s] the facts that give rise to that cause of action."²²

One element of legal malpractice is an attorney-client relationship.²³

²⁰ Barrett v. Freise, 119 Wn. App. 823, 848-50, 82 P.3d 1179 (2003).

²¹ Cawdrey v. Hanson Baker Ludlow Drumheller, P.S., 129 Wn. App. 810, 816, 120 P.3d 605 (2005).

²² Id. at 816-17.

²³ Schmidt v. Coogan, 181 Wn.2d 661, 665, 335 P.3d 424 (2014).

Generally, the attorney-client relationship ends if the client hires a new attorney.²⁴

Here, Block's fourth claim for relief expressly states that it is for legal malpractice. She acknowledges that this claim is subject to a three-year statute of limitations.

It is undisputed that Block replaced Kram with another attorney in 2008. After that point, Kram no longer had an attorney-client relationship with Block. Thus, after that point, Kram could no longer commit legal malpractice. Accordingly, the statute of limitations began to run in November 2008, at the latest. Because Block did not commence this action until 2013, she failed to timely bring this malpractice claim.

Block argues that her claim against Kram was timely for two reasons. First, Block argues that the statute of limitations began to run in February 2012, when Kram filed a declaration in court opposing Block's suit against Barcus. In the alternative, Block argues that the statute of limitations began to run in November 2011, when Kram provided a copy of Block's file to Block's new attorney. Neither argument is persuasive.

Block relies on RPC 1.9 to argue that Kram committed malpractice in 2012. That rule sets forth the duties that lawyers owe to former clients.²⁵ This argument fails for two reasons.

²⁴ 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 16:29 at 719 (4th ed. 2013).

²⁵ RPC 1.9.

First, Washington's RPCs state that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."²⁶ Thus, Block cannot use an RPC to establish that she still had an attorney-client relationship with Kram. Accordingly, her attorney-client relationship with Kram ended in 2008, when she hired substitute counsel.

Second, our RPCs state that a "[v]iolation of a [RPC] should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."²⁷ Thus, Block also cannot rely on a violation of the RPCs as a cause of action against Kram.

Block also argues that the statute of limitations on her claim did not begin to run until November 2011. Block argues that Kram refused to provide Block his file on her case until that date. But Block's citation to the record demonstrates only that he refused to provide her a copy at his expenses, under the terms of their retainer agreement. He offered to allow her to look over the case file or to make a copy at her expenses. Thus, this argument is unpersuasive.

TOLLING

Block next argues that the statutes of limitations on all of her claims were tolled under various doctrines. We disagree with all of her arguments.

RCW 4.16.190

Block argues that RCW 4.16.190 indefinitely tolled all four of her claims. We disagree.

²⁶ RPC Scope [17].

²⁷ *Id.* at [20].

RCW 4.16.190 tolls statutes of limitations for a person who is “disabled to such a degree that he or she cannot understand the nature of the proceedings.”

This tolling applies even if the person has a guardian.²⁸

But this statute does not apply to actions under TEDRA (the Trust and Estate Dispute Resolution Act) if the person has a guardian. Under TEDRA:

The tolling provisions of RCW 4.16.190 apply to this chapter [TEDRA] **except** that the running of a statute of limitations under subsection (1) or (2) of this section, or any other applicable statute of limitations for any matter that is the subject of dispute under this chapter, **is not tolled as to an individual who had a guardian ad litem**, limited or general guardian of the estate, or a special representative to represent the person during the probate or dispute resolution proceeding.^[29]

Thus, when a person has a guardian ad litem or general guardian, his or her claims are not tolled for matters that are the subject of dispute under TEDRA.

It is undisputed that Sarah is severely disabled. It is also undisputed that a guardian represented her. Thus, if this case is a “matter that is the subject of dispute under” TEDRA, Block’s claims, brought on behalf of Sarah, were not tolled. But if the claims did not fall under TEDRA, her claims were tolled, and she timely filed this action, regardless of the statute of limitations. Thus, the dispositive question is whether this matter falls under TEDRA.

²⁸ Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 220, 770 P.2d. 182 (1989).

²⁹ RCW 11.96A.070(4) (emphasis added).

The purpose of TEDRA “is to set forth generally applicable statutory provisions for the resolution of disputes and other matters involving trusts and estates.”³⁰

RCW 11.96A.030(2) states that under TEDRA, “‘Matter’ includes any issue, question, or dispute involving: . . . (c) The determination of any question arising in the administration of an estate or trust.” This court has held that “[t]he plain words of this definition of ‘matter’ make clear the broad scope of this term.”³¹

Here, we note that Block’s complaint cites TEDRA. She expressly alleges that subject matter jurisdiction exists “under the statutes . . . including but not limited to, RCW 11.96A.020 and 11.96A.040.”³² And we conclude that Block’s claims fall under TEDRA’s broad definition of “matter.”

This case involves the administration of Sarah Block’s guardianship estate and special needs trust. Block’s complaint alleges that the guardianship court did not properly approve Barcus’s fee agreement. It also alleges that the guardian ad litem failed to properly evaluate Barcus’s fees. Similarly, the complaint alleges that the guardianship court failed to determine whether Barcus’s fees were reasonable. The complaint also

³⁰ RCW 11.96A.010.

³¹ In re Estate of Bernard, 182 Wn. App. 692, 722, 332 P.3d 480, review denied, 339 P.3d 634 (2014).

³² Clerk’s Papers at 3.

alleges that Barcus improperly paid himself fees directly from a settlement instead of first placing the funds in Sarah's trust.

Thus, this case involves "question[s] arising in the administration of" Sarah Block's guardianship estate and special needs trust. Accordingly, it is a "matter" under TEDRA's broad definition of that term.

Additionally, Block's complaint cites TEDRA several times. She cites TEDRA as one ground for jurisdiction and venue. And her complaint seeks attorney fees under TEDRA. Thus, while Block now claims that TEDRA does not apply to this case, that claim is inconsistent with her own assertions when she commenced this action.

Block argues that TEDRA's exception to RCW 4.16.190 does not apply to her case for several reasons.

First, Block argues that her case does not fall under TEDRA because she did not allege a cause of action contained in TEDRA's RCW chapter. But as explained earlier, TEDRA has a broad scope, and this case falls within it.

Second, Block argues that no statute of limitations contained in TEDRA controls in this case. Thus, Block argues that TEDRA's tolling exemption does not apply to her case.

But the exemption—RCW 11.96A.070(4)—tolls "any other applicable statute of limitations."³³ This plain language does not limit its application to statutes of limitation contained in TEDRA. Instead, if "any matter" is disputed

³³ RCW 11.96A.070(4).

under TEDRA, the tolling exception applies to **any** applicable statute of limitations.

Third, Block argues that Sarah was not represented during a probate or dispute resolution proceeding, thus RCW 11.96A.070(4) does not apply. But RCW 11.96A.070(4) applies to “individual[s] who had a guardian ad litem, limited or general guardian of the estate, **or a special representative to represent the person during the probate or dispute resolution proceeding.**”³⁴ Because there is no comma after “special representative,” the phrase “to represent the person during the probate or dispute resolution proceeding” modifies only that term.³⁵ Thus, the tolling exception applies whenever an individual is represented by a guardian ad litem or a general guardian—it is not necessary that the guardian represent the individual in a probate or dispute resolution proceeding.

Block also argues that if TEDRA prevents the tolling of her claims under RCW 4.16.190, then it is unconstitutional. She is mistaken.

Block argues that not tolling her claims would be unconstitutional under article I, section 12 of the Washington constitution. That section prohibits granting “any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to

³⁴ Id. (emphasis added).

³⁵ Id.

all citizens, or corporations.”³⁶ To support this claim, she relies on Schroeder v. Weighall.³⁷

In that case, the supreme court held that an exception to RCW 4.16.190’s tolling was unconstitutional. Under the exception at issue, medical malpractice claims were not tolled under RCW 4.16.190.³⁸ The supreme court held that this tolling exemption “place[d] a disproportionate burden on the child whose parent or guardian lacks the knowledge or incentive to pursue a claim on his or her behalf.”³⁹ The court also noted that it unconstitutionally granted a benefit—limited liability—to medical malpractice defendants.⁴⁰

The present case is distinguishable. First, TEDRA’s tolling exception only applies to those “who had a guardian ad litem, limited or general guardian of the estate, or a special representative.”⁴¹ Thus, it only applies to those whose interests were represented. Accordingly, unlike Schroeder, the tolling exception does not burden a “particularly vulnerable population.”⁴²

Second, TEDRA’s tolling exception does not benefit any particular class of defendants. In Schroeder, the exception singled out medical malpractice claims,

³⁶ CONST. art. I, § 12.

³⁷ 179 Wn.2d 566, 316 P.3d 482 (2014).

³⁸ RCW 4.16.190(2).

³⁹ Schroeder, 179 Wn.2d at 578-79.

⁴⁰ Id. at 573-74.

⁴¹ RCW 11.96A.070(4).

⁴² Schroeder, 179 Wn.2d at 577.

while tolling all other claims.⁴³ Here, in contrast, the tolling exemption applies to all causes of action.

Thus, because TEDRA's tolling exception does not burden a vulnerable population or confer a benefit to a particular group, Block's argument is not persuasive.

In sum, we conclude that TEDRA applies to Block's claims. Accordingly, Block's claims were not tolled under RCW 4.16.190, and the statutes of limitations for her claims have run.

Equitable Doctrines

Block argues that she raised genuine questions of material fact whether equitable doctrines tolled her claims. Specifically, she argues that equitable tolling or equitable estoppel may apply in her case, depending on contested facts. We disagree.

"Estoppel is appropriate to prohibit a defendant from raising a statute of limitations defense when a defendant has 'fraudulently or inequitably invited a plaintiff to delay commencing suit until the applicable statute of limitation has expired.'"⁴⁴ The three elements of equitable estoppel are: First, "an admission, statement, or act inconsistent with a claim afterward asserted; second, action by another in reasonable reliance on that act, statement, or admission; and third,

⁴³ *Id.* at 570.

⁴⁴ *Robinson v. City of Seattle*, 119 Wn.2d 34, 82, 830 P.2d 318 (1992) (quoting *Del Guzzi Constr. Co. v. Global Northwest, Ltd.*, 105 Wn.2d 878, 885, 719 P.2d 120 (1986)).

injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.”⁴⁵

Block’s allegations fail to establish that she is entitled to equitable estoppel. She does not identify any “admission, statement, or act” of the defendants’ that is inconsistent with their current defenses. Additionally, she has not shown reasonable reliance on her part. Accordingly, there are no genuine issues of material fact whether Block is entitled to equitable estoppel.

Block also fails to allege facts indicating that equitable tolling applies in this case. “Equitable tolling is a remedy that permits a court to allow an action to proceed when justice requires it, even though a statutory time period has elapsed.”⁴⁶ This doctrine applies only in “narrow circumstances.”⁴⁷ Equitable tolling requires “bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff.”⁴⁸

Here, Block alleges that Barcus and Kram acted in bad faith by being “instrumental in getting court orders prohibiting her from [filing suit].” Block refers to a January 2009 order that denied Block’s request for the trust to hire an attorney. In December 2008, Block sought to have the trust pay a \$10,000 retainer for an attorney to investigate the reasonableness of Barcus’s fees. The trustee denied this request. In January 2009, the guardianship court then denied

⁴⁵ Id.

⁴⁶ In re Pers. Restraint of Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008).

⁴⁷ Id.

⁴⁸ Id.

Block's request to overrule the trustee's decision. Barcus appeared at the January 2009 hearing to oppose the trust funding the litigation.

Here, even assuming that the defendants acted in bad faith, Block did not act diligently. Block was aware of the potential issue with Barcus's fees since 2006. In that year, she wrote a letter to Barcus stating that she "w[ould] probably never be at peace with the huge fees [Barcus] require[d]." Block also contacted an attorney about investigating the reasonableness of Barcus's fees in 2008. Yet Block did not commence this action until 2013.

Additionally, although the guardianship court denied Block's request for the trust to fund the litigation against Barcus, the court noted that Block could proceed if she retained counsel without using the trust's funds. Block ultimately did retain counsel at her own expense but not until July 2011. Thus, part of Block's delay in filing the case was her delay in retaining counsel, at her expense. Accordingly, Block did not act with reasonable diligence and is not entitled to equitable tolling of her claims.

We affirm the trial court's summary judgment dismissal of Block's claims.

Cox, J.

WE CONCUR:

Trickey, J

[Signature]

NO. 71742-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TERRI BLOCK
as guardian of SARAH BLOCK

Appellant,

v.

THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC, a
Washington Professional Limited Liability Company, BEN F. BARCUS
and JANE DOE BARCUS, individually and the marital community
comprised thereof; LEGGETT & KRAM, a Washington Partnership;
PETER KRAM and JANE DOE KRAM, individually and the marital
community comprised thereof,

Respondents.

APPELLANT'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

In September of 2005 a talented young woman (Sarah Block) was rendered mentally and physical incompetent for the rest of her life by the actions of a drunk driver. Sarah's parents hired the Barcus firm to represent Sarah under a written contingent fee agreement. The Barcus firm settled the case for policy limits within a few weeks with little efforts. There were no issues regarding liability, damages or coverage.

The Barcus firm took almost \$700,000 in attorney's fees without compliance with Court rules requiring court approval – SPR 98.16W. When Terri Block tried to object to the fees, her lawyer Peter Kram (who was also the lawyer for Barcus in this matter), verbally abused Terri and told her she did not have any basis to object to the fees.

When Terri got a new lawyer to represent her in the guardianship, she filed a motion to allow her to have an attorney review the fees within a couple of weeks. Without standing or invitation, Barcus appeared and opposed any attempt to evaluate the reasonableness of the fees. Barcus threatened the financial wellbeing of both Terri and her mentally and physically disabled daughter. The Court entered an order not only restricting the special needs trust from funding the review, but prohibited Terri from taking any further action without court order.

When Terri did get counsel, Barcus and Kram refused to give Terri Block her files. They filed motions for a protective order seeking to be permitted to deny Terri her files. Barcus' stated objective was to prevent a

review of his fees. The Court also entered orders denying any discovery whatsoever. Terri could not even ask for her files from the guardian ad litem, trustee or the insurance company paying the claim. Terri was prohibited by court order from taking any further action against Barcus and Kram without court authorization.

When her lawyers were finally able to get Terri's files, they presented an analysis of the potential claim to the guardianship judge, who agreed that the matter at long last should go forward. Before any substantial discovery, Barcus and Kram moved for summary judgment on the statute of limitations.

The trial court granted summary judgment and this court affirmed. There were a number of issues, but this motion is limited to the question of whether TEDRA applies to plaintiff's claims, and a new defense raised for the first time in the court's opinion regarding the malpractice claim against Kram.

II. POINTS OF FACT THE COURT OVERLOOKED OR MISAPPREHENDED

The Court has overlooked or misapprehended key facts in determining several critical issues, including whether TEDRA applies to Ms. Block's claims, and whether it was her fault in not filing suit earlier.

A. Points of Fact Cited by the Court to Invoke TEDRA and Preclude Tolling.

Many of the facts cited by the Court to show that TEDRA applies to Block's claims are incomplete or incorrect. In order to present an accurate picture of the TEDRA issue to the Court, we point out the following.

- The Court incorrectly states that "In this case, the guardianship court approved the fees Barcus and Kram received in an order entered March 31, 2006." Opinion at 8. However, the fees were not presented to the guardianship court or the judge assigned to the guardianship, but to a pro tem ex parte commissioner whose statements on the record indicated that he didn't realize the issue of the reasonableness of the fees were before him. CP 7-8, CP 738 Furthermore, plaintiff alleges that the issue of the reasonableness of the fees was not presented to the court in compliance with SPR 98.16W or PCSPR 98.16W. CP 6. This creates at least a question of fact.
- The Court incorrectly states that Block's complaint "alleges that the guardianship court failed to determine whether Barcus's fees were reasonable." Opinion at 12. Block's complaint makes no claims regarding the actions of the guardianship court. The complaint alleges

that the fees were never approved as required by SPR 98.16W which is not governed by guardianship law or Title 11.

- The Court's opinion, referring to plaintiff's complaint, says "It also alleges that the guardian ad litem failed to properly evaluate Barcus's fees." Opinion at 12. The statement does not accurately reflect plaintiff's complaint. Block alleges that "No settlement guardian ad litem was appointed to evaluate attorney's fees" as required by SPR 98.16W and PCLSPR 98.16W. CP 5. The complaint also points out that Mr. Gray, claimed by Barcus to be a settlement guardian ad litem, was never appointed for that purpose, did not meet the rules requirements, and did not perform the functions of a settlement guardian ad litem as required by the rules. CP 5-6 The requirements of SPR 98.16W and PCLSPR 98.16W are not part of laws regarding guardianships, trusts or any other provision of Title 11 or TEDRA.
- The Court incorrectly states that "The complaint also alleges that Barcus improperly paid himself fees directly from a settlement instead of first placing the funds in Sarah's trust." Opinion at 12-13 (no citation to the record). There is no such allegation in the complaint. Block did point out in her brief that Barcus paid himself from the settlement funds directly without placing them into Sarah's trust to demonstrate that the payment of the fees was not part of the

administration of the trust. CP 1301 The trust did not exist at the time Barcus paid himself the fees. Block's claim did not involve TEDRA as the trust was not in any way involved.

- The Court in its opinion claims that funds were disbursed to counsel from the settlement the month after the fees were approved. Opinion 2. In fact, Barcus paid himself the same day the court entered the order – in violation of RPC 1.15A, CP 1301
- The Court states that Block's claim that TEDRA does not apply to this case is inconsistent with her own assertions when she commenced the action. Opinion at 13. Block did include a reference to TEDRA as an alternative basis for venue and jurisdiction, but none of her claims mentions TEDRA. The complaint's allegations are misapplied in the following respects.
 - Even if TEDRA was cited as an alternative basis for jurisdiction or venue, including that general allegation would not mean that the general allegation applied to each and every claim. Only one claim against Kram, that contained in paragraph 5.4 (CP 13) might, depending on the facts to be discovered, involve the administration of the Special Needs Trust and guardianship estate. An allegation that some claims might be subject to TEDRA if the facts ultimately

warrant that, does not warrant a conclusion that all alleged claims therefore are TEDRA claims.

- Defendants denied the TEDRA allegations in answering the complaint, making their positions in their summary judgment motions inconsistent with their assertions in their answers. CP 27 §2.1, 41 §2.1.
- The Court’s reliance on the alternative jurisdiction and venue allegations to show that Block’s claims fall within TEDRA is to essentially apply the doctrine of Judicial Estoppel. That defense was never pleaded or discussed as part of the summary judgment motion. It would not apply here.

“Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” **Cunningham**, 126 Wn. App. at 224-225. Its purposes are to preserve respect for judicial proceedings without the necessity of resorting to the perjury statutes; to bar as evidence statements by a party which would be contrary to sworn testimony the party has given in prior judicial proceedings; and to avoid inconsistency, duplicity, and the waste of time. **Cunningham**, 126 Wn. App. at 225. There are two primary limitations on the application of the doctrine. First, it may be applied “only where the position of the party to be estopped is clearly inconsistent with its previous one”; and second, ‘that party must have convinced the court to accept that previous position.’ **In re Coastal Plains, Inc.**, 179 F.3d 197, 206 (5th Cir. 1999).”

Miller v. Campbell, 137 Wn. App. 762, 769, 155 P.3d 154, 158 (2007).

B. Points of Fact Cited by the Court to Indicate Delays by Terri Block in Acting for Sarah

Many of the facts cited by the Court to show that Terri Block could have or should have filed suit earlier are incomplete or incorrect. We respectfully recognize that the Court cannot reference all of the facts contained in the record in its opinion. However, we ask that the following items be taken into account in its reconsideration of this case.

- The Court refers to an order by the guardianship court in January 2009 denying Block's request to use \$10,000 of trust funds to investigate the reasonableness of Barcus' fees, and that Block did not act diligently because she was aware of the potential issue with Barcus' fees in 2006. The Court indicates she wrote a letter to Barcus in 2006 indicating that she "w[ould] probably never be at peace with the huge fees [Barcus] required." Opinion at 17 -18. However, both Block and Kram acknowledge that Block contacted Kram (her guardianship attorney) in 2006 to complain about the fees, but Kram refused to help her, CP 784
- To demonstrate a lack of diligence by Block, the Court states, "Additionally, although the guardianship court denied Block's request

for the trust to fund the litigation against Barcus, the court noted that Block could proceed if she retained counsel without using the trust's funds." Opinion at 18. However, she was in fact not allowed to proceed even if she paid for counsel. The 2009 order referred to by the Court also provided that "Any add'tl legal steps in pursuing a cause of action must be explicitly approved by the Court." CP 656-68. Block was allowed to pay for an investigation, but she was specifically prohibited from taking legal action on her own.

- Also not mentioned in the Court's opinion is a February 10, 2012 order in response to Block's request that she and her counsel be allowed access to her files held by Kram, Barcus, the trustee, guardian ad litem and the insurance company that paid the claim. Block's request to be allowed to obtain the files of the trustee, the guardian ad litem, and Farmer's Insurance Company was denied. Her requests to be able to subpoena materials to investigate the matter of fees, to take depositions of relevant witnesses, and to consult with and obtain expert opinions relating to the Barcus fees were also denied. The order provided that "No discovery is to occur w/o explicit order of the court." The Trustee was prohibited from funding any fees/proposed litigation of the Guardian or Mr. Caryl [her counsel regarding the fee issue] "without explicit court approval." The guardianship court did

require Barcus and Kram to give Block her files, but they were allowed to remove anything they deemed “work product” without disclosing to Block or counsel what was being removed. CP 1277-79.

- The Court’s opinion states that “Block argues that Kram refused to provide Block his file on her case until that date [2011]. But Block’s citation to the record demonstrates only that he refused to provide her a copy at his expense, under the terms of their retainer agreement.” Opinion at 10. This is incorrect. The opinion ignores extremely important facts. When Kram provided a copy of the retainer agreement requiring Block to pay for a copy, her counsel agreed to pay those costs. Nevertheless, Barcus and Kram not only refused to provide Block her files, but they filed motions asking for protective orders to allow them to refuse to give their client her files. CP 1152-1167. At the hearing on the motions regarding the production of the files, Kram asserted that Barcus was also his client with regard to the same matter, and that Barcus had not given his permission to produce the file. CP 1034. Barcus stated that his purpose in not wanting to produce his file was to prevent the train from leaving the station for any evaluation of his fees. CP 1039.

III. POINTS OF LAW THE COURT OVERLOOKED OR MISAPPREHENDED

A. Application of TEDRA to All of Plaintiff's Claims

Mistakes regarding the Court's factual basis for finding that TEDRA applies to Block's claims are discussed above.

The Court's opinion regarding the application of TEDRA to Block's claims focuses on some portions of RCW 11.96A.070(4), but overlooks or does not apply other provisions of the statute. In determining whether this matter falls under TEDRA, the Court points out that the definition of "matter" is broad. However, that is not enough to prevent tolling. The "matter" must be a "subject of dispute under this chapter" and "determination of any question arising in the administration of an estate or trust." RCW 11.96A.070(4). Opinion at 12.

No reference to any statute regarding the administration of Sarah's trust or TEDRA was made by Block in her claims, by the defendants in their summary judgment motions, or by the Court in its opinion. No claim which was the "subject of dispute" under TEDRA has ever identified.

B. Malpractice Claim Against Kram

The Court's opinion states that, "It is undisputed that Block replaced Kram with another attorney in 2008. After that point, Kram no

longer had an attorney-client relationship with Block. Thus, after that point, Kram could no longer commit legal malpractice.” Opinion at 9.

This issue was never raised, briefed or discussed by the parties in the trial court or this appeal. The Court’s opinion does not cite any authority which would relieve Kram from his fiduciary duties to Block once he was discharged. It may be that this issue is one of first impression in Washington.

A similar situation was presented to the Ninth Circuit Court of Appeals in the matter of **Damron v. Herzog**, 67 F.3d 211 (1995). There the 9th Circuit reversed a summary judgment granted to an attorney based on arguments similar to those raised by the Court’s opinion. Herzog claimed that he could not be sued for malpractice based on a conflict of interest arising out of representation of a client in prior matter because the attorney-client relationship no longer existed. The 9th Circuit Court of Appeals rejected the argument based on a continuing duty of loyalty.

“For the purpose of Herzog’s adverse representation in a substantially related matter, his attorney-client relationship with Damron was still in effect. We find it nonsensical to hold that the attorney-client relationship does not remain intact with respect to matters substantially related to the initial matter of engagement. Such a result is contrary to the basic tenets of attorney-client relationships. The Supreme Court has long held attorneys to stringent standards of loyalty and fairness with respect to their clients. In 1850, the Supreme Court stated:

There are few of the business relations of life involving a higher

trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the detriment or prejudice of the rights of the party bestowing it. Stockton v. Ford, 52 U.S. (11 How.) 232, 13 L. Ed. 676 (1850).”

Damron v. Herzog, 67 F.3d 211, 214 (9th Cir. 1995)

The Court in **Damron** held that a client could hold an attorney liable and accountable for a violation of his continuing duties to his former client. In this case, Kram cannot avoid liability for his actions which violated his continuing duty of loyalty to Sarah Block simply because he was no longer attorney for the guardianship.

IV. CONCLUSION

It is important to remember that this matters come before the court on motions for summary judgment. Therefore, the respondents have the burden of proof to show that there are no material questions of fact. All allegations are to be construed in favor of the nonmoving party - Terri Block. There are questions of fact throughout this matter. As demonstrated above, Block has contested with references to the record each of the facts cited by the Court in its opinion to support the

opinion that this case falls within TEDRA. At a very minimum,
questions of fact exist on the issue of tolling under TEDRA.

RESPECTFULLY SUBMITTED this 17th day of August, 2015.

LAW OFFICE OF G. LEE RAAEN



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CERTIFICATE OF SERVICE

The undersigned certifies that on this day I caused to be served via email transmission and US Mail the attached Motion for Reconsideration on the following counsel of record:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 17th day of August, 2015.



G. Lee Raaen

COURT OF APPEALS
STATE OF WASHINGTON
2015 SEP 25 PM 1:04

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

TERRI BLOCK, as guardian of SARAH
BLOCK,

Appellant,

v.

THE LAW OFFICES OF BEN F. BARCUS
& ASSOCIATES, PLLC, a Washington
professional limited liability company; BEN
F. BARCUS and JANE DOE BARCUS,
individually and the marital community
comprised thereof; LEGGETT & KRAM, a
Washington partnership; PETER KRAM
and JANE DOE KRAM, individually and
the marital community comprised thereof,

Respondents.

No. 71742-1-I

ORDER DENYING MOTION
FOR RECONSIDERATION

Appellant, Terri Block, has moved for reconsideration of the opinion filed in this case on July 27, 2015. The court having considered the motion has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 27th day of August 2015.

For the Court:

Cox, J.

Judge

2015 AUG 27 11:11:01

COURT OF APPEALS
STATE OF WASHINGTON

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

TERRI BLOCK, as guardian of SARAH BLOCK,)	No. 71742-1-1
)	
Appellant,)	ORDER DENYING MOTION TO PUBLISH OPINION
)	
v.)	
)	
THE LAW OFFICES OF BEN F. BARCUS & ASSOCIATES, PLLC, a Washington professional limited liability company; BEN F. BARCUS and JANE DOE BARCUS, individually and the marital community comprised thereof; LEGGETT & KRAM, a Washington partnership; PETER KRAM and JANE DOE KRAM, individually and the marital community comprised thereof,)	
)	
Respondents.)	
)	

Appellant, Terri Block, has moved for publication of the opinion filed in this case on July 27, 2015. The panel hearing the case has considered the motion and has determined that the motion to publish should be denied. The court hereby

ORDERS that the motion to publish the opinion is denied.

Dated this 27th day of August 2015.

For the Court:

Cox, J.

Judge

2015 AUG 27 AM 11:01
COURT OF APPEALS
STATE OF WASHINGTON