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NO. 73629-9-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Estate of:

ELIZABETH K. WAGNER,  
Deceased.

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ELMER R. WAGNER, as beneficiary,  
Appellant-Cross Respondent,

v.

JILL WRIGHT a/k/a "JILL ARCHER," as Personal Representative and as  
beneficiary to the Estate of Elizabeth K. Wagner, JILL WRIGHT a/k/a  
"JILL ARCHER," and JOHN DOE ARCHER and the marital community  
composed thereof,  
Respondent-Cross Appellant.

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APPELLANT'S BRIEF

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## I. STATEMENT OF THE CASE

Elmer Wagner was married to Elizabeth Wagner for 20 years. When Elizabeth<sup>1</sup> passed away in 2009, her daughter, Jill Archer, was appointed personal representative. Rifts between Elizabeth's children and Elmer have marred probate of Elizabeth's Last Will & Testament ("Will"), resulting in significant shortages to Elmer in his rightful distributions from the Estate of Elizabeth Wagner ("Estate") and from an oil and mineral trust set up by the Will ("Tvedt/Murphy Trust"). By way of example, Ms. Archer colluded with her brothers to deny Elmer his community property rights to certain real property, interfered with nonprobate assets that Elmer held as a joint tenant with right of survivorship, and deducted Estate fees out of Elmer's share of the Tvedt/Murphy Trust proceeds. Elmer was forced to file a TEDRA Petition seeking to remedy these wrongs and remove Ms. Archer as the personal representative.

Shortly before trial on Elmer's TEDRA Petition, and more than three years after Ms. Archer had the Will admitted to probate, Ms. Archer alleged for the first time that the Will was the product of undue influence and that Elmer had engaged in the unlicensed practice of law. The trial court allowed testimony and argument on these claims, despite Elmer's objection that Ms. Archer's will contest was untimely, finding that it had equitable authority to consider undue influence claims at any time.

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<sup>1</sup> This Appellant's Brief refers to the Wagners by their first names for clarity and intends no disrespect.

After trial, the trial court found no evidence that the Will was the product of undue influence or that Elmer practiced law by helping his wife type the Will. The trial court found, relevantly to this appeal, that Elmer was entitled to a community property share of certain real property and distributions from the Tvedt/Murphy Trust. The trial court also declined to remove Ms. Archer as personal representative or to disinherit her under the Will's no contest clause. The trial court also denied Elmer's request for attorney fees, awarding each side \$10,000 in attorney fees from the Estate.

Elmer asks this Court to find that Ms. Archer brought a bad faith will contest by alleging undue influence more than three years after the Will's admission to probate, without any evidence of undue influence, and after she had admitted that the Will was valid and not the product of undue influence. Because Ms. Archer brought a bad faith will contest, Elmer asks this Court to reverse the trial court's order and apply the no contest clause to Ms. Archer. Elizabeth intended to prevent the litigious and expensive delays caused by frivolous claims like Ms. Archer's will contest, and her intent under the no contest clause should be respected. Elmer also asks this Court to reverse the order in which the trial court refused to remove Ms. Archer as personal representative, adjust the distribution calculations, and award him his attorney fees both at trial and on appeal.

## **II. ASSIGNMENTS OF ERROR**

1. Finding of Fact 1.15 is not supported by substantial evidence.

2. Finding of Fact 1.16 is not supported by substantial evidence.

3. Conclusion of Law 2.4 is not supported by the findings of fact or the evidence.

4. The trial court abused its discretion in refusing to remove Ms. Archer as personal representative.

5. Finding of Fact 1.61 is not supported by substantial evidence.

6. Conclusion of law 2.15 is not supported by the findings of fact or the evidence.

7. The trial court erred in refusing to find that Ms. Archer's will contest was brought in bad faith and applying the Will's no contest clause.

8. The trial court erred in calculating the distributions to Elmer and the heirs.

9. The trial court abused its discretion in denying Elmer's request for attorney fees and entering the June 13, 2014, Order on Civil Motion regarding fees and August 4, 2014, Order re Disbursement of Funds.

10. The trial court abused its discretion in denying Elmer's motions in limine to exclude evidence relating to Ms. Archer's will contest.

### **III. ISSUE STATEMENTS**

1. Under RCW 11.24.010, a will contest must be commenced within four months of the date a will is admitted to probate or the will becomes final and binding. Should this Court hold that the trial court abused its discretion in denying Elmer's motions in limine to exclude

evidence relating to Ms. Archer's will contest claims because the claims were time-barred? (Assignment of Error No. 10).

2. A will's no contest clause will be enforced if a party brings a bad faith will contest. Should this Court hold that the trial court erred in refusing to enforce the Will's disinheritance clause after Ms. Archer initiated a bad faith will contest in her trial brief that was time-barred and factually frivolous? (Assignments of Error Nos. 5, 6, and 7).

3. Under RCW 11.28.250 and RCW 11.68.070, a trial court may remove a personal representative who does not reside in Washington and who breaches his or her fiduciary duties to the Estate or its heirs. Should this Court hold that the trial court abused its discretion in refusing to remove Ms. Archer as the personal representative due to her residence in Chicago, Illinois and her repeated breaches of fiduciary duties? (Assignments of Error Nos. 1, 2, 3, and 4).

4. Should this Court hold that the trial court erred in ordering that the overpayment to the other heirs from the Tvedt/Murphy Trust's proceeds be repaid to Elmer out of funds in the registry that already belonged to Elmer? (Assignment of Error No. 8).

5. Should this Court hold that Elmer is entitled to attorney fees at the trial level and on appeal pursuant to RAP 18.1, RCW 11.24.050, and RCW 11.96A.150? (Assignment of Error No. 9).

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#### IV. FACTS

##### 1. Elmer and Elizabeth Wagner's 20-Year Marriage.

Elmer and Elizabeth married on July 27, 1989, and the couple remained married for over 20 years.<sup>2</sup> During their marriage, the Wagners lived in multiple residences, including a home that Elizabeth's parents deeded to her prior to the marriage (the "10th Avenue home").<sup>3</sup> While married, the Wagners maintained joint checking accounts that they used to pay various household bills, including the mortgage on the 10th Avenue home.<sup>4</sup> Into the joint checking account, Elmer deposited money from his salary, his pension, and income from the sale of his separate real property and Elizabeth deposited earnings and money from the proceeds of mineral and oil deeds that she had inherited.<sup>5</sup>

While married, Elizabeth and Elmer extensively remodeled the 10th Avenue home, totaling approximately \$52,000, not counting the labor Elmer contributed.<sup>6</sup> The couple paid for the remodeling costs out of their joint checking account.<sup>7</sup> In 2003, the Wagners sold a piece of real property that they jointly owned and placed the proceeds in their joint checking account.<sup>8</sup> They later purchased Certificates of Deposit ("CDs").<sup>9</sup> The Wagners held their bank accounts, the CDs, and a Scottrade retirement

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<sup>2</sup> I Verbatim Report of Proceedings (1 VRP) at 62 – 63.

<sup>3</sup> I VRP at 65 – 66.

<sup>4</sup> I VRP at 69, 77, 79 – 80.

<sup>5</sup> I VRP at 69 – 70, 111 – 13.

<sup>6</sup> II VRP at 307.

<sup>7</sup> I VRP at 69.

<sup>8</sup> I VRP at 123.

<sup>9</sup> I VRP at 123.

account as joint tenants with right of survivorship.<sup>10</sup> The couple also owned a pickup truck as joint tenants with right of survivorship.<sup>11</sup>

In approximately 2002, doctors diagnosed Elizabeth with chronic obstructive pulmonary disease (“COPD”).<sup>12</sup> As late as 2009, Elizabeth was physically active and enjoyed driving herself places and gardening.<sup>13</sup> Witnesses invariably described Elizabeth as mentally sharp, strong-willed, and confident in her beliefs.<sup>14</sup>

## **2. Elizabeth Drafts her Last Will and Testament.**

In 2009, Elizabeth drafted a revised Will.<sup>15</sup> Elizabeth made handwritten changes to her existing will that Elmer typed up at Elizabeth’s request.<sup>16</sup> After executing the revised Will, Elizabeth sent a copy of the Will to her children for their review.<sup>17</sup> Neither Ms. Archer nor her brother, Todd Kulesza, thought the Will was objectionable at that time.<sup>18</sup>

In the Will, Elizabeth bequeathed to her husband a life estate in the 10th Avenue home so long as the house remained Elmer’s primary residence.<sup>19</sup> Once the life estate ended, the personal representative was directed to sell the house and distribute the proceeds equally between Elmer and Elizabeth’s three children.<sup>20</sup> In addition, Elizabeth stated that the

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<sup>10</sup> I VRP at 69, 124, 263 – 64, 288.

<sup>11</sup> III VRP at 329 – 32.

<sup>12</sup> II VRP at 272.

<sup>13</sup> I VRP at 91 – 92.

<sup>14</sup> II VRP at 282 – 83, 304 – 06.

<sup>15</sup> I VRP at 90.

<sup>16</sup> I VRP at 90.

<sup>17</sup> II VRP at 201.

<sup>18</sup> II VRP 192, 201, 290, 293. Elizabeth’s third child, Kurt Kulesza, did not testify.

<sup>19</sup> Clerk’s Papers (CP) at 7.

<sup>20</sup> CP at 7.

proceeds from the Tvedt/Murphy estate trust were to be held in trust by her oldest child; distributed equally between Elmer and her children during Elmer's life; and, after Elmer's death, distributed between the children.<sup>21</sup> Elizabeth also bequeathed all of her household effects to Elmer as well as the "rest, residue, and remainder of [her] estate."<sup>22</sup> All Estate costs were to be paid out of the residue.<sup>23</sup> In addition, Elizabeth's Will included a no contest clause that disinherited any beneficiary who began or maintained a proceeding to challenge or deny any portion of the Will.<sup>24</sup>

**3. Elizabeth Passes Away and her Daughter is Appointed Personal Representative.**

Elizabeth died testate on August 26, 2009.<sup>25</sup> At the time of her death, Elizabeth was survived by her husband Elmer and Elizabeth's three surviving children from a prior marriage, Ms. Archer, Kurt Kulesza, and Todd Kulesza.<sup>26</sup> In her Will, Elizabeth named Ms. Archer as personal representative.<sup>27</sup>

Following Elizabeth's death, Ms. Archer admitted the Will to probate and received letters testamentary on September 1, 2010.<sup>28</sup> In her Petition for Probate of Will, Ms. Archer declared that "[a]t the time of executing the said Will, the decedent was of legal age, of sound mind, not

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<sup>21</sup> CP at 7.

<sup>22</sup> CP at 7.

<sup>23</sup> CP at 8.

<sup>24</sup> CP at 8.

<sup>25</sup> CP at 1.

<sup>26</sup> I VPR at 64; CP at 1.

<sup>27</sup> CP at 3, Article III.

<sup>28</sup> II VRP at 198 – 99; CP at 14 – 21.

acting under duress, menace, fraud or undue influence and was competent to execute the same.”<sup>29</sup> The trial court made a similar finding in admitting the Will to probate.<sup>30</sup> At trial, Ms. Archer testified that at the time she admitted the Will to probate, she did not believe that any undue influence had occurred.<sup>31</sup>

As personal representative, Ms. Archer, a resident of Chicago, Illinois, supposedly delegated much of the accounting and decision-making of the Estate to her prior counsel, Suzanne Danielle.<sup>32</sup> Ms. Archer has resided in Chicago since 1985.<sup>33</sup>

#### **4. Ms. Archer’s Disposition of Estate Assets.**

In 2012, Elmer vacated the 10th Avenue home and the Estate sold the residence.<sup>34</sup> Allegedly on the advice of Ms. Danielle, Ms. Archer concluded that she owned one-third of the 10th Avenue home.<sup>35</sup> With this belief, Ms. Archer issued one-third of the proceeds from the sale of the 10th Avenue home to herself, and two-thirds to be split four ways among herself, her brothers, and Elmer.<sup>36</sup> Ms. Archer surreptitiously distributed the one-third she retained equally among herself and her brothers.<sup>37</sup> Ms. Archer also attempted to hide in the escrow documents that Elmer needed to sign a

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<sup>29</sup> CP at 1 – 2.

<sup>30</sup> CP at 14.

<sup>31</sup> II VRP at 198 – 99.

<sup>32</sup> II VRP at 194.

<sup>33</sup> II VRP at 281.

<sup>34</sup> I VRP at 80.

<sup>35</sup> II VRP at 247.

<sup>36</sup> II VRP at 247 – 48, 252 – 53.

<sup>37</sup> II VRP at 254.

provision stating that by accepting the home proceeds, he was waiving his rights to the entire Estate.<sup>38</sup>

In addition, Ms. Archer failed to investigate Elmer's claim of a community property interest in the 10th Avenue home.<sup>39</sup> Ms. Archer saw Elmer's claim to a community property interest in the 10th Avenue home as "irrelevant."<sup>40</sup> Ms. Archer also declared the CD funds as residue and offset the amount against the proceeds of the 10th Avenue home sale.<sup>41</sup> To pay the Estate's attorney fees and probate fees, Ms. Archer allowed her attorney to deduct those costs from Elmer's share of the oil and mineral deed proceeds rather than from the residuary.<sup>42</sup> Ms. Archer claimed that she did not notice some of the costs attributed to Elmer and felt that because he challenged her interpretation of the Will, he should pay the Estate's attorney fees.<sup>43</sup> As a further attempt to deny Elmer his rights, Ms. Archer ignored the joint tenant with right of survivorship designations and claimed that the truck, CD, and Scottrade accounts belonged to the residue and should be used to pay Estate bills, like the attorney fees she incurred.<sup>44</sup>

**5. Elmer Files a TEDRA Petition Relating to the Distributions, Ms. Archer brings an Untimely Will Contest.**

On April 15, 2013, Elmer filed a TEDRA Petition, alleging the following claims: (1) quiet title as to the 10th Avenue house, (2) rescission

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<sup>38</sup> I VRP at 97.

<sup>39</sup> II VRP at 231 – 32.

<sup>40</sup> II VRP at 232 – 33.

<sup>41</sup> I VRP at 124.

<sup>42</sup> II VRP at 218 – 22.

<sup>43</sup> II VRP at 218 – 22.

<sup>44</sup> II VRP at 263.

of certain documents executed by Ms. Archer, (3) breach of fiduciary duties, (4) unjust enrichment and constructive trust, (5) conversion, (6) an accounting, and (7) removal of Ms. Archer as personal representative.<sup>45</sup> Ms. Archer did not allege any counterclaims in her Answer.<sup>46</sup>

In her trial brief filed April 8, 2014, Ms. Archer alleged for the first time that the Will was the product of Elmer's undue influence and that his assistance in helping his wife type the Will constituted the unlawful practice of law that justified his disinheritance.<sup>47</sup> At the pretrial motions hearing, Elmer objected to the defenses as untimely.<sup>48</sup> Elmer specifically objected to Ms. Archer's attempts to challenge the validity of a Will that she admitted to probate as a valid Will and for failing to timely file a will contest.<sup>49</sup>

In response, the trial court stated that it always had jurisdiction to consider claims of undue influence or fraud regarding the drafting and execution of a will:

The whole dispute here is really the – not so much the validity of the will but the interpretation of the will. And one of those facts I always assume in these kind of cases is whether or not there was any undue influence in the writing of the will....

And so the issue really becomes whether or not there was undue influence when she wrote the will. I don't know that question but I do think that's a valid issue to point out because that's one of the reasons why we're here obviously.

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<sup>45</sup> CP at 31 – 33.

<sup>46</sup> CP at 113 – 16.

<sup>47</sup> CP at 371 – 85.

<sup>48</sup> I VRP at 22 – 23.

<sup>49</sup> I VRP at 24.

The fact that the will has already been admitted into probate without any apparent objections certainly does fly in the face of that issue, and I'll consider that; but I am going to let – if there is – if there's evidence that you have to indicate that there was some kind of an und[ue] reaching or undue influence, you can present it. . . .

So there has to be some type of evidence of undue influence or overreaching or something else that would get you to the same spot that you tried to get to by citing the RPCs because I understand that argument really well....But I do honestly think that if there's fraud here that fraud's always an issue that the Court has jurisdiction to inquire about . . . .<sup>50</sup>

Elmer also filed motions in limine seeking to bar Ms. Archer's mention of any issues relating to her will contest, which the trial court denied.<sup>51</sup>

In her opening statement,<sup>52</sup> Ms. Archer's attorney claimed that Elmer "unduly influence[d]" Elizabeth because she "was sick [and] heavily dependent on him."<sup>53</sup> Ms. Archer's attorney also argued that the Will should be invalidated because Elmer, a non-lawyer, engaged in the unauthorized practice of law by assisting his wife in drafting a Will that named him as a beneficiary.<sup>54</sup> Ms. Archer acknowledged that even lawyers are able to draft Wills for spouses naming themselves as beneficiaries, but claimed such an exception only applies "to wills that are fundamentally fair."<sup>55</sup>

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<sup>50</sup> I VRP at 25 – 26.

<sup>51</sup> CP at 336 – 69, 387 – 88.

<sup>52</sup> The trial court bifurcated the accounting portion of the proceeding. I VRP at 13. As such, the trial addressed only the interpretation of the Will and Ms. Archer's will contest.

<sup>53</sup> I VRP at 56.

<sup>54</sup> I VRP at 52 – 56.

<sup>55</sup> I VRP at 55.

Ms. Archer elicited testimony about Elmer's brief attempt at law school as well as his lack of a license to practice law.<sup>56</sup> Ms. Archer also elicited testimony about Elmer's efforts to help Elizabeth type up the Will changes she wanted to make and whether he instructed her to consult with an attorney.<sup>57</sup> Despite claims that Elizabeth was heavily influenced by Elmer in the preparation of her Will, Ms. Archer testified that in 2009, when Elizabeth executed her Will, Elizabeth was physically active, mentally sharp, and not suffering from dementia.<sup>58</sup> Ms. Archer testified that Elizabeth was a confident, strong-willed person.<sup>59</sup> Elizabeth's youngest son, Todd Kulesza, who operates as Ms. Archer's power of attorney in Washington State, admitted that the Will is valid.<sup>60</sup> Ms. Archer devoted the bulk of her closing argument to the idea that Elmer exerted undue influence or improperly practiced law in assisting his wife in typing her Will.<sup>61</sup>

**6. The Trial Court Finds that Elmer committed no Wrongdoing, Declines to Remove Ms. Archer as Personal Representative, Declines to Apply the Will's No Contest Clause, and Finds that Elmer is Entitled to 25 Percent of All Oil and Mineral Proceeds.**

On June 13, 2014, the trial court entered findings of fact and conclusions of law.<sup>62</sup> The trial court found, relevantly to this appeal, that (1) Ms. Archer did not breach her fiduciary duties because she was following the advice of Ms. Danielle and therefore should not be removed

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<sup>56</sup> I VRP at 131 – 33.

<sup>57</sup> I VRP at 146 – 48, 153 – 54; II VRP at 188.

<sup>58</sup> II VRP at 282.

<sup>59</sup> II VRP at 283.

<sup>60</sup> II VRP at 293.

<sup>61</sup> II VRP at 367 – 409.

<sup>62</sup> CP at 722.

as personal representative;<sup>63</sup> (2) Ms. Archer's counterclaim for unauthorized practice of law was denied;<sup>64</sup> (3) Ms. Archer presented the Will to probate as a "valid Will";<sup>65</sup> (4) Ms. Archer's counterclaim for undue influence was denied;<sup>66</sup> (5) it would not apply the will contest clause of the Will because the claims and counterclaims were necessary to resolve inconsistencies within the Will,<sup>67</sup> and (6) all debts and money owed to any beneficiary of the Will or the Tvedt/Murphy Trust shall be paid from funds held the court registry.<sup>68</sup> The trial court also ordered a full and final accounting for the Estate.<sup>69</sup>

#### **7. Hearing and Calculation of Distributions Owed to Elmer.**

On December 12, 2014, the trial court held an evidentiary hearing on the Estate's accounting to determine the final disbursement amounts.<sup>70</sup> The parties agreed as to an accounting performed by CPA Cary Deaton. The trial court issued an oral ruling adopting Mr. Deaton's accounting performed and ordered Elmer to be paid out of the court's registry.<sup>71</sup> Additionally, the trial court ordered the parties to pay for the taxes owed on the royalty payments in proportion to their share of the proceeds and that

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<sup>63</sup> CP at 724 – 25, 734 (Findings of Fact 1.14 – 1.16, Conclusion of Law 2.4).

<sup>64</sup> CP at 725, 734 (Findings of Fact 1.17 – 1.20, Conclusion of Law 2.5).

<sup>65</sup> CP at 723 (Finding of Fact 1.5).

<sup>66</sup> CP at 725, 734 (Findings of Fact 1.21 – 1.24, Conclusion of Law 2.6).

<sup>67</sup> CP at 732, 736 (Findings of Fact 1.60 – 1.61, Conclusion of Law 2.15).

<sup>68</sup> CP at 736 (Conclusion of Law 2.14).

<sup>69</sup> CP at 736 – 37 (Conclusions of Law 2.19 – 2.20).

<sup>70</sup> VRP (Dec. 12, 2014) at 4.

<sup>71</sup> VRP (Dec. 12, 2014) at 22, 26:22 – 23.

Mr. Deaton's bill be paid out of the registry before any other payments are made.<sup>72</sup> No final order was entered at this time.

Accounting issues arose after the hearing. Relevant to this appeal, a dispute arose as to the order in which to account for the money owed to Elmer. Elmer objected to the trial court using funds held in the registry from the oil proceeds to satisfy the overpayment to Ms. Archer and her brothers without accounting for his entitlement to 25 percent of those funds.<sup>73</sup> Ms. Archer and her brothers had received more than \$77,000 in excess distributions from the Estate and the Tvedt/Murphy Trust.<sup>74</sup> Because of an agreement between the children, the Court focused solely on making Elmer whole. Elmer's one-quarter share of the overpayment to the children totaled by that point \$19,789.12.<sup>75</sup> At the time of the hearing on entry of a final judgment, the registry of the court held \$48,475.81 in proceeds from the oil and mineral deeds. Elmer asked the trial court to award him one-quarter of the oil proceeds in the registry, which he was entitled to receive as a one-quarter heir, and then award the amounts overpaid to Ms. Archer and her brother separately.<sup>76</sup> Elmer asked that the \$19,789.12 calculated by Mr. Deaton be paid out of the balance of the registry.<sup>77</sup> Using the balance

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<sup>72</sup> VRP (Dec. 12, 2014) at 26 – 27.

<sup>73</sup> CP at 1066 – 67.

<sup>74</sup> VRP (Dec. 12, 2014) at 18.

<sup>75</sup> VRP (Dec. 12, 2014) at 21. Ms. Archer had actually caused the Estate and Tvedt/Murphy Trust to underpay Elmer by significantly more than \$19,789.12, but by the time of the entry of final judgment, the remaining underpayment totaled \$19,789.12. *See* VRP (June 4, 2015) at 8.

<sup>76</sup> VRP (June 4, 2015) at 13 – 14.

<sup>77</sup> CP at 1066 – 67.

in the registry at the time of the Judgment's entry, Elmer's calculations were as such:

Net owed to heirs:	\$45,783.81
One-quarter of balance owed to Elmer:	\$11,445.95
Make whole payment to Elmer:	\$19,789.12
<b>Total amount owed to Elmer:</b>	<b>\$31,235.07</b>

Had Ms. Archer properly distributed funds from the beginning, Elmer would not have had his equalizing payment deducted from the current proceeds.

On June 14, 2015, the trial court adopted Ms. Archer's accounting method and entered a Final Judgment and Order.<sup>78</sup> In doing so, the trial court effectively denied Elmer an additional \$4,947.28 in distributions. Elmer timely appealed and Ms. Archer cross-appealed.<sup>79</sup>

## V. ANALYSIS

The trial court abused its discretion in denying Elmer's motion in limine regarding Ms. Archer's will contest. The trial court erred in refusing to disinherit Ms. Archer because it felt the result was "too harsh." Ms. Archer brought a bad faith will contest past the statutory deadline, and the disinheritance clause should be applied. Additionally, because Ms. Archer does not live within the State of Washington, she is ineligible to serve as personal representative and her breaches of fiduciary duties disqualify her

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<sup>78</sup> CP at 1070 – 73; *See also* VRP (June 4, 2015) at 18 (trial court found that Elmer did not already have a right to the proceeds of the Tvedt/Murphy Trust being held in the court's registry).

<sup>79</sup> CP at 1083 – 1163.

no matter where she lives. The trial court also abused its discretion in calculating damages by forcing Elmer to pay out of his share of the current oil and mineral proceeds the equalizing payment necessary to balance the distributions to the heirs.

**1. The Trial Court Abused its Discretion in Denying Elmer's Motions in Limine Regarding Ms. Archer's Untimely Will Contest.**

The trial court abused its discretion in denying Elmer's motions in limine to exclude evidence regarding Ms. Archer's untimely will contest. By the time Ms. Archer asserted her undue influence claim, the Will had been final and binding for more than three years. As the Supreme Court has recently held, there are no equitable bases to extend the statutory time bar for commencing a will contest.

This Court reviews a trial court's decision on the admissibility of evidence, and its rulings on motions in limine for abuse of discretion.<sup>80</sup> Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.<sup>81</sup> This standard is also violated when a trial court applies the wrong legal standard or bases its ruling on an erroneous view of the law.<sup>82</sup>

The trial court abused its discretion in denying Elmer's motions in limine relating to Ms. Archer's will contest because it applied the wrong legal standard. The trial court does not retain the authority to consider

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<sup>80</sup> *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

<sup>81</sup> *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

<sup>82</sup> *State v. Corona*, 164 Wn. App. 76, 78 – 79, 261 P.3d 680 (2011).

claims of undue influence throughout the course of a will's probate. Rather, strict statutory time limits apply to bar untimely consideration of such claims.

If a will contest is not commenced within four months after the will's admission to probate, claims such as undue influence are forever barred and the will is binding and final.<sup>83</sup> "Washington courts have always strictly enforced the requirements for commencing will contest actions."<sup>84</sup> In *Miles*, the Supreme Court held that a will contest was time-barred when the petitioner did not personally serve the personal representative within the time period specified by statute, and thus the will was final and binding.<sup>85</sup> The court emphasized the strict nature with which lower courts are to interpret RCW 11.24.010's time limitations.<sup>86</sup>

Similarly to the petitioner in *Miles*, Ms. Archer's will contest was untimely. Ms. Archer did not commence her will contest within four months after the Will's admission to probate. In fact, she waited over three years to try to commence a will contest. Ms. Archer did not file a separate petition, or serve Elmer with such a Petition. Instead, she asserted her will contest claim through argument in her trial brief. Despite Elmer's objections, the trial court allowed the testimony because the trial court felt that its equitable powers allowed it to consider issues of unjust enrichment at any time. This is an incorrect legal standard. The trial court abused its

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<sup>83</sup> *Miles v. Jepsen*, \_\_\_ Wn.2d \_\_\_, 358 P.3d 403, 404 (2015); *see also* RCW 11.24.010.

<sup>84</sup> *Miles*, 358 P.3d at 405.

<sup>85</sup> *Miles*, 358 P.3d at 403 – 04.

<sup>86</sup> *Miles*, 358 P.3d at 405.

discretion in denying Elmer's motions in limine to exclude testimony regarding Ms. Archer's will contest claims. Elmer asks that this Court vacate the order and remand with instructions to grant Elmer's motions in limine.

**2. The Trial Court Erred in Not Enforcing the No Contest Clause because Ms. Archer brought a Bad Faith Will Contest.**

The trial court erred in refusing to apply the no contest clause disinheriting Ms. Archer. Ms. Archer brought a bad faith will contest more than three years after she admitted the Will to probate and affirmed under oath that the Will was not the product of undue influence. Ms. Archer's will contest was time-barred and factually frivolous. As discussed above, RCW 11.24.010 strictly limits will contests to those commenced within four months of a will being admitted to probate. Ms. Archer began a will contest more than three years after she admitted the Will to probate and admitted that the Will was valid. Finding of fact 1.61<sup>87</sup> is not supported by the evidence and Conclusion of Law 2.15 is unsupported by the findings of fact and evidence.<sup>88</sup>

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<sup>87</sup> Finding of Fact 1.61 states:

To the extent that the Petitioner's TEDRA action and the Respondent[']s counterclaims may be construed as a Will Contest, this Court finds that Article VI of the Decedent's will is inapplicable. The claims of the Parties were necessarily brought and required to interpret the Decedent's Will which contains several inconsistencies, and to clarify the Decedent's true intent. Consequently, application of Article VI of the Will in this case would be inconsistent with the Decedent's intent.

CP at 732.

<sup>88</sup> Conclusion of Law 2.15 states that "Article VI of the Decedent's Will is inapplicable to this action." CP at 736.

This Court reviews whether the trial court's findings of fact are supported by substantial evidence.<sup>89</sup> This Court reviews the trial court's conclusions of law, even if labeled as findings of fact, de novo.<sup>90</sup>

Article VI, the no contest clause, of the Will states:

In the event that any devisee, legatee, or beneficiary under this Will, or any one of my heirs shall begin or maintain any proceeding to challenge or deny any provision of this Will, any share or interest given to that person shall lapse and go into the residue of my estate and my Personal Representative is directed and required to refrain from making any distribution of any sums whatsoever to that person, if any, who shall seek to contest this will or any of its provisions.<sup>91</sup>

Following the presentation of evidence, the trial court found that:

1.15 The [Will] was presented to this Court as the Decedent's valid Will upon Respondent Archer opening probate this matter....

1.21 Respondents also counterclaimed against Petitioner asserting that Petitioner exerted undue influence over the Decedent...

1.22 The uncontroverted evidence at trial showed that at the time the Decedent wrote her Will, she was not mentally impaired, was relatively healthy, appeared to be in complete control, and that the Decedent wrote her Will approximately ten (10) to eleven (11) months before her death.

1.23 Respondent Archer's uncontroverted testimony at trial was that the Decedent was "sharp as a

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<sup>89</sup> *In re Foreclosure of Liens*, 123 Wn.2d 197, 202, 867 P.2d 605 (1994); *Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991).

<sup>90</sup> *Casterline v. Roberts*, 168 Wn. App. 376, 383, 284 P.3d 743 (2012).

<sup>91</sup> CP at 8.

tack,” “strong willed,” and “knew her mind” in 2009 when she wrote her Will.

1.24 There was no evidence at trial to show that the Petitioner exerted undue influence over the [Decedent].<sup>92</sup>

Despite these findings, the trial court declined to invoke Section VI of the Will to disinherit Ms. Archer because the trial court found that Elmer’s claim and Ms. Archer’s counterclaim were necessary to determine Elizabeth’s intent in drafting her Will.

Substantial evidence does not support Finding of Fact 1.61 because Ms. Archer’s will contest was not necessary to determine the Will’s interpretation. The evidence also does not support Conclusion of Law 2.15 because (1) Ms. Archer failed to timely commence her will contest, (2) there was no factual or legal support for her claims of undue influence, and (3) Ms. Archer is estopped from denying the Will’s validity.

**i. Ms. Archer’s Will Contest was Time Barred.**

Ms. Archer failed to timely commence a valid will contest, yet claimed in her trial brief and during trial that the Will was invalid due to Elmer’s alleged undue influence. Her will contest was time-barred and the Will was binding and final by the time of trial.

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<sup>92</sup> CP at 723, 725 – 26.

As stated above, Ms. Archer had to commence her will contest within four months of the Will's admission to probate.<sup>93</sup> This deadline was not met. The Will was final by the time of trial.<sup>94</sup>

The evidence does not support the conclusion that Ms. Archer was trying to clarify the Will's interpretation. Issues respecting the competency of the deceased to make a will, or respecting the decedent's execution of the will under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a party of it, shall be tried and determined by the court.<sup>95</sup> The term "validity" refers to the genuineness or legal sufficiency of the will under attack; it raises a question of whether the will is legally sufficient in form, contents, and compliance with statutory requirements as to execution.<sup>96</sup>

Ms. Archer's counterclaims cannot be interpreted as anything other than a will contest. Ms. Archer specifically alleged that the Will was invalid because Elmer had allegedly exerted undue influence over his wife when she drafted the Will because of her ill health and his alleged unauthorized practice of law. There is no evidence that Ms. Archer's claims regarding Elmer's alleged undue influence had anything to do with the interpretation of the Will. Ms. Archer did not argue about the interpretation of the Will; she sought solely to disinherit Elmer because of alleged misconduct. Any

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<sup>93</sup> RCW 11.24.010.

<sup>94</sup> *In re Estate of Toth*, 138 Wn.2d 650, 656, 981 P.2d 439 (1999) ("Where the statute authorizes the contest of a will, and specifies the time within which such contest may be instituted, the court has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute").

<sup>95</sup> RCW 11.24.010.

<sup>96</sup> *In re Peters Estate*, 43 Wn.2d 846, 855, 264 P.2d 1109 (1953).

argument about the interpretation of the Will was related to Elmer's TEDRA Petition claims. Ms. Archer's claims were an attempt at a will contest and were time-barred.

On this basis of timeliness alone, the trial court's Finding of Fact 1.61 is not supported by substantial evidence and Conclusion of Law 2.15 is unsupported by the findings and evidence.

ii. ***Even if Ms. Archer's Will Contest was not Time-Barred, her Claims of Undue Influence and Improper Practice of Law were Frivolous.***

Despite the statutory time bar to Ms. Archer's will contest, considerable time was spent at trial discussing whether Decedent was competent to make her Will and whether Elmer exerted undue influence in assisting her. There was no evidence that Decedent lacked mental capacity to execute her Will, as Ms. Archer and her brother agreed. Additionally, there was no evidence that Elmer exerted outsized influence in Decedent's decision making or drafting process. The un rebutted testimony is that Elmer was simply a scrivener for his wife. Even if it had been timely, Ms. Archer's will contest was still frivolous.

A will is the product of undue influence when a party interferes with the testator's free will, preventing the testator from exercising his own judgment and choice.<sup>97</sup> Certain circumstances may raise a question about undue influence, including (1) a fiduciary or confidential relationship between the testator and the beneficiary, (2) active participation by the

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<sup>97</sup> *In re Smith's Estate*, 68 Wn.2d 145, 153, 411 P.2d 879 (1966).

beneficiary in preparing or procuring the will, and (3) the beneficiary's receipt of an unusually or unnaturally large part of the estate.<sup>98</sup> Other considerations include “the age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting undue influence, and the naturalness or unnaturalness of the will.”<sup>99</sup> But, the presence of these elements will not automatically invalidate a will; rather, they “appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will.”<sup>100</sup>

There is no evidence that Elmer received an outsized inheritance, that he actively participated in drafting Decedent’s Will, or that Decedent lacked the mental vigor required to execute the Will. The unrebutted evidence showed that Elmer’s role was limited to typing up what Decedent drafted.<sup>101</sup> Additionally, Ms. Archer admitted that at the time Elizabeth executed the Will, she was physically active, mentally sharp, and not suffering from dementia.<sup>102</sup> Ms. Archer testified that Elizabeth was a confident, strong-willed person.<sup>103</sup> Elizabeth’s youngest son, Todd Kulesza, who operates as Ms. Archer’s power of attorney in Washington State, admitted that the Will is valid.<sup>104</sup>

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<sup>98</sup> *Smith*, 68 Wn.2d at 153.

<sup>99</sup> *In re Estate of Bussler*, 160 Wn. App. 449, 466, 247 P.3d 821, 830 (2011) (quoting *In re Estate of Riley*, 78 Wn.2d 623, 647, 479 P.2d 1 (1970)).

<sup>100</sup> *Estate of Bussler*, 160 Wn. App. at 466.

<sup>101</sup> CP at 725 (Findings of Fact 1.18 – 1.19).

<sup>102</sup> II VRP at 282; CP at 725 – 26 (Findings of Fact 1.22 – 1.23).

<sup>103</sup> II VRP at 283.

<sup>104</sup> II VRP at 293.

The trial court also found that the “uncontroverted evidence” is that Elmer acted only as a scribe for Elizabeth and that Elizabeth was mentally competent to write her Will. The trial court also found that there was “no evidence” to indicate that Elmer acted as an attorney.

Ms. Archer offered no evidence that would support a finding that Elmer exerted undue influence over Elizabeth in the Will’s drafting. Ms. Archer’s will contest was factually and legally defenseless, and served no other purpose than trying to scare Elmer into settling his claims. On this basis as well, substantial evidence does not support Finding of Fact 1.61 or Conclusion of Law 2.15.

**iii. *Because Ms. Archer’s Will Contest was Time-Barred and her Will Contest was Brought in Bad Faith, the Will’s No Contest Clause should have been Applied.***

Ms. Archer’s will contest was brought in bad faith and the trial court erred in not applying the no contest clause. The trial court should have disinherited Ms. Archer as required by the Will.

Washington courts enforce no contest clauses.<sup>105</sup> The no contest or forfeiture clause operates where the contest is brought in bad faith and without probable cause.<sup>106</sup> If a contestant initiates an action on the advice of counsel, after fully and fairly disclosing all material facts, she will be deemed to have acted in good faith and for probable cause as a matter of law.<sup>107</sup> Bad faith has been defined as “actual or constructive fraud’ or a

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<sup>105</sup> *Boettcher v. Busse*, 45 Wn.2d 579, 585, 277 P.2d 368 (1954) (citing *In re Estate of Chappell*, 127 Wash. 638, 221 P. 336 (1923)).

<sup>106</sup> *In re Estate of Mumby*, 97 Wn. App. 385, 393, 982 P.2d 1219 (1999).

<sup>107</sup> *Mumby*, 97 Wn. App. at 393.

‘neglect or refusal to fulfill some duty...not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.’”<sup>108</sup>

Ms. Archer’s will contest was not brought in good faith for a variety of reasons. First, RCW 11.24.010 operates as an absolute time bar to Ms. Archer’s will contest. There are no set of facts under which Ms. Archer could reasonably argue that she was entitled to challenge the Will more than three years after the trial court admitted it to probate. Second, Ms. Archer offered no evidence to support her claims and ultimately admitted her mother’s competency to execute the Will. Third, Ms. Archer’s will contest was part of her pattern of behavior of refusing to fulfill her duties to Elmer as an heir of the Estate. Ms. Archer has, throughout the Estate’s probate, refused to provide Elmer with his fair share of the Estate, including denying him his share of the 10th Avenue house, hiding distributions of the 10th Avenue house’s proceeds, attempting to trick him into signing away his rights under the Will, refusing to investigate his community property claims, trying to pay Estate debts out of Elmer’s nonprobate assets, and refusing him distributions. Ms. Archer’s will contest was a product of her ongoing attempts to deny Elmer the fair share of the Estate that Elizabeth left to him.

Finally, Ms. Archer’s will contest was brought without good faith because as personal representative, she was barred from challenging the Will’s validity. Equitable estoppel is appropriate when three elements are

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<sup>108</sup> *Mumby*, 97 Wn. App. at 394.

met: (1) a party's admission, statement, or act inconsistent with a later claim; (2) action by another party in reliance on the first party's act, statement, or admission; and (3) injury that would result to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission.<sup>109</sup> In her Petition for Probate of Will, Appointment of Executor, Adjudication of Testacy and Heirship, and Order of Solvency and Nonintervention Powers, Ms. Archer declared under penalty of perjury that "[a]t the time of executing the said Will, the decedent was of legal age, of sound mind and body, not acting under duress, menace, fraud, or undue influence and was competent to execute the same."<sup>110</sup> By making these assertions, Ms. Archer was appointed personal representative and given power to manage the Estate. Elmer did not attempt to seek appointment as personal representative or object to Ms. Archer's appointment. It is inequitable to allow Ms. Archer to benefit from her new case theory after having been placed in charge of the Estate for so many years. Ms. Archer has waived any right to challenge the Will's validity and should be estopped from challenging the Will or argue undue influence. Ms. Archer's claims of undue influence were in and of itself, bad faith.

There was no good faith basis supporting Ms. Archer's will contest. In Findings of Fact 1.18 through 1.24, the trial court explicitly found that there was absolutely no evidence supporting Ms. Archer's claims of undue influence and the unlawful practice of law. The trial court erred in not

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<sup>109</sup> *Kramarevsky v. Dep't of Soc. & Health Svcs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

<sup>110</sup> CP at 1 – 2.

invoking the disinheritance clause, and the findings and evidence do not support Conclusion of Law 2.15. Ms. Archer's inheritance under the Will should pass to the residue of the Estate, including her interest in the Trust and her interest in the 10th Avenue house's proceeds. Ms. Archer should be divested of any distribution made to her from the Estate or Trust.

**3. The Trial Court Erred in Not Removing the Personal Representative for Residing in Illinois and Breaches of her Fiduciary Duties.**

The trial court also erred by not removing Ms. Archer for her obvious, intentional, and ongoing breaches of fiduciary duty and her residence outside of Washington State. Finding of Fact 1.15<sup>111</sup> and Finding of Fact 1.16<sup>112</sup> are not supported by substantial evidence and Conclusion of Law 2.4 is not supported by the findings or the evidence.<sup>113</sup>

The trial court may remove an executor for any proper cause.<sup>114</sup> RCW 11.68.070 permits the trial court to revoke a personal representative's letters of administration if, on the motion of any heir of the estate, it is shown that the personal representative has failed to execute his or her trust faithfully or is subject to removal for any reason specified in RCW 11.28.250. RCW 11.28.250 states:

Whenever the court has reason to believe that any personal representative has wasted, embezzled, or mismanaged, or is

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<sup>111</sup> Finding of Fact 1.15 states that "The uncontroverted testimony of Respondent Archer at trial was that she followed the advice of the attorney for the Estate, Suzanne Danielle, in all of her actions as Personal Representative and Executrix." CP at 724.

<sup>112</sup> Finding of Fact 1.16 states "There was no evidence at trial to support that Respondent Archer breached her fiduciary duties." CP at 725.

<sup>113</sup> Conclusion of Law 2.4 states "Petitioner's claim for removal of Respondent Archer as Personal Representative and Executrix of the Estate is denied." CP at 734.

<sup>114</sup> *Ocoma Foods Co. v. Newman*, 60 Wn.2d 127, 372 P.2d 530 (1962).

about to waste, or embezzle the property of the estate committed to his charge, or has committed or is about to commit a fraud upon the estate, or is incompetent to act, or is permanently removed from the state, or has wrongfully neglected the estate, or has neglected to perform any acts as such personal representative, or for any other cause or reason which the court appears necessary, it shall have the power and authority, after notice and hearing to revoke such letters.

The trial court may revoke a personal representative's letters of administration under the "for any other cause" provision if the conduct is similar to the other grounds listed in RCW 11.28.250.<sup>115</sup> The trial court has broad discretion as to the grounds on which it may remove an executor, and such grounds must only be valid and supported by the record.<sup>116</sup>

As an initial matter, the trial court should have removed Ms. Archer as personal representative because she resides in Chicago, Illinois. The trial court found in Finding of Fact 1.2 that "Respondent Jill Archer a/k/a Jill R. Wright...is a resident of the State of Illinois."<sup>117</sup> "Whenever the court has reason to believe that any personal representative...is permanently removed from the state...it shall have the power and authority, after notice and hearing to revoke such letters."<sup>118</sup> The trial court specifically found that Ms. Archer is no longer a Washington resident, yet failed to remove her as personal representative. Given Finding of Fact 1.2, Conclusion of Law 2.4 is error. Ms. Archer should have been removed as personal representative of the Estate.

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<sup>115</sup> *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004).

<sup>116</sup> *In re Aaberg's Estate*, 25 Wn. App. 336, 339, 607 P.2d 1227 (1980).

<sup>117</sup> CP at 723.

<sup>118</sup> RCW 11.28.250.

In addition, Ms. Archer's personal interests conflict with the Estate's interests and she has breached her fiduciary duties to Elmer. A trial court does not abuse its discretion when it removes a personal representative whose personal interest conflicts with the estate's interests.<sup>119</sup> A personal representative owes fiduciary duties to the heirs of the estate.<sup>120</sup> Ms. Archer has demonstrated a more than three-year commitment to finding new ways to deny Elmer his inheritance. Ms. Archer's refusal to investigate Elmer's community property interest, mischaracterization of non-probate assets as residue, refusal to properly allocate and distribute proceeds from the 10th Avenue home sale, and attempting to force Elmer to waive his rights to the Estate are at odds with the Estate's best interests. The Estate is best served by a personal representative who will be able to carry out Decedent's Will without the conflict of her own personal interests. These actions also breach the fiduciary duties Ms. Archer owed to Elmer.

Ms. Archer has demonstrated time and again that she does not respect Elizabeth's intent and acts to enrich herself and her brothers. Substantial evidence does not support Finding of Fact 1.16.

Finding of Fact 1.15, that Ms. Archer's misdeeds are excused because of the advice she received from her prior attorney, is not supported by substantial evidence. Ms. Archer's conduct continued after she terminated her prior counsel, and her reliance on Ms. Danielle's advice does not excuse Ms. Archer's conduct. At trial, Ms. Archer had a new attorney,

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<sup>119</sup> *In re Clawson's Estate*, 3 Wn.2d 509, 519-20, 101 P.2d 968 (1940).

<sup>120</sup> *In re Estate of Ehlers*, 80 Wn. App. 751, 761 – 62, 911 P.2d 1017 (1996).

yet continued to allege that nonprobate assets belonged to the Estate's residue and tried to bring an untimely will contest that lacked any legal or factual bases. She continued to allege that she was entitled to offset the Estate's attorney fees from Elmer's portion of the oil and mineral proceeds, even though she denied that these funds belonged in the residue. Ms. Archer's misconduct is not attributable to a single attorney's bad advice; she has acted improperly in the execution of her duties and should be removed.

Substantial evidence does not support Finding of Fact 1.15 or Finding of Fact 1.16, and Conclusion of Law 2.4 is unsupported by the findings of fact and the evidence.

This matter is extremely contentious between Elmer and the children. Moreover, if Ms. Archer is disinherited, she has no role serving as the personal representative. Ms. Archer's brothers have colluded with her in her attempts to disinherit Elmer and are not qualified to serve as personal representative of the Estate. Elmer requests the appointment of an independent personal representative to close the Estate.

**4. The Trial Court Erred in Determining the Accounting by Forcing Elmer to Pay for his Prior Underpayments out of Trust Proceeds Already Owed to Him.**

The trial court also erred in its order distributing funds from the Tvedt/Murphy Trust to equalize the overpayment to Ms. Archer and her brothers. In doing so, the trial court effectively ordered Elmer to pay for part of the overpayment to the other heirs out of his own inheritance. As a

result, Elmer was underpaid \$4,947.28. Elmer respectfully requests that this Court vacate the Final Judgment and Order and Amended Final Judgment and Order and remand for entry of a new Final Judgment consistent with this analysis.

The trial court concluded that Elmer was to receive one-quarter of “all income, royalties, and payments generated to the Tvedt/Murphy estate trust for the duration of his life.”<sup>121</sup> However, the trial court deducted from the court’s registry the \$19,789.12 owed to Elmer for prior overpayments to the other heirs without accounting for Elmer’s entitlement to 25 percent of the registry’s balance. That is, the trial court forced Elmer to pay for the shortage that Ms. Archer caused.

At the time of distribution, the registry had a balance of \$48,475.81. After deducting funds owed to Mr. Deaton, the registry had a balance of \$45,783.81. Pursuant to the trial court’s findings of fact, Elmer was entitled to 25 percent of these funds, \$11,445.95. The trial court found that Ms. Archer and her brothers had been overpaid more than \$77,000 through prior distributions and that this amount should have been returned to the Estate. However, Ms. Archer and her brothers wanted to handle equalizing their shares of the Estate amongst themselves, so the trial court limited its holdings to Elmer’s 25 percent of the overpayment. The trial court found that Elmer was entitled to \$19,789.12. The trial court deducted the \$19,789.12 owed to Elmer from the balance of the registry, and then ordered

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<sup>121</sup> CP at 735 (Conclusion of Law 2.11.2).

the distribution of the registry's remainder equally among the four heirs.<sup>122</sup> But this essentially forced Elmer to pay for the overpayment to Ms. Archer and her brothers out of funds to which he was already entitled.

If Elmer's calculations had been used, his distribution would have been as follows:

Net balance of registry:	\$45,783.81
One-quarter interest owed to Elmer:	\$11,445.95
25% of overpayment to other heirs:	\$19,789.12
<b>Total owed to Elmer:</b>	<b>\$31,235.07</b>

However, the distributions as they actually occurred shorted Elmer:

Net balance of registry:	\$45,783.81
25% of Overpayment to other heirs:	(\$19,789.12)
New net balance of registry:	\$25,994.69
One-quarter interest owed to Elmer:	\$6,498.67
<b>Total paid to Elmer:</b>	<b>\$26,287.79</b>

By adopting Ms. Archer's accounting, the trial court shorted Elmer's distribution by \$4,947.28. Because Elmer is entitled to 25 percent of all income, interest, royalties, generated by the Tvedt/Murphy Trust during his life, Elmer asks that this Court vacate the Final Judgment and Order and Amended Final Judgment and Order and remand with instructions to properly account for Elmer's 25 percent interest in the Tvedt/Murphy Trust proceeds.

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<sup>122</sup> CP at 1081 – 82.

## 5. Elmer is Entitled to his Attorney Fees on Appeal

Elmer requests his attorney fees at the trial level and on appeal pursuant to RAP 18.1, RCW 11.96A.150, and RCW 11.24.050.

If the will is sustained following a will contest, “the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney’s fees as the court may deem proper.”<sup>123</sup> Attorney fees are appropriate under RCW 11.24.050 “when a contestant does not make a prima facie case [of undue influence], and merely offers evidence which the trial court is justified in holding as a matter of law does not require any proof to combat it.”<sup>124</sup> Additionally, TEDRA permits the award of attorney fees from the personal representative or the estate.<sup>125</sup>

As detailed above, there was no probable cause or good faith basis to support Ms. Archer’s will contest. She has consistently, regardless of who was her counsel, acted to undermine Elizabeth’s intent in the Will and deny Elmer his inheritance. Elmer and Elizabeth were married for 20 years, and yet he has been forced to fight for his right to a community property interest in the home he and Elizabeth shared, to nonprobate assets that passed to him outside of probate, and to distributions from the Tvedt/Murphy Trust. There was no good faith basis for Ms. Archer’s actions and Elmer should not be forced to pay his attorney fees out of the

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<sup>123</sup> RCW 11.24.050.

<sup>124</sup> *Barbee v. Barbee*, 134 Wash. 418, 423, 235 P. 945 (1925).

<sup>125</sup> RCW 11.96A.150.

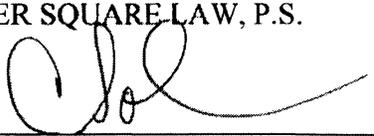
inheritance he had a right to receive. The trial court abused its discretion in denying Elmer's request for attorney fees. Elmer asks that this Court award his reasonable attorney fees and costs against Ms. Archer personally at both the trial level and on appeal. The other heirs should not be forced to forfeit part of their inheritance because of Ms. Archer's litigious choices.

## VI. CONCLUSION

For the foregoing reasons, Elmer requests that this Court hold that Ms. Archer's will contest was brought in bad faith and that the trial court therefore erred in refusing to enforce the no contest clause of the Will. Additionally, the trial court abused its discretion in not removing Ms. Archer as the personal representative because she does not reside in Washington State, she has personal conflicts of interest with the Estate, and she has breached her fiduciary duties to Elmer. Elmer also asks that this Court remand for a revised accounting and distribution that does not require him to fund his own repayment. Finally, Elmer asks for an award of attorney fees at the appellate and trial level against Ms. Archer.

RESPECTFULLY SUBMITTED this 23<sup>rd</sup> day of November, 2015.

LEDGER SQUARE LAW, P.S.

By: 

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Attorneys for Appellant/Cross-  
Respondent

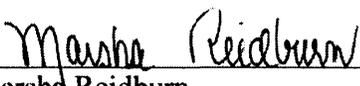
**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

J. Mills Law Office of J. Mills 705 S. Ninth St., Suite 201 Tacoma, WA 98405-4622	<input type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
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DATED this 29th day of November, 2015 at Tacoma,  
Washington.

  
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Marsha Reidburn  
Legal Assistant to Chrystina R. Solum