FILED
September 16, 2015
Court of Appeals
Division I
State of Washington

73102-5

No. 73102-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES ATKINSON,

Appellant,

v.

ESTATE OF BERT W. HOOK,

JERRY HOOK, Personal Representative,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR SAN JUAN COUNTY
THE HONORABLE DONALD E. EATON

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal is premised on the false claim that the will appellant Jim Atkinson advocates for admission to probate is a "facially and presumptively valid Last Will and Testament from Arizona." (App. Br. 6) The "Atkinson will" may have been signed by Bert Hook, a Washington resident, in Arizona, but it was not a valid will because it had been signed by only one other person, an Arizona notary public, when Bert died a few days later. Bert's only valid will was an earlier will, properly executed in Washington, which appointed Bert's brother, respondent Jerry Hook, as personal representative and sole heir.

In an effort to make it valid under Arizona law, Atkinson had his girlfriend sign the Atkinson will in Washington, 40 days after Bert's death and 45 days after she claims she saw Bert sign it in Arizona. Despite this extraordinary post mortem effort, the Atkinson will was not "facially and presumptively valid" under Arizona law because there remain questions whether a notary public could act as a witness to the will and whether the girlfriend signed the will "within a reasonable time" after seeing Bert sign it.

The trial court properly dismissed Atkinson's contest of Bert's Washington will because the final act that purported to validate the

Atkinson will – the second signature of a "witness" – occurred in Washington. The Atkinson will was invalid under Washington law, which requires that two witnesses sign the will "while in the presence of the testator and at the testator's direction or request." RCW 11.12.020(1). The girlfriend did not sign the will in the presence of or at the request of Bert, who had died over a month earlier. This Court should affirm the trial court's order dismissing Atkinson's will contest, confirm the Washington courts' jurisdiction to consider counterclaims against Atkinson for abuse and financial exploitation, and award attorney fees to the estate under RCW 11.24.050 and RCW 11.96A.150 for having to defend this appeal.

II. RESTATEMENT OF ISSUES

1. Respondent obtained an order admitting to probate the testator's only valid will at the time of his death. Appellant filed a will contest advocating for a purported later will that had been signed by only one other person when the testator died. More than a month later, a second person signed the will in Washington. Did the trial court properly dismiss the will contest under RCW 11.12.020(1), which requires that a valid will be signed by two witnesses in the presence and at the direction of the testator?

2. A will signed by only one person other than the testator is not valid under Washington law, where the testator was domiciled, or under Arizona law, where the testator purportedly signed the later will. Did the trial court properly deny appellant's motion to revoke letters testamentary to respondent when the only valid will at the time the letters were issued an earlier valid will that the court had admitted to probate?

3. Appellant commenced this action by filing a will contest that sought affirmative relief. Did the trial court properly exercise personal jurisdiction over the appellant to consider counterclaims against him?

4. The court has discretion to assess attorney fees against a will contestant under RCW 11.24.050 and RCW 11.96A.150(1). Should this Court award attorney fees to respondent for having to defend this appeal of an order dismissing appellant's will contest?

III. RESTATEMENT OF FACTS

A. Bert Hook, a Washington resident, executed his Last Will and Testament and First Codicil in 1988 and 1999, leaving his entire estate to his brother Jerry.

Bert Hook, an unmarried man with no children, executed a Last Will and Testament on February 29, 1988. (CP 837-42) Respondent Jerry Hook is Bert's only sibling; they had a close

relationship all their lives.[1] (CP 984) In his will, Bert appointed Jerry as personal representative and left his entire estate to their mother. (CP 839-40) After their mother died, Bert on June 10, 1999, executed a codicil reappointing Jerry as personal representative and leaving his entire estate to Jerry. (CP 843-46) It is undisputed that Bert's will and codicil ("the Washington will") were validly executed under Washington law.

Bert primarily resided in Davenport, Washington, but usually spent winters in Salome, Arizona, a town of 1200, 60 miles west of Phoenix. (Finding of Fact (FF)[2] 1, 2, 22, CP 954, 958; CP 1401) Bert always kept the vast majority of his personal property in the State of Washington, including all of his personal files and tax records. (FF 23, CP 958) In July 2011, Bert placed his brother Jerry on three of his Washington bank accounts as joint tenant with right of survivorship. (FF 21, CP 958)[3] Bert maintained most of his liquid

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[1] To avoid confusion, this brief refers to the personal representative Jerry Hook and testator Bert Hook by their first names.

[2] After an evidentiary hearing on the issue of Bert's domicile, the trial court issued findings of fact to support its conclusion that Bert was domiciled in Washington when he died. (CP 953-65) Atkinson does not challenge this decision or any of these findings on appeal.

[3] When Bert died, those assets passed to Jerry outside of the probate as the surviving joint tenant. *See* RCW 11.02.005(10). Atkinson falsely claims that Jerry somehow surreptitiously accessed these accounts "using his Letters Testamentary." (App. Br. 37, fn. 5)

assets in these accounts and another account in San Juan County into which his social security checks were electronically deposited. (FF 15, 33, CP 957, 960) Bert also gave Jerry the only keys to his safety deposit box at a bank in Friday Harbor that contained Bert's Last Will and Testament and First Codicil. (FF 16, 20, CP 957; CP 1051)[4]

B. Shortly after Bert had heart surgery in fall 2011 he traveled to Arizona with Atkinson, who knew that Bert was "very sick."

In **September 2011**, Bert, age 77, had surgery to replace a heart valve. (CP 145, 1052) He was subsequently admitted to an in-patient rehabilitation center in Spokane for several weeks. (CP 1052-53) Bert was eventually discharged to the care of Jerry and Jerry's wife at their home on Lummi Island for further rehabilitation. (CP 1053) Within days of moving in with Jerry, Bert became agitated with Jerry's attempts to ensure his health and safety by insisting that Bert take prescribed medication and stay in Jerry's home until it was safe for Bert to reside in a separate apartment on Jerry's property. (*See* CP 139-41, 143) In **October 2011**, Bert asked appellant Jim

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[4] Atkinson accuses Jerry of "emptying" the safety deposit box of $20,000 in gold. (App. Br. 37, fn. 5) There is no evidence that there was any gold in the safety deposit box. The purported list of Bert's property in the "Atkinson will" does not reference "$20,000" in gold, but only makes a general reference to "gold" without specifying any location or amount. (*See* CP 28-29)

Atkinson and Jim's girlfriend, Anna Levitte, to take him to his apartment in Salome, Arizona. (CP 23, 1053) Atkinson, aware that Bert was "very sick and had had a pig valve put into his malfunctioning heart and his heart function was apparently very limited," took Bert to Arizona. (CP 24)

C. Bert's mental and physical health rapidly declined in Arizona. In the months leading up to creation of the Atkinson will, Bert was depressed and suffering from confusion and/or dementia.

Atkinson casts aspersions on Jerry's decision to probate and take actions consistent with Bert's Washington will (App. Br. 36-38), demanding an award of attorney fees based on his claim that he had a "duty to oppose" the Washington will, and that he does so in "good faith." (App. Br. 40-41) This timeline sets out the events that informed why Jerry probated the Washington will, and are also relevant to Atkinson's demand for fees on appeal:

January 20, 2012. Bert signed a Health Care Power of Attorney appointing Atkinson and another friend, Jack Jenkins, as his agents. (CP 145-46) The document was notarized by Linda Darland, an Arizona notary public who worked in a realty office in Salome, Arizona. (CP 135, 146)

January 23-26, 2012. Bert was hospitalized. Patient progress notes describe Bert as "confused," "very paranoid," "unruly

with staff," "hallucinating," and "disoriented." (*See* CP 1053-55, 1425-26) Atkinson told medical personnel that Bert "takes whatever narcotic he can find" and "has dementia." (CP 1421)

Bert's doctor recommended that Bert be placed in a nursing facility. (*See* CP 1423) After a "lengthy discussion" between the doctor, Bert, Atkinson, and Levitte, it was agreed that Bert would be discharged to a nursing facility. (CP 1423) On the day Bert was to be transferred to the facility, Atkinson, described in the patient notes as being "very powerful in his need to control" Bert's health-care, told the nurse that he instead intended to take Bert "home":

> Pt's Power of Attorney/Friend, Mr. Atkinson is very powerful in his need to control our patient's care issue's. On 1/26/12 after a lengthy discussion with patient and Mr. and Mrs. Atkinson re: Dr's order for SNF rehab. for a brief stay, all party's agreed with the goal of placing pt. in Assisted Living when dc'd from rehab... Arrangements for transfer were begun, the Atkinson's were advised transfer would not occur before 3 p.m. At 4 p.m. the Atkinson's returned informing nursing they were taking pt. home immediately.
>
> Sudden change per Power of Attorney from in-patient SNF Rehabilitation to discharge home.

(CP 1423)

February 2, 2012. With "confusion" as his "chief complaint," Bert visited a medical clinic. (CP 1055) Bert complained of "being confused most of the time and not being able to remember

normal day-to-day things that are important." (CP 1055) Bert told the medical provider that he was "recently discharged from the hospital but does not remember where or why." (CP 1055) Bert was diagnosed as "severely hypoxic." (CP 1055)

February 3, 2012. Bert was visited at home by a registered nurse, who reported that Bert required supervision "due to cognitive impairment." (CP 1056) The nurse described Bert as "confused as to where he is or which hospital he had been taken to approximately a week previously." (CP 1056) The nurse noted that Bert's caregiver, his friend Paul Latenser, stated "Bert Hook had been like this [confused] for the two days that he had seen him." (CP 1056)

Latenser was in fact "shocked at how fast Bert had deteriorated from when he went into the hospital the previous September" in Washington. (CP 1402) Latenser described Bert as "easily confused and could not care for himself." (CP 1402) Latenser "noticed significant decline in his mental and physical conditions." (CP 1402) It appeared to Latenser that Bert was suffering from dementia. (CP 1399-1405)

In the days Latenser was caring for Bert, Bert never once mentioned making a new will or stated an intent to leave Latenser

any property. (CP 1405)[5] Latenser "did not believe that Bert Hook was capable of making a new Will or making any major decisions at the time he allegedly signed the Atkinson will." (CP 737)

February 8, 2012. Bert met with a doctor, who described Bert as "still having hallucinations, a tough time breathing, and [ ] in chronic pain. [ ] The primary assessment at the time was 'confusion.'" (CP 1056)

February 10, 2012. Latenser realized that he could not properly care for Bert on his own. (CP 1404) Latenser told Atkinson that Bert had threatened to kill himself, and that he had found a gun in one of Bert's drawers. (CP 1402, 1404) Latenser believed that Bert

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[5] Atkinson claims Bert had expressed a desire to make a new will earlier (App. Br. 11), but the trial court struck his declaration in support of that claim (CP 106-18, 193), as well as all testimony "as to any transaction had by [Atkinson] or any statement made to him, or in his presence, by Bert W. Hook. Anna Levitte, Jack Jenkins, and any other party who would take under the Atkinson will are also barred by [the dead man's statute, RCW 5.60.030] from offering such testimony." (CP 192-94) Although Atkinson assigns error to this ruling, he provides no argument to support his challenge, and has thus waived it. *Erdmann v. Henderson,* 50 Wn.2d 296, 298, 311 P.2d 423 (1957).

The only admitted evidence to support Atkinson's claim that Bert voiced a desire to change his will is a declaration from Alan Hester, a friend of Atkinson and the final caregiver Atkinson hired for Bert. (*See* CP 169-75) Atkinson paid Hester $2,000 from Bert's funds during the week before Bert's death, and gave Hester an additional $1,000 for "expenses." (CP 1060)

needed to be in an assisted living/nursing home facility, but Atkinson disagreed. (CP 1404)

That same day, Atkinson, Levitte, and another friend, Jack Jenkins, drove Bert to a place they called the "Ranch" in Bouse, Arizona. (CP 124, 1025, 1405) According to Jenkins, Bert asked Jenkins to "scribble down his last wishes." (CP 124) Levitte typed up Jenkins' "scribbles" into what Atkinson represents is Bert's Last Will and Testament. (CP 245) The "Atkinson will" names Atkinson as executor, Jenkins as an alternate executor, and leaves the bulk of Bert's estate to Atkinson, Jenkins, and Levitte, with smaller bequests to Jerry, Jerry's son Patrick Hook, Latenser, and James Parker.[6] (CP 126-29)

February 12, 2012. A nurse visited Bert in his home. Although Atkinson was using Bert's funds to pay Alan Hester to care for Bert, the nurse found Bert alone and confused, with his compression stockings around his ankles, causing circulation problems. (CP 1057, 1060)

[6] Latenser and Patrick Hook have disclaimed any interest in Bert's estate. (CP 737, 744) Parker has not been involved in this litigation.

February 13, 2012. Levitte drove Bert to the realty office in Salome where notary public Linda Darland worked. (CP 20, 245)[7] Darland had notarized Bert's signature on the Health Care Power of Attorney appointing Atkinson and Jenkins as his agents three weeks earlier. (CP 146, 149)[8]

Darland went to Levitte's car to notarize Bert's signature on the Atkinson will. (*See* CP 20, 55) Darland did not recall the conversation, if any, she had with Bert, did not read the document that she notarized, did not keep a copy of the document, and believed the whole process took less than five minutes. (CP 56, 976) Although Levitte claims she was present when Bert signed the Atkinson will, she did not sign the will as a witness. (CP 1277-78)

February 16, 2012. Bert awoke from a nap and did not recognize Hester, who Bert had known for 30 years. (CP 169, 172, 1060) Believing Hester was an intruder, Bert called 911. (CP 172) When the responders arrived, Bert asked to be taken to the hospital.

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[7] In his brief, Atkinson claims that he also went to the realty office. (App. Br. 12) There is no support in the record for this claim; neither Darland's affidavit nor Levitte's declaration mention Atkinson's presence. (*see* CP 20, 56-57) Given the events surrounding Bert's last days, it is hard to see how Atkinson's presence would aid his cause on appeal in any event.

[8] It is unclear from the record what if any relationship Darland had with Bert, Atkinson, Jenkins, or Levitte.

(CP 172) The responders loaded Bert in the ambulance, but then "POA [Atkinson] had come to home and informed ambulance service to get off his property and put the pt back in the home as he was a hospice patient and does not want to go to the hospital." (CP 1431)

On the same day, either Atkinson or Jenkins made out a $20,000 check from Bert's Arizona checking account, writing a notation on the check that it was for "health care and living expenses." (CP 1059) The check was cashed after Bert killed himself; Atkinson used most of the $20,000 to reimburse himself for personal expenses, including cleaning his truck and travel to Spokane, and to pay the attorney who continues to represent him in this action. (CP 1060)

February 18, 2012. Atkinson left Bert alone in his truck with a loaded .357 magnum in the console next to Bert. Bert used Atkinson's gun to kill himself. (CP 135, 1060-61, 1402, 1404)

D. Atkinson filed a will contest after Jerry commenced an action in Washington to probate Bert's Washington will.

1. Jerry submitted the Washington will for probate in San Juan County.

Although Atkinson had told Jerry that Bert signed a new will, he never offered to send the will to Jerry (CP 242, 982-83), and Jerry did not believe that Bert would have signed a new will if he were in

his right mind. (CP 983) On **March 9, 2012,** Jerry filed a petition to probate Bert's 1988 Will and 1999 Codicil in San Juan County Superior Court. (CP 1) Letters Testamentary were issued on **March 12, 2012**. (CP 11) On **March 23, 2012,** Atkinson through his current counsel for the first time sent Jerry a copy of the Atkinson will. The copy had been signed only by Bert and by Darland, who had notarized Bert's signature. (*See* CP 1149-51)

2. Atkinson arranged to have his girlfriend Levitte, a beneficiary, sign the Atkinson will in Washington after Jerry challenged its validity.

Without the signature of two witnesses, the Atkinson will was not valid under the law of Washington, where Bert was domiciled when he died, RCW 11.12.020, or under the law of Arizona, where Bert signed the will. Ariz. Rev. Stat. § 14-2502. On **March 27, 2012,** Jerry advised Atkinson that the Atkinson will was not facially valid under either Arizona or Washington law. (CP 1153-54) Jerry also advised Atkinson that he intended to commence a "vulnerable adult" investigation into his actions with Bert. (CP 1154) Two days later, on **March 29, 2012** – 40 days after Bert took his own life, and 45 days after Darland notarized Bert's signature on the Atkinson will in Arizona – Atkinson's girlfriend Levitte, a beneficiary under the Atkinson will, signed it in Spokane, Washington. (CP 29)

3. Atkinson contested Bert's will in Washington. After Jerry filed counterclaims against him, Atkinson began a probate action in Arizona.

On **April 4, 2012,** Atkinson filed a petition in San Juan County Superior Court contesting the validity of the Washington will and claiming that the Atkinson will had revoked the Washington will. (CP 15) Atkinson moved to revoke the Letters Testamentary issued to Jerry and sought an accounting of the inventory of the estate and any distributions made. (CP 16, 31)

Jerry answered Atkinson's petition on **April 11, 2012,** raising counterclaims against Atkinson. (CP 847-857) Jerry asked that Atkinson be ordered to account for and deliver any of Bert's assets and records in his possession. (CP 850) Jerry alleged that "on information and belief, Petitioner Atkinson kept Bert W. Hook so medicated and sedated that Bert W. Hook, with his serious dementia, was incapable of making informed decisions with regard to his Estate and had insufficient testamentary capacity to make a will under both Arizona and Washington law." (CP 853) Atkinson did not answer the counterclaims or otherwise object to Jerry's claim that the court had personal jurisdiction over him. (*See* CP 1067)

On **April 17, 2012,** Atkinson filed an action in Arizona to probate the Atkinson will (CP 45-46; CP 1093-99), swearing under

oath that he and Levitte were residents of Spokane Valley, Washington. (CP 1094)

4. The Arizona court dismissed Atkinson's probate action after the Washington court determined that Bert was domiciled in Washington.

On **May 11, 2012,** the Washington court denied Atkinson's motion to revoke Letters Testamentary "at this time because no good cause has been shown to revoke such letters." (CP 69) Atkinson has never renewed this motion.

San Juan County Superior Court Judge Donald Eaton ("the trial court") then conducted a two-day evidentiary hearing to determine Bert's domicile at the time of his death. (CP 953) Although Atkinson now claims that this hearing was "wasteful," "superfluous," and "unnecessary" (App. Br. 15), Atkinson's strenuous objection to Jerry's assertion that Bert was a Washington resident necessitated the hearing. (*See* CP 1003)

Bert's domicile was relevant in part because there were competing proceedings in Washington and Arizona, and Bert's domicile at the time of his death controlled which court would assume jurisdiction over the probate action. The Arizona court had stayed the probate action Atkinson had commenced there pending the Washington court's determination of Bert's domicile (CP 72)

pursuant to Ariz. Rev. Stat. § 14-3202, which requires the Arizona court to stay a proceeding if there are conflicting claims as to the decedent's domicile and an earlier probate proceeding had been commenced in another jurisdiction.

Bert's domicile was also relevant to the validity of the Atkinson will. RCW 11.12.020 provides that a will "executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death, shall be deemed to be legally executed." In other words, if the Atkinson will was executed in Washington, but Bert had been domiciled in Arizona, the determination whether the will was valid could be made under either Washington or Arizona law. But if Bert was domiciled in Washington and the will was executed in Washington, the determination of validity must be made under Washington law.

After an evidentiary hearing on October 31-November 1, 2012, the trial court concluded that Atkinson "failed to introduce substantial credible evidence that Bert W. Hook ever formed the requisite intent to change his domicile from Washington to Arizona." (FF 45, CP 964) Accordingly, on **April 26, 2013,** the trial court concluded that it had "jurisdiction over the parties and the subject

matter of this action." (CP 964) Atkinson has not challenged this determination, or the Arizona court's dismissal of Atkinson's probate action on **June 5, 2013.** (CP 1105, 1107)

E. The trial court affirmed personal jurisdiction over Atkinson after Jerry filed amended counterclaims alleging financial abuse of a vulnerable adult.

On August 8, 2013, Jerry moved to amend his answer to Atkinson's will contest to include additional counterclaims, and to join Levitte and Jenkins as additional parties on claims of financial abuse of a vulnerable adult, financial exploitation, and for return of certain properties that Bert allegedly conveyed in the months before his death. (CP 988-91) Jerry filed his amended answer and counterclaims, and initial claims against Jenkins and Levitte, on September 20, 2013. (CP 1108-1143)

Jenkins, who wished to "avoid being entangled in the fight between Jerry Hook and Jim Atkinson" (CP 1175), subsequently settled with Bert's estate. (CP 462-67) His decision was also based on the opinion of his attorney, Jacob Cohen of Oak Harbor, that

"there was a high probability that the [Atkinson] will was invalid under both Arizona and Washington law." (CP 1173-75)[9]

Despite Atkinson's earlier sworn statement that he and Levitte resided in Spokane Valley, Washington, in April 2012 (CP 1094), Atkinson and Levitte now moved to dismiss on the grounds they not residents of Washington. (CP 345-57) On December 2, 2014, the trial court granted the motion as to Levitte, but denied the motion as to Atkinson. (CP 654-57) Without deciding whether Atkinson was a resident, the trial court concluded that Atkinson consented to the exercise of personal jurisdiction by filing the will contest that initiated this proceeding. (CP 469, 655-56) Jerry does not challenge the decision dismissing Levitte from this action on the

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[9] Atkinson has accused Jerry of procuring this settlement by "bribery." (*See* App. Br. 37, fn. 5) But the trial court rejected those "serious allegations" when it approved the settlement with Jenkins. (*See* CP 1176-1177: "Court understands the argument and the allegations and they are serious allegations that he has made and is not buying into them. It was a legitimate effort by Mr. Jenkins to get out of the lawsuit [ ] Court finds nothing wrong with the agreement.") The trial court also cautioned Atkinson's counsel, (who continues to represent him on appeal), against "making comments or attacks directed toward opposing counsel, don't want any allegations about wrong doing of opposing counsel unless set forth in a motion. Court is asking [Atkinson's counsel] to stay focused on the issues and leave out the comments/attacks against opposing counsel and move forward." (*See* CP 1177)

Atkinson also attempted to rely on a settlement offer Jerry made to him as evidence of "bribery." The trial court struck the offer as "inadmissible and should not have been presented to the court." (CP 1176-1177) Atkinson nevertheless improperly relies on this same stricken evidence in his appellate brief. (App. Br. 37, fn. 5, *citing* CP 452)

grounds she was not a "co-petitioner" in the will contest. (CP 469-70)

F. The trial court dismissed the will contest after concluding that the Atkinson will was executed in Washington and the will was not valid under Washington law.

The biggest distinction between Arizona and Washington law is that a witness can sign a will within a "reasonable time after person witnessed" the testator's signing of the will under Ariz. Rev. Stat. § 14-2502(A)(3), whereas RCW 11.12.020(1) requires that two witnesses sign the will in the testator's presence and at his direction. On February 13, 2014, Jerry moved for partial summary judgment dismissing the will contest because the Atkinson will was not valid under Washington law, where it was executed. (CP 384)

The trial court agreed with Jerry that the will was executed in Washington, concluding that "the execution of a document means completing all of the steps necessary to make the document a legal instrument." (*See* CP 473, 574) The trial court noted that "while significant acts toward the execution of the [Atkinson] will did occur in Arizona, those acts did not make the [Atkinson] will an executed document. It only became an executed document when Ms. Levitte signed it and she signed it in Washington." (CP 574)

Because the Atkinson will was executed in Washington, where Bert was domiciled at his death, the trial court tested its validity under RCW 11.12.020(1), which provides that "a last will and testament, executed in the mode prescribed by the law of the place where executed or of the testator's domicile, shall be deemed to be legally executed." The trial court concluded that the Atkinson will was not legally executed because two witnesses did not sign it in the presence of Bert. (CP 651) The trial court therefore dismissed Atkinson's will contest with prejudice on August 8, 2014. (CP 651)

The trial court denied Atkinson's motion for reconsideration, refused to enter CR 54(b) findings, and denied RAP 2.3(b)(4) certification on February 13, 2015. (CP 659-61) Atkinson filed a notice of appeal. (CP 643) On April 3, 2015, Commissioner Mary Neel, citing *Estate of Bernard,* 182 Wn. App. 692, 332 P.3d 480, *rev. denied,* 339 P.3d 634 (2014), concluded that "the trial court order declaring the Arizona will invalid and dismissing the will contest with prejudice was appealable."

Jerry's counterclaims against Atkinson for abuse and vulnerable adult claims remain pending in the trial court.

IV. ARGUMENT

A. The trial court properly dismissed the will contest when it concluded that Bert's only valid will was the Washington will admitted to probate.

1. The Atkinson will is not valid under Washington law.

A will signed by a Washington domiciliary and executed in Washington that is not signed by two witnesses in the presence and at the direction of the testator is not valid under RCW 11.12.020, which requires that a valid will "shall be attested by two or more competent witnesses, by subscribing their names to the will [ ] while in the presence of the testator and at the testator's direction or request." When Bert Hook died, his only valid will was the Washington will that he and two witnesses had signed. The Atkinson will was not valid because it was only signed by Bert and a notary public. Because the second witness did not sign the will in Bert's presence at his direction or request, the signature of a purported second witness 40 days after Bert died could not make the Atkinson will, which was invalid at the time of Bert's death, valid.

It is not enough that Bert "signed his Last Will and Testament before two attesting witnesses" (App. Br. 25) if the witnesses did not in fact sign the will in his presence. In construing a statute, this Court cannot "simply ignore express terms. We must interpret a statute as

a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant." *Ralph v. State Dep't of Natural Res.*, 182 Wn.2d 242, 248, ¶ 5, 343 P.3d 342 (2014) (citations omitted). Atkinson's interpretation of the statute would eliminate from the statute the express language requiring "two or more competent witnesses subscrib[e] their names to the will [ ] while in the presence of the testator." RCW 11.12.020(1).

Division Two recently rejected an argument similar to the one made by Atkinson here in *Estate of Burton v. Didricksen,* ___ Wn. App. ___, ___ P.3d ___ (2015 WL 4920961) (Aug. 18, 2015). In *Estate of Burton,* the decedent signed two separate documents, each of which purported to leave his entire estate to the appellant. Each document was independently witnessed by one person. The trial court concluded that the two separate documents did not make a valid will under RCW 11.12.020.

In affirming the trial court's decision, Division Two rejected appellant's claim that two witnesses attesting to the same testamentary gift in two separate documents was sufficient to meet the two-witness requirement of RCW 11.12.020. As the *Estate of Burton* court notes, no "Washington courts have [ ] applied the substantial compliance doctrine to the requirements of RCW

11.12.020(1)." ___ Wn. App. ___, ¶ 19. But even under the test for "substantial compliance," the failure to have two witnesses sign one integrated document in the presence of the testator was fatal. *Estate of Burton,* ___ Wn. App. ___, ¶ 26.

This Court reached a similar result in *Estate of Ricketts,* 54 Wn. App. 221, 773 P.2d 93 (1989). In *Estate of Ricketts,* the testator signed a codicil that altered the distributive scheme of an earlier executed will. The witnesses to the codicil did not sign their names to the codicil, as required by the statute then in effect. Instead, the witnesses signed a separate "Affidavit of Subscribing Witnesses to the Codicil" that was stapled to the codicil. This Court reversed the trial court's admission of the codicil to probate, holding that because the codicil failed to meet the "minimum statutory formalities" requiring the witnesses sign the codicil itself, it was invalid. *Estate of Ricketts,* 54 Wn. App. at 225.

Finally, our Supreme Court relied on the same principles to conclude that a testator's attempt to change her will by making handwritten "strike-outs" was "invalid and ineffective," because "they were accomplished without the formalities required for the proper execution of wills" in *Estate of Malloy,* 134 Wn.2d 316, 328, 949 P.2d 804 (1998). Because the testator's later handwritten

changes did not meet the statutory requirements, the Court concluded that the will must be probated as it was originally written and executed, without effect to those attempted changes. *Estate of Malloy,* 134 Wn.2d at 328.

While the Legislature has "reduced the formalities" governing the execution of wills "to a minimum," "these minimum statutory formalities must be met." *Estate of Ricketts,* 54 Wn. App. at 225. In this case, because the Atkinson will was not signed by two witnesses "while in the presence of the testator," as required by RCW 11.12.020, the trial court properly concluded that it was not a valid will and dismissed Atkinson's will contest with prejudice.

2. Because a will is executed where the last act necessary to make it effective occurs, the Atkinson will was not "executed" until a second witness signed it in Washington.

The Atkinson will could never have been validly "executed" under Washington law because it was signed by only one person other than Bert before he died. As a matter of law (and physical fact), a second person could not possibly witness the will in Bert's "presence" and at his "direction" after he died. RCW 11.12.020(1). Thus, a will that is not properly witnessed before the decedent dies can never become a valid will under Washington law.

There is nothing "strained" or "unrealistic" (App. Br. 29) in the trial court's determination that the Atkinson will was "executed" when Levitte signed the will in Washington. (CP 574: "It only became an executed document when Ms. Levitte signed it and she signed it in Washington.") Because RCW 11.12.020 looks to the law of the state where a will was "executed" to determine its validity, the term "executed" is critical. And a will is executed when the last act necessary to make it effective occurs.

"In the absence of a statutory definition, we may ascertain the plain and ordinary meaning of unambiguous statutory terms by resort to a dictionary." *Lindeman v. Kelso Sch. Dist. No. 458*, 162 Wn.2d 196, 201-02, ¶ 8, 172 P.3d 329 (2007). The dictionary defines "execute" as "to make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form." Black's Law Dictionary 467 (Abridged 7th ed. 2000); *see also Estate & Guardianship of Vermeersch*, 15 Ariz. App. 315, 488 P.2d 671, 673 (1971) ("'Execute' is defined as 'to put into effect: carry out fully and completely'.") (*citations omitted*); *In re Renter's Estate*, 148 Neb. 776, 29 N.W.2d 466, 468 (1947) (execute defined as: "To complete, as a legal instrument; to perform what is required to give validity to, as by signing, and perhaps sealing and delivering; as, to execute a

deed, lease, mortgage, will, and [t]he act of signing and sealing and delivering a legal instruction, or giving it the forms required to render it valid.") (*citations omitted*); *Riegel v. Holmes,* 171 N.E.2d 553, 563 (Ohio 1960) ("to complete, as a legal instrument: to perform what is required to give validity to, as by signing and perhaps sealing and delivering; as to execute a deed, will, etc."). Thus, the Atkinson will was not executed in Arizona simply because *Bert* signed it there. (App. Br. 25)

An executed will requires the testator's signature *and* the signature of two witnesses under both Washington and Arizona law:

> [A] will shall be:
>
> 1. In writing.
>
> 2. Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction.
>
> 3. Signed by at least two people, each of whom signed within a reasonable time after that person witnessed either the signing of the will as described in paragraph 2 or the testator's acknowledgment of that signature or acknowledgment of the will.

Ariz. Rev. Stat. § 14-2502(A) (Execution; witnessed wills; holographic wills).

> Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and shall be attested by two or more competent witnesses, by subscribing their names

> to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request.

RCW § 11.12.020(1) (Requisites of will – Foreign wills). Because Levitte's signature – the last act necessary to execute the Atkinson will – occurred in Washington, where Bert was domiciled, the trial court properly concluded that its validity turned on whether it was valid under Washington law. (*See* CP 574)[10]

Finally, contrary to appellant's claim (App. Br. 29), the Atkinson will was not a "foreign will" made invalid because it was "not executed in the mode prescribed by the state of Washington." Because Bert was domiciled in Washington at the time of his death, and the Atkinson will was signed by the second witness in Washington, it was a Washington will, not a "foreign will." *See* Black's Law Dictionary 776 (Revised 4th ed. 1968) (defining foreign will as a "will of person not domiciled within state at time of death").

[10] Consequently, the trial court properly vacated the parties' earlier stipulation that the validity of the Atkinson will should be determined under Arizona law. "[S]tipulations on matters of law are not binding on a court and should be vacated when determined to be erroneous." (CP 574, 650) *See Folsom v. County of Spokane,* 111 Wn.2d 256, 261, 759 P.2d 1196 (1988). Atkinson challenges the trial court's decision vacating the earlier stipulation (App. Br. 38), but provides no authority or argument why the court erred in vacating a stipulation to a legal issue that was erroneous as a matter of law. This Court should thus consider Atkinson's challenge waived.

And because the Atkinson will was not validly "executed in the mode prescribed by the law of the place where executed [Washington] or of the testator's domicile [Washington], either at the time of the will's execution or at the time of the testator's death," RCW 11.12.020(1), the trial court properly concluded that the Atkinson will was invalid and dismissed Atkinson's will contest.

3. The Atkinson will was not "presumptively valid" under Arizona law because only one witness had signed it before the testator died.

In an effort to resuscitate the Atkinson will, Atkinson asserts that the Atkinson will was "executed" in Arizona, and thus governed by Arizona law. But there can be no dispute that when Bert died the Atkinson will was not "presumptively valid" under Arizona law either, because it still had only been signed by one person other than Bert.

The only other person to have signed the Atkinson will before Bert died was Linda Darland, who asserted that Bert "acknowledged" the will before her in her capacity as notary public. (CP 1151) Although she later claimed that she intended to be a "witness" to the will (CP 56), Darland's signature on the will itself was made as a "notary public." (*See* CP 1151) As a consequence, Darland could not have been a witness for purpose of the "two-witness" rule under

Arizona law. *See Estate of Muder,* 159 Ariz. 173, 765 P.2d 997, 998 (1988).

In *Estate of Muder,* the document signed by the testator was signed by one witness and a notary public, to whom the testator "acknowledged" the will. The Arizona Supreme Court held that the document was not a valid will under Ariz. Rev. Stat. § 14-2502 because it was signed by only one witness – the notarization did not count as a witness signature. *Estate of Muder,* 765 P.2d at 998. Here, the trial court declined to resolve whether the Atkinson will could ever be valid under Arizona law because it concluded there was a factual dispute whether Bert intended Darland to serve as a witness or notary public when she signed the will. (*See* CP 301) But the reasoning of *Estate of Muder* provides an alternate means of affirming the trial court even if Arizona law could apply. *See Syrovy v. Alpine Resources, Inc.,* 80 Wn. App. 50, 54-55, 906 P.2d 377 (1995), *rev. denied,* 129 Wn.2d 1012 (1996).

Under Arizona law, a will is executed when it is in writing, signed by the testator, and "signed by *at least two people,* each of whom signed within a reasonable time after that person witnessed [ ] the signing of the will." Ariz. Rev. Stat. § 14-2502 (*emphasis added*); *see also Estate of Muder,* 765 P.2d at 998 ("it is apparent

that this was not a proper formal will pursuant to the statute because only one witness signed it."). Even if Arizona law did apply, the trial court determined that whether Levitte signed the will "within a reasonable time" after witnessing Bert signed it was an unresolved factual question. Even if the Atkinson will could still be executed if signed by a witness within a "reasonable time" after the testator's death, the Atkinson will was not "executed" until signed by Levitte in Washington, and thus was not "presumptively valid" under Arizona law when Bert died. (CP 574)

4. This court should reject "post-death attestation" as a matter of public policy.

"The full faith and credit clause only requires that we recognize and give effect to foreign judgments, not foreign laws, if they contradict a strong public policy." *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 425, 635 P.2d 708 (1981) (J. Stafford, *dissenting, citing Hughes v. Fetter*, 341 U.S. 609, 611, 95 L. Ed. 1212, 71 S. Ct. 980 (1951)). Even if the Atkinson will was executed in Arizona, this Court should hold as a matter of public policy that a will of a Washington resident that is not valid at the time of the testator's death cannot be made valid by a "post-death attestation" thereafter, regardless of the law of the place where it is signed. That is particularly true where, as here, the purported will, invalid at the

time of the testator's death, is argued to have the effect of revoking a validly executed Washington will. *See* RCW 11.12.020; RCW 11.12.040.

Atkinson argues for the validity of the Atkinson will relying exclusively on *Estate of Jung*, 210 Ariz. 202, 109 P.3d 97 (2005), an intermediate Arizona appellate court decision approving (in theory) post-death attestation of a will. But the Arizona Supreme Court has never adopted the analysis of *Estate of Jung*, and other jurisdictions with statutes similar to Arizona's have rejected post-death attestation as contrary to public policy because it unnecessarily opens the door to fraud, encourages will contests, and "puts witnesses, not the testator, in control of the disposition of the estate." *Estate of Saueressig*, 38 Cal. 4th 1045, 136 P.3d 201, 208, 44 Cal. Rptr. 3d 672 (2006); *Estate of Flicker*, 215 Neb. 495, 339 N.W.2d 914, 915 (1983); *Estate of Royal*, 826 P.2d 1236, 1239 (Colo. 1992); *Rogers v. Rogers*, 71 Or. App. 133, 691 P.2d 114, 115 (1984), *rev. denied*, 695 P.2d 1371 (1985).

As the California Supreme Court reasoned in *Estate of Saueressig*, "to allow postdeath attestation would . . . permit a witness to validate a will that the deceased testator executed, but deliberately did not have signed because of changed intent." 136 P.3d

at 208. The Nebraska Supreme Court similarly reasoned that "permitting witnesses to sign a will after the death of a testator would erode the efficacy of the witnessing requirement as a safeguard against fraud or mistake. We must bear in mind that we are dealing with an instrument allegedly signed or acknowledged by a man who is now dead. He is not present to confirm or reject it." *Estate of Flicker*, 339 N.W.2d at 915.

If "the will speaks as of the date of the testator's death, it follows that the document should be complete at that time," and that allowing witnesses to sign after the testator's death "increases the chances for falsifying signatures, or coercing witnesses to sign documents that may not, in fact, be the will ascribed to the testator," as the Colorado Supreme Court recognized in *Estate of Royal,* 826 P.2d at 1238-39. *See also Rogers v. Rogers,* 71 Or. App. at 136 (to die "intestate" is to die without "leaving a valid will. If the requirements of execution have not been met at the time of death, then the will is not valid . . ."); *In re Cannock's Will,* 81 N.Y.S.2d 42, 43 (Sur. 1948) ("A will must be a valid, perfect instrument at the time of the death of the testator. It takes effect at the instant the testator dies. If invalid then, life cannot be given to it by the act of a third party.").

Our courts also have long recognized the public policy reasons that a will be valid at the time of the testator's death:

> [T]he essential characteristic of an instrument testamentary in its nature is that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and per contra no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory; it acquires a fixed status and operates as a conveyance of title.

Young v. O'Donnell, 129 Wash. 219, 224, 224 P. 682 (1924) (*citations omitted*). The "character of the instrument" when Bert died was that the Atkinson will was not valid under either Washington or Arizona law, and a post death attestation cannot make valid what was invalid at the time of the testator's death.

This case perfectly illustrates the risk of fraud in post-death attestation. Here, the post-death "witness" is a beneficiary who will not otherwise take from the estate, and who only claimed to be present as a witness when Bert signed the will *after* the probate of the Washington will was commenced and it was pointed out that the Atkinson will had not been valid when Bert died. Washington public policy requires that wills be witnessed before the testator dies, and at

his direction. This Court should decline to rely on doubtful Arizona precedent to authorize post-death attestation of the Atkinson will.

5. The trial court gave effect to Bert's last wishes in his validly executed will.

Atkinson's complaint that dismissal of his will contest somehow undermines Bert's intent misses the point. (*See* App. Br. 20-28) A testator's intent can only be carried out if expressed in a legally executed valid will. The Atkinson will was not a valid will, and any intent underlying the making of it is irrelevant.

The "right of testamentary freedom is a statutory right, and the power to regulate the form and validity of wills belongs with the Legislature. This state's Legislature has determined that the right of testamentary freedom includes the right to make a will, the right to change a will, and the right to revoke a will. It also has determined that in order to be valid, a will must be in writing, formally executed and attested to by two witnesses." *Estate of Malloy*, 134 Wn.2d at 322 (*citations omitted*). A testator must comply with statutes regulating the execution of wills. Otherwise, the testator's intent, expressed by will, has no legal effect and is to be ignored by the courts. Jeffrey A. Schoenblum, 2 Page on the Law of Wills §19.4, at 12 (2d ed. 2003).

That the distribution set out in an invalid will cannot be carried out regardless whether the purported testator made his intention "clear" is more than borne out in our courts' decisions in *Estate of Burton*, *Estate of Ricketts,* and *Estate of Malloy*, discussed *supra* at 22-24. In each of those cases, the purported testator made known his or her intentions as to how they wanted their estate distributed upon their death. The courts refused to validate invalid wills in those cases under circumstances far more compelling than the facts here, where there was no dispute as to the competency of the decedents when they attempted to make their intentions known. Because those intentions were not effected in a valid will, the courts properly declined to carry them out.

Atkinson in particular misplaces his reliance on *Estate of Elliott,* 22 Wn.2d 334, 156 P.2d 427 (1945) (App. Br. 21). Unlike here, there was no dispute that the later will in *Estate of Elliott* was properly executed. Instead, the issue was whether the petitioner was time-barred from bringing her action to probate the later will, when it was not brought within the time for will contests. The Court held that the offer of a later will to probate does not constitute a contest of a prior will and a court of probate has inherent authority to admit

to probate a later will while an estate is still open. *Estate of Elliott,* 22 Wn.2d 360-61. But here, Atkinson has never sought to probate the Atkinson will in Washington. Instead, he brought this action solely to contest the Washington will.

Estate of Elliott held that "where the testator has made more than one will, the last will is the one which must be given effect as the latest and final expression of the decedent's testamentary wishes, *if such result can be obtained within the established rules of law.*" 22 Wn.2d at 351 (emphasis added). But this statement, on which Atkinson so heavily relies, is not inconsistent with the trial court's decision here. Under "established rules of law," the Atkinson will cannot be given effect because it was not validly executed.

RCW 11.12.230 does not compel a different result. Under RCW 11.12.230, "all courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them." But the statute presumes a valid will, which should be construed to "give effect to the testator's intent." *Estate of Campbell,* 87 Wn. App. 506, 510, 942 P.2d 1008 (1997). Because the Atkinson will was not valid, it need not be "construed" to determine Bert's intent.

Proper execution of a will is not just a mere "technicality," as Atkinson urges. (App. Br. 22-23) Instead, the "minimum statutory formalities must be met" before the court can conclude that a will is valid, regardless whether the testator intent is clear. *See Estate of Malloy,* 134 Wn.2d at 322; *Estate of Burton* ___ Wn. App. ___, ¶ 16; *Estate of Ricketts,* 54 Wn. App. at 225. Since the Atkinson will did not meet these formalities here, the trial court properly concluded that the Atkinson will was not valid.

B. The trial court properly denied Atkinson's motion to revoke Letters Testamentary issued to Jerry.

The trial court properly denied Atkinson's motion to revoke the Letters Testamentary issued to Jerry because "no good cause has been shown." (CP 69-70) Atkinson's challenge to the trial court's decision presupposes that the Atkinson will was valid and that it "expressly revoked his prior will and codicil from 1999." (App. Br. 36) But when the court entered its order, there had not yet been any determination on the validity of the Atkinson will, which was indisputably not valid at the time of Bert's death since it was signed by only one other individual.

Until the later will is determined to be the "true will of the decedent," the first will is "in the eyes of the law [ ] the legal will of

the decedent." *Estate of Jolly,* 3 Wn.2d 615, 622-23, 101 P.2d 995 (1940). And even if, as Atkinson asserts, Bert intended to revoke the Washington will (App. Br. 26), absent a subsequently executed valid will, Bert would have died intestate and his estate would have gone to Jerry, his brother, not to Atkinson. RCW 11.04.015(2)(c).

Atkinson claims that the Letters Testamentary should have been revoked because Jerry Hook had "actual prior knowledge of the existence of his brother's last will from Arizona" when he sought to probate the Washington will. (App. Br. 36) But it is undisputed that Atkinson never gave Jerry a copy of the purported later will until after the probate of the Washington will was commenced, and even then the copy of the Atkinson will was only signed by one person other than Bert, making it invalid under either Washington or Arizona law. (CP 1149-51) Indeed, Atkinson has not presented the Washington court with the original of the Atkinson will to date.

C. The Washington courts had personal jurisdiction over Atkinson because he initiated the will contest and sought an accounting of Bert's estate.

The issue whether the court has personal jurisdiction over Atkinson for purposes of Jerry's counterclaims, which have not yet been tried, is not properly before this Court. Commissioner Neel ruled only that the order dismissing Atkinson's will contest with

prejudice was appealable under RAP 2.2(a). An order denying a motion to dismiss, on the other hand, is not a final order and is not appealable. Nor does the order denying Atkinson's motion to dismiss Jerry's counterclaims "prejudicially affect" the order dismissing the will contest to warrant review under RAP 2.4. However, respondent asks the Court to address this fully briefed issue now under RAP 1.2(a) to avoid a likely second appeal when the trial court rules against Atkinson after a trial on Jerry's counterclaims for abuse and financial exploitation of Bert.

Atkinson's claim that the court could not assert personal jurisdiction over him is based on his assertion that he was an "out-of-state defendant." (App. Br. 32) But there was substantial evidence that Atkinson lived in Washington when he filed his petition to contest the will in San Juan County Superior Court. (*See* Sub no. 293; Supp. CP ___) Atkinson swore under oath that he resided in Spokane Valley in his petition to probate the Atkinson will in Arizona, commenced shortly after filing the will contest in Washington. (CP 1094)

Further, Atkinson is not a "defendant." Contrary to his assertion, he did more than "deliver Bert Hook's Last Will and Testament to a probate court." (App. Br. 34) Instead, Atkinson

initiated a will contest, seeking not only to set aside the probate of the 1988 Will and 1999 Codicil, but also demanding an accounting of the estate from Jerry Hook. (CP 15-17)

A party "waives any claim of lack of personal jurisdiction if, before the court rules, he or she asks the court to grant affirmative relief, or otherwise consents, expressly or impliedly, to the court's exercising jurisdiction." *Marriage of Steele*, 90 Wn. App. 992, 997-98, 957 P.2d 247, *rev. denied*, 136 Wn.2d 1031 (1998); *see also Kuhlman Equip. Co. v. Tammermatic, Inc.*, 29 Wn. App. 419, 425, 628 P.2d 851 (1981) (a party invokes the jurisdiction of the court by seeking permissive affirmative relief and consents to personal jurisdiction). The trial court properly concluded that it had personal jurisdiction over Atkinson because he "elected to invoke the jurisdiction of this court by initiating the present proceeding." (CP 469)

Atkinson claims that his commencement of the will contest did not invoke personal jurisdiction because an action to set aside a probate is *in rem* and not *in personam*. (App. Br. 31) But "a probate court has all the powers of a court of general jurisdiction. [T]he distinction between *in rem* and *in personam* may be somewhat artificial." *Hadley v. Cowan*, 60 Wn. App. 433, 440, 804 P.2d 1271

(1991). "When a superior court has presented to it through a petition, in any matter of probate, any issue touching the estate, it has jurisdiction both of the parties and of the subject-matter, and it deals with them not as a court of limited, but of general, jurisdiction. It may exercise all of its powers, legal or equitable, and may even invoke the aid of a jury to finally determine the controversy." *Guardianship of Adamec*, 100 Wn.2d 166, 175, 667 P.2d 1085 (1983) (*quoting Estate of Martin*, 82 Wash. 226, 233, 144 P. 42 (1914)). "Allegations of undue influence, abuse of confidence, fraud, and substitution of respondents' will for the deceased's will all are of a single 'transactional nucleus of facts' that could and should [be] determined in the probate challenge." *Hadley*, 60 Wn. App. at 442; *see also Estate of Black*, 153 Wn.2d 152, 172-73, 102 P.3d 796 (2004) (trial court should have considered claims of competency, authenticity of lost will, and undue influence in a single probate proceeding, because they arise from the same "transactional nucleus of facts").

Even if Atkinson did not consent to the court's exercise of personal jurisdiction by filing the will contest, he consented to it by actively participating in the litigation for over three years after commencing the action. *Boyd v. Kulczyk*, 115 Wn. App. 411, 415, 63 P.3d 156 (2003) (party waived defense of lack of personal

jurisdiction by appearing, filing responsive pleadings, participating in arbitration, moving for trial *de novo,* and trying the matter). Atkinson actively participated in the evidentiary hearing regarding Bert's domicile, after which the trial court concluded that it had "jurisdiction over the parties and the subject matter of this action." (CP 953-965) Atkinson also allowed himself to be subject to court orders that restrained him from disposing of assets and required him to provide an inventory of Bert's property. (*See* CP 79-80)

Atkinson may claim his objection to the court's exercise of personal jurisdiction only arose after Jerry filed his amended counterclaims. But Atkinson did not object to the court's personal jurisdiction over him when Jerry in April 2012 served his counsel with the initial answer and counterclaims, which also included allegations that Atkinson abused Bert, a vulnerable adult, requiring disgorgement of any properties or monies transferred to Atkinson prior to Bert's death. (CP 847-57, 1067) Jerry's amended counterclaims merely expanded on his initial counterclaims, based on later discovery. The trial court properly exercised personal jurisdiction over Atkinson because he initiated this action and actively participated in the litigation before objecting to the court's exercise of personal jurisdiction over him.

D. This Court should deny Atkinson's request for fees on appeal, and award fees to the estate.

There is no basis for an award of attorney fees to Atkinson. Instead, attorney fees should be awarded to the estate for defending Atkinson's appeal of the order dismissing his will contest under RCW 11.24.050; RCW 11.96A.150(1); RAP 18.1.

RCW 11.24.050 gives the court discretion to assess attorney fees against a contestant to a will if the will is sustained:

> If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, 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.

RCW 11.24.050; *see also* RCW 11.96A.150(1) (granting both the trial court and appellate court to award attorney fees after considering "any and all factors that it deems to be relevant and appropriate"). Here, the trial court sustained the Washington will, so attorney fees and costs should be assessed against Atkinson, not the estate.

Relying on *Estate of Black,* Atkinson claims that he is entitled to fees because he was seeking to protect "all beneficiaries of both wills." (App. Br. 40) In *Estate of Black,* the court awarded attorney fees to both proponents of separate wills, because both parties had a "duty to oppose the will and acted in good faith." 153 Wn.2d at 174.

But whether Atkinson has acted in good faith has yet to be determined, and will not be determined until the trial on Jerry's counterclaims against Atkinson. Further, three of the beneficiaries under the Atkinson will have disclaimed their interests; the only individuals Atkinson seeks to "protect" are himself and Levitte, whose post-death attestation he claims made both of them Bert's heirs. Although no fees should be awarded to Atkinson at all, any fee award to appellant must await resolution of Jerry's counterclaims against Atkinson.

Fees should be awarded to the estate for defending against this appeal. The Atkinson will was not valid when Bert died, and Atkinson's attempts to make it so by having Levitte sign it 40 days after Bert's suicide caused this litigation, and unnecessary attorney fees. Atkinson, not Bert's estate, should be responsible for the fees incurred. *See Estate of Starkel*, 134 Wn. App. 364, 375-76, 134 P.3d 1197 (2006) (awarding attorney fees to respondent for having to defend will contest when contestant did not act with probable good cause or in good faith).

V. CONCLUSION

This Court should affirm the trial court's decision in its entirety and award attorney fees to respondent for having to defend this appeal of the trial court's order dismissing Atkinson's will contest.

Dated this 16th day of September, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 16, 2015 I arranged for service of the foregoing Brief of Respondent to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
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DATED at Seattle, Washington this 16th day of September, 2015.

Amanda K. Norman