NO. 73102-5

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SC#93247-6

JAMES ATKINSON,

Appellant/Petitioner,

v.

ESTATE OF BERT W. HOOK, JERRY HOOK, Personal Representative,

Respondent.

APPELLANT'S PETITION FOR REVIEW TO SUPREME COURT

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I. **Identity of Petitioners.** The petitioner is James Atkinson. This Petition for Review is being filed by his attorney, David P. Boswell, WSBA #21475.

II. **Court of Appeals Decision.** Petitioner seeks review of the Court of Appeals Decision filed May 9, 2016 under Cause No. 73102-5.

III. **Concise Statement of Issues Presented for Review per RAP 13.4(c)(5).**

The issues presented for review are:

a) Whether a facially valid, legally executed foreign last will can be defeated by technical construction of Washington's foreign wills proviso, RCW 11.12.020(1)?

b) Whether the legislative intent of Washington's foreign wills proviso should be defeated by technical construction of it?

c) Whether, after stipulating that the valid foreign last will was "executed" in Arizona (and that Arizona law would apply to determine its validity) an opposing party is permitted to unstipulate, or is judicially estopped?

d) Whether the choice of law should be permitted to change (by interpretation) in the middle of the game with the result of defeating both a testator's intentions and the Legislature's intention to recognize valid foreign wills?

e) Whether choice of law is controlled by a significant relations test?

IV. Statement of Facts and Procedures Relevant to Issues per RAP 13.4(c)(6).

Dying in his winter residence in Arizona in early 2012, Bert Hook changed his will (as he had told his attorney months earlier he wanted to do), revoking the one he had written almost 30 years before, which had left his entire estate to his brother, Jerry Hook. *CP-28-30, CP-118 ("I want to make a new will").* Bert prepared his last will in Arizona and signed it there before two attesting witnesses, in accordance with Arizona law. *CP-472 (citing A.R.S. 14-2502(A)); CP-235.* One of them, Linda Darland, affixed her signature to the Arizona will at the time Bert signed and, being a notary public, acknowledged his signature and set her official notary seal to the document. *CP-472.* The other attesting witness, Anna Levitte, affixed her signature to the Arizona will in Spokane, Washington shortly after Bert died, as allowed by both Arizona law and Washington law.[1] *CP-29; CP-30.* The trial court would eventually make an unchallenged finding that Bert's last will from Arizona was valid "on its face" under Arizona law. *CP-472.*

[1] *In Re Estate of Jung, 109 P.3d 97, 98 (Az. 2005) ("we determine that A.R.S. 14-2502 does not preclude a witness from signing a testamentary document after the testator has died... ").* Washington also allows proof of wills by attesting witnesses after a testator's decease. *See, RCW 11.20.020(2); RCW 11.12.020(2) (foreign wills deemed valid "whenever executed").*

Bert's brother, Jerry Hook, despite knowing of the existence of the last will from Arizona (but without disclosing to the court), admitted to probate in San Juan County the revoked 30-year-old will from Washington. *CP-1-5.*

The personal representative under Bert's Arizona will, Jim Atkinson, objected and, as was his legal duty, presented the Arizona will to court, seeking revocation of the Letters Testamentary issued to Jerry Hook by the San Juan County Superior Court. *CP-15-17.* A will contest ensued.

In the course of proceedings, Jerry Hook conceded that his brother, Bert Hook, had "executed" his Arizona will in Arizona, *CP-82 ("it is uncontroverted that Mr. Hook executed the document entitled Bert Hook Will, Last Will and Testament, in Arizona").* He conceded the proper choice of law to apply was Arizona law. *CP-83 (courts have "uniformly applied the law of the location where a will was executed in determining the validity of the execution of such will").* The parties stipulated to it, and the trial court entered an Order establishing that Arizona law would apply. *CP-84 (Stipulated Order) ("Arizona law will apply to determine the validity of the execution of the Arizona will of Bert W. Hook dated February 13, 2012").*

Having done so, Jerry Hook moved for summary dismissal of the will contest under Arizona law. *CP-195.* The trial court denied the motion

finding factual issues remained. *CP-299-301.* Then, he moved a second time for summary dismissal, *CP-384,* this time taking the contrary position that "Washington law applies to the mode of legal execution of the Arizona will", *CP-385,* and that he should be permitted to renege on his prior concessions that 1) the Arizona will was "executed" in Arizona; 2) that the law of the location where it was executed (Arizona) should apply; and 3) that he should be permitted to unstipulate to the Stipulated Order entered by the court -- all because attesting will witness Anna Levitte affixed her signature to the Arizona will in Spokane, Washington, not Arizona.[2]

Initially, the trial court disagreed with Jerry Hook's arguments on his second motion for summary dismissal, finding correctly, as mentioned, that the Arizona will was "on its face" valid under Arizona law, bearing, as it did, the signatures of the testator and two attesting witnesses. *CP-472.* It also correctly ruled, as a matter of law, that our Legislature intended by the foreign wills proviso of RCW 11.12.020(1) "to allow the admission of wills properly executed under the laws of jurisdictions other than Washington." *CP-472.* This, it said, was the "clear legislative intent" of the statute. *Id.* Moreover, the trial court denied this second motion for summary dismissal because it could not bring itself to defeat what it found to be the apparent last wishes of Bert Hook. *CP-474 (statute "does not require the court to*

[2] There is no requirement in either Arizona or Washington that an attesting will witness must affix a signature in any particular place.

defeat the apparent last wishes of Bert Hook"). The trial court carefully, specifically and correctly applied the principles set forth in the case of *In Re Elliott's Estate, 22 Wn.2d 334, 351, 156 P.2nd 427 (1945),* holding that a testator's intentions are a "sovereign guide" and statutes may not be construed so as to defeat the will of a testator unless such construction be absolutely required. *Id; CP-473.*

Finally, the trial court also ruled that "the most significant acts" regarding execution of the Arizona will were: (1) that of the testator signing the document and, (2) that two people witnessed the signing, both of which it found occurred in Arizona. *CP-473.* All these findings and conclusions remain unchallenged.

The court concluded that "the Arizona will was not executed in Washington." *CP-474.* Despite the fact that the last act to complete execution of the Arizona will occurred in Washington; "its admission to probate in Washington is not dependent upon compliance with the formalities of Washington law." *Id.* Rather, the court said, it should be "deemed legally executed if facially valid under the laws of Arizona when Ms. Levitte signed as a witness." *Id.* The trial court rejected the argument that the place where Anna Levitte affixed her signature made Bert's valid last will from Arizona a Washington will; it rejected the technical construction Jerry Hook advocated.

Eight days later, Jerry Hook moved for reconsideration. *CP-483.* He insisted that the trial court had erred because post-death affixation of an attesting witness's signature to a will should be prohibited regardless of Arizona's laws and, significantly, that "the testator's intent should have been ignored." *CP-503.*

On July 11, 2014, the trial court changed its mind, reversed itself, vacated the Stipulated Order and dismissed Atkinson's will contest with prejudice, citing unknown "implications" that a document may be considered executed in a place other than where the last act necessary to make it an executed document occurred. *CP-574.* In other words, because attesting will witness Anna Levitte affixed her signature to Bert's last will in Washington, not Arizona, the trial court could construe the word "executed" in Washington's foreign wills proviso to mean the Arizona will was executed in Washington and did not comply with Washington's will formalities. The facially valid last will from Arizona became an invalid Washington will because of this construction.

By allowing Respondent to take an inconsistent position, renege on his concessions of fact and stipulations of law and, using technical construction to change the choice of law by which the validity of the Arizona will would be determined, the testator lost his testamentary freedom, his recognized intentions were defeated, the legislative intent of

Washington's foreign will proviso was defeated and this court's prohibition against defeating a testator's valid will and intentions by technical construction of a statute was eviscerated. *In Re Elliott's Estate, supra @ 351.*

Atkinson appealed on several grounds specifically asking the Division I Court of Appeals, among other things, to (1) reverse the decision to dismiss with prejudice, (2) to reverse as error the trial court's accommodation allowing Jerry Hook to unstipulate and (3) to review his challenge to personal jurisdiction of the trial court over him. *Brief of Appellant @ 7 (Assignment of Error No. 3); Appellant's Reply @ 6; CP-414-415 (judicial estoppel precludes second motion for summary dismissal).*

On May 9, 2016, the Division One Court of Appeals by published Opinion affirmed the trial court's summary dismissal on reconsideration. *See, Published Opinion.* The Court candidly acknowledged that if the validity of the Arizona will is assessed under the Arizona statute, summary judgment was improperly granted. *Opinion dated May 9, 2016 @ p. 7.* It said the "preliminary and dispositive issue is the meaning of the word "executed" as used in RCW 11.12.020. *Id.* It held that the plain meaning of the word must comprise all the acts of the testator and witnesses and, because Anna Levitte affixed her signature in Washington, Bert Hook's last

will from Arizona "...is a Washington will, not a foreign will." *Id. @ 9.* In doing so, the Court navigated around the principles of *In Re Estate of Elliott, supra,* concluding (erroneously) that *Elliott's* principles could be disregarded because it was undisputed there that the competing wills in the case were both properly executed and that was "not the case here." *Opinion @ 11.*[3]

Finally, without discussion or analysis at all, the Court of Appeals made no ruling on Petitioner Atkinson's issue of judicial estoppel and, refused to decide whether the trial court could exercise *in personam* jurisdiction over him.

Petitioner seeks review here.

V. Direct and Concise Reason Why Review Should be Accepted per RAP 13.4(c)(7).

a) The principles of *Elliott's* case apply to prohibit construction of a statute which defeats both the testator's intentions and the intent of the statute itself. (Statement of Issues Nos. a), b))

As the trial court correctly recognized, this is a case of "first impression" that "turns on a technicality." *VRP p. 35, l. 17, 19 ("legal issue of first impression"); VRP p. 10, l. 22 (court's decision "turns on a technicality").* Nowhere in the history of Washington's jurisprudence has a facially valid foreign will been thrown out by technically construing a word

[3] This is incorrect; the trial court in unchallenged findings and conclusions found the Arizona will was valid on its face and complied with all of Arizona's will formalities. The Arizona will was properly executed.

in Washington's foreign wills proviso (allowing a stipulated choice of law to change) which defeated both the testator's recognized intentions and the intention of Washington's Legislature in deeming valid foreign wills valid. The trial court's decision on reconsideration and the Court of Appeals affirmation of it are in conflict with the decisions of this court under RAP 13.4(b).

Obviously, by navigating around the principles of *Elliott's* case, the Court of Appeal's decision is in conflict with it. *Elliott* should neither be ignored nor its principles relaxed. It is simply incorrect for the Court of Appeals to say that Bert's Arizona will was not a facially valid foreign will after the trial court itself made unchallenged findings to that effect. *CP-472.*

It is also incorrect to say that the word "executed" has a "plain meaning". Obviously, the meaning of this single word, undefined by statute, meant something else when Jerry Hook conceded his brother's will was "executed" in Arizona and, just as obviously, its meaning was not plain when the trial court refused to construe it in such a way. The meaning of a word undefined in a statute must be read in context, not isolation. *City of Seattle v. State, 136 Wn.2d 693, 965 P.2d 619 (1998) (a statute is ambiguous if it contains a term undefined by the statute and the meaning of the term is not plain); State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314*

(1992) (courts avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment prevails over express but inept wording.)

The Court of Appeal's Opinion is contrary to a litany of decisions of this court upholding the supremacy of a testator's intentions. *See, Elliott, supra @ 351 (testator's intentions are "sovereign guide").* The Court of Appeal's Opinion is contrary to a litany of this court's decisions recognizing the paramount duty of statutory construction is to ascertain and give effect to legislative intentions and that the literal meaning of words used in the statute should not produce a result which is unlikely, absurd or strained. *See, State v. Elgin, 118 Wn.2d 551, 825 P.2d 314 (1992).*

Here, the Court's published opinion holds that the word "executed" has a plain meaning such that our State Legislature in 1917 could not have intended to deem valid foreign wills legally executed, a result which seems absurd or strained to Petitioner. Significantly, our Legislature expressly amended Washington's foreign wills proviso in 1990 to eliminate a prior requirement that execution of foreign wills take place "without the state". *Washington Session Laws 1990, ch. 79.* It makes no difference now where attesting will witness Anna Levitte affixed her signature to Bert's Arizona will and doing so in Spokane did not make it a Washington will. The 1917 Legislature could not have meant that facially valid foreign wills and

testator's intentions could be defeated by the caprice of the location where an attesting witness affixed a signature. The 1990 amendment made this clear. In this case, it is undisputed and incontrovertible that our Legislature intended that valid foreign wills be deemed legally executed in Washington. Besides these, as in Arizona, our state legislature mandates that courts give due regard for a testator's intentions, not disregard them. And, Washington's probate jurisprudence, as in Arizona, is full of reported decisions stating and restating the major tenent of probate law, that court's will go to the utmost possible length to carry into effect the testator's wishes and that these wishes will be sustained wherever possible. *See, Elliott, supra @ 350, citing In Re Peter's Estate, 101 Wash. 572, 172 Pac. 870 (1918); In Re Phillip's Estate, 193 Wash. 194, 74 P.2nd 1015 (1938); Dean v. Jordan, 194 Wash. 661, 79 P.2nd 331 (1938), etc.* This is a "sovereign guide." *Elliott, surpa @ 351.*

There is no dispute in this case that Bert's Arizona will is facially valid under Arizona law. There is no dispute that Washington law deems facially valid foreign wills legally executed. There is no dispute in this case that defeating the testator's intentions and the Legislature's intent (to recognize valid foreign wills) was effected by technical and literal construction of the meaning of the word "executed" in Washington's foreign wills proviso -- but only after permitting Jerry Hook to renege on

his concessions and stipulations. There is no dispute in this case that any other dictionary meaning attributed to the undefined word "executed", as the Legislature intended 100 years ago, would have resulted in giving effect to the testator's intentions, to the legislative intention and to the rules and principles of *Elliott's* case and its progeny. *See, discussion @ CP-512-518 (single words in statutes should not be read in isolation; context supplies meaning).* [4]

And, even if the Legislature in 1917 had intended to have the word "executed" mean every act necessary to make a will valid, it did not intend to encroach over onto Arizona's probate scheme and make the place where one act occurred control its validity.

b) Arizona law applies to the execution requirements of Bert's last will. (Statement of Issues Nos. c), d) and e)).

Although Petitioner Atkinson specifically asked the Court of Appeals for a decision on the propriety (and fairness) of allowing Respondent to take inconsistent positions of fact and law in the litigation, the Court of Appeals did not rule on the issue. This omission seems to endorse Respondent's position that civil litigants are permitted to take inconsistent positions on both questions of fact and law. By failing to rule on the issue of judicial estoppel to take inconsistent positions in the litigation, the Court of Appeals deprived Mr. Atkinson of its consideration

[4] *See, Estate of Griffen, 86 Wn.2d 223, 226,543 P.2d 245 (1975) ("technical rules of construction may not be invoked to defeat intent").*

and determination, contrary to the decisions of this court, which admonish courts of appeals to decide cases on the merits. *RAP 1.2(a), see , State v. Olson, 126 Wn.2d 315, 322, 893 P.2nd 629 (1995).* And in any event, the Court of Appeals Opinion is in conflict with both this court's recent ruling in *Anfinson v. FedX Ground, 174 Wn.2d 851, 281 P.3d 289 (2012),* and, its own recognition of the holding of *Anfinson,* in *Kellar v. Estate of Kellar, 172 Wn. App. 562, 291 P.3d 906 (Div. I, 2012).*[5]

Respondent relied on a line of cases in the course of this will contest arguing for the proposition that courts are free to vacate stipulated orders concerning questions of law.[6] But *Anfinson* directly and unequivocally holds that judicial estoppel applies to assertions of fact and questions of law. *Anfinson, supra @ 865-6, citing Helfand v. Gerson, 105 F.3d 530, 535 (9th Cir. 1997).* One or the other must be right; not either or both as whim may dictate.

This court's holding in *Anfinson* cannot be reconciled with the cases argued by Respondent allowing him to unstipulate. Respondent has clearly taken inconsistent positions on questions of fact and/or law and should be estopped to do so. Without some explication of the boundaries between

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[5] In *Anfinson,* the Court rejected any distinction between application of judicial estoppel to assertions of fact and questions of law holding, that judicial estoppel may apply to questions of law. *Anfinson, supra @ 865-6, citing Helfand v. Gerson, 105 F.3d 530, 535 (9th Cir. 1997).*

[6] These cases included *Warden v. Smith, 178 Wn. App. 309, 314 P.3d 1125 (2013); State v. Drum, 168 Wn.2d 23, 33, 225 P.3d 237 (2010); CP-392.*

judicial estoppel and a court's power to vacate stipulations upon request, Petitioner's case cannot be wholly or fairly decided. Mr. Atkinson would like a ruling. This issue involves a question of substantial public interest that should be determined by the Supreme Court because all Washington civil litigants (and the attorneys who represent them) should know the boundaries of these conflicting legal doctrines, or the extent to which they may overlap. A substantial public interest exists because the purpose of the doctrine of judicial estoppel is to protect the integrity of the judicial process. *Kellar, supra @ 580, citing New Hampshire v. Maine, 532 U.S. 742, 749, 121 S. Ct. 1808, 149 L. Ed. 2nd 968 (2001).* Judicial integrity is important to Petitioner Atkinson and all who appear in Washington courts.

c) *Lex loci contractus* was abolished; a "significant relations" test applies in will contests, too. (Statement of Issues Nos. d) and c)).

By determining that the plain meaning of the word "executed" as used by our state legislature 100 years ago required attesting will witness Anna Levitte to affix her signature to the Arizona will in a particular place (Arizona), the Court of Appeals gave its approbation to the abolished doctrine of *lex loci contractus*.[7] This, too, is in conflict with the decisions of this court and other courts of appeals.

[7] Said another way, the Court of Appeals held that because Anna's affixation of her signature occurred in Washington, the Arizona will became a "Washington will". *Opinion @ 11.*

The rule of *lex loci contractus* was abolished by this court long ago and replaced by the rules enunciated in the Restatement (Second) *Conflict of Laws. Baffin Land Corp. v. Monticello Mot. Inn, 70 Wn.2d 875, 899, 425 P.2d 647 (1967) ("we should no longer adhere to the rule of lex loci contractus").* The law of the state which has the most significant relationships with a controversy governs the validity and effect of a contract. *Id. @ 900.* The Court of Appeal's decision is in conflict with *Baffin* and the trial court's unchallenged findings that "the most significant acts" in this case occurred in Arizona – and "significantly more" of them. *CP-473.* Review is warranted.

d) The court should decide undecided issues pursuant to RAP 13.7.

The Court of Appeals declined to rule on Petitioner Atkinson's challenge to *in personam* jurisdiction over him in the trial court saying it is not an appealable final order under RAP 2.2(a). *Opinion @ 12.* It also failed to rule on Atkinson's judicial estoppel issue. Both should be decided.

VI. Conclusion.

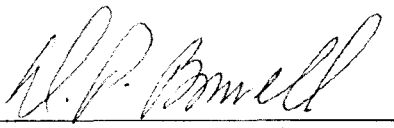
Jim Atkinson has presented to the court the decedent's facially valid, legally executed last will from Arizona. It reflects the testator's intentions, as the trial court found. Its validity in Washington is statutorily deemed established under Washington's foreign wills proviso. The State Legislature in 1990 statutorily eliminated any requirement that execution of

a foreign will take place wholly or partially outside of the state of Washington and, at the same time, declared that the provisions of its foreign wills proviso applied to any will "whenever executed." The fact that attesting will witness Anna Levitte affixed her signature to the Arizona will within this state is not fatal to its validity. The fact that she affixed her signature to the last will in Washington does not, by interpretation, convert the Arizona will into a Washington will. The fact that she affixed her signature in Washington is no ground or basis for changing the choice of law. The abolished rule of *lex loci contractus* finds no exception in this case. In any event, choice of law in this case should never have been allowed to change once Respondent took the position that Bert's last will was "executed" in Arizona and Arizona law should apply to the determination of its validity. That act cannot be reconciled with the principles of judicial estoppel most recently announced in this court in the *Anfinson* case.

The court should affirm the primacy of a testator's intentions as a "sovereign guide" in probate matters and discountenance any relaxation of *Elliott* and its progeny. This is the little featherweight which has been ignored and defeated by the Court of Appeal's decision. The court should accept the trial court's correct determination that the Arizona will manifests Bert Hook's testamentary intentions and last wishes. The court should

accept the trial court's correct determination that the Arizona will is facially valid under Arizona law. The court should accept the trial court's correct determination that, by Washington statute, the Arizona last will is deemed valid and that this is the clear intent of Washington's foreign wills proviso. The court should reprehend the practice, the impropriety and the unfairness of allowing litigants to unstipulate to facts or law. The court should revoke the Letters Testamentary issued to Jerry Hook and name Mr. Atkinson as the personal representative of Bert's estate. And, the court should, pursuant to RAP 13.7, decide the issues that were left undecided by the Court of Appeals -- issues that bear on just resolution of the case. The court should declare that Arizona law applies to all issues regarding the Arizona will.

Respectfully submitted this 7th day of June, 2016.



David P. Boswell, WSBA #21475
Attorney for Petitioner/Appellant

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 June 7, 2016, I arranged for service of the foregoing APPELLANTS' PETITION FOR REVIEW TO SUPREME COURT to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals – Div. I One Union Square 600 University Street Seattle, WA 98101	X E-File
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DATED at Spokane, Washington this 7th day of June, 2016.

Linda LaPlante

Linda LaPlante

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Estate of BERT W. HOOK, Deceased. JAMES ATKINSON, Appellant, v. ESTATE OF BERT W. HOOK, JERRY HOOK, Personal Representative, Respondent.	)	No. 73102-5-I DIVISION ONE PUBLISHED OPINION FILED: May 9, 2016

BECKER, J. — A will is not "executed" under RCW 11.12.020 until the occurrence of the last formal act necessary to make the will valid. Here, although the testator and one witness signed a will in Arizona, the second witness signed it in Washington. Therefore, the will was executed in Washington, not in Arizona. The will is not valid in Washington because the second witness did not sign in the testator's presence.

At issue is an order granting summary judgment. To review an order granting summary judgment, we engage in the same inquiry as the trial court. We will not resolve factual issues but rather must determine if a genuine issue exists as to any material fact. All inferences are construed in the light most

favorable to the nonmoving party. In re Estate of Black, 153 Wn.2d 152, 160-61, 102 P.3d 796 (2004).

The will in question was signed in Arizona by Bert Hook shortly before his death. Bert Hook was an unmarried man with no children. He maintained a residence in eastern Washington. He usually spent winters in a small town in Arizona. In 1988, Bert executed a valid Washington will, and in 1999, he added a valid codicil. These documents, which we will refer to as "the 1988 will," devised all of Bert's estate to Jerry Hook, his older brother and only sibling. Jerry was designated as personal representative.

In September 2011, at the age of 77, Bert underwent heart surgery in Spokane, Washington. After three weeks in an inpatient rehabilitation center, Bert was discharged to stay with Jerry in western Washington. Within a few days, Bert wanted to leave. Bert asked James Atkinson, a longtime friend who was then in Arizona, to come and get him. Atkinson drove up from Arizona with another friend, Anna Levitte. They took Bert to eastern Washington to help him close up his residence. The three then departed for Arizona, where Bert had his own residence in a rural airpark.

In January 2012, Bert prepared a new written will, which we will refer to as "the Atkinson will." The Atkinson will revokes the 1988 will and names Atkinson as the personal representative. The beneficiaries include Atkinson, Levitte, Jerry Hook, and several other individuals.

On February 13, 2012, Bert went with Levitte to the office of Linda Darland, a notary public. Levitte and Darland watched Bert sign the Atkinson will. Darland then signed the will and applied her notary seal.

On February 18, 2012, Bert Hook committed suicide in Arizona. Atkinson notified Jerry Hook and informed him that Bert had made a new will.

Atkinson contacted David Boswell, Bert's attorney in Spokane, about probating the Atkinson will. Atkinson and Levitte drove to Spokane on February 27, left the Atkinson will with Boswell for his review, and returned to Arizona.

On March 9, 2012, Jerry Hook petitioned the San Juan County Superior Court for an order admitting the 1988 will to probate. The petition was granted, and the court issued letters testamentary to Jerry Hook on March 12.

Meanwhile, Boswell discovered that under Arizona law, a will signed by a testator is valid if it is also signed by two witnesses within a reasonable time. On March 29, 2012, Levitte traveled to Spokane and signed the Atkinson will.

On April 4, 2012, Atkinson filed a petition in the superior court of San Juan County contesting the 1988 will on the basis that the Atkinson will expressly revoked the 1988 will. Atkinson moved for withdrawal of the letters testamentary that had been issued to Jerry Hook. The trial court denied this motion.

On April 17, 2012, Atkinson filed an action in Arizona to probate the Atkinson will.

On July 6, 2012, the San Juan County court entered an order accepting the parties' stipulation that the "facial validity" of the Atkinson will would be determined under Arizona law.

On April 26, 2013, after an evidentiary hearing, the San Juan County court entered an order determining that Washington was Bert Hook's domicile at the time of his death. As a result of this determination, which is unchallenged on appeal, the Arizona court stayed the probate action commenced by Atkinson and eventually dismissed it. See ARIZ. REV. STAT. § 14-3202.

On May 24, 2013, Jerry Hook moved for partial summary judgment, arguing that the Atkinson will was invalid under Arizona law because Darland signed the will as a notary, not as a witness, and Levitte did not sign it within a reasonable time of witnessing Bert Hook's signature. On July 26, 2013, the trial court denied this motion, finding there were factual issues with respect to whether the Atkinson will was validly executed under Arizona law.

On February 12, 2014, Jerry Hook filed a second motion for partial summary judgment. This time he argued that the will was invalid under Washington law. He asked the court to vacate the stipulation to Arizona law. The court denied the motion. Jerry Hook moved for reconsideration. On July 11, 2014, the court granted reconsideration and ruled that the Atkinson will was executed in Washington, not Arizona, and its admission to probate was dependent upon compliance with the formalities of Washington law, not Arizona law. Because the Atkinson will is plainly invalid under Washington law, the court dismissed Atkinson's will contest with prejudice. As a result, the letters testamentary issued to Jerry Hook remain in effect and Bert Hook's estate will be probated under the 1988 will. Atkinson appeals.

MEANING OF "EXECUTED"

Atkinson contends that the Atkinson will was executed in Arizona, is valid under Arizona law, and must be given effect in Washington as the last expression of Bert Hook's wishes.

The starting point is Washington's Statute of Wills, RCW 11.12.020. This statute "describes the proper execution of all wills." Estate of Black, 153 Wn.2d at 164.

> **Requisites of wills—foreign wills.** (1) 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: PROVIDED, 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, 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, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.
>
> (2) This section shall be applied to all wills, whenever executed, including those subject to pending probate proceedings.

RCW 11.12.020.

The Atkinson will was not attested to by Levitte, the second witness, in the presence of Bert Hook.[1] For this reason, the Atkinson will does not satisfy the formalities required of Washington wills by the first part of RCW 11.12.020(1). Unless the proviso for foreign wills applies, the Atkinson will cannot be given effect.

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[1] It is assumed for purposes of summary judgment that the signature of Darland, the notary, is one attestation by a competent witness.

Under the proviso, a will "executed in the mode prescribed by the law of the place where executed" will be given effect in Washington. For example, a holographic will is effective in Washington if it is valid in the state of the testator's domicile. In re Wegley's Estate, 65 Wn.2d 689, 690, 399 P.2d 326 (1965).

Atkinson contends the will is legally enforceable in Washington because it is valid in Arizona. The Arizona statute requires two witnesses for execution, but it does not require that the witnesses sign in the presence of the testator. Witnesses need only sign "within a reasonable time" after witnessing the testator's signature or acknowledgement.

> **Execution; witnessed wills; holographic wills**
>
> **A.** Except as provided in §§ 14-2503, 14-2506 and 14-2513, 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.
>
> **B.** Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills under § 14-2503, portions of the document that are not in the testator's handwriting.

ARIZ. REV. STAT. ANN. § 14-2502. As construed by an Arizona appellate court, the Arizona statute "does not preclude a witness from signing a testamentary document after the testator has died." In re Estate of Jung, 210 Ariz. 202, 203, 109 P.3d 97 (Ariz. Ct. App. 2005). It requires "only that the signature be affixed within a reasonable time of witnessing the testator's signature or acknowledgment." Estate of Jung, 210 Ariz. at 207.

If the validity of the Atkinson will is assessed under the Arizona statute quoted above, as Atkinson contends it should be, summary judgment was improperly granted. Levitte signed the will 45 days after she witnessed the signing of the will by Bert Hook. Conceivably, further proceedings would determine that 45 days is "within a reasonable time" and that the signatures of Levitte and Darland satisfy the Arizona statute.

But the proviso for foreign wills in RCW 11.12.020(1) allows the validity of the Atkinson will to be assessed under the Arizona statute only if Arizona was the "place where executed." The preliminary and dispositive issue, then, is the meaning of the word "executed" as used in RCW 11.12.020. Atkinson contends a will is "executed" once the testator has signed it. He claims the Atkinson will was executed in Arizona on February 13, 2012, when Bert Hook signed it in the presence of Levitte and Darland.

The meaning of a statute is a question of law reviewed de novo. The court's fundamental objective is to ascertain and carry out the legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found, is appropriate as part of the determination whether a plain meaning can be ascertained. Dep't of Ecology, 146 Wn.2d at 10; see also Estate of Black, 153 Wn.2d at 164. The statutory context must be taken into account. Dep't of Ecology, 146 Wn.2d at 11.

Where the legislature has not defined a term, we may look to dictionary definitions. Cornu-Labat v. Hosp. Dist. No. 2 Grant County, 177 Wn.2d 221, 231-32, 298 P.3d 741 (2013). Both parties cite dictionary definitions to the effect that "execute" means to make a document valid or legal by signing. See, e.g., BLACK'S LAW DICTIONARY 689 (10th ed. 2014) ("To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form"). That definition is useful, but it does not go far enough to support Atkinson's assertion that a testator's signature on a will is enough by itself to execute the will.

The trial court concluded that the execution of a document means completing all of the steps necessary to make the document a legal instrument. By this reasoning, a will is not "executed" until the occurrence of the last formal act necessary to make the will valid. We agree and hold that the meaning of the word "executed" in RCW 11.12.020 comprises the acts of the witnesses as well as the act of the testator.

That this is the plain meaning of "executed" in RCW 11.12.020 is demonstrated by examining a related statute, RCW 11.20.070(1). In the case of a lost or destroyed will, "the court may take proof of the execution and validity of the will and establish it, notice to all persons interested having been first given." RCW 11.12.070(1). The use of RCW 11.12.020 is required to determine whether a lost will was properly executed under RCW 11.20.070. Estate of Black, 153 Wn.2d at 164. In Estate of Black, it was clear that the lost will had been signed by the testator, but it was unclear whether the document had been signed by

more than one attesting witness. The court held that proof of a signature by a second attesting witness was required to complete the formalities of execution. Estate of Black, 153 Wn.2d at 166.

The formalities of execution under both Washington and Arizona law include two witnesses who have either "attested" or "signed" the will. RCW 11.12.020(1); ARIZ. REV. STAT. ANN. § 14-2502(3). The Atkinson will, although signed by Bert Hook in Arizona, could not be a valid or legal instrument under Washington or Arizona law until it had the signatures of two witnesses. The signature of the second witness was placed on the Atkinson will on March 29, 2012, when Levitte signed it in Spokane. The trial court reasoned that while "significant acts toward the execution" of the Atkinson will occurred in Arizona, it "only became an executed document when Ms. Levitte signed it and she signed it in Washington."

We affirm the trial court's reasoning. Because Arizona was not the "place where executed," RCW 11.12.020(1), the proviso in the statute for foreign wills does not apply. The Atkinson will is a Washington will, not a foreign will. As a Washington will, it is invalid. There is no second witness who attested to the Atkinson will while in the presence of Bert Hook and at his direction or request. The Atkinson will cannot be admitted to probate in Washington either as a foreign will or as a Washington will.

Atkinson opposes this result with the argument that Bert Hook's last wishes expressed in the Atkinson will may not be defeated by a technical construction of the term "executed." He derives this argument from In re Estate

of Elliott, 22 Wn.2d 334, 351, 156 P.2d 427 (1945). In that case, the court stressed the importance of carrying out the expressed will of the testator.

> "Courts will not, by technical rules of statutory or other legal construction, defeat the right of the testator to have effect given to the latest expression of his testamentary wishes."
>
> . . .
>
> "Statutes should not be construed so as to defeat the will of the testator, unless such construction be absolutely required. Neither should the will of a testator be defeated, as here, by the carelessness of the persons whose duty it was to present the codicil for probate. It is not their rights which are taken away, but the right of the testator to have his will carried out."

Estate of Elliott, 22 Wn.2d at 351, quoting In re Estate of Bronson, 185 Wash. 536, 549-50, 55 P.2d 1075 (1936) (Beals, J., dissenting). See also RCW 11.12.230 (courts must have "due regard" for the testator's intent).

Atkinson's reliance on Estate of Elliott is misplaced. He quotes the above passage out of context. Read in full, Estate of Elliott shows that a court will not concern itself with carrying out a testator's wishes expressed in a will unless it is first established that the will is properly executed and admissible in probate.

In Estate of Elliott, more than seven months after the decedent's first will was admitted to probate, the appellant petitioned to have a later will admitted to probate. The trial court rejected the appellant's petition because it was outside the statute of limitations for a will contest. The Supreme Court reversed, holding that the statute of limitations for a will contest is inapplicable when a later will is offered. A court of probate "has inherent authority at any time, while an estate is still open, to admit to probate a later will than that theretofore probated." Estate of Elliott, 22 Wn.2d at 361.

In reaching that conclusion, the court said that "the right to dispose of one's property by will is not only a valuable right but is one assured by law, and will be sustained whenever possible." Estate of Elliott, 22 Wn.2d at 350. The intent of the testator is "'a fundamental maxim, the first and greatest rule, the sovereign guide, the polar star, in giving effect to a will.'" Estate of Elliott, 22 Wn.2d at 351, citing JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS, § 413, at 352 (2d ed. 1926). But the court qualified these statements by adding that "*the instrument must, of course, first be admitted to probate*" and the court will give effect to "the latest and final expression of the decedent's testamentary wishes, *if such result can be obtained within the established rules of law.*" Estate of Elliott, 22 Wn.2d at 351 (emphasis added).

The established rules of law include the formalities of executing a will in compliance with RCW 11.12.020. In Estate of Elliott, it was undisputed that the competing wills were both properly executed. That is not the case here. Because the Atkinson will was not properly executed, it cannot be admitted to probate within the established rules of law in Washington. Therefore, the wishes of Bert Hook expressed therein will not be given effect.

LETTERS TESTAMENTARY

In April 2012, the trial court denied Atkinson's motion to revoke the letters testamentary that appointed Jerry Hook as the personal representative of Bert Hook's estate. The basis for the motion was Atkinson's assertion that the appointment of a personal representative should follow the Atkinson will rather than the 1988 will. Atkinson argues that the letters testamentary should be

revoked because Jerry Hook was deceitful to the trial court. The alleged deceit is that when Jerry Hook submitted the 1988 will to probate, he did not disclose to the court that Atkinson had told him there was a more recent will. Because this argument was not raised below in connection with the request to revoke the letters testamentary and is unsupported by citation to relevant authority, we do not consider it.

COUNTERCLAIMS

When Jerry Hook filed an answer to Atkinson's will contest petition, he asserted counterclaims based on allegations that Atkinson abused and financially exploited Bert Hook, a vulnerable adult. Atkinson moved to dismiss the counterclaims for lack of personal jurisdiction. The trial court denied the motion to dismiss. Atkinson contends the trial court erred by asserting in personam jurisdiction over him for the purpose of hearing the counterclaims.

As Jerry Hook points out, the denial of the motion to dismiss the counterclaims for lack of personal jurisdiction is not an appealable final order under RAP 2.2(a). The counterclaims are still pending in the superior court. Jerry Hook nevertheless joins Atkinson in asking this court to decide the issue of personal jurisdiction, an issue that is not properly before this court on direct appeal, to avoid a second appeal. As a basis for discretionary review, Jerry Hook invokes RAP 1.2(a) ("rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits").

Discretionary review is not granted under RAP 1.2(a). The criteria for discretionary review are stated in RAP 2.3(b). Neither party has addressed RAP

2.3(b). We decline to review the order denying the motion to dismiss Jerry Hook's counterclaims.

ATTORNEY FEE REQUESTS

Both parties have requested an award of attorney fees on appeal under RCW 11.96A.150(1). Jerry Hook additionally asks for fees under RCW 11.24.050.

When Atkinson's will contest petition was dismissed in the trial court, it was not apparent that Atkinson had a right to an immediate appeal. The trial court refused to enter findings under CR 54(b) and denied certification for discretionary review under RAP 2.3(b)(4). Presumably because the case had not ended, neither party made a request for attorney fees in the trial court. Later, however, this court allowed Atkinson to proceed with a direct appeal, having determined that the order dismissing the will contest was an appealable final order under RAP 2.2(a). See Estate of Barnard, 182 Wn. App. 692, 728, 332 P.3d 480, review denied, 339 P.2d 634 (2014).

The attorney fee statutes cited by the parties allow the court to exercise considerable discretion. The trial court, being more fully acquainted with the entire case and the parties, is in a better position than this court to exercise that discretion. Because of the posture of the present case, the trial court has not yet had the opportunity to consider whether an award of attorney fees to either party is appropriate. Under these circumstances, we decline to award attorney fees on appeal to either party and instead defer to the trial court. On remand, the trial court may hear requests for attorney fees, including fees for this appeal.

Affirmed and remanded for further proceedings consistent with this opinion.

Becker, J.

WE CONCUR:

Spearman, J.

Schindler, J.