Supreme Court Cause No. 100971-2
Court of Appeal Cause No. 82328-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Estates of:

PATRICIA A. BERG,
and S. EDWARD BERG,
Deceased.

RANDALL A. BERG,
Appellant,

vs.

KATHLEEN M. MYRON, in her capacity as personal representative,

Respondent.

AMENDED PETITION FOR REVIEW

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INTRODUCTION

Probating a will is one of the most fundamental and important functions of a court, occurring daily in Washington trial courts and affecting tens of thousands of Washingtonians. Like with contract interpretation, the paramount goal of will interpretation is to determine the testator's intent. In virtually every circumstance, that intent cannot be ascertained by the plain words of the will itself without examining the surrounding circumstances of the will's execution. This Court held in *Matter of Est. of Bergau* that surrounding circumstances may be considered, even absent ambiguity, when ascertaining the testator's intent because that approach consistently yields interpretations likely to coincide with the meaning the testator contemplated. 103 Wn.2d 431, 435–36, 693 P.2d 703 (1985).

The Court of Appeals' decision has called this holding into question. Now, it is unclear what evidence Washington courts may consider *before* a finding of ambiguity as to a testator's intent. Review is warranted under RAP 13.4(b)(1) to clarify the evidence that a Washington court may consider when interpreting a will to determine the testator's intent. Review is also warranted because this is an issue of substantial public interest, affecting thousands of Washingtonians daily. RAP 13.4(b)(4).

The standard of review also plays a vital role in identifying an appellate court's respective role in deciding every issue on review. This

Court has long held that, for mixed questions of law and fact, an appellate court reviews those issues for "substantial evidence." A testator's intent is a question of fact question central to every will interpretation of a will. The Court of Appeals ignored this Court's precedent, applying a de novo standard to review the trial court's findings of fact concerning the interpretation of a will. Review is also warranted under RAP 13.4(b)(1) to re-affirm and clarify that trial courts' interpretation of wills involving ascertainment of a testator's intent are reviewed for substantial evidence.

I. IDENTITY OF PETITIONER

Petitioner is Kathleen M. Myron, in her capacity as Personal Representative for the Estate of Patricia A. Berg ("Kathy").

II. COURT OF APPEALS DECISION

Kathy seeks review of the Court of Appeals' unpublished decision filed on April 4, 2022 in *Matter of Estate of Berg*, No. 82328-1-I (slip opinion attached). The Court of Appeals issued an order denying Kathy's timely motion for reconsideration on April 27, 2022. In its decision, the Court of Appeals reversed the trial court's ruling following a bench trial that Patricia Berg did not intend to exercise the limited power of appointment provided to her in Ed Berg's Will.

III. ISSUES PRESENTED FOR REVIEW

1. The standard of review plays a vital role in identifying an appellate court's respective role in deciding every issue on review. This Court has long held that, for mixed questions of law and fact, an appellate court reviews those issues for "substantial evidence." A testator's intent is a fact question central to every will interpretation. The Court of Appeals ignored this Court's precedent, applying a *de novo* standard to review the trial court's findings of fact concerning the interpretation of a will. Should this Court grant review under RAP 13.4(b)(1) to re-affirm and clarify that trial courts' interpretation of wills involving ascertainment of a testator's intent is reviewed for substantial evidence?

2. Akin to the context rule of contract interpretation, certain facts outside the "four corners" of a will relevant to the testator's intent must be considered by Washington courts in interpreting a will, even if the will is unambiguous. This Court previously established that it is proper for lower courts to ascertain a testator's intent by considering the "surrounding circumstances and language." There is a distinction between "surrounding circumstances" and "extrinsic evidence" in Washington case law. Should this Court grant review under RAP 13.4(b)(1) to clarify that Washington courts must consider "surrounding circumstances and language" when interpreting a will?

3. Every day, citizens of Washington draft wills and Washington courts probate them with the guidance of precedent and prevailing rules of construction. Washington courts' paramount duty is to give effect to a testator's intent. This duty cannot be properly carried out if Washington courts can never analyze the surrounding circumstances existing when a will was signed. Does the Court of Appeal's decision have broad reaching public policy implications that the Washington State Supreme Court should review?

IV. STATEMENT OF THE CASE

Edward and Patricia Berg were married for 65 years and had five children together, including Randall Berg ("Randy") and Kathleen Myron ("Kathy"). During their marriage, Edward and Patricia built a successful equipment rental company called Berg Equipment and Scaffolding, Inc. ("Berg Scaffolding"). Randy and Kathy both worked for Berg Scaffolding for the last three decades. To secure the future for Berg Scaffolding, Edward and Patricia prepared detailed estate plans to guarantee that the next generation could continue to expand upon their hard work.

Edward prepared his Last Will and Testament on February 22, 2013 ("Edward's Will")—approximately one year before he died. CP 25. Edward's Will had two broad objectives: (1) to provide for his wife while she was alive and (2) to minimize any estate tax exposure. CP 28. Therefore, Edward's Will created two credit shelter trusts to benefit Patricia while she was alive and then, after her passing, directed for his fifty percent of the community property to be distributed as follows:

> (b) Gift of Company Stock. I give my interest in the Berg Equipment & Scaffolding Co., Inc. to my children in the following stated shares:
>
> | | |
> |---|---|
> | Thomas E. Berg | 5% |
> | Sharon L. Griffin | 5% |
> | Randall A. Berg | 25% |
> | Christine C. DeLaney | 10% |
> | Kathleen M. Myron | 55% |
>
> (c) Gift of Condo to Tom. I give any interest that I own in the real property located at 609 N. 50th Ave, Yakima, WA 98908 (the "Condo") to my son, Thomas E. Berg, and I also forgive him of any loan obligation that I have made to him in regard to the Condo.
>
> (d) Balance of Estate. I give the balance of my estate to my children in the following stated shares:
>
> | | |
> |---|---|
> | Thomas E. Berg | 22.50% |
> | Sharon L. Griffin | 22.50% |
> | Randall A. Berg | 16.25% |
> | Christine C. DeLaney | 22.50% |
> | Kathleen M. Myron | 16.25% |

Patricia had a limited amount of control over the credit shelter trusts created by Edward's Will. CP 3-4. This was intentional as limited powers of appointment avoid estate tax exposure:

> (a) Limited Power of Appointment. I give my wife a limited testamentary power of appointment to direct how the remaining trust assets shall be distributed. My wife may exercise this power in any valid manner, outright or in trust, in any amounts and proportions; provided that if any of my descendants survive my wife, this power shall be exercisable only in favor of any one or more of my descendants. If this power is exercised by appointing any assets in trust, the appointment shall be effective even though the terms of the trust provide that the trust assets shall be distributed upon the termination of the trust to a beneficiary other than my descendants if none of my descendants are then living. This power may not be exercised, however, in favor of my wife, my wife's estate, my wife's creditors or the creditors of my wife's estate or in the manner described in Section 2041(a)(3) of the Internal Revenue Code. My wife must expressly refer to and exercise this power in her valid Will or codicil for the appointment to be effective.

Id. (emphasis added). Therefore, under Edward's Will, if Patricia did not both "**expressly refer to"** and "**exercise this" limited power of appointment**, the assets would be distributed as set forth above in Edward's Will. *Id.* Edward died on January 24, 2014, Patricia was appointed his personal representative, and Edward's Will was admitted to probate on March 28, 2014. Notably, Randy would receive a smaller percentage of the business than Kathy.

Following Edward's death, Patricia worked with Rehberg Law Group, PLLC and her daughter, Christine DeLaney, to prepare Patricia's Will and the Patricia A. Berg Trust. CP 134-141. There is no evidence that Patricia ever attempted to exercise the Limited Power of Appointment from Edward's Will ("LPOA"). The language in her Will was inserted by the drafting attorney—but not at Patricia's request. At that time, she had not indicated, to anyone, that she intended to exercise the LPOA. There is no express reference to the LPOA in Patricia's Will nor is there an express election to exercise the LPOA in Patricia's Will. The only potential reference relied upon by the Court of Appeals was a subsection of Patricia's Will addressing her remainder estate:

1.2 Remainder Estate. All the rest, residue and remainder of my estate, of whatever nature and wherever situated, of which I may own or be entitled at the time of my death, including property over which I may have a power of appointment which I have not otherwise exercised, released, or refused in writing, to exercise, I give, devise and bequeath to the Trustee of the PATRICIA A. BERG TRUST created under a Trust Agreement dated September 22, 2014, by myself as Trustor, which has been signed prior to this Will and is now in full force and effect, as an addition to the principal of said Trust, under the terms, conditions, and provisions contained in said Trust Agreement and any amendments made to said Trust Agreement subsequent to the date of said Trust. If the Trust created by said Agreement shall have terminated prior to my death, then this paragraph of my Will shall be construed to establish a Trust with the same terms and conditions as said PATRICIA A. BERG TRUST, including any amendments made prior to the date of my death, and all assets provided for in this paragraph shall go to the Trustee therein named.

CP 45. This single passage does not refer to the LPOA and does not identify any single asset or power. The language is general and equivocal; it can apply to many different powers or assets within a single category.

Therefore, based on the language of Patricia's Will and the circumstances that existed at the time she executed her will, Patricia did not intend to exercise the LPOA.

Patricia's Will, without exercising the LPOA, resulted in Kathy and Randy each receiving an equal, forty-percent interest in Berg Scaffolding. CP 74-75. Such equalization was not a coincidence, as it was consistent with Patricia's contemporaneous notes. Patricia intended make certain that her two children each received an equal stake in the company. CP 144. This is also consistent with all the evidence presented at trial, including the testimony of Patricia's daughter, daughter Christine C. Delaney ("Christine") and the testimony of Patricia's drafting attorneys.

Christine testified that her mother did not intend to exercise the LPOA and that it was her mother's intent to divide Berg Scaffolding equally. RP 275-278. To do so, she had to state a higher percentage would go to Randy, in order to balance out the percentages.

Patricia's attorney, Ryan Rehberg, testified that Patricia did not choose to exercise the LPOA. RP 56, 60-61. He made clear that Section 1.2 of Patricia's Will was merely boilerplate and not included at Patricia's direction. RP 77, 79; CP 264. This is also consistent with the testimony of Sabrina Go, the other drafting attorney. Ms. Go testified at trial that Patricia did not intend to exercise the LPOA. RP at 191. Therefore, both the unambiguous language of Patricia's Will and the surrounding circumstances show that Patricia did not exercise the LPOA.

V. ARGUMENT

A. The Court of Appeals Misstated Washington Law in Broadly Ruling Appellate Courts Review De Novo a Trial Court's Interpretation of a Will

This Court in *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982), held that the proper standard of review to apply in situations where there are mixed questions of law and fact is substantial evidence:

> In this case, the Court of Appeals was presented with evidence sharply in conflict, in the form of expert testimony, and the majority determined the weight of the evidence

> contrary to that of the fact finder. The dissent weighed the evidence again, coming to still another conclusion. **We hold that it is not the province of the reviewing court to try the facts de novo when presented with mixed questions of law and fact, whether on appeal from a judgment of the superior court, administrative tribunal, or administrative judge.** *See Bennett Veneer Factors, Inc. v. Brewer*, 73 Wash.2d 849, 441 P.2d 128 (1968).

Franklin County. Sheriff's Off. v. Sellers, 97 Wn.2d 317, 329–30, 646 P.2d 113 (1982). This decision was based on an earlier decision from this Court—*Bennett Veneer Factors, Inc. v. Brewer*, 73 Wash. 2d 849, 850, 441 P.2d 128 (1968). This Court has consistently held that the standard of review is substantial evidence and by applying the de novo standard, the Court of Appeals has confused the issue—thereby necessitating review by this Court.

And this standard makes sense because the trial court (like in this case) hears live testimony, observes the witnesses' demeanor, and makes credibility determinations. The trial court is thus in the best position to make findings necessary for interpretation of a will—which is why this Court made clear that "it is not the province of the reviewing court to try the facts de novo when presented with mixed questions of law and fact . . .". *Id.*

The series of cases cited to support the proposition that an appellate court should review a will *de novo* need clarification. In its opinion, the Court of Appeals relied upon *King v. Snohomish City.*, 146 Wn.2d 420, 424,

47 P.3d 563 (2002), *In re Est. of Wright*, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008), and *Woodard v. Gramlow*, 123 Wn. App. 522, 95 P.3d 1244 (2004). However, *King* did not address mixed questions of law and fact, interpretation of wills, nor the standard of review for a testator's intent. *King*, 146 Wn.2d at 424. *Wright* relies upon *Woodard* for the proposition that an appellate court reviews a will de novo. *Wright*, 147 Wn. App. At 680. *Woodard* then relies upon *King* for the same proposition. *Woodard*, 123 Wn. App. At 1246. In fact, none of the cases support the idea that an appellate court must review a trial court's interpretation of will de novo.

This Court should settle the question of whether a trial court's interpretation of a will is reviewed de novo where a testator's factual intent is determinative. The Court of Appeals in *Little* states that: "The interpretation of a will is a question of law that we review de novo." *Matter of Est. of Little*, 9 Wn. App. 2d 262, 275, 444 P.3d 23 (2019). *Little* relied upon *Curry*. The *Curry* Court stated that: "Interpretation of a will is a question of law, which we review de novo where, as here, the trial court's factual findings are not in dispute and are deemed verities on appeal." *In re Est. of Curry*, 98 Wn. App. 107, 112–13, 988 P.2d 505 (1999). *Curry* cited to three other cases. However, none of those three cases address this issue. *See Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995) (contractor dispute case); *Espinoza v. City of Everett*, 87 Wn. App. 857,

865, 943 P.2d 387 (1997) (forfeiture proceeding); *Erickson v. Reinbold*, 6 Wn. App. 407, 422, 493 P.2d 794 (1972) (standard on summary judgment).

Indeed, substantial evidence review applies to mixed questions of law and fact in a will dispute because "testamentary intent is a question of fact." *See Eisenbach v. Schneider*, 140 Wn. App. 641, 651, 166 P.3d 858 (2007) ("Testamentary intent is a question of fact."); *citing In re Soesbe's Est.*, 58 Wn.2d 634, 636, 364 P.2d 507 (1961) ("Both arguments overlook the primary rule that the construction of a will, including **testamentary intent, is a question of fact to be decided upon the relevant evidence and not by technical rules of law.**") (emphasis added).

This Court should clarify its holding in *Franklin* and determine whether the substantial evidence standard on review of trial courts' interpretation of wills applies. Such a task necessarily involves questions of fact, insofar as they involve questions of a testator's actual intent. "Where, as here, some findings are actually conclusions of law or mixed findings of fact and conclusions of law, we review the factual components under the substantial evidence standard and the conclusions of law, including those mistakenly characterized as findings of fact, de novo. 'Substantial evidence' is that 'quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.' '[W]here there is conflicting evidence, the court needs only to determine whether the

evidence viewed most favorable to respondent supports the challenged finding.'" *In re Est. of Haviland*, 162 Wn. App. 548, 561, 255 P.3d 854 (2011) (internal citations omitted).

B. The Court of Appeals Was Required to Consider the "Surrounding Circumstances and Language" in Ascertaining Testator's Intent.

Washington courts can and should consider information outside of the four corners of a will, prior to any finding of ambiguity, when ascertaining a testator's intent. This Court has previously held that a testator's intentions are "viewed through the surrounding circumstances and language" existing at the time a will is executed. *Matter of Est. of Bergau*, 103 Wn.2d 431, 435–36, 693 P.2d 703, 705 (1985). It is only when "any uncertainty arises as to the testator's true intention" that "extrinsic evidence" may be considered. *Id.,* at 436-37. Therefore, this Court's prior holdings distinguish between the term *surrounding circumstances* and the term *extrinsic evidence*; the former "must" be considered, whereas the latter may be considered only when uncertainty arises as to the testator's intent.

In this matter, the trial court properly applied this Court's holding regarding intent of a testator when it considered both the language of the will and the surrounding circumstances. Indeed, the trial court is mandated to do so—as was the Court of Appeals. Court of Appeals selectively quoted

portions of this Court's decision in *Matter of Est. of Bergau* in its opinion, but omitted the key language that the trial court relied upon:

> When called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent. *In re Estate of Riemcke*, 80 Wash.2d 722, 728, 497 P.2d 1319 (1972). Such intention must, if possible, be ascertained from the language of the will itself and the will must be considered in its entirety and effect must be given every part thereof. *In re Estate of Douglas*, 65 Wash.2d 495, 499, 398 P.2d 7 (1965); *Elder v. Seattle First Nat'l Bank*, 33 Wash.2d 275, 278, 204 P.2d 1068 (1949).
>
> **Because a testator employs language in the will with regard to facts within his knowledge, the court must consider all the surrounding circumstances, the objects sought to be obtained, the testator's relationship to the parties named in the will, his disposition as evidenced by provisions to be made for them and the general trend of his benevolences as disclosed by the testament.** *Anderson v. Anderson*, 80 Wash.2d 496, 495 P.2d 1037 (1972); *In re Estate of Quick*, 33 Wash.2d 568, 206 P.2d 489 (1949). It will be presumed that the testator was familiar with the surrounding circumstances which could affect the construction materially, such as the value of his property. 4 W. Bowe & D. Parker, Page on Wills § 30.08, at 63 (1961). **Although a will speaks as of the date of the testator's death, the testator's intentions, as viewed through the surrounding circumstances and language, are determined as of the time of the execution of the will.** *In re Estate of Robinson*, 46 Wash.2d 298, 280 P.2d 676 (1955).

Matter of Est. of Bergau, 103 Wn.2d 431, 435–36, 693 P.2d 703, 705 (1985) (emphasis added); *see also In re Estate of Price*, 73 Wn. App. 745, 754, 871 P.2d 1079 (1994).

Washington courts are required to consider the surrounding circumstances of the drafting of a will. Ambiguity is not required. "[I]n construing a will, the court is faced with the situation as it existed when the will was drawn and must consider all the surrounding circumstances, the objects sought to be obtained, and endeavor to determine what was in the testator's mind when he made the bequests, and the court must not make a new will for him or warp his language in order to obtain a result which the court might feel to be right." *Anderson v. Anderson*, 80 Wn.2d 496, 499–500, 495 P.2d 1037 (1972) (internal citations omitted). Because the Court of Appeals did not consider those surrounding circumstances and that decision contravening decisions of this Court, this Court should grant review.

The Court of Appeals erred in failing to recognize the "latent ambiguity" and "equivocation" present in the underlying will. Two different readings of the underlying will produce two possible distributive outcomes: one where Kathy and Randy share equally in the family business, and one where Randy has a majority share of the business. This is evidence of a "latent ambiguity" because it cannot have been a coincidence that one reading of the underlying will—a reading the Court of Appeals has rejected—produces this mathematical result, in light of the "facts as they exist." *Bergau*, 103 Wn.2d at 436. The ambiguity of "equivocation" is

evident where, as in this case, a *specific* reference requirement may be considered satisfied by *general* language which applies to "two or more . . . things of the same description." *Id.*, at 437.

The lack of clarity regarding what facts a court can consider as "surrounding circumstances" can clearly have an extremely significant effect on lower court decisions involving interpretation of wills. Surrounding circumstances include "objective factors" like the "skill of the draftsman, "the relationship of the testator," and "the subject matter of the gift." *Matter of Estate of Wendl*, 37 Wn. App. 894, 898, 684 P.2d 1320, 1323 (1984). As demonstrated by these cases, Washington trial and appellate courts can, and regularly do, consider various "surrounding circumstances" when interpreting a will. Here, the Court of Appeals clearly considered certain surrounding circumstances, including (1) whether Patricia had a power of appointment at the time she created her Will, and (2) the number of powers she had, in reversing the trial court decision.

Consideration of the "surrounding circumstances" is necessary to interpret the "language" used in wills. In the underlying case, an *implied*, *equivocal*, or *general* reference was insufficient; the limited power must be *expressly* referenced, if this is explicitly required by the testator. The words "this power" in Ed's Will refer to the specific limited power of appointment he is creating in his Will. Indeed, Patricia's Will made no specific

references at all—it made a general, categorical reference to "a" power that could have applied to many different powers. CP 45, CP 275-277, and CP 659. Edward's Will requires "express" reference to "this" *power*, but the language of Patricia's Will only generally refers to *property* over which she has "a" power. The Court of Appeals ruling erases the significance of the "express" requirement, erroneously rendering part of Ed's Will completely meaningless. *See* RCW 11.12.230; *Anderson v. Anderson*, 80 Wn.2d 496, 499–500, 495 P.2d 1037 (1972); *In re Price's Est.*, 75 Wn.2d 884, 886, 454 P.2d 411 (1969). Proper consideration of the surrounding circumstances, alongside the language, would have prevented this error.

This Court should clarify the case law in Washington regarding the extent and scope of "surrounding circumstances and language" that a trial court may consider in interpreting a will. *Bergau*, 103 Wn.2d at 435-36. Without such clarification, the boundary between consideration of pre-ambiguity "surrounding circumstances," and post-ambiguity "extrinsic" evidence, will remain blurry and confuse trial and intermediate appellate courts.

C. The Petition Involves an Issue of Substantial Public Interest that Should Be Determined by the Washington State Supreme Court.

This Court should grant review because this case concerns an issue of substantial public interest affecting most Washingtonians. RAP

13.4(b)(4). The Court of Appeals' decision, though unpublished, has broad reaching implications for every probate in Washington and for interpretation of every Washington will. According to the Washington State Department of Health, 63,177 Washingtonians died in 2020.[1] While not all deaths result in a probate being opened, tens of thousands of probates are opened in Washington State every year. This decision has broad reaching implications that will impact hundreds of thousands, if not millions, of families. This Court should accept review.

1. If the Court of Appeals' Decision Stands, Trial Courts Will Be Prohibited to Consider Surrounding Circumstances, in Contradiction of Established Precedent.

As set forth above, the Court of Appeals' decision is counter to established precedent. That decision may affect many future cases involving similar (recurring) issues unless this Court accepts review. While the Court of Appeals paid lip service to the surrounding circumstances requirement, it has conflated surrounding circumstances and extrinsic evidence. Trial courts are required to consider the surrounding circumstances of the drafting of a will and the intent of the testator. By prohibiting the introduction of evidence around the drafting of Patricia's Will the Court of Appeals has

[1] https://doh.wa.gov/data-statistical-reports/washington-tracking-network-wtn/death.

essentially rendered decades of precedent meaningless. It is vital for this Court to clarify the appropriate standards in probates. RAP 13.4(b)(1), (4).

2. If the Court of Appeals' Decision Stands, Trial Courts Will Be Forced to Imply Intent from Boilerplate Language Included in Error by Counsel—and in Contradiction to the Testator's Intent.

The basis for the Court of Appeals' holding that Patricia exercised the LPOA is the inclusion of a single paragraph in Patricia's Will—Section 1.2. The attorneys who drafted Patricia's Will testified at trial that the relevant portion of Patricia's Will was merely boilerplate language the draftsmen added in error without consulting Patricia. RP 77, 79; CP 264. It is undisputed that these terms were included in error and without Patricia's knowledge or intent. *Id.* What is particularly troubling in this case is objective facts offered at trial demonstrated Patricia's intent *not* to exercise the LPOA. CP 661. Therefore, if the Court of Appeals' decision is permitted to stand, a testator's intent must be determined solely based upon the boilerplate language included in error by counsel—even if the Court knows that it is contrary to the testator's intent. This is wrong and the Court should grant review.

This is not to say that boilerplate language cannot or should not be consider by courts, nor that boilerplate alone gives rise to uncertainty. However, when the surrounding circumstances demonstrate the error, the

trial court should be permitted to consider that evidence so that the trial court can effectuate the intent of the testator—which is the trial court's primary responsibility in probate. *In re Estate of Riemcke*, 80 Wn.2d 722, 728, 497 P.2d 1319 (1972).

3. If the Court of Appeals' Decision Stands, Express Reference Requirements in Both Wills and Contracts Will Be Eliminated.

In its decision, the Court of Appeals ignored and rendered meaningless the plain language of Edward's Will and, by doing so, has the potential to render such requirements meaningless in every will and contract in Washington. As set forth above, in order to exercise the LPOA, Edward's Will required that Patricia: "expressly refer to and exercise this power . . .". CP 4. It is undisputed that there was no reference whatsoever to the LPOA in Patricia's Will or to a specific exercise of the LPOA. The Court of Appeals got around this issue by relying upon the boilerplate language that was included in error: "including property over which *I may have* ***a*** power of appointment." CP at 45 (emphasis added).

If this kind of interpretation is permitted to continue, there will be no such thing as an express reference or a specific exercise in Washington. All wills and all contracts that have such requirements could be interpreted to only require a general, catch-all, reference in order to be sufficient. This Court should accept review to address this confusion and to make clear that

if a requirement is put in a will or contract in Washington, Washington will enforce that term as the testator had intended. To do otherwise would overrule decades of precedent and throw Washington into chaos.

Not only are wills executed by Washington citizens under threat, but also statutory law passed by our Legislature, written contracts used in daily business, legal sources, dictionaries, and even this Court's prior decisions will need to be rewritten in this situation where the terms "express" or "expressly" are rendered legally meaningless. The words "express" or "expressly" are central in Washington decisions on many areas of law, ranging from routine basic contract interpretation to the most fundamental questions of sovereignty and the powers resting with the people of our State. *See Bremerton Concrete Products Co., Inc. v. Miller*, 49 Wn. App. 806, 809, 745 P.2d 1338 (1987); *Love v. King County*, 181 Wn. 462, 467, 44 P.2d 175 (1935). Statutes involving dissolutions of marriages, and statutes of limitations themselves, which rely on the meaning of the term "express" are thrown into disarray if the word is equivalent to "implied." *See* RCW 26.09.170(2)-(4); RCW 4.16.040(1).

In attempting to resolve one family's dispute regarding their parents' written estate plans, an important area of confusion in Washington case law regarding interpretation of wills has been discovered—one with very broad implications for how Washington courts can interpret written

contracts and many other fundamental legal practices. Unless it is immediately addressed, this confusion in the law will persist and produce major uncertainty in trial and appellate courts tasked with interpretation of a will. Washington courts need clarity on the facts they can and cannot consider when performing the paramount duty of giving effect to a testator's intent.

IV. CONCLUSION

Review is warranted under RAP 13.4(b)(1)-(2), (4) to clarify the proper standard of review when reviewing mixed questions of law and fact arising from a bench trial to determine the testator's intent and to clarify the scope of evidence a Washington court may consider when ascertaining the testator's intent.

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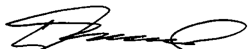
DATED June 7, 2022.

Respectfully submitted,

DICKSON FROHLICH PS



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APPENDIX

APPENDIX TO AMENDED PETITION FOR REVIEW

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Estate of PATRICIA A. BERG, the Marital Trust of S. EDWARD BERG, and the Trust of PATRICIA A. BERG, Deceased, RANDALL A. BERG, Appellant, v. KATHLEEN M. MYRON, as Personal Representative for the Estate of Edward Berg, as Personal Representative for the Estate of Patricia Berg, and as Trustee under the Patricia A. Berg Trust, Respondent.	No. 82328-1-I DIVISION ONE UNPUBLISHED OPINION

COBURN, J. — Two siblings dispute whether their deceased mother intended to exercise her limited power of appointment (LPOA), which affected both of the siblings' interests in the family scaffolding company. At trial, the court improperly looked outside the four corners of the will and considered extrinsic evidence in making its determination that the mother did not intend to exercise her LPOA. Because the mother's will is not ambiguous, we hold that the mother did exercise her limited power of appointment and reverse the trial court.

We remand for further proceedings.

FACTS

Patricia A. Berg (Patricia) and S. Edward Berg (Edward) were married for 65 years.[1] They had six children together, two of whom are central to this action: Randall Berg (Randy) and Kathleen Myron (Kathy). During Edward and Patricia's marriage, they founded a scaffolding company (Berg Equipment) in 1969. Edward ran day-to-day operations while Patricia handled financial and accounting responsibilities. In 1980, Edward suffered a stroke, and Randy was named vice president of operations after having worked at Berg Equipment since his teenage years. Kathy has served as treasurer of Berg Equipment for about 21 years and more recently has served as secretary treasurer for the past seven years.

Edward's will was admitted to probate following his death in January 2014. He appointed Patricia as personal representative of his estate, and named Kathy as successor personal representative. Edward's will created two credit shelter trusts: an Exemption Trust and a Marital Trust.

Patricia was the sole beneficiary of both trusts, and paragraphs 3.3(a) (Exemption Trust) and 4.3(b) (Marital Trust) of Edward's will contained identical language giving Patricia limited testamentary power of appointment over the remainder of both the Exemption Trust and the Marital Trust:

> Limited Power of Appointment. I give my wife a limited testamentary power of appointment to direct how the remaining trust assets shall be distributed. *My wife may exercise this power*

[1] Because multiple family members share the same surname, we refer to all family members by their first names as referred to in their briefing for clarity and consistency.

> *in any valid manner***,** outright or in trust, in any amounts and proportions; provided that if any of my descendants survive my wife, this power shall be exercisable only in favor of any one or more of my descendants. If this power is exercised by appointment of any assets in trust, the appointment shall be effective even though the terms of the trust provide that the trust assets shall be distributed upon termination of the trust to a beneficiary other than my descendants if none of my descendants are then living. This power may not be exercised, however, in favor of my wife, my wife's estate, my wife's creditors or the creditors of my wife's estate or in the manner described in Section 2041(a)(3) of the Internal Revenue Code. *My wife must expressly refer to and exercise this power in her valid Will or codicil for the appointment to be effective.*

(Emphasis added.) Further, each of the trusts provided the following regarding alternative disposition:

> Alternative Disposition. To the extent that my wife does not effectively exercise the limited testamentary power of appointment, the remaining assets shall be distributed in the same manner as my estate under Section 2.3 as if my wife had predeceased me.

Section 2.3(b) of Edward's will provided how his interest in the stock of Berg Equipment should be distributed among his children:

Thomas E. Berg	5%
Sharon L. Griffin	5%
Randy A. Berg	25%
Christine C. Delaney	10%
Kathy M. Myron	55%

Following Edward's death, Patricia consulted with attorney Ryan Rehberg of Rehberg Law Group about her own estate planning and creating her will. On September 22, 2014, Patricia executed her will and the Patricia A. Berg Trust (Patricia's trust). Paragraph 1.1 of her will addresses her personal effects.

Paragraph 1.2 addresses the remainder of her estate:

> Remainder Estate. All the rest, residue and remainder of my estate, of whatever nature and wherever situated, of which I may own or be entitled at the time of my death, *including property over which I may have a power of appointment which I have not otherwise exercised, released or refused in writing, to exercise,* I give, devise and bequeath to the Trustee of the PATRICIA A. BERG TRUST created under a Trust Agreement dated September 22, 2014, by myself as Trustor, which has been signed prior to this Will and is not in full force and effect, as an addition to the principal of said Trust.

(Emphasis added.)

Section B.2.3 of Patricia's trust provided how any interest in Berg Equipment stock should be specifically distributed among her children:

Thomas E. Berg	5%
Sharon L. Griffin	5%
Randy A. Berg	55%
Christine C. Delaney	10%
Kathy M. Myron	25%

In January 2016, Patricia met with attorney Sabrina Go of Rehberg Law Group to discuss implementing possible amendments to Patricia's will. However, Patricia never followed through, and no amendments were executed.

Patricia died on February 17, 2018, and Patricia's will was subsequently admitted to probate. Patricia's will appointed Kathy as the personal representative of her estate, and her trust appointed Kathy as successor trustee of her trust.

On August 12, 2019, through counsel, Kathy notified Randy that she was taking the position that Patricia did not exercise her LPOA in Edward's will. She explained that she intended to distribute Edward's share of the Berg Equipment stock as he intended, which gave Kathy 55 percent and Randy 25 percent. Kathy also explained that she would distribute Patricia's share of Berg Equipment according to Patricia's trust, which gave Kathy 25 percent and Randy 55 percent. In total, Randy and Kathy would own equal shares of Berg Equipment.

On August 30, 2019, Randy initiated a judicial proceeding under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW. Randy petitioned the court requesting that it make a finding that Patricia effectively exercised her LPOA, and also that the court direct Kathy to immediately distribute the Berg Equipment stock as provided in section B.2.3 of Patricia's trust.

In November 2020, the court held a bench trial and heard testimony from various witnesses, including family members, attorneys Ryan Rehberg and Sabrina Go from Rehberg Law Group, and also expert witness Professor Karen Boxx. The court also considered various exhibits related to the creation of Patricia's will as well as several exhibits regarding Patricia's 2016 meeting with Go.

Professor Boxx, a professor at the University of Washington School of Law, testified that although Patricia's will was not perfectly drafted, the language in Paragraph 1.2 of Patricia's will was certainly sufficient to exercise power of appointment under former RCW 11.95.060(2) (1989). She testified that the prior

version of this statute made it harder for individuals to exercise their power of appointment because the will had to reference the power and the date of the power.

Rehberg, the attorney Patricia initially met with to discuss the creation of her 2014 will, testified that he did not personally prepare her will, but he knew someone at his law firm did. Rehberg conceded that he had discussed the LPOA with Patricia and whether she wanted to exercise it or not, but after reviewing his own notes, could not recall if she wanted to exercise her LPOA.

The court also heard from Sabrina Go, an attorney at Rehberg Law Group, regarding her involvement with the administration of Patricia's estate. Go, who was not involved in the drafting of Patricia's will, met Patricia for the first time when Go witnessed the signing of Patricia's will not long after Go started working at Rehberg Law Group. Go could not recall much from that first meeting, but testified that the language of paragraph 1.2 of Patricia's will contained standard form language that Rehberg typically uses when creating wills.

Both Rehberg and Go reviewed exhibits of Go's notes and communications related to the January 2016 meeting, and based on those exhibits, testified that they believed the LPOA language was not inserted into Patricia's will at her direction.

According to Go's notes, at the 2016 meeting that discussed possible amendments, Rehberg assured Patricia that she did not have to change her documents because she already had something in place. At trial, Rehberg testified that he could not recall what that was in reference to. After trial, the

court issued its written findings of facts and conclusions of law. The court concluded that paragraph 1.2 of Patricia's will did not manifest her intent to exercise her LPOA. It gave weight to the testimony of Rehberg and Go, who testified that paragraph 1.2 of Patricia's will "was a 'standard general paragraph – a catch-all language' that they use", and it "was not added at Patricia's request nor was it added in order to address Patricia's [LPOA] under Edward's will." It also took into consideration that Patricia worked with Go after the execution of her will to make changes, but Patricia never made the final decision to go forward and had not retained their firm.

The court concluded that "Paragraph 1.2 of Patricia's Will did not effectively exercise the [LPOA] granted to her by Edward's Will." It reiterated, "Such a –matter of routine – language that is added by the attorneys in every Will does not manifest Patricia's intention of exercising her [LPOA]." The court also concluded that paragraph 1.2 in Patricia's will is a "residuary estate clause which contains no specific reference to the power granted by Edward's Will and uses language which indicates Edward's 50% interest in Berg Equipment would be considered part of Patricia's Estate."

Finally, the court ordered that "Kathy shall immediately distribute the shares in Berg Equipment to the children in the percentage specified in Patricia's Trust (i.e., [Randy] 40%, [Kathy] Myron 40%, Christine DeLaney 10%, Thomas Berg 5%, and Sharon Griffin 5%)."

Randy appeals.

DISCUSSION

Standard of Review

The parties disagree over which standard of review should apply to the issues in this case.

Kathy[2] contends that this court should review for abuse of discretion as to factual determinations. She cites to cases in which evidentiary rulings and sanction decisions were at issue.[3] Evidentiary rulings and sanction decisions are not at issue here.[4] Kathy also relies on Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 329–30, 646 P.2d 113 (1982), for the proposition that even in cases of mixed questions of law and fact, review should still be for an abuse of discretion. That was not the holding in Franklin where our Supreme Court explained the proper scope of review of mixed issues of law and fact.[5]

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[2] Because Kathy is the personal representative of the estates and trusts at issue, we refer to the respondent as Kathy.

[3] Univ. of Wash. Med. Ctr. v. Dep't of Health, 164 Wn.2d 95, 104, 187 P.3d 243 (2008) (discussing trial court's evidentiary ruling); Highland School Dist. No. 203 v. Racy, 149 Wn. App. 307, 312, 202 P.3d 1024 (2009) (reviewing trial court's sanction decision).

[4] Randy did not assign error to the trial court's evidentiary rulings.

[5] The Supreme Court explained:

> Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts, with a view to determining the legal consequences. As we said in Daily Herald Co. v. Department of Employment Security, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979), mixed questions of law and fact exist 'where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term.' We have invoked our inherent power to review de novo those issues.
>
> De novo review in these cases refers to the inherent authority of this court to determine the correct law, independently of the agency's decision, and apply it to the facts as found by the agency and upheld on review by this court.

The trial court listed 39 findings of fact. Randy challenged findings of fact numbers 23, 33, 34, 35, 36, 37 and 39. We conclude the challenged findings are actually conclusions of law, including interpretations of the will.

It is well settled that an appellate court reviews de novo the trial court's interpretation of a will. King v. Snohomish County, 146 Wn.2d 420, 423–24, 47 P.3d 563 (2002); In re Est. of Wright, 147 Wn. App. 674, 680, 196 P.3d 1075 (2008); Woodard v. Gramlow, 123 Wn. App. 522, 526, 95 P.3d 1244 (2004). Because "'[a] conclusion of law is a conclusion of law wherever it appears,'" any conclusion of law erroneously denominated a finding of fact will be subject to de novo review. Robel v. Roundup Corp., 148 Wn.2d 35, 43, 59 P.3d 611 (2002) (alteration in original) (citing Kane v. Klos, 50 Wn.2d 778, 788, 314 P.2d 672 (1957)).

Ambiguity

Randy first contends that paragraph 1.2 of Patricia's will was not ambiguous and sufficiently manifested her intent to exercise her LPOA. We agree.

"When called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent." In re Estate of Bergau, 103 Wn.2d 431, 435, 693 P.2d 703 (1985). "The intent must, if possible, be derived from the four corners of the will and the will must be considered in its entirety." In re Estate of Mell, 105 Wn.2d 518, 524, 716 P.2d 836 (1986) (citing Bergau, 103 Wn.2d at 435). "The testator is presumed to have known the law at the time of execution

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Franklin, 97 Wn.2d at 329-30 (citations omitted).

of his will." Mell, 105 Wn.2d at 524 (citing In re Estate of Patton, 6 Wn. App. 464, 471, 494 P.2d 238 (1972)). "If, after reading the will in its entirety, any uncertainty arises about the testator's intent, extrinsic evidence, including testimony of the drafter, may be admitted to explain and resolve the ambiguity." Mell, 105 Wn.2d at 524 (citing Bergau, 103 Wn.2d at 436).

A. Express Referral

The parties do not dispute that Patricia was required to manifest her intent to exercise the LPOA. See former RCW 11.95.060(2) (1989)[6] ("The holder of a testamentary power may exercise the power only by the powerholder's last will, signed before or after the effective date of the instrument granting the power, that manifests an intent to exercise the power.").

Kathy contends Patricia did not manifest such an intent because paragraph 1.2 of Patricia's will did not meet Edward's requirements in order to effectively exercise the LPOA. Kathy argues that paragraph 1.2 did not expressly refer to the power granted by Edward's will.

The language in Edward's will regarding the LPOA stated, "My wife must expressly refer to and exercise this power in her valid will or codicil for the appointment to be effective." Paragraph 1.2 of Edward's will required Patricia to expressly refer to and exercise "this power." It did not require Patricia's will to specifically refer to Edward's will.

[6] Former RCW 11.95.060 (1989) was repealed on January 1, 2022, but it applies to the Findings of Fact and Conclusions of Law entered on January 8, 2021.

Paragraph 1.1 of Patricia's will addressed her personal effects. Paragraph 1.2 discussed the remainder of her estate and provided:

> All the rest, residue and remainder of my estate, of whatever nature and wherever situated, of which I may own or be entitled at the time of my death, *including property over which I may have a power of appointment* which I have not otherwise exercised, released or refused in writing, *to exercise, I give, devise and bequeath to the Trustee of the PATRICIA A. BERG TRUST* created under a Trust Agreement dated September 22, 2014, by myself as Trustor, which has been signed prior to this Will and is not in full force and effect, as an addition to the principal of said Trust.

(Emphasis added.) This language is an express reference to and exercise of her power.

Edward's will did not require Patricia to reference Edward's will specifically in order to exercise her LPOA. Thus, Patricia's will was not ambiguous.

B. *Standard Form Language*

Attorney Rehberg testified that he had done some estate planning and consulting with Patricia at different times, though he could not remember how many times or when he first met with her. He testified that he was not the one who drafted her will and did not know who the specific person was at his firm who drafted the document. Rehberg further testified that the language in paragraph 1.2 of Patricia's will that stated "property over which I may have a power of appointment, which I've not otherwise exercised, released, or refused in writing" was language used in the firm's standard form used in creating estate planning documents.

Rehberg was the notary at the time Patricia executed her will and trust on September 22, 2014. He could not independently recall the discussion during

the signing about the terms of her will or trust. He testified that he recalled having had a conversation with Patricia about the LPOA, but his notes did not indicate what was clearly discussed, and he could not recall, based on his own notes, whether she wanted to exercise or not exercise her power of appointment. Attorney Go joined the Rehberg Law Group shortly before Patricia executed her will and acted as a witness to the execution of the will, but she was not involved in its preparation. That was the first time Go met with Patricia but Go could not recall much from that meeting.

The trial court concluded that "[t]he language in [Paragraph 1.2] is conditional that the drafting attorneys include routinely in their draft of Wills. Such a – matter of routine – language that is added by the attorneys in every Will does not manifest Patricia's intention of exercising her limited power of appointment."

Kathy concedes that "[i]f Patricia intended to use the limited power, then there is no dispute that the language [in Paragraph 1.2] would have been effective to do so." However, Kathy argues, that "[m]ere sufficiency of the language is not enough to establish Patricia's real intent, particularly when it is Patricia's intent that makes the language legally sufficient." (Emphasis in original.) Kathy is wrong. Intent must, if possible, be derived from the four corners of the will and the will must be considered in its entirety. Mell, 105 Wn.2d at 524.

The language in paragraph 1.2 was not ambiguous because it contained standard form language.

Extrinsic Evidence

Kathy relies on Matter of Estate of Wendl, 37 Wn. App. 894, 898, 684 P.2d 1320 (1984), to support her contention that "surrounding circumstances" are relevant without a finding of ambiguity. Kathy misconstrues the notion that the evidence the trial court considered below was consistent with the rule related to "surrounding circumstances."

"[T]hough in construing intent from the words of the will, the court may not rewrite the will, it is nevertheless appropriate to consider 'the situation as it existed when the will was drawn' with an awareness of 'all the surrounding circumstances.'" Wendl, 37 Wn. App. at 897 (quoting Anderson v. Anderson, 80 Wn.2d 496, 499, 495 P.2d 1037 (1972). But the surrounding circumstances must pertain to objective factors. Wendl, 37 Wn. App. at 897. In the instant case, these facts and circumstances must relate to the time when the will was executed. As our Supreme Court explained in Anderson,

> The intent must be gathered when possible from the words of the will, construed in their natural and obvious sense. Further, in construing a will, the court is faced with the situation as it existed when the will was drawn and must consider all the surrounding circumstances, the objects sought to be obtained, and endeavor to determine what was in the testator's mind when he made the bequests, and the court must not make a new will for him or warp his language in order to obtain a result which the court might feel to be right.

80 Wn.2d at 499 (citation omitted).

During trial, Kathy introduced and the trial court considered communications related to a meeting in January 2016, more than a year after Patricia executed her will. Further, the trial court considered testimony from all of

Patricia's heirs, as well as attorneys Rehberg and Go as to their beliefs based on extrinsic evidence, regarding whether Patricia intended to exercise her LPOA and whether the distribution indicated in her trust applied to all of the interest in Berg Equipment or just her 50 percent share of the Berg Equipment.

According to Patricia's trust, after the trustor's death, the trustee "shall divide and allocate any interest" the trust has in Berg Equipment as indicated in the trust, which included 55 percent of Berg Equipment to Randy, and 25 percent to Kathy. That interest, according to paragraph 1.2 in Patricia's will, included "property over which I may have a power of appointment."

In concluding that Patricia did not intend to exercise her LPOA, the trial court considered extrinsic evidence beyond objective facts of the surrounding circumstances at the time Patricia's 2014 will was drawn. This was improper.

Administration of Trust

Randy next contends that the trial court erred by failing to enter findings of facts or conclusions of law regarding Kathy's failure to complete administration of Patricia's trust within the time mandated by the trust, and he requests the court remand this issue to the trial court.

In his petition, Randy requested that the court "enter an order . . . requiring Kathy to immediately distribute the shares in Berg Equipment." Following trial, the trial court expressly ordered, "Kathy shall immediately distribute the shares in Berg Equipment to the children in the percentage specified in Patricia's Trust." Randy did not make a claim or request relief that would warrant the trial court to make additional findings of fact and conclusions of law.

Any error that may exist from the trial court not making specific findings of fact and conclusions of law as to Kathy's administration of Patricia's trust was harmless.

Attorney's Fees

Both Randy and Kathy request attorney fees and costs on appeal under former RCW 11.96A.150(1) (2007) and RAP 18.1. We have discretion to award reasonable attorney fees and costs in such a manner as this court determines to be equitable. The award may be from any party to the proceedings, from the assets of the estate or trust involved in the proceedings, or from any non-probate asset that is the subject of the proceedings. Former RCW 11.96A.150(1) (2007). "In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved." Id.

Randy, during oral argument, suggested that the award of attorney fees and costs come from Kathy personally. However, Kathy is not a party to the proceedings. The petition related to Edward's trust and Patricia's trust and estate. Kathy is the personal representative of Patricia's estate, the successor trustee of Patricia's trust, and the successor personal representative of Edward's estate. This suit does not involve a claim against Kathy personally.

Because Randy is the prevailing party, we award him fees and costs on appeal to be taken from Patricia's estate.

CONCLUSION

We hold that Patricia manifested her intent to exercise her power of appointment in her will, which was not ambiguous. The trial court improperly considered extrinsic evidence in concluding otherwise. We award attorney fees and costs to Randy.

Reverse and remand for further proceedings.

Coburn, J.

WE CONCUR:

Brennan, J. Andrus, A.C.J.

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

In the Matter of the Estate of PATRICIA A. BERG, the Marital Trust of S. EDWARD BERG, and the Trust of PATRICIA A. BERG, Deceased, RANDALL A. BERG, Appellant, v. KATHLEEN M. MYRON, as Personal Representative for the Estate of Edward Berg, as Personal Representative for the Estate of Patricia Berg, and as Trustee under the Patricia A. Berg Trust, Respondent.	No. 82328-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The respondent, Kathleen M. Myron, having filed a motion for reconsideration herein, and a majority of the panel having determined the motion should be denied; now, therefore, it is hereby

ORDERED the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Coburn, J.

DICKSON FROHLICH

June 07, 2022 - 2:53 PM

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