73102-5

NO. 73102-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JAMES ATKINSON,

Appellant/Petitioner,

v.

ESTATE OF BERT W. HOOK, JERRY HOOK, PERSONAL REPRESENTATIVE

Respondent.

APPELLANT'S OPENING BRIEF

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I. Introduction

States' probate codes vary. Arizona has adopted the Uniform Probate Code. Washington has not. This case presents a single question of law asking whether the words of a proviso in Washington's Statute of Wills, RCW 11.20.020(1), as construed by the trial court, operate to defeat a facially and presumptively valid Last Will and Testament from Arizona and, thus, the testator's intentions, contrary to the controlling law of either state. Calling this a case of first impression, the trial court ruled it does, interpreting the word "executed" in the proviso (which "deems" the Arizona will valid if executed in the mode prescribed by Arizona) to mean all acts of "execution" must be completed in the foreign state, regardless of the foreign state's probate code or the testator's intentions, before it is deemed a valid foreign will.

The case also presents a question of the trial court's assertion of *in personam* jurisdiction over a foreign executor to have tort claims adjudicated against him and whether Arizona's law should apply to determine the validity of the decedent's last will from Arizona.

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II. Assignments of Error

No. 1. In throwing out decedent's Last Will and Testament from Arizona, the trial court erred by applying Washington law and by violating the State Supreme Court's decisional law admonition that no statute should be construed so as to defeat the right of a testator to have effect given to the latest expression of his testamentary wishes.

No. 2. The trial court failed to give due regard to the true intent and meaning of the testator as required by RCW 11.12.230 after wrongly applying Washington law.

No. 3. The trial court also erred by applying Washington law and by ignoring the plain meaning of Washington's Statute of Wills, RCW 11.12.020 or erred by giving it a construction which defeated the legislative intent (to "deem" executed foreign wills valid).

No. 4. The trial court erred in vacating its prior order that Arizona law should apply to determine the validity of the Arizona Will.

No. 5. The trial court erred by asserting *in personam* jurisdiction over Mr. Atkinson merely for bringing forward the testator's last will and testament from Arizona.

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No. 6. The trial court erred by failing to revoke Letters Testamentary issued to Respondent Jerry Hook (under false pretenses) where a facially and presumptively valid later will revoked the will offered for probate.

No. 7 The court erred as a matter of law by dismissing the will contest with prejudice and denying Petitioner's Reconsideration.

No. 8. The trial court erred by applying Washington's Deadman's Statute to exclude relevant testimony.

III. Issues Pertaining to Assignments of Error

a) Whether or not Washington's will formalities apply to defeat a formally executed Arizona will and the testator's intentions?

b) Whether or not statutory construction can operate to defeat a testator's intentions if Washington law applied?

c) Whether or not sufficient contacts with Washington have been shown to support *in personam* jurisdiction over Mr. Atkinson.

d) Whether the place of "execution" of a last will, and interpretation of the meaning of that word in Washington code, can defeat the last will of a testator?

IV. Statement of the Case

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Bert Hook, an independent bachelor all his life, prepared a Washington will in 1988. *CP-1.*[1] He later made a Codicil to the Washington will dated June 10, 1999. *Id.* Under the 1999 Codicil, all of Bert's estate was devised to his brother, Jerry Hook. *CP-2 (sole heir).*

In 2011, Bert, then about 75 years old, underwent heart surgery in Spokane. Because convalescence from his surgery at his home in Lincoln County was impractical, his brother Jerry and Jerry's new wife, Anne Gilbert, offered to put him up in a separate apartment at their residence property on Lummi Island in Whatcom County. Bert went there in October 2011. Things did not go well.

As far as the record speaks to the events of Bert's very temporary residence on Lummi Island with his brother Jerry and wife Anne, Bert resented the dictatorial way they commanded his intake of prescription medicines. *CP-139 (handwritten note: "...in my house you must take the drugs").* Being independent all his life and prizing it, he resented being housed in the same residence with Jerry and Anne, not the promised separate apartment. *Id. ("you told me I could use the apartment".)* Anne Gilbert got angry with Bert. *CP-143. ("Anne gets angry very quickly.")* He asked his brother to take him home to Lincoln County, but his wife

[1] Bert may have been married for a year or so, many decades before his death.

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prohibited it. *CP-139. ("not in my car").* He asked his brother to take him to the ferry dock so he could go to Bellingham and stay in a fully-equipped rental unit, but his brother refused any transport. *Id. ("could not leave to take me anywhere").* He resented being captive on an island. Frustrated and angry, only two days after arriving, he called his long-time friend, Jim Atkinson, in Arizona (where Bert spent most winters in his own residence) and asked Jim to come get him. *Id. ("come and get me"); CP-131-132 (Atkinson Declaration).*

About October 21, 2011, Jim Atkinson and Anna Levitte drove from Arizona and picked up Bert Hook in Washington where they immediately departed for Bert's home on Teel Hill Road in Lincoln County with plans to take Bert to his winter home in Arizona. *CP-130-131.* They picked up some personal belongings in Lincoln County, turned the water off, shut the power down, closed the place up and locked it. *CP-131.* The three of them then drove to Sprague, Washington and stayed a couple of days, then began their road trip to Arizona. *Id.*

Bert Hook had a major falling-out with his brother during his brief stay on Lummi Island. *Id. See, Declaration of Counsel in Opposition to Motion to Modify @ Exhibit "A", Deposition of Jerry Hook, of record. ("Yes, falling out with you and your wife while he was there.")*

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Once he arrived in Arizona, Bert wrote his attorney to say he wanted to change his will. *CP-118 ("I want to make a new will.")* He did so from his own winter residence in a rural airpark near his friends, Jim Atkinson, Anna Levitte and Jack Jenkins, who also spent winter there. *CP-130; CP-122.* Bert's friends tried to assist Bert with his health care in Arizona, but could only help to the extent Bert permitted them. He guarded his independence closely. He wanted to live alone. He did not want to go to a nursing home. *CP-143 ("Bert, I know you don't want to go into a nursing home.")*

About January 2012, Bert, together with his friends Jim Atkinson, Anna Levitte and Jack Jenkins, in an airplane hangar near Bouse, Arizona, dictated to his friends the new will he wanted to make. *CP-337-339 (Jenkins Declaration).* Bert had good reasons for changing his will besides the anger he felt at the way he'd been treated by his brother and his brother's new wife on Lummi Island. Bert thought his brother, Jerry Hook, who was already 80 years old, had plenty of money and didn't need more from him. *CP-170 (Hester Declaration).* He thought all of his money would go to his brother Jerry when he died, who would later leave it to his new wife, Anne Gilbert, whom he disliked. *Id.* He thought his money would later end up with Anne Gilbert's children and he didn't want

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this to happen, as he knew none of them. *Id.* He was afraid that Jerry would inherit all his money and Anne or her children would get it later. *Id.* Bert did not intend to disinherit his brother completely, however. He wanted to sprinkle his bounty around. So, he made instructions to devise his Roach Harbor property to his brother, Jerry Hook, the single most valuable asset in his estate. *CP-337-9; Jenkins' Declaration ("Jerry would sue if completely excluded.")* Instead of a single beneficiary of Bert's estate, the Arizona will named seven beneficiaries, including Bert's brother.

Inside the hangar, Jack Jenkins made handwritten notes of Bert's testamentary wishes as he dictated them. *CP-151-2; CP-337-8.* Anna Levitte then typed them up. *CP-245 (Levitte Declaration).*

On February 13, 2012, Jim Atkinson, Anna Levitte and Bert Hook drove together to the offices of an Arizona notary public near Salome, Arizona, where Bert signed his Last Will and Testament before two attesting witnesses, Linda Darland and Anna Levitte. *CP-53; CP-20-21.* Linda Darland affixed her signature to the instrument at the time and, being an Arizona notary who knew Bert, also affixed her notary seal. *CP-53-4.* The will was expressly designated Bert's Last Will, and expressly revoked all prior wills. *CP-28.*

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Bert committed suicide, on February 18, 2012.

Within 24 hours, Jim Atkinson called Jerry Hook, who, after Bert left Lummi Island, had gone vacationing with his wife in New Zealand. *CP-241.* The two had been in some communication regarding Bert's health and convalescence since leaving Washington. *CP-241-3; CP-292.* Jim Atkinson told Jerry his brother had died. He also told Jerry about the existence of Bert's Arizona will and that the will had been notarized. *Id.* Jerry Hook threatened to challenge it. *CP-292 ("I may challenge any new will").* Nevertheless, on March 9, 2012, upon his return from New Zealand, Jerry Hook petitioned the San Juan County Superior Court for Letters Testamentary without informing the court of his actual, prior knowledge of Bert's notarized last will from Arizona and revocation of the old will. The Letters issued. *CP-11.*

Before the end of February 2012, Jim Atkinson, the named personal representative under the Arizona will, contacted Bert's Attorney in Spokane informing him that he had the last will of Bert Hook and that he was bringing it to Spokane for review and probate. *CP-241-43.* Mr. Atkinson engaged Attorney Boswell for the purpose of determining the validity of the Arizona will. He left the original instrument in Mr. Boswell's office, then returned to Arizona. *Id.*

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Attorney Boswell researched the question of the validity of Bert's last will from Arizona. He learned that Arizona had adopted the Uniform Probate Code. He reviewed Arizona's statute regarding formalities of will execution. That statute, A.R.S. 14-2502, required a testator to sign his/her will and that two people who had either witnessed that signature, or the testator's acknowledgement of that signature, or acknowledgment of the will, sign it also within a reasonable time after witnessing the signature, or either acknowledgement. Boswell next researched decisional law from Arizona (and other UPC states) and determined, as other UPC states hold, that the signatures of attesting witnesses was permitted even after the death of a testator. *In Re Estate of Jung, 109 P.3d 97 (Ariz. App. Div. I, 2005).* Once this legal research was completed, Boswell informed Jim Atkinson and Anna Levitte that Bert's last will from Arizona would be valid under Arizona law upon the signature of Anna Levitte, an attesting witness, provided her signature was affixed to the will within a reasonable time. Mr. Atkinson and Ms. Levitte promptly returned to Spokane, Washington, where, on March 29, 2012, Anna Levitte signed the instrument. *CP-21.*

Shortly thereafter, Atkinson presented Bert's Arizona will, now executed in the mode prescribed by Arizona, to the Superior Court in San

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Juan County and moved to have Letters Testamentary revoked. *CP-15 (Petition Contesting Validity); CP-31 (Motion for Revocation).* What followed for the next three years was a wasteful, unnecessary, twisted procedural and substantive attack against Bert's last will, as Jerry Hook had threatened. *CP-106-7 ("all unnecessary and unnecessarily costly... ").* Mr. Hook answered Mr. Atkinson's pleadings by asserting a swarm of counterclaims against him, including alleged abuse and exploitation of a vulnerable adult in Arizona, fraud, undue influence and others. Mountainous discovery was propounded. *Id.* Protective orders were sought and issued. Pre-trial motions flow everywhere. *Id.* For example, believing (erroneously) that Bert's domicile would control which state's law would apply to determine the validity of the Arizona will, Mr. Hook embroiled Mr. Atkinson in inordinate proceedings to establish Bert's domicile in Washington. It took about eighteen months. Domicile, however, was never relevant to the validity issue. *CP-91, Thomas Culbertson Declaration ("domicile is superfluous"); CP-405 (erroneously asserting domicile would control).* Mr. Hook would eventually concede domicile was superfluous and that Arizona law would apply.

On July 6, 2012, Mr. Hook declared to the trial court that "it is uncontroverted that Mr. Hook executed the document entitled "Bert Hook

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Last Will and Testament in Arizona". *CP-82.* He declared to the trial court that other jurisdictions with similar statutes have uniformly applied the law of the "location where a will was executed" in determining the validity of the execution of such will. *CP-83.* He asked the trial court to enter an order saying that Arizona law, the place where the Arizona will was executed, "will apply to determine the validity of the execution of the Arizona will of Bert W. Hook dated February 13, 2012." *Id. @ 83-4.* Being in agreement, both with the admission that Bert executed his Arizona will in Arizona and the concession that Arizona law would apply to determine the validity of Bert's last will, Mr. Atkinson so stipulated. The court entered its order establishing it would. *CP-77 (Stipulated Order).*

Once entered, Mr. Hook moved for summary determination that the Arizona will was invalid under Arizona law. *CP-195.* The trial court denied this motion on July 26, 2013. *CP-299.*

Apparently regretting his prior stipulation and concession, and seemingly unconscious of any contradiction of principle, Mr. Hook filed a motion to vacate the stipulated order and to declare the Arizona will invalid under Washington law. *CP-384.* Mr. Hook's argument, in part, was that a 1990 amendment to Washington's Statute of Wills could only

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be construed as imposing a "temporal modification" on the admission of foreign wills to probate, i.e., that no foreign will from anywhere could be "deemed" valid if an attesting witness signed after the testator's death. *CP-499.* This was the "outer limit" of recognition of valid execution of a foreign will in Washington. *Id.* Anything else was just "some quirk of foreign law". *CP-401.* This argument was properly rejected by the trial court because Arizona allows it.

Mr. Hook also argued that, because Anna Levitte, an attesting witness, had affixed her signature within the territorial limits of Washington State, the term (in the foreign wills proviso) "the place where executed" meant that Bert's Arizona will was executed in Washington State and, therefore, could not comply with the proviso. The word "executed" as used in RCW 11.20.020 "can have but one meaning," he asserted. *CP-497.* As the argument went, for the first time since statehood valid foreign wills would not be deemed valid, although executed in the mode prescribed by the place where executed, because the word "executed" in Washington's foreign wills proviso could be interpreted to disallow them.

At first, the trial court also denied this second summary judgment motion saying RCW 11.12.020(1) "reflects a clear legislative intent that

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Washington should recognize testamentary instruments that have been properly executed in other jurisdictions". *CP-473.*

Dissatisfied again, and before an Order could be entered, Mr. Hook moved for reconsideration and/or clarification. *CP-483.* No new grounds were asserted except those asserted the first go around, but, this time, for unknown reasons, the trial court reversed itself, vacated the Stipulated Order, granted partial summary judgment and dismissed the Arizona will with prejudice. *CP-585.* The single ground for granting reconsideration and summary judgment was the one previously rejected, that the act which made the Arizona will an executed document occurred in Washington, i.e., the second attesting witness's affixation of signature, Anna Levitte. *CP-585.* Mr. Atkinson filed for reconsideration, or, alternatively, asked the court to certify the question to the Court of Appeals or, at least, for an order of appealability under CR 54(b). All were denied. *CP-625.* An order was entered. *CP-581.*

The same day, Mr. Hook filed a motion for partial distribution of estate assets to himself as the sole beneficiary of the revoked Washington will. *CP-629.* Mr. Atkinson immediately filed this appeal, *CP-643,* moved in the Court of Appeals for a stay of all other trial court

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proceedings and an injunction from the distribution or sale of estate assets. *CP-643.*

On April 3, 2015, by Commissioner's Ruling, Mr. Hook's remaining claims (for alleged abuse of a vulnerable adult in Arizona) were stayed and the trial court was instructed to conduct initial hearings regarding *supersedeas* bonds under RAP 8.1., *See Commissioner's Notation Ruling Dated April 3, 2005, See, First Supplemental Designation of Clerk's Papers.* Those hearings were held on May 15, 2015. *See, Verbatim Report.* The trial court ordered Mr. Atkinson to post two bonds, a non-resident cost bond under RCW 4.84.210 and *supersedeas* bond in the total amount of $80,000. Mr. Atkinson is unable to post these bonds. He immediately moved the Court of Appeals for review and cancellation of the bonding requirements. On July 7, 2015 his motion was denied. *See, Commissioner's Notation Ruling dated July 7, 2015.*

As of this writing, it appears Mr. Hook could distribute, sell, liquidate, transfer and dissipate estate assets, and otherwise administer the estate, without any restrictions. Only the grant of Atkinson's pending Motion to Modify might able to prevent it, and if not, the fruits of his appeal will not be preserved and the estate looted.

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V. Argument

a) Statutory construction which defeats a testator's intentions is prohibited.

To begin with, it is incontrovertable that Bert Hook's Last Will and Testament from Arizona was signed by him in Arizona, before two people who witnessed him sign, a Notary Public who affixed her own signature at the time and affixed her notary seal to the original will (acknowledgement) and Anna Levitte. *CP-28-29.* The Arizona will has also been signed by Anna Levitte. *CP-29.* Bert Hook's Last Will and Testament from Arizona contains his signature and the signature of two attesting witnesses. It meets all the formalities of A.R.S.14-2502. It is a facially and presumptively valid last will. It expressly revoked the will being probated in San Juan County Superior Court. These are undisputed facts.

By these undisputed facts, it is abundantly clear that the true intent and meaning of the testator was to dispose of his property at death according to his Arizona will. The trial court lost sight of this and disallowed it as a matter of law. Bert's intentions formed no part of the trial court's order. It did so exclusively on the basis of its interpretation and construction of the word "executed" contained in the foreign wills

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proviso, RCW 11.12.020(1), such that the place of execution could not have been in the mode prescribed by Arizona law because will witness Anna Levitte affixed her signature within the territorial limits of Washington. As the argument goes, and as the trial court's order reflects, the act that made the Arizona will an executed document occurred in Washington and, therefore, the "place of execution" under foreign wills proviso, RCW 11.12.020(1), was Washington. *CP-585.* The conclusion was that the Arizona will was not legally executed under Washington law and must be thrown out. *Id.* All this was the result of the trial court's construction of the meaning of the word "executed", as urged by Mr. Hook.

This, the trial court was prohibited from doing.

In *In Re Elliott's Estate, 22 Wn.2d 334, 156 P.2d 427 (1945),* the court said:

> "The right to dispose of one's property by will is not only a valuable right, but is assured by law and will be sustained wherever possible...and, where the testator has made more than one will, the *last* will is the one which must be given effect as the latest and final expression of a decedent's testamentary wishes, if such result can be obtained within the established rules of law. (original emphasis) ... Courts go to the utmost possible length to carry into effect the testator's wishes, provided always that he has given them lawful expression. It is not only the testator's will which must be given effect, but it is his last will which must prevail. Where possible, the last will of a competent

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> testator will be upheld, and 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 is absolutely required." (underlining added)

Elliott @ 351.

Courts do not go looking for ways to defeat a testator's intentions. The opposite is true. Instead of looking for ways to defeat a testator's intentions, it is the purpose and duty of a court in construing a will to give effect to the testator's intentions. *In Re Estate of Campbell, 87 Wn. App. 506, 510, 942 P.2d 1008 (Div. I 1997).* Courts must give effect to the testator's intent as of the time of the will's execution. *Id.*

The *Elliott* court declared it a fundamental maxim, the first and greatest rule, the sovereign guide, the "polar star" in giving effect to a will, that the intention of the testator as expressed in the will is to be fully and punctually observed so far as it is consistent with the established rules of law. *Elliot, supra @ 351.*

Here, the trial court threw out the facially and presumptively valid Last Will and Testament of the decedent, Bert W. Hook. It applied Washington law to do so, as it interpreted and construed it, and it did so admittedly by employing technical rules of statutory or other legal

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construction. *VRP-10 (court's decision "turns on a technicality").* It construed Washington's foreign wills proviso to mean that the phrase, "the law of the place where executed" could not be the place where the will was signed by the testator and witnessed by two people but rather the place where one attesting witness later signed it. In other words, Washington State was the place where Bert Hook's Arizona will was "executed", not Arizona, and, therefore, the will, which otherwise would have been "deemed to be legally executed" under the statute, was invalid. This technical construction of the statute defeated Bert Hook's intentions and violated the rule of *Elliott's* case prohibiting technical construction of statutes or other legal instruments to do so.[2]

The trial court defeated Bert Hook's testamentary intentions by technical construction of the Washington statute. This was error. The trial court ruled exactly as the Washington State Supreme Court has said it could not.[3]

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[2] Neither Arizona's probate code nor the Uniform Probate Code require attesting witnesses to affix their signatures in any particular place. It is immaterial that Anna Levitte affixed her signature to the Arizona will in Washington; it is only important that she was an attesting witness when it was signed in Arizona by Bert Hook.

[3] Obviously, even the trial court struggled with its decision. In Respondent's first Motion for Summary Judgment, the court "concluded that the Arizona will was not executed in Washington, despite the fact that the last act to complete "execution" occurred in Washington." *CP-474.* Its admission to probate in Washington is "not dependent upon compliance with the formalities of Washington law. *Id.* Rather, it should be deemed legally executed if facially valid under the laws of Arizona when Ms. Levitte signed as a witness." *Id.* On reconsideration, the court said it must reverse its prior conclusion that

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b) The trial court ignored RCW 11.12.230

Washington Courts are not only prohibited from construing statutes to defeat the will of a testator, but by Washington statute are required to do the opposite - - give effect to a testator's last wishes. It is the duty of the court to do so. *Estate of Campbell, supra.* RCW 11.12.230 ("the Effectuation Statute") mandates that a testator's intent be the controlling determinant. It says all courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them. *RCW 11.12.230.*[4] This is the Legislature's intent. It controls the decision in this case.

The trial court altogether ignored this statutory directive. It violated the mandate and plain meaning of RCW 11.12.230, and thus, the public policy of the State of Washington. *Estate of Campbell, 46 Wn.2d 292, 295, 280 P.2d 686 (1955) (last will must be given effect as the final*

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the Arizona will was not executed in Washington because "the act that made the Arizona will an executed document occurred in Washington." *CP-574.* Thus does Washington's Statute of Wills prevent a facially valid foreign will from being given effect despite the proviso that deems it valid. Thus does the holding of the *Elliott* court bend and break. Thus does Arizona's and the Uniform Probate's Code prescribed mode of valid will execution get rejected in Washington State. Thus does Mr. Hook's prior concession of Arizona execution get ignored. And thus does Bert Hook's last wishes and will get defeated.

[4] Arizona law (which should apply to any determination of Bert's intentions, and once did) also requires, both statutorily and by decisional law, that the testator's intentions be ascertained and given effect. *A.R.S. 14-1102(2).*

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expression of the testator's wishes); Estate of Stein, 78 Wn. App. 251, 259, 896 P.2d 740 (1995) ("determination of a decedent's wishes is the overriding factor in Washington probate proceedings"); Estate of Price, 73 Wn. App. 745, 754, 871 P.2d 1079 (Div. I, 1994) ("courts must give effect to the testator's intent as of the time of the will's execution"). The trial court ignored the "polar star".

In Washington, courts ascertain a testator's intentions "as of the time of the will's execution." *In Re Leva's Estate, 33 Wn.2d 530, 536, 206 P.2d 482 (1949).* The time of the Arizona will's execution was February 13, 2012. *CP-28-29.* This would be the time the decedent signed his will, before attesting witnesses. It happened in Bouse, Arizona. This is the correct meaning of the word "executed" as the Washington State Legislature intended when it was written into Washington's Code in 1917. The word "executed", or "execution", means to sign. *CP-515 (contemporaneously defining the words execute and execution as "to make valid or legal by signing"); CP-524, @ Exhibits "B", "C", "D", "E", "F", "G", "H", "I" and "J" (1917 dictionary definitions).* It is also a definition which gives effect to Bert Hook's last will and wishes, as required. The place where attesting witness Anna Levitte affixed her signature to the Arizona will is irrelevant under either Washington law or

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Arizona law. Bert's intentions control. On its face, the last will reads: "I, Bert Hook, revoke all previous wills and codicils." *CP-28.* The testator's plain intention from the face of the document at the time he signed it before attesting witnesses was to revoke the will now being probated.

Moreover, as discussed below, the language of RCW 11.12.020 referring to the time of the will's "execution" does not mean, and could not mean, the time when Anna Levitte affixed her signature to the face of Bert's will because Bert was dead at that time; his intentions could not be ascertained after his death. They could only be determined at the time he executed his will in Arizona, February 13, 2012.

Wills should be construed to uphold rather than defeat devises and bequests. *Estate of Levas, supra, @ 536, citing, In Re Lambell's Estate, 200 Wash. 220, 93 P.2d 352 (1939); In Re MacMartin's Estate, 131 Wash. 192, 229 Pac. 530 (1924); other citations omitted.* A court is bound to give that construction to a will which will effectuate the intention of the testator. *In Re Lee's Estate, 49 Wn.2d 254, 260, 299 P.2d 1066 (1956); RCW 11.12.230.* Courts are required to be disposed to "as liberal a construction as possible to effect the carrying out of the intention of a testator, when it is possible to determine the testator's intention from all the surroundings and context of a devise. *Id. @ 260.* And, Washington

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courts are admonished not to search for ambiguity in any statute by imagining a variety of alternative interpretations. *Am. Cont'l. Ins. Co. v. Steen, 151 Wn.2d 512, 519, 91 P.3d 864 (2004), citing, State v. Watson, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).* In fact, no construction of Washington's foreign wills proviso was needed at all, as the plain, common sense meaning of the word "execution" is to sign. If the legislative intent is plain, the court's inquiry is ended. *Lowy v. Peace Health, 159 Wn. App. 715, 719, 247 P.3d 7 (Div. I, 2001).*

And, when faced with two possible constructions of a will, one of which will accomplish the evident end sought by the testator and another which will not, the former construction should be adopted. *In Re Lee's Estate, supra @ 260; and see, Webster v. Thorndyke, 11 Wash. 390 (1895) overruled on other grounds, 11 Wash. 550, 554, and its progeny (for the same principle that if of two constructions of an instrument one will give effect to all the objects which it is evident were sought to be accomplished by its execution and another will not, the one which will should be adopted).*

Just as courts are prohibited from applying technical rules of statutory or other construction to defeat a testator's intentions, courts are statutorily prohibited from disregarding a testator's intent and meaning, as

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determined from the will at the time of its execution. The trial court's disregard of RCW 11.12.230 is legal error.

Obviously, our legislature intended for courts to give effect to valid foreign wills no matter the provisions of its own probate code. Foreign wills are deemed valid under Washington law if executed in the mode prescribed by the law of the foreign state, here, Arizona. This was the legislative intention of Washington's foreign wills proviso. As Bert Hook's Last Will and Testament from Arizona bears his signature, under jurat seal, the signatures of two attesting witnesses, and being facially and presumptively valid under either/both Arizona or Washington law, throwing it out of court with prejudice on a question of law (statutory construction) has contravened legislative intention, public policy, the Effectuation Statute and Bert's last expression of his testamentary wishes –his intent.

c) Dismissal also violated the intent of RCW 11.12.020

Just as the trial court violated the admonitions of the *Elliott* court, ignored the mandate and plain meaning of the Effectuation Statute, RCW 11.12.230, and defeated Bert Hook's testamentary wishes, so the court erred interpreting and construing RCW 11.12.020(1).

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As mentioned, Petitioner submits, the plain meaning of the word "executed" in Washington's foreign will proviso means the place where Bert Hook signed his Last Will and Testament before attesting witnesses. The trial court's inquiry should have ended there. It did not. Still, it was required to ascertain and give effect to legislative intent. *Labor & Indus. v. Granger, 159 Wn.2d 752, 762, 153 P.3d 839 (2007) ("the meaning of a particular word in a statute is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole.").* It could not have been our Legislature's intention that the language of the foreign wills proviso (deeming foreign wills legally executed if executed in the mode prescribed by the law of the place where executed) made valid foreign wills invalid because not executed in the mode prescribed by the state of Washington, much less by the trial court's acrobatic construction of it. This is a strained interpretation. Strained and unrealistic interpretations of statutes are prohibited. *State v. Mannering 150 Wn.2d 277, 283, 75 P.3d 961 (2003).* Statutes must be interpreted to give effect to legislative intent. This is fundamental. *Estate of Haviland, 177 Wn. 2d. 68, 76, 301 P.3d 31 (2013) (the court's fundamental objective is to ascertain and carry out the legislature's intent).* Statutes must be interpreted and construed consistent with their underlying purposes and

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policies. Constructions that yield unlikely absurd or strained consequences must be avoided. *City of Seattle v. Fuller, 177 Wn.2d 263, 270, 300 P.3d 340 (2013).* They must be interpreted and construed in furtherance of the obvious purpose for which they were created. *Safeco Ins. Co. v. Meyering, 102 Wn.2d 385, 392, 687 P.2d 195 (1984) ("the paramount concern of the court is to insure that the statute is interpreted consistently with the underlying policy of the statute.").* They must be construed according to the ordinary meaning of the words used, not by searching for ambiguities. *State v. Brown, 8 Wn. App. 639, 643, 509 P.2d 77 (1973). Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001) ("a statute is not ambiguous simply because different interpretations are conceivable; courts are not obliged to discern an ambiguity by imagining a variety of alternative interpretations.").*

Although construction was unnecessary, all of these rules of construction were violated by the trial court in construing RCW 11.12.020(1), with the obvious result, again, that this statute has been interpreted and construed to defeat its plain meaning and legislative intent, the Arizona will and Bert's wishes. This was error.

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d) The trial court erred asserting personal jurisdiction over Mr. Atkinson.

Prior to filing a reply to Mr. Hook's scurrilous allegations and counterclaims against Mr. Atkinson, he moved the trial court to dismiss those claims for lack of personal jurisdiction. *CP-344.* Mr. Atkinson is not a resident of Washington. *CP-23; CP-326 ("I am not a resident of the state of Washington")* He has never been personally served with process. He appeared only in San Juan County Superior Court because he had a legal duty to deliver the decedent's last will from Arizona. *RCW 11.20.010; A.R.S. 14-2516(A),(B).* He sought dismissal on two grounds.

First, an action to set aside a probate is an action *in rem* and not *in personam. CP-347, citing In Re Estate of Black, 116 Wn.App. 492, 66 P.3d. 678 (2003).* In Washington, it is a uniform rule. *Id. Rem* proceedings take no cognizance of an owner or a person. *Smale v. Noretep, 150 Wn. App. 476, 478, n.4. 208 P.3d 1180 (Div. I, 2009).* The filing of a will contest under the same cause number as ongoing probate proceedings, incidental and relating to the same estate, does "not convert [the action] to an *in personam* proceeding". *Black, supra @ 499, 500.* The trial court erroneously rejected this ground.

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Second, Atkinson sought dismissal for lack of constitutional process. *CP-349.* Atkinson asserted that for a forum state to have personal jurisdiction over him as an out-of-state defendant, Mr. Hook had the burden of proving certain minimum contacts with, and purposeful availment of, the forum state such that the maintenance of the suit did not offend traditional notions of fair play and substantial justice. *CP-349, citing International Shoe Company v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 9 L. Ed. 95 (1945); Tyee Construction Company v. Dulien Steel, 62 Wn.2d 106, 115-6, 381 P.2d 245 (1963).* Atkinson argued, citing a multitude of cases, including *Hansen v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L.Ed. 1283 (1958),* that no court can acquire *in personam* jurisdiction over a party without showing these contacts under *International Shoe, supra.*

Here, Mr. Hook made no attempt to argue that Mr. Atkinson had contacts with the state of Washington sufficient to hale him into a local court to answer personally for alleged statutory torts allegedly committed in Arizona. Mr. Hook made no allegations that his alleged causes of action arose out of an act done or a transaction consummated in Washington, or that he purposely availed himself of the forum state. The *Hanson* court repudiated such a ground for assertion of personal

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jurisdiction saying probate courts would otherwise enjoy nationwide service of process to adjudicate interests in property with which neither the state nor the decedent could claim any affiliation. *CP-350, citing Hanson, supra, @ 249.*

In *Oliver v. American Motors Corporation, 70 Wn.2d 874, 425 P.2d 647 (1967),* the Washington State Supreme Court held that a non-resident who has no contacts with the state (apart from the occurrence at issue) and who, in fact, has done no act in the state, but whose act in another state has [allegedly] had an injurious consequence in this state, cannot constitutionally be said to have submitted to the jurisdiction of the state. *Oliver, supra, @ 880.*

And in *Tyee Construction Company, supra,* our Washington State Supreme Court, citing *Hanson v. Denckla, supra,* held no personal jurisdiction can be asserted over a non-resident defendant unless said defendant purposely did some act or consummated some transaction in the foreign state from which the cause of action arose. And, even then, jurisdiction must still not offend traditional notions of fair play and substantial justice. *Tyee, supra, @ 116-16. CP-349, 357.* Personal jurisdiction must be constitutionally obtained. Mr. Atkinson has not surrendered his liberty interest under the 14th Amendment by performing

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his legal duty to deliver Bert Hook's Last Will and Testament to a probate court acting only with *in rem* jurisdiction.

Without making any finding of such contacts or purposeful availment, the trial court ruled otherwise, simply implying Mr. Atkinson's consent to be sued personally in Washington. *CP-619 (consented to the exercise of in personam jurisdiction).*

Cases from other jurisdictions also demonstrate the error of the trial court's jurisdictional order.

For example, in *Gordon v. Granstedt, 513 P.2d 165 (Haw. 1973),* the Supreme Court of Hawaii recognized the holding of *Hansen v. Denckla, supra,* that restrictions on the exercise of personal jurisdiction of state courts are a "consequence of territorial limitations on the power of the respective states." *Gordon, surpa, @ 168.* The *Gordon* court, which, like here, involved a will contest, said:

> "The only argument which may conceivably be made to justify the exercise by the Santa Clara Court of personal jurisdiction over defendant on the basis of his appearance in that court in connection with the will contest is to say that such appearance implied a consent on the part of defendant that he would subject himself to the personal jurisdiction of that court in any subsequent litigation there on any matter involving the Estate of Theodore Granstedt, Sr. We do not see any basis on which such consent may be implied." *Id.*

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Similarly, a Texas Court of Appeals rejected the assertion of personal jurisdiction in the context of a non-resident contesting a last will and testament holding that such jurisdiction could not be asserted since none of the claims arose from or were related to the will contest, or any conduct alleged to have occurred within the state. *Walz v. Martinez, 307 SW3d 374 (Tex. App., San Antonio 2009).*

And in *Martel v. Stafford, 992 F.2d 1244 (1st Cir. 1993),* the U.S. Court of Appeals, applying Massachusetts's law, recognized that personal representatives are creatures of the state which appointed them and, as such, possess no power to act beyond the creator's boundaries. *Martel, supra, @ 1246.* It rejected a trial court's assertion of *in personam* jurisdiction over a foreign executor based on implied consent because "Massachusetts has never recognized personal jurisdiction over a foreign executor..." *Id. @ 1249. And see, Harmon v. Eudaily, 407 A.2d 232 (1979); Kailieha v Hayes, 536 P.2d 568 (1975), citing Gordon v. Grandstedt, supra (fundamentally unfair and offensive to all traditional notions of fair play and substantial justice to compel [a non-resident] to defend against a suit simply by reason of an isolated encounter with a resident).*

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The trial court erred asserting *in personam* jurisdiction over Jim Atkinson in a *rem* proceeding or by reason of implied consent, with no showing of sufficient contacts, purposeful availment, or a cause of action arising out of alleged conduct in Washington.

e) The trial court erred refusing to revoke Letters Testamentary obtained under false pretenses.

By statute, a will can be revoked by a subsequent will that revokes the prior will. *RCW 11.12.040(1)(a).* Here, Bert Hook's Arizona will expressly revoked his prior will and codicil from 1999. *CP-29.*

Also by statute, whenever a court has reason to believe that a personal representative has wasted, embezzled, mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or otherwise has committed or is about to commit a fraud upon the estate or has wrongfully neglected the estate or for any other reason or cause to which the court appears necessary, it shall have the power and authority to revoke Letters Testamentary. *RCW 11.28.250.*

Jerry Hook, with actual prior knowledge of the existence of his brother's last will from Arizona, sought and obtained Letters Testamentary without telling the trial court. *CP-11.* He did so on his oath. *CP-9 ("I will perform according to law the duties of my trust...so help me God.")*

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This is sufficient reason alone for the trial court to revoke Letters Testamentary obtained by Jerry Hook surreptitiously. He knew there was a later will; knew his brother had signed it and had it notarized; knew, through his counsel, the provisions of RCW 11.12.040(1)(a); knew his concealment of a later will a misrepresentation to the court and a breach of his oath. And, after he promised he would challenge any new will, he did. But, he should not have tried to get away with his deceits in a courtroom -- a bad place for a masquerade. *Sidis v. Rosaia, 170 Wash. 587, 591-2; 17 P.2d 37 (1932) ("court of law is a dangerous place for masquerade").*.[5] And now, using the power he obtained by deceit, he intends to distribute the assets of the estate to himself, and sell them. *CP-715.* This is a fraud on the actual estate of Bert Hook.

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[5] Mr. Hook has also apparently emptied Bert Hook's safety deposit box, which Petitioner contends contained $20,000 in gold coins and other estate property. He has also admittedly allowed the value of the Roach Harbor property to diminish by almost 40% since he obtained Letters Testamentary. And, using his Letters Testamentary, has acquired more than $150,000 in money or cash equivalents in bank deposits claiming they were non-probate assets. As set out in Mr. Atkinson's letter to Commissioner Neel of Division I Court of Appeals, Mr. Hook regularly relies on unpublished decisions submitted to the trial court, conducts *ex parte* hearings, acquires *ex parte* orders and has attempted to bribe material witnesses in the case. *CP-726 (Ex Parte Motion); CP-726 (Ex Parte Order); CP-442-451 (illegal offer of property and benefit to material witnesses in exchange for false statement); CP-452 (Declaration of Counsel in Opposition). See, Response letter to Commissioner Neel dated June 22, 2015.* The trial court has not disapproved any of this.

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It was error for the trial court not to immediately revoke the Letters Testamentary and appoint Petitioner Atkinson as the personal representative of Bert's Last Will and Testament from Arizona.

f) Arizona Law applies to effectuate the Testator's intentions.

The trial court erred vacating its order of July 6, 2012, establishing that Arizona law would be applied to determine the validity of Bert's Last Will from Arizona.

Jerry Hook admitted that Bert's last will was executed in Arizona. He stipulated that Arizona law would apply to determine the validity of the Arizona will. That admission and that stipulation (concession) and Mr. Atkinson's good-faith agreement with him should never have been reneged upon or reversed, much less by some interpretation and construction of the word "executed" in Washington's foreign will's proviso, contrary to its intent, its purposes, its policies and the testator's intentions. As a result of the trial court's vacation of the July 6, 2012 order, and of Mr. Hook's shameless retreat from his prior position, Mr.

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Atkinson finds himself in protracted, contentious expensive litigation with Mr. Hook, and uncertain if his testator's last wishes mean anything.[6]

The facts are these: Arizona requires a testator's signature on a will. Bert's signature appears on the Arizona will. Arizona requires two people who saw him sign to sign it, too. Both Linda Darland and Anna Levitte have. In both Arizona and Washington, it is the duty of the court to give effect to the testator's intentions and, in both states, construing statutes to defeat the will of a testator is prohibited. *Estate of Muder, 765 P.2d 997, 1000 (Ariz. 1998) ("courts should not adopt upon purely technical reasoning a construction which would result in invalidating wills").* Mr. Atkinson wonders aloud how it is that Washington law could even pretend to be applicable?

The court erred in vacating its prior orders and by applying Washington law at all to defeat Mr. Hook's Last Will and Testament. The court should reinstate the order.

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[6]Mr. Atkinson has asserted Arizona law should apply as it is the place where Bert's Arizona will was executed, i.e., signed by him. This is the only construction which gives effect to his testamentary intentions. But Arizona law, being applied to the entire case, should also be applied for its evidentiary aspects, particularly, but not exclusively, whether or not the trial court has been properly issuing orders and striking relevant testimony from the record based on application of Washington's Dead Man's Statute, not Arizona's, which varies considerably from Washington code and interpretive decisions. Mr. Atkinson contends that the trial court has erred and will continue to err by applying Washington's substantive law and evidentiary rules, not Arizona's. Further briefing and argument on this matter must be reserved.

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g) Request for fees under RAP 18.1.

RCW 11.96A.150(1) grants Petitioner Atkinson the right to seek an award of attorney's fees on appeal: a) from any party to the proceedings; b) from the assets of the estate involved in the proceedings; or c) from any non-probate asset that is the subject of the proceedings. *RCW 11.96A.150(1).*

Moreover, applicable law provides that Mr. Atkinson is entitled to seek recovery of attorney's fees out of the estate regardless of whether he is successful in the contest of the will being probated. *Estate of Watlack, 83 Wn. App. 603, 613, 945 P.2d 1154 (1997), citing In Re Klein's Estate, 28 Wn.2d 456, 475, 183 P.2d 518 (1947).* Mr. Atkinson is entitled to seek payment of his attorney's fees and it is an abuse of discretion not to award him those fees because this will dispute involves all beneficiaries (of both wills) affects the rights of all beneficiaries (of both wills) and an award against the estate would not harm any uninvolved beneficiaries. *Estate of Black, 153 Wn.2d 152, 174, 102 P.3d 796 (2004).* This action seeks to establish which of the alleged beneficiaries have a right to the decedent's estate. Mr. Atkinson also has a right to recover attorney's fees out of the estate, or from Mr. Hook, regardless of the success of his action, because he had a duty to bring the Arizona will forward and take all legitimate

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steps to uphold the testamentary instrument. *Black, supra, @ 174 (party entitled to fees where "duty to oppose" and acted in good faith).* Mr. Atkinson had such a duty and so acted. *RCW 11.20.010 (duty of custodian to deliver will; liability stated).* A fee is award is warranted.

VI. Conclusion

In one fell swoop the Superior Court for San Juan County 1) reversed its own Stipulated Order and applied Washington law to throw out a facially valid Arizona last will; 2) breached the rule of *Elliott's* case prohibiting the application of technical rules of statutory construction to defeat a testator's intentions; 3) ignored the plain meaning of the Effectuation Statute, RCW 11.12.230; 4) erroneously construed RCW 11.12.020(1); and 5) defeated the testator's intentions. Each and every one of these actions was legal error.

For any one of these reasons, any of which apply, the court should reverse the Order of Dismissal from San Juan County Superior Court. Cumulatively, that relief seems imperative as the course of conduct here is all much too glaring in its defiance of reason. A testator's intentions have been defeated. That's wrong.

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The court also erred in asserting personal jurisdiction over Jim Atkinson, a foreign executor who did nothing more than deliver the decedent's last will to the probate court for adjudication, in good faith, as was his legal duty. He is a non-resident, has committed no acts within the State of Washington, has never been served process, and has never purposefully availed himself to support implied consent to personal jurisdiction. The court should reverse the trial court's order implying consent to personal jurisdiction.

The court should reverse the trial court's order vacating its prior orders that Arizona law would apply to determine the outcome of this case in all respects.

The court should revoke the Letters Testamentary currently held by the Respondent Jerry Hook, dismiss his counterclaims, order an award of attorney's fees and expenses in connection with this prolonged controversy and name Jim Atkinson as the lawful and proper personal representative of Bert Hook's estate.

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Finally, the court should enjoin the sale or distribution of any estate assets and order a constructive trust imposed on any which have already taken flight.

Respectfully Submitted this 17 day of July, 2015

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DECLARATION OF SERVICE

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

That on July 17, 2015, I arranged for service of the foregoing Appellant's Opening Brief to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	_____Facsimile _____Messenger _____U.S. Mail X E-File
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DATED at Spokane, Washington this 17 day of July, 2015.

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