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COURT OF APPEALS
DIVISION II

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No. 36238-4-II

STATE OF WASHINGTON
Chum

**IN THE COURT OF APPEALS
DIVISION NO. II
OF THE STATE OF WASHINGTON**

ESTATE OF JAMES ANDREW BLACK

DAVID BLACK, Appellant

v.

JOAN STONE, Respondent

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 2

I. COUNTER STATEMENT OF THE ISSUES 3

II. COUNTER STATEMENT OF THE CASE..... 3

III. ARGUMENT 8

 A. THE PETITIONER IN A WILL CONTEST PROCEEDING MUST
 PROVE HIS CHALLENGES BY CLEAR, COGENT, AND
 CONVINCING EVIDENCE 8

 B. THE LAST WILL AND TESTAMENT OF JAMES ANDREW
 BLACK WAS VALIDLY EXECUTED PURSUANT TO STATUTE10

 C. PETITIONER’S WILL CONTEST BASED ON LACK OF
 TESTAMENTARY INTENT FAILS UNDER ANY ANALYSIS..... 14

 D. RESPONDENT SHOULD BE AWARDED REASONABLE
 ATTORNEY FEES AND COSTS OF THIS APPEAL 16

IV. CONCLUSION 17

TABLE OF AUTHORITIES

Table of Cases

<u>Estate of Knowles</u> , 135 Wn.App. 351 (Div. 2, 2006).....	9
<u>Dean V. Jordan</u> , 194 Wash. 661, 672 (1938).....	9
<u>Estate of Reilly</u> , 78 Wn. 2d 623, 663 (1970)	9
<u>Croton Chemical Corp. v. Birkenwald, Inc.</u> , 50 Wn. 2d 684, 685 (1957)	10
<u>State v. Thomas</u> , 150 Wn 2d 821, 874 (2004)	10
<u>Estate of Bergau</u> , 103 Wn. 2d 431, 435 (1995)	15
<u>Estate of Riemcke</u> , 80 Wn. 2d 722, 728 (1972).....	15
<u>Wang v. McMahl</u> , 103 Wn. App. 945, 954 (2000), review denied, 144 Wn. 2d 1011 (2001).....	16

Statutes

<i>RCW 11.24.010</i>	8
<i>RCW 11.24.030</i>	8
<i>RCW 11.12.020</i>	11
<i>RCW 11.20.020 (2)</i>	11
<i>RCW 11.24.050</i>	16

Other Authorities

<i>Black's Law Dictionary</i>	12
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I. COUNTER STATEMENT OF ISSUES

- A. What is the appropriate burden of proof for a trial court to apply in a will contest proceeding when the petitioner alleges the testator lacked testamentary capacity at the time of the execution of the will?
- B. What does RCW 11.12.020 require in order for a will to be validly executed?
- C. May a question of testamentary intent be raised for the first time on appeal?
- D. Is the executor of the estate entitled to an award of attorney fees on appeal against the will contest petitioner herein?

II. COUNTER STATEMENT OF THE CASE

In January 1998, James Andrew Black was diagnosed with cancer. RP 13, l. 12-18. Exhibits 3, 4, 5. Shortly thereafter, Mr. Black contacted his long-time attorney, Francis Cushman, to update his Last Will and Testament. RP 24, l. 16-25; CP 84, l. 10-19. Attorney Cushman had prepared Black's prior will in 1990, along with the will of Black's companion, Joan E. Stone. CP 49, l. 8-15; CP 93, l. 10-18.

James Andrew Black signed his Last Will and Testament at Cushman's office on February 17, 1998. CP 61, l. 23-CP 62, l. 2. The will was witnessed by Cushman's secretary, Sylvia Lang, and Henrietta Powell, a secretary in the realty office that shared space with Cushman. CP 84, l. 5-7. Lang and Powell signed a form affidavit in which they both swore under oath that they were each of legal age and competent to be a witness to the will, that *Mr. Black signed* in their presence, that Mr. Black appeared to be of sound mind and not under duress, menace, fraud, or undue influence, as well other standard formalities. Ex. 3. Cushman notarized the will. CP 83, l. 23-24; Ex. 3.

The 1998 will referred to Black's wife, Joan Stone, his two children from a prior marriage, and his wife's five children from a prior marriage. Ex. 3. As is often the case in the will of a married person, all of the assets of the testator were first bequeathed to the spouse. Ex. 3. Secondly, *in the event the wife predeceased the testator*, the estate was to be divided into six equal shares, "with my husband's two sons to share equally in one share" and a full share going to each of Joan's children. Ex. 3. This same language about "my husband's two sons" was repeated in the contingent division of a Credit Shelter Trust. Ex. 3. *Cushman stated these unusual provisions having the two sons split one share were expressly discussed with Mr. Black.* CP 89, l. 21-24. The will also clearly

referred to two of Joan Stone's children as Mr. Black's "stepchildren," Ex.

3. Lang testified that the "husband's sons" language was merely her clerical error, arising from her failure to delete the word "husband's" at the two locations when copying from a compatible, similar will simultaneously prepared for Joan Stone. CP 40, l. 19-CP 41, l. 8; CP 90, l. 16-24. Stone confirmed that her will was revised at approximately the same time. RP 25, l. 16-18; RP 26, l. 23-25.

Lang and Cushman both described Attorney Cushman's standard routines in preparing a will, allowing a client to review it, and in having it signed. CP 47, l. 10-13; CP 53, l. 24-CP54, l. 5. Both recalled nothing unusual about the process as applied in this case, although both were understandably unable to recall specific conversation that may have occurred some eight years prior.

Cushman and Lang both indicated that James Andrew Black was well known to Attorney Cushman, to the point that Cushman could describe Black's general demeanor, recognize that it was different in light of his recent cancer diagnosis, and characterize Black as sad, but also unquestionably coherent. CP 43, l. 17-18; CP 110, l. 3-12; CP 111, l. 15-16. Stone confirmed that she and Black had been to see Cushman many times. RP 12, l. 17-18; RP 27, l. 1-13. Neither Lang nor Cushman had any question about Black's mental competency, CP 43, l. 19-21; CP 111, l. 25-

CP112, l. 4, or the lack of any sort of undue influence. CP 43, l. 22-CP 44, l. 20; CP 110, l. 19-20. Cushman recalled that Black had come into the office separately, apart from Stone, at the time he reviewed and signed his Last Will and Testament on February 17, 1998. CP 107, l. 5-6.

James Andrew Black, unfortunately, needed to visit the Virginia Mason Medical Center Emergency Room later the same day, a few hours after signing his Last Will and Testament. Copies of the medical records for that visit clearly indicate that “the patient is alert and oriented x 3. Cranial nerves, strength and sensory exams are normal.” Ex. 7; RP 35, l. 6-7.

James Andrew Black died on December 10, 1998. Joan Stone filed and recorded Black’s will on September 1, 1999. The probate of Black’s estate was not commenced until April 21, 2005. On August 18, 2005, David Black, James Andrew Black’s son, filed his Petition to Contest Will and Set Aside Order Admitting Will to Probate. The initial reason stated for the will contest was that “the decedent did not have testamentary capacity.” CP 15. David Black subsequently amended his petition to include the additional challenge that “the will was not executed in accordance with RCW 11.12.020.” CP 27. No other basis to challenge the will was alleged at the trial level. RP 3, l. 5-20; CP 30-32. Specifically,

any question of Mr. Black's testamentary intent, or lack thereof, is raised for the first time on appeal.

The trial judge ruled that David Black had not only failed to meet his burden of proof of clear, cogent, and convincing evidence that his father was not competent to execute a will, RP 75, l. 2-10, but also specifically noted that the same day independent and unbiased observations of medical personnel corroborated Cushman's assessment that Black was alert, aware, and competent on the day he executed his Last Will and Testament. RP 73, l. 4-22.

The trial judge also assessed the deposition testimony of attorney Cushman and secretary Lang, in light of the content of the written will and accompanying witness affidavit, Cushman's standard will-signing procedures, Cushman's familiarity with Black, and the fact that eight years had passed since the signing of the will, and ruled that David Black had failed to meet his burden of proof of clear, cogent, and convincing evidence that either the will was not properly executed, RP 72, l. 16-22, or that the erroneous inclusion of the word "husband's" in two locations was anything more than a mere clerical oversight. RP 75, l. 11-RP 76, l. 5.

Award of attorney fees to the prevailing party was reserved, RP 76, l. 5-9, and this appeal filed before any action was requested on a possible award.

III. ARGUMENT

A. The petitioner in a will contest proceeding must prove his challenges by clear, cogent, and convincing evidence.

Ordinarily, a will is admitted to probate, or is rejected at an ex parte hearing without notice, pursuant to RCW 11.20.020. Within four months thereafter any person interested in the will may contest its validity or rejection. RCW 11.24.010. The person contesting the will “shall file a petition containing his or her objections and exceptions to said will... Issues respecting the competency of the deceased to make a last will and testament, or respecting the execution by a deceased of the last will and testament under restraint or undue influence or fraudulent representations, or for any other cause affecting the validity of the will or a part of it, shall be tried and determined by the court.” RCW 11.24.010.

“In any such contest proceedings, the previous order of the court probating, or refusing to probate, such will shall be prima facie evidence of the legality of such will, if probated, or its illegality, if rejected, and the burden of proving the illegality of such will, if probated, or the legality of such will, if rejected by the court, shall rest upon the person contesting such probate or rejection of the will.” RCW 11.24.030. One who contests a will has the burden of proving its invalidity by evidence that is

clear, cogent, and convincing. In Estate of Knowles, 135 Wn.App. 351 (Div. 2, 2006). The mere presence of circumstances which may raise the suspicion of invalidity of the will "... will not automatically invalidate a will. Rather, they "appeal to the vigilance of the court and cause it to proceed with caution and carefully to scrutinize the evidence offered to establish the will." " Estate of Knowles, 135 Wn.App. at 357, citing Dean V. Jordan, 194 Wash. 661, 672 (1938). Thus, even where facts presented by the will contest petitioner are so suspicious as to raise a presumption of undue influence, and in the absence of rebuttal evidence may even be sufficient to overthrow the will, the existence of any presumption does not relieve the will challengers of proving their case by clear, cogent, and convincing evidence. Knowles, 135 Wn.App. at 357; Estate of Reilly, 78 Wn.2d 623, 663 (1970).

In essence, it is possible the burden of proof may shift from the will challengers, but only after they have first met their burden of proof.

Here, the trial court unequivocally found that the will contest petitioner, David Black, had failed to meet his burden of proof in any regard. In addition to the court's preliminary oral ruling set forth in the report of proceedings, written findings of fact were entered without objection.

On appeal, a trial court's findings are reviewed only for substantial supporting evidence. Evidence is considered substantial if it is sufficient to persuade a rational, fair-minded person of the factual finding. Knowles, 135 Wn.App. at 356. If that standard is satisfied, the court on appeal shall not substitute its judgment for the trial court's. Ibid; Croton Chemical Corp. v. Birkenwald, Inc., 50 Wn. 2d 684, 685 (1957). The court on appeal always defers findings on any witness credibility issues to the trial court. Knowles, Ibid; State v. Thomas, 150 Wn 2d 821, 874 (2004).

In the case at hand there is ample evidence in the record to support the trial court finding that the will contest petitioner failed to meet his burden of proof of clear, cogent, and convincing evidence that the will was invalid due to lack of testamentary capacity. In fact, the trial court judge stressed the impartial observations of medical personnel indicating mental capacity on the exact same day the will was executed. Since there is, therefore, substantial evidence in the record to support the trial court finding, the finding and ruling that the petitioner David Black failed to meet his initial burden of proof must be upheld.

B. The last will and testament of James Andrew Black was validly executed pursuant to statute.

Petitioner David Black vaguely and ambiguously asserts that the subject last will and testament was somehow not properly executed pursuant to RCW 11.12.020. Petitioner is in error.

RCW 11.12.020 requires, in its entirety:

- (1) Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and *shall be attested by two or more competent witnesses*, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020 (2), while in the presence of the testator and at the testator's direction or request: PROVIDED, That a last will and testament, executed in the mode prescribed by the law of the place where executed or of the testator's domicile, either at the time of the will's execution or at the time of the testator's death, shall be deemed to be legally executed, and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state:
- (2) This section shall be applied to all wills, whenever executed, including those subject to pending probate proceedings.

RCW 11.12.020 (emphasis added)

RCW 11.20.020 (2) provides, in its entirety:

“In addition to the foregoing procedure for the proof of wills, any and all of the attesting witnesses to a will *may*, at the request of the testator, or after his decease, at the request of the executor or any person interested under it, make an affidavit before any person authorized to administer oaths, stating such facts as they would be required to testify to in court to prove such will, which affidavit may be written on the will or may be attached to the will or to a photographic copy of the will. The sworn statement of any witness so taken shall be accepted by the court as if it had been taken before the court.”

RCW 11.20.020 (2) (emphasis added)

The term “attested” is not defined within RCW 11. Black’s Law Dictionary, Seventh Edition, defines “attest” as follows:

1. to bear witness; testify...
2. to affirm to be true or genuine; to authenticate by signing as a witness...

Black’s Law Dictionary, page 124

In the subject will there is an attached form affidavit in which the two witness declared as follows:

- (1) I am of legal age and competent to be a witness to the Will of JAMES ANDREW BLACK (the “Testator”).
- (2) The testator in my presence and in the presence of the other witness whose signature appears below.
 - (a) declared the foregoing instrument to be his Will,
 - (b) requested me and the other witness to act as witnesses to his Will and make this affidavit, and
 - (c) signed such instrument.
- (3) I believe the testator to be of sound mind, and that in so declaring and signing he was not acting under any duress, menace, fraud or undue influence.
- (4) The other witness and I, in the presence of the testator and of each other, now affix our signatures as witnesses to the Will and make this affidavit.

Last will and testament of James Andrew Black, Ex. 3

Even petitioner acknowledges in his appellate brief, at page 8, that there are no formal words of attestation required. There is no case law specifically requiring that the testator affirmatively request the witnesses to be witnesses to the facts they subscribe to. In the case at hand, the two witnesses were the secretary to the attorney who prepared the will, who

had had numerous prior contacts with the testator, and a secretary for a realty office that shared a single room space with the attorney who prepared the will. Secretary Lang and attorney Cushman both testified through their deposition that James Andrew Black was known to them, seemed competent and coherent, desired to sign the amended will, had opportunity to review it and make changes, and was free from any apparent duress or influence. Cushman represented that he would bring in necessary witnesses and Lang testified that will signings were generally scheduled so that the law office could ensure witnesses were available. In summary, the totality of the circumstances clearly presents a picture that all the requirements a witness might be called upon to verify were in fact known to the witnesses.

As this is a will contest, petitioner David Black has the burden of proving by clear, cogent, and convincing evidence that one or more of the legal requirements set forth in the attestation affidavit of the will witnesses was not in fact satisfied. Since no specific language or ritual is required, any given element might be satisfied by implication, totality of the circumstances, or even outright statement which can not now be easily recalled by the witnesses eight years later. The attestation affidavit by itself is prima facie evidence of compliance, and petitioner must overcome that prima facie evidence by clear, cogent, and convincing evidence.

Witnesses to a will are “not legally disqualified by reason of mental incapacity, personal interest, or conviction of crime, from testifying in courts of justice.”... only a person who appears “incapable of receiving just impressions of the facts” or “of relating them truly” is incompetent to testify. Estate of Knowles, 135 Wn.App. at 361. Thus, competency of a witness is not in question. The mere fact that the witness might surmise sufficient impressions of the facts to make their declaration at the time is adequate. Petitioner has failed to meet his burden of proof. Suggested forms and procedures, as related by petitioner in his appellant brief are not controlling law. While the suggested forms and procedures may be a better practice, the failure to follow such forms and procedures does not invalidate a will.

C. Petitioner’s will contest based on lack of testamentary intent fails under any analysis.

Neither the original nor the amended will contest petition filed by David Black clearly articulated any challenge to the validity to the will based on lack of testamentary intent of James Andrew Black at the time of execution of his will. At trial, however, there was some discussion, particularly through the deposition testimony of Sylvia Lang and Francis Cushman, of whether specific language of the will was evidence of James

Andrew Black's testamentary intent. The specific language referred to a contingent request to "my husband's sons."

Petitioner correctly cites the court to the proposition that "when called upon to construe a will, the paramount duty of the court is to give effect to the testator's intent." Estate of Bergau, 103 Wn. 2d 431, 435 (1995) citing Estate of Riemcke, 80 Wn. 2d 722, 728 (1972).

The trial court, in its oral opinion, apparently accepted and believed Sylvia Lang's testimony that the questioned language was merely her own clerical error in failing to make all necessary changes when copying from a compatible will prepared for Joan Stone. Further, as noted in the statement of facts herein, Francis Cushman specifically testified that he went over the testator's intent to give his own two son's a single share to divide between them in the event the contingent bequest was followed.

CP 89, L. 21-24

Read as a whole, except for the addition for the word "husband's" where it did not belong, the will in question clearly reads as a reasonable will wherein the testator primarily gives everything he has to his surviving spouse, and then secondarily, in the event his wife predeceases him, makes some division of assets among the children of the combined family. Since the limitation on the inheritance of testator's own two sons was expressly discussed with attorney Cushman, it appears there is ample evidence in the

record to accept the findings of clerical error and that the will reflects the testator's intent.

Aside from the technical requirement that this particular challenge to the will was not clearly articulated in the will contest petition or amended petition, it is clear that petitioner David Black once again failed to meet his burden of proof of clear, cogent, and convincing evidence of lack of testamentary intent.

D. Respondent should be awarded reasonable attorney fees and costs of this appeal.

The will contest statute, RCW 11.24, contains a statutory attorney fee clause, as follows:

“If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.”

RCW 11.24.050

When a statute entitles a party to attorney fees at the trial level, same the statute may be interpreted to allow for attorney fees on appellate review as well. See, e.g., Wang v. McMahl, 103 Wn. App. 945, 954 (2000), review denied, 144 Wn. 2d 1011 (2001). While an award of attorney fees was reserved and not decided at the trial level before this appeal was filed, the award was never denied. The trial court opinion was

that petition David Black had failed to meet his burden of proof in any aspect of his will contest petition. Since there in fact substantial evidence to support the trial court's ruling on each aspect of the petition, it seems unlikely that David Black will prevail at the appellate level as well. Essentially, David Black has caused his father's estate and its sole beneficiary, Joan Stone, to incur substantial attorney fees and costs both at the appellate level and the trial court level. David Black should be required to pay Joan Stone and the estate's attorney fees and costs at the appellate level.

IV. CONCLUSION

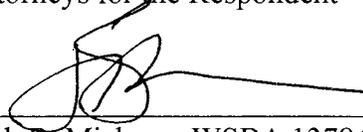
Will contest petitioner David Black has universally failed to meet his burden of proof of clear, cogent, and convincing evidence on any aspect of his petition. His challenge to his father's testamentary capacity is directly refuted by substantial medical record evidence on the same day the will in question was executed. His challenge to the attestations of the will witnesses is directly refuted by the totality of the circumstances and familiarity of the witnesses and attorney notary with the testator. His ambiguous challenge to testamentary intent based upon an erroneous reference to "my husband's sons" is refuted by substantial evidence that inclusion of the word "husband's" was merely a clerical error, and that the testator did expressly discuss awarding his two sons a single share of the

contingent estate to divide between them. In summary, the appellate standard of review is to assess whether there was substantial evidence to support the trial court findings. Since substantial evidence clearly exists in the record on each of the points raised by petitioner, the trial court ruling must stand. Petitioner should be assessed respondent's reasonable attorney fees and costs of this appeal.

Dated this 14 day of November, 2007.

Respectfully Submitted:

MICHEAU AND ASSOCIATES, PS
Attorneys for the Respondent

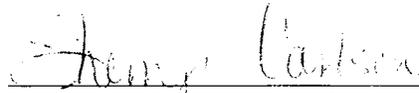
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Jack B. Micheau, WSBA 13784



JACK B. MICHEAU, WSB#13784

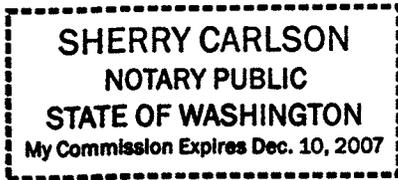
SUBSCRIBED AND SWORN to before me this 14th day of November, 2007.



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