

NO. 46321-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

DEBORAH DESPAIN,

Respondent,

vs.

**ESTATE OF GEORGE LUND, JR.;
DUANE LUND; JOHN DOES 1-10,**

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered Findings of Fact 2, 3 and 9 because they are not supported by substantial evidence.

2. The trial court abused its discretion when it denied the defendant's motion to continue or bifurcate the trial so he could attend and testify and when the trial court denied the defendant's motion to reconsider that decision.

3. The trial court erred when it divided real property upon a finding of a constructive trust so as to grant plaintiff a benefit that was neither promised nor relied upon in the creation of the trust.

4. The trial court erred when it found that the defendants' motion for reconsideration was untimely.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. In a case involving a claim of constructive trust used to challenge the devise of real property in a will in which the parties contest the appropriate division of the real property under the constructive trust, does a trial court abuse its discretion if it refuses to grant a continuance or bifurcation of the trial and when it denies reconsideration on that ruling when defense counsel informs the court that the defendant is seriously ill and cannot attend when no claim is made that the continuance will in any way prejudice the plaintiff and when the defendant's motion for reconsideration sets out evidence supporting his claim that he could not attend the trial because of illness?

3. Does a trial court err if it grants a benefit under a constructive trust that was neither promised nor relied upon in the creation of the trust?

4. Is a Motion for Reconsideration under CR 59(b) timely if it is filed on the tenth day after the order from which the motion is taken is filed with the clerk of the court?

STATEMENT OF THE CASE

Factual History

Prior to 1970 George Lund and his wife purchased 40 acres of land in rural Cowlitz County, placed a home on it and moved in with their three children, Diane, Deborah and Duane. RP 47, 60-61, 87. Their home was toward the north end of the property and about equidistant from the west and east boundaries. RP 63; Trial Exhibit No. 1. They later sold five acres to friends. RP 87. Their property is bordered on the north by Mt. Pleasant Road and is about four times longer (north-south) than it is wide (east-west). Trial Exhibit No. 1. During their time living on that property George Lund and his wife also took care of foster children. RP 17-18. Their daughters Diane and Deborah later got married and moved to other locations with their respective spouses and their son Duane moved into another building on the north end of the property. RP 53, 64-65, 98.

A few years after Diane got married and moved away George and his wife invited their daughter Deborah and her husband to move onto the property and build a home, telling them that it was their intent to divide the property into three equal sized parcels and give one to each of the children. RP 65-66. In fact George and his wife later executed wills devising all of the property to the surviving spouse and then dividing the property equally among the three children upon the surviving spouse's demise. CP 94-104,

105-110, 111-123, 124-126; Trial Exhibit No. 2 1-13, 22-24; RP 103-104. These wills did not incorporate a plat map, neither did they purport to establish property lines to create the property division. *Id.* In response to her parent's request Diane and her husband built a home on the west by northwest side of the property, which has the address 2307 Mt. Pleasant Road. RP 67-68, 114. At some point while building their home on the property George approached Diane's husband and showed him a map roughly setting out Diane and her husband's third of the property. RP 67. Diane's husband later testified at trial that the map admitted as Trial Exhibit No. 1 looked similar to the map George had shown him while he and Diane were building their home. *Id.*

Later George and his wife made the same offer to Deborah and her husband. RP 53-54. In response Deborah and her husband built a home and some outbuildings directly north of George and his wife's house about half-way to the northern boundary and moved to that location in 1988. RP 55-56, 107-108, 111-112.. Their residence has the address 2409 Mt. Pleasant road. RP 110. At some point after they built their home and moved into it George had a survey done showing how he had wanted the property divided. RP 66. According to Deborah's ex-husband, that survey gave Deborah the middle section of the property including George's home. *Id.* A fourth residence sits at the northern boundary of the property at 2407 Mr. Pleasant Road and is

about as far north of Deborah's residence as Deborah's residence is north of George and his wife's residence.¹ RP 110.

At one point the defendant Duane Lund lived in the northern most residence at 2407 Mt. Pleasant Road with his wife Leslie. RP 110. His sister Deborah lived about 200 to 300 feet directly south at 2409 Mt. Pleasant with her husband and children, and George Lund and his wife lived about 200 to 300 feet farther south at 2403 Mt. Pleasant Road. RP 67-68, 114, 110; Trial Exhibit No. 1. George and his wife's residence was connected to Mt. Pleasant Road by a long dirt road that ran from the north end of the property to the east of 2407 and 2409. Trial Exhibit No. 1. Those two residences had driveways that ran up to that road. Trial Exhibit No. 1.

George's wife passed away in July of 2005. CP 184 (Finding of Fact No. 5). After she died Diane's husband had a conversation with George in which he indicated that he had changed his will to give all of the property to Duane. RP 73-76. In fact, George later executed a new will doing precisely that in September of 2005. RP 55, 92; CP 184 (Finding of Fact No. 6). Upon learning this Diane and her husband initiated a lawsuit against her father which ended with the court quieting title to her in an 11.2 acre rectangle of

¹The record on appeal includes Trial Exhibit No. 1, which is a large plat map (approximately 34 by 36 inches) showing the property and residences at issue in this case. A portion of a scanned reduction of that Exhibit is included in the appendix of this brief.

land running north and south on the west side of the property with her residence at 2307 sitting at the northwest end. RP 73-76.

George Lund later passed away in November of 2008. CP 184 (Finding of Fact No. 7). Just prior to his death the defendant Duane Lund and his wife Leslie moved into George's residence at 2403 Mt. Pleasant Road and have lived there continuously since that point in time. RP 117, 120. After her father's death Deborah moved from her residence at 2409 Mt. Pleasant Road. RP 111-112. Her adult children now reside at that address. RP 45-46.

Procedural History

When Duane began proceedings to probate his father's will Deborah filed the instant suit seeking to quiet title in a third of the original property under a theory of constructive trust. CP 1-7, 8-9, 10-11. She also challenged the validity of George Lund's final will arguing undue influence on the part of her brother Duane. RP 9-14. This case was set for trial on a number of occasions. CP 38, 46, 51, 143-144, 145, 148-149, 150, 153-154, 157-158, 178-180. Each date was either stricken by the court because of conflicts with criminal cases or stricken at the agreement of the parties, once at plaintiff's request and once at defendant's request. *Id.* At no point did the defendant seek or obtain a continuance over plaintiff's objection. RP 178-180.

The last trial setting in this matter occurred on June 12, 2013, at which time the court set the case for a non-jury trial during the week of

March 13, 2014. CP 157-158, On the evening of March 17, 2014, the defendant's trial attorney called him to verify that he would be present the next day for trial. CP 178-180. The defendant then informed her that he was extremely ill and in a great deal of pain because of a double hernia, that he was confined to his bed, that he had surgery scheduled and that he was taking opiates for pain. *Id.* He asked that she get a continuance of the trial date and she assured him that she would be able to do so. CP 178-180, 190-196, 199-201.

On the morning of trial the defendant's attorney filed a written motion to continue the trial. CP 178-179. In the alternative, she moved to bifurcate the proceedings to allow the presentation of the defendant's case on a later day. *Id.* Defendant's counsel gave the following affirmation in support of the motion:

1. I have assisted the Lund family since early 2008, and I have known Mr. Duane Lund since that time. He is not one to make up stories about his health.

2. I have left a message for Mr. Lund late last week, after confirming the trial commencement date and time for this week. On arriving at my office early yesterday morning, after the weekend, Mr. Lund had left me a message requesting a continuance of this trial.

3. Mr. Lund's continuance request is due to a serious medical issue which had recently developed concerning Mr. Lund personally, and for which in-patient surgery is imminent to avoid additional complications. Currently under his local doctor's care, Mr. Lund has limited mobility, and he requires rest, so as not to cause more serious medical issues.

4. Since the commencement of this 2009 case, Mr. Lund has only required one previous continuance. That was due to surgery which took place of his young step granddaughter at the children's hospital in Seattle. That continuance had been requested and agreed to between counsel well before the trial date set.

5. The other continuances were not at Mr. Lund's request. They were as a result of 1) court congestion with unresolved criminal matters; 2) severe winter weather which closed the courthouse; and 3) a continuance request by plaintiff's attorney due to a conflict in his schedule.

6. Accordingly, on behalf of Mr. Lund, I respectfully request a continuance of the trial; or in the alternative to proceed with plaintiffs' testimony, and set over the defendant's testimony to a date certain.

CP 179-180; RP 1-2.

Although plaintiff's counsel objected to both requests he did not make any claim of prejudice. RP 2-4. The trial court denied both of the defendant's motions but did state that it would allow the defendant to testify telephonically. RP 4-5. Following a short recess the defendant's attorney informed the court that she had been unable to contact the defendant via telephone. RP 7-8. The trial then began with both parties presenting their opening statements. RP 9-14, 14-16.

During opening, plaintiff's attorney stated that plaintiff was proceeding on two separate theories: (1) that the defendant exerted undue influence over his father in the creation of his father's last will and testament, and (2) that plaintiff's actions in building a home on her father's property in

reliance upon his promise to give her a portion of that property created a constructive trust. RP 9-14. Following the defendant's opening statements plaintiff called seven witnesses, including Diane and James Swogger as well as Deborah Despain and her ex-husband. RP 16-122. They testified to the facts set out in the proceeding factual history. *See Factual History, supra*. In addition, during the trial Deborah Despain testified that the yellow outline on the map constituting Trial Exhibit No. 1 showed that portion of the property that her father had intended to give to her. RP 103, 110, 119, 122.

Finally, pursuant to ER 904 the court granted plaintiff's motion to introduce the following documents into evidence:

1. Last Will and Testament of Billie June Lund dated 10/19/00;
2. Quit Claim Deed dated 11/3/89 for 2307 Mt. Pleasant Road authored by James and Diane Swogger;
3. Quit Claim Deed dated 11/1/89 for 2307 Mt. Pleasant Road authored by Diane Swogger, Deborah DeSpain and Duane Lund;
4. Plat Map;
5. Map;
6. Cowlitz County Parcel Search Report;
7. Quit Claim Deed dated 1/19/89 authored by George and Billie J. Lund;
8. Last Will and Testament of Billie June Lund dated 7/24/81;
and
9. Diary Notes from January of 2006 for George Lund.

CP 41-45; RP 121-122; Trial Exhibit No. 2.

Following examination of the seventh witness and just prior to the lunch break plaintiff rested. RP 122. Defendant's attorney then informed the court that she had made another unsuccessful attempt to contact the defendant via telephone. RP 124. Following the lunch break defendant's attorney informed the court that she had attempted further contact with the defendant during the lunch hour but had been unsuccessful. RP 124. At this point the court heard argument from both parties and then ruled that (1) plaintiff had proven the existence for a constructive trust for one-third of the original property, (2) plaintiff had not proved the claim of undue influence in the creation of George Lund's final will, and (3) no evidence was presented to rebut Deborah Despain's claim that the yellow outline on Trial Exhibit No. 2 showed that portion of the land that her father intended to give to her. RP 135-137, 138-139, 142-148. The court later entered the following written Findings of Fact and Conclusions of Law in support of its oral ruling:

THIS MATTER was tried before the above-entitled Court on March 18, 2014. The Plaintiff, DEBORAH KELLOGG, fka DEBORAH DESPAIN, appeared by and through her attorney, Duane C. Crandall of Crandall, O'Neill, Imboden & Styve, P.S., the defendants, ESTATE OF GEORGE LUND, JR and DUANE LUND, appeared by and through their attorney, Janna R. Lovejoy. Defendant Duane Lund failed to personally appear at the time of trial due to an alleged medical issue reported to his attorney. Defendant's attorney presented a motion to continue the matter, outlining the past continuances and the current request for a continuance, which the court denied by written order. The Plaintiff stipulated to defendant

Duane Lund appearing telephonically and the Court so ordered. Defendant Duane Lund also failed to appear telephonically. The Court considered the admitted trial exhibits, the witness testimony of Denny Parkhill, Diane Swogger, James Swogger, Jeff DeSpain, Twila Barbieri, Charmaine Lund Basford, and Deborah Kellogg, and the argument of the parties.

Based upon the foregoing, the Court enters the following:

I. FINDINGS OF FACT

1. It was the intent of George Lund, Jr. And June Lund to divide their real property located on Mt. Pleasant Road in Kelso, Washington (hereinafter "real property") equally between their three (3) children, namely Diane Swogger, Deborah Kellogg, and Duane Lund.

2. George Lund, Jr. And June Lund promised 11.2 acres, more or less to Deborah Kellogg. Said property encompassed the residence of George Lund, Jr., prior to his death, located at 2403 Mt. Pleasant Road and bare land located at 2409 Mt. Pleasant Road on which Deborah Kellogg had resided in as her own residence. Currently, 2403 Mt. Pleasant Road is inhabited by Duane Lund or a third party with his permission.

3. Exhibit 1 admitted at the March 18, 2014 trial of this matter accurately depicts the real property that was promised to Deborah Kellogg.

4. George Lund, Jr. and June Lund executed Last Will and Testament consistent with their intent to divide the real property equally between their three children.

5. June Lund passed away on July 28, 2005, bequeathing and devising all of her interest in the real property to George Lund, Jr.

6. On September 19, 2005, George Lund, Jr. Executed a new Last Will and Testament bequeathing and devising his interest in the real property to Duane Lund only.

7. George Lund, Jr. passed away on November 3, 2008.

8. In reasonable, justifiable reliance upon her parents promise, Deborah Kellogg and her former husband, Jeff Despain moved to the property located at 2409 Mr. Pleasant Road in or about 1988 and made substantial improvements to the property, including clearing the property, constructing a roadway, garage and barn, and installing a septic system and fencing. Deborah Kellogg and/or her daughter and/or her son have continued to reside at the property since that time.

9. In reasonable, justifiable reliance upon her parents promise, Deborah Kellogg and her former husband Jeff DeSpain, utilized the property located at 2403 Mt. Pleasant Road for recreation, including riding horses and additional pasture. In order to recreate on the property, Deborah Kellogg cleared brush and developed trails over a several year period.

10. Since the death of George Lund Jr., Duane Lund has exerted dominion and control over 2403 Mt. Pleasant Hill Road, including his parents home and the surrounding acreage preventing Deborah Kellogg from access and/or utilizing such.

11. Duane Lund did not appear at trial on March 18, 2014 and no witnesses testified on his behalf.

12. The Court allowed telephone testimony at trial on March 18, 2014, without objection by Plaintiff's counsel; however, that did not occur.

Based upon the foregoing, the Court enters the following:

II. CONCLUSIONS OF LAW

1. The Court has personal jurisdiction and subject matter jurisdiction in this matter.

2. The real property sought by Deborah Kellogg has been held in constructive trust by defendants and fee simple title thereto must be quieted in Deborah Kellogg.

3. Retention of the real property by Duane Lund which is sought by Deborah Kellogg would result in his unjust enrichment.

4. There is clear, cogent, and convincing evidence of the basis for impressing the constructive trust.

5. The Lund's promise to devise the real property to Deborah Kellogg was supported by valuable consideration and had been clearly intended by the decedents.

6. The Lund's had agreed to will or leave the real property to Deborah Kellogg.

7. The services contemplated as consideration for the agreement to will or leave the real property to Deborah Kellogg, including moving her family onto the property and developing such, was actually performed by Deborah Kellogg.

8. Deborah Kellogg moved her family to the real property and developed such in reliance upon the Lund's agreement to devise or leave the real property to her.

9. The Lunds should have reasonably expected their promise to leave the real property to Deborah Kellogg to induce action on the part of Deborah Kellogg.

10. The Lunds' promise induced action by Deborah Kellogg.

11. Deborah Kellogg justifiably relied upon the Lunds' promise to leave her the real property.

12. Injustice can only be avoided by enforcement of the Lunds' promise to give the real property to Deborah Kellogg.

13. Any portion of the Last Will and Testament of George Lund, Jr. purporting to bequeath the real property sought by Deborah Kellogg to Duane Lund is void and without effect.

14. Deborah Kellogg reasonably relied upon the promise of title to the real property and defendants are stopped from any right or claim to it.

III. ORDER

1. Title to the real property sought by Deborah Kellogg is hereby quieted to Deborah Kellogg.

2. Defendants shall transfer to Deborah Kellogg free and clear fee simple title to the residence and property located at 2409 Mt. Pleasant Road, Kelso, Washington. Attached hereto, marked as Exhibit "A", is a map approximately outlining the property to be transferred to Plaintiff, which had been the developed personal residence of Deborah Kellogg and her family.

3. Defendants shall transfer to Deborah Kellogg free and clear fee simple title to 2403 Mt. Pleasant Road, with the exception of the rock pit. Attached hereto, marked as Exhibit "A", is a map outlining the property to be transferred to Plaintiff.

4. Defendants and/or any other occupants shall vacate the mobile home located at 2403 Mt. Pleasant Road within ninety (90) days of March 18, 2014, leaving no waste, spoilage or destruction. Said mobile home may either be moved at Defendants expense or left on the property, with that decision left to Defendants choice.

5. That portion of George Lund, Jr's Last Will and Testament dated September 19, 2005 wherein he leaves the real property to Duane Lund is invalid and without legal effect.

6. If a survey is necessary to determine the property lines for the real property, the cost thereof shall be split between Plaintiff and defendants. The cost thereof shall be commercially reasonable. Deborah Kellogg may proceed with a survey and seek reimbursement of one-half of the cost thereof from defendants. The parties shall agree upon a professional surveyor, properly licensed and bonded.

7. The parties are ordered to cooperate with the transfer of the real property, as set forth in this order.

CP 183-188

Judge Evans of the Cowlitz County Superior Court signed the foregoing findings and conclusions on April 7, 2014. CP 188. However,

plaintiff did not file this document until the next day. CP 183. Consequently the document bears the Cowlitz County Superior Court Clerk's stamp dated April 8, 2014. CP 183. On April 18, 2014, ten days after the Findings, Conclusions and Order was filed with the clerk, defendant filed a Motion for Reconsideration of the trial court's denial of the defendant's Motion to Continue or Bifurcate. CP 189. The defense also filed the supporting affirmations of Duane Lund, Cindy Anderson and Leslie Hakkinen, as well as the Medical records for the defendant. CP 189, 190-196, 197-198, 199-201, 202-206.

The defendant's affirmation stated the following concerning his medical condition on and before the trial date:

As the court is aware, trial was scheduled for Tuesday, March 18, 2014. In early March, I started developing severe abdominal and back pain. I developed an enlarged testicle that was extremely painful as well. The pain got progressively worse to the point where on or about March 12, 2014, I called my doctor, Dr. Anthony J. Simons of Peace Health to get an appointment. His first available appointment was Friday, March 21, 2014.

As the pain progressively got worse, I started taking pain medication. Normally, I avoid taking pain medication, but by Sunday, March 16, 2014, I was in agony, had not been able to sleep the night before, and ultimately had to start taking pain medication to try to sleep. It got so bad I called the emergency hospital hotline. They told me that unless I became nauseous and running a high fever, I should just keep my appointment for Friday, March 21, 2014. Even with pain medication, I was up most of the night tossing and turning, unable to get comfortable, couldn't sleep, and was in significant distress. That condition persisted into Tuesday, March 17, 2014.

At about 4:00 p.m., on March 17, 2014, my attorney, Janna Lovejoy, called me and reminded me of our trial date for the next day. Because there had been numerous continuances due to court congestion, quite frankly, I had forgotten about the trial date. I explained to Ms. Lovejoy that there was absolutely no way I would be able to make it to trial the next day. At that point, I was in extreme distress. My wife got on the phone with us and explained to her my conditions. Ms. Lovejoy assured us it would be no problem to get a continuance of the trial so I could be present and present my case. She made this statement several times, assuring me that I had nothing to worry about, that I didn't need to show up, and that we would have a new trial date probably in the Summer. Based on these assurances, I stayed home, bedridden, until my doctor appointment on March 24, 2014.

CP 190-191.

In his affirmation given in support of the Motion for Reconsideration the defendant also stated the following concerning his attorney's inability to contact him by telephone on the day of trial.

I never head any phone calls on Tuesday, March 18, 2014. Apparently, in order to allow me to sleep, my wife had turned down the ringer. Nobody told me I could testify by phone. I didn't even know that was possible. Even if I had received a phone call, I do not think I could have been competent to testify. I was in extreme pain and distress and on pain medication. In the confidential file, please find a copy of Dr. Simons' report from our meeting on March 21, 2014. He found me to have bilateral hernias. The hernia on my left was much more pronounced than on the right. Furthermore, he found my right testicle quite shrunken, to the point where it was almost imperceptible. He recommended surgery.

I simply had no physical ability to make it to trial on March 18, 2014. I implore this court to reconsider its decision denying the motion for continuance and set this matter for trial so that I can present my side of the case. In the alternative, I ask the court to reconsider that portion of its decision that awards property that I have resided on to the Plaintiff.

CP 191-192.

In fact, the affirmation of the defendant's wife given in support of the Motion for Reconsideration set out both the defendant's medical condition and why he could not be contacted by telephone on the trial date. CP 199-201. She stated:

I can verify that my husband, the Defendant herein, had been very ill over the week end of March 15, 2014. Prior to that weekend, he had made an appointment to see a doctor. That appointment was scheduled for March 21, 2014. His condition worsened over the weekend, and by Sunday, March 16, 2014, he was bedridden. He called the hospital, but was told that as long as he wasn't vomiting or running a fever, he should just keep his appointment for Friday, March 21, 2014.

I can verify that my husband was in no condition to attend trial and informed Ms. Lovejoy of that fact. I heard her on several occasions explain that she would ask for a continuance, and that it would be no problem. She further explained that we did not need to show up for trial, and that we would have a trial date sometime in the Summer.

. . . I spoke with my friend Cindy Andersen, Monday evening and asked her to check up on Duane the next day while I was at work. Duane had a horrible, fitful night trying to sleep. The next morning, Tuesday, March 18, 2014, I turned the phone ringer down to a minimum so that he could sleep. Nobody told us we could be asked to testify by phone. I didn't even know that was possible.

I can verify that my husband's condition remained roughly the same until he went to his doctor appointment on March 21, 2014. There, they found that he had bilateral hernias that needed surgical repair. My husband is not one to complain, go to doctors, or take pain medication. I can verify that he did all three during the week of March 17, 2014.

CP 199-200.

Finally, the affirmation of the defendant's friend Cindy Anderson given in support of the Motion for Reconsideration stated the following about the defendant's condition on the day of trial:

On March 18, 2014, I called Duane's residence. I got no answer. I continued to call several times as this was unusual. When I failed to reach anybody, I drove to the property. Upon knocking on the door for several minutes, Duane finally answered. All I can tell this court is that he looked horrible. After opening the door, he immediately went back and lay on the couch. He explained to me that he was in a lot of pain and that he was taking substantial pain medication. He explained that, due to the significant pain, he was unable to get much sleep at night. He would take pain meds that would knock him out for a period of time and then he would wake up.

The phone ringer was turned down to very minimum. Duane had not heard my phone calls. Even if he had there would have been no way for him to have conducted any type of lengthy conversation, especially testify at a trial.

What I observed is that he was unable to stand up straight. He was holding his groin area as he tried to shuffle walk from the front door back to the couch. He appeared hunched over and moved very slowly, deliberately, and carefully. He spoke in a somewhat slurred tone. I asked if he was sick to his stomach and he said, "no." but that is how he appeared.

CP 198.

Finally, the defendant's medical records dated March 21, 2014, show that the defendant was diagnosed with bilateral inguinal hernias, and was prescribed 200 milligrams of ibuprofen to be taken every six hours as needed for pain, and 325 milligrams of hydrocodone and acetaminophen to be taken

every four hours as needed for pain. CP 203. The doctor's recommendation was surgery to repair the hernias. CP 206.

In addition, the defendant's affirmation outlined the evidence that he would have presented had the court continued or bifurcated the trial and given him the opportunity to testify. CP 192-196. It was as follows:

Under paragraphs 8 and 9 of the Findings of Fact, Conclusions of Law, and Order, the court indicated that Deborah DeSpain (nka Deborah Kellogg) reasonably and justifiably relied on our parents' promises with regards to the subject property. I too have relied upon our parent's promises. Attached hereto are two maps of the subject property. The first map shows in yellow and red the subject property that Deborah DeSpain has used, and throughout this trial, has requested. This map was drawn by Deborah DeSpain and, until the trial had occurred without my presence, was the property she was requesting. The boxes near the number 2403 are my doublewide mobile home and stick built garage. The line extending into that area is my paved driveway. The well for my property is located in that immediate area. I have lived in the doublewide mobile home located there since October 2008. I have paid the taxes on all the property, including Deborah DeSpain's portion since April 2009, the first real estate tax bill that came following my father's passing away.

Currently living in the home is my wife, Leslie Hakkinen and her 32 year old developmentally disabled daughter, Heather Hakkinen. My wife and I have been married since 2000, but, in order to maintain clarity in disability benefits for her daughter, she has kept the same name as her daughter.

I kept the drive rocked maintained over the years. I have maintained the buildings, including roofing the garage. The garage is where I make my living. It holds my moving equipment and yard tools. The well supplies water to both my house and 2407 Mt. Pleasant Road, which is a home where my wife's daughter and her three children live.

The second map is a drawing I believe of the rough property

lines that the court approved without my presence. Under this division, Ms. Despain would be awarded a portion of my blacktop driveway, my shop, and the doublewide mobile home as well as the well. Although the court indicated I could move the doublewide mobile home, I cannot do so with regards to the blacktop, well, or my stick built shop. I am confident Ms. Despain will shut off the well to the two residences and I cannot afford to dig a new one. In addition, this is my home and the home of my wife and disabled stepdaughter. It is my understanding the cost of moving the mobile home would be in excess of \$10,000 and I doubt that it would survive the move. That doesn't include the cost of a road and leveling an area to put it, power, and septic and a new well. In any event, I and my family should not be forced out of our home when, throughout this trial, Ms. Despain was not seeking that portion of the property. I am shocked at the outcome of the court's decision granting a portion of the property that I reasonably relied on would be awarded to me. I do not have a problem with Ms. DeSpain obtaining her 11.2 acres, including the pasture as she diagramed in the first map, but it is completely inequitable for her to be given the property that my home is located on and that I was awarded.

CP 192-193.

The court later denied the Motion to Reconsider substantively and as untimely. CP 226-228. The defendant thereafter filed timely notice of appeal. CP 225.²

²In fact, the defendant filed an initial Notice of Appeal on May 6, 2014, some 28 days after the Findings of Fact, Conclusions of Law and Order was entered. Defendant did so because plaintiff had questioned the timeliness of Defendant's Motion for Reconsideration. Approximately two weeks later the trial court entered the order denying defendant's Motion for Reconsideration. Defendant thereafter filed a second Notice of Appeal from the denial of that motion. This court has now consolidated both appeals.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT 2, 3 AND 9 BECAUSE THEY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *Ford v. Bellingham--Whatcom County Dist. Bd. of Health*, 16 Wn.App. 709, 558 P.2d 821 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *Holland v. Boeing Co.*, 90 Wn.2d 384, 583 P.2d 621 (1978). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, the defendant assigns error to Findings of Fact 2, 3 and 9. These findings state:

2. George Lund, Jr. And June Lund promised 11.2 acres, more or less to Deborah Kellogg. Said property encompassed the residence of George Lund, Jr., prior to his death, located at 2403 Mt. Pleasant Road and bare land located at 2409 Mt. Pleasant Road on which Deborah Kellogg had resided in as her own residence. Currently,

2403 Mt. Pleasant Road is inhabited by Duane Lund or a third party with his permission.

3. Exhibit 1 admitted at the March 18, 2014 trial of this matter accurately depicts the real property that was promised to Deborah Kellogg.

9. In reasonable, justifiable reliance upon her parents promise, Deborah Kellogg and her former husband Jeff DeSpain, utilized the property located at 2403 Mt. Pleasant Road for recreation, including riding horses and additional pasture. In order to recreate on the property, Deborah Kellogg cleared brush and developed trails over a several year period.

CP 184-185.

The defendant concedes that there is evidence in the record to support the bare factual claims contained in findings 2 and 3. There is evidence in the record to support a finding that at some point in time after Deborah Kellogg built a home and moved onto the property George Lund did promise Deborah the land outlined in yellow on Trial Exhibit No. 1. She did make this claim in her testimony as did her ex-husband Jeff DeSpain.

The error that defendant does assign to these two findings is that no evidence supports either an implicit or an explicit conclusion that George Lund made such a promise as an inducement to get Deborah and her then husband to move onto the property and build their home. Rather, the evidence from each of the witnesses was clear that the only promise George Lund made prior to Deborah and her husband building on the property and

moving into that home was to eventually devise one-third of the property to Deborah. Indeed, the original wills plaintiff introduced into evidence only contain a gift of one-third of the property to each of their three children. Neither did the wills claim to give George Lund's home to any one of the three children over the interest of the other two. Thus, to the extent findings 2 and 3 can be interpreted to hold that George Lund promised Deborah his home at 2403 Mt. Pleasant prior to Deborah's move to the property that interpretation is unsupported by substantial evidence.

The same error exists in finding 9. That is to say, there is no evidence that George Lund or his wife ever made a promise to give their home at 2403 Mt. Pleasant to Deborah until some time well after she had built a home on the property and moved into it. Thus, to the extent that this finding can be interpreted to hold that George and his wife promised their home to Deborah as an inducement to get her to move to the property and build a home such an interpretation is not supported by substantial evidence.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT'S MOTION TO CONTINUE OR BIFURCATE THE TRIAL IN THIS CASE SO HE COULD ATTEND AND TESTIFY AND WHEN THE TRIAL COURT DENIED THE DEFENDANT'S MOTION TO RECONSIDER THAT DECISION.

The granting or denying of a motion for a continuance rests within the sound discretion of the trial court and will not be disturbed on appeal, absent a showing that the trial court abused its discretion. *Deep Water Brewing,*

LLC v. Fairway Resources Ltd., 152 Wn.App. 229, 215 P.3d 990 (2009).

The same rule applies to review of the denial of a motion to reconsider that decision. [citation]. An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

The denial of motion to continue a case to allow a party to appear and defendant is generally disfavored by the courts, particularly when the party moving for a continuance is ill and cannot attend the trial. As the court notes in *Chamberlin v. Chamberlin*, 44 Wn.2d 689, 700, 270 P.2d 464 (1954): "It is always well for trial courts to be liberal in the matter of granting continuances, where a party or a material witness on account of sickness or other unavoidable reason is unable to be present at the time set for the trial of the cause . . ." (quoting *Puget Sound Machinery Depot v. Brown Alaska Co.*, 42 Wn. 681, 85 P. 671(1906)). The decision in *Chamberlin v. Chamberlin* illustrates this principle.

In *Chamberlin v. Chamberlin*, *supra*, the respondent in a divorce proceeding moved for a continuance on the date of trial pursuant to a written motion filed by counsel a few days before trial. The motion was supported by two affidavits. The first was counsel's affidavit stating that his client, who lived out of state, was ill with the flu and unable to travel to Washington or to attend the trial. The second was Respondent's affidavit stating that she

was ill with the flu and unable to either travel to Washington or attend the trial. In response Petitioner's attorney stated that she was willing to stipulate that the court could consider Respondent's prior affidavits as part of the trial in lieu of her live testimony. The court then inquired whether or not Respondent intended to testify to any facts not contained in her affidavits already filed. When counsel indicated that she would not, the court denied the motion once based upon opposing counsel's stipulation that the court could consider those affidavits in lieu of Respondent's testimony. The case then proceed to trial with Petitioner testifying along with one other witness who established Petitioner's residency requirement. The court then gave its oral ruling granting Petitioner's request for a bill of divorce.

Respondent's attorney thereafter filed a Motion for a New Trial and a Motion for Reconsideration of the denial of the Motion to Continue. These motions were supported by further affidavits submitted by the Respondent setting out her medical condition along with the testimony and evidence she would have presented had she be able to attend the trial. After due consideration the trial court denied the motions. Respondent thereafter appealed the trial court's denial of the Motion to Continue and the denial of the Motion for Reconsideration of that decision, arguing that the trial court had abused its discretion when it denied the motion to continue and the motion for a new trial.

In response, Petitioner argued on appeal that the trial court did not abuse its discretion in denying the motion to continue because (1) respondent did not comply with RCW 4.44.040 by presenting furnishing affidavits setting out her expected testimony, and (2) that Petitioner's stipulation putting the allegations in Respondent's prior affidavits into the record of the trial, by the very terms of the statute, prohibited the court from granting the continuance even had she met the requirements of the statute. This statute, repealed in 1984 and reenacted verbatim as CR 40(e), stated and continues to state as follows:

A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. . . .

Chamberlin v. Chamberlin, 44 Wn. 2d at 698-99.

The Supreme Court rejected both of these arguments, commenting as follows on the first:

Even if it were conceded that the showing first made by appellant in support of her motion for a continuance was insufficient (and we do not decide that question) the showing made by appellant in support of her motion to reopen and her later motion for a new trial certainly was sufficient to inform the court that appellant intended to present a great deal of material evidence challenging almost every phase of respondent's testimony.

Chamberlin v. Chamberlin, 44 Wn. 2d at 700.

The Court of Appeals then went on to reject Petitioner's second argument, noting that the trial court needs live testimony in order to properly weigh credibility. The court noted:

The conflicting testimony of the two parties can only be weighed and properly evaluated by a trial judge who has seen and heard the *viva voce* testimony of each party and has had an opportunity to observe their demeanor on the witness stand and apply the usual tests for determining their relative credibility. This cannot be satisfactorily done by listening to one party testify in person and then comparing therewith the answer and affidavits of the other party. In a bitterly contested divorce case such as this the procedure followed here afforded appellant little better consideration of her contentions than she would have received in a default divorce proceeding.

Chamberlin v. Chamberlin, 44 Wn. 2d 689, 706, 270 P.2d 464, 473 (1954)

The court then went on to note that normally the court should be liberal in granting continuances when a party or material witness cannot attend because of sickness. In support of this proposition the court cited the following proposition from *Corpus Juris Secundum*:

Whether the ruling of a court on a motion for a continuance is within the proper exercise of its sound discretion usually depends on the facts of the particular case, the chief test being whether the grant or denial of the motion operates in the furtherance of justice. . . . a continuance should be granted if a denial thereof would operate to delay or defeat justice; *and courts have been said to be liberal in continuing a cause when to do otherwise would deny applicant his day in court.*

Chamberlin, 44 Wn. 2d at 703 (quoting 17 C.J.S., *Continuances*, § 6, p. 194.)

(italics added by court in *Chamberlin*).

The court then went on to cite a number of Washington cases for this proposition including *Strom v. Toklas*, 78 Wn. 223, 138 P. 880 (1950), and *Zulauf v. Carton*, 30 Wn.2d 425, 192 P.2d 328 (1948). In both of those cases the Washington Supreme Court reversed trial court refusals to grant trial continuances following the unavoidable absence of one of the parties.

The court then reversed the trial court's refusal to grant the Motion for Continuance and the Motion for New Trial, holding as follows:

As we view it, no hardship could have been caused respondent by delaying the trial for thirty days. After all, at the time of the trial the parties had been married for more than thirty-five years. On the other hand, great hardship could (and did) come to appellant by requiring her to submit to a trial in absentia, thus summarily terminating her marital status without her being heard.

Under these circumstances, the granting of a divorce to respondent without permitting appellant to testify in support of her answer and the averments of her four affidavits seems to us a denial of justice. Because, for the reasons stated herein, we are convinced that the trial court abused its discretion in refusing to grant appellant's motion for a new trial, the judgment must be reversed and the cause remanded for that purpose.

Chamberlin, 44 Wn. 2d at 706-707.

A number of compelling similarities exist between the facts in *Chamberlin* and the facts in the case at bar. In *Chamberlin* the defendant became ill prior to trial and was unable to attend because of the illness. So in the case at bar the defendant became ill prior to trial and was unable to attend because of the illness. In *Chamberlin* the defendant informed her

attorney of her illness and inability to attend the trial and her attorney filed a written motion to continue supported by his affirmation. So in the case at bar the defendant informed his attorney of his illness and inability to attend the trial and his attorney filed a written motion to continue supported by her affirmation. In *Chamberlin* the defendant later followed up the denial of the motion with a motion for a new trial, supported by further affidavits setting out defendant's inability to attend because of illness and setting out her anticipated testimony. So in the case at bar the defendant followed up the denial of the motion with a motion for reconsideration supported by further affidavits setting out the defendant's inability to attend because of illness and setting out his anticipated testimony.

In addition, in both *Chamberlin* and the case at bar plaintiffs did not dispute the defendants' factual claims that they were prevented from attending the trial because of illness. Indeed, in the case at bar the defendant presented three supporting affirmations describing his inability to attend or even testify by telephone as well as his medical records showing that the defendant was diagnosed with bilateral inguinal hernias and was prescribed narcotic pain medication. Consequently, in this case, as in *Chamberlin*, even if trial counsel's initial affirmation was insufficient to justify the continuance, the affirmations given in support of the post-trial motion were more than sufficient.

Finally, in the case at bar the defendant's affirmation given in support of his post-trial motion presents an outline of what his testimony would have been, which disputed the testimony of his sister on a number of key points. Thus, in the same manner that the trial court in *Chamberlin* abused its discretion when it denied the defendant's motion to continue and the defendant's motion for post-trial relief, so in the case at bar the trial court abused its discretion when it denied the defendant's motion to continue and motion for post-trial relief. As a result this court should vacate the judgment in this case and remand for a new trial.

III. THE TRIAL COURT ERRED WHEN IT DIVIDED REAL PROPERTY UNDER A FINDING OF CONSTRUCTIVE TRUST SO AS TO GRANT PLAINTIFF A BENEFIT THAT WAS NEITHER PROMISED NOR RELIED UPON IN THE CREATION OF THE TRUST.

A constructive trust arises "where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it." *Baker v. Leonard*, 120 Wn.2d 538, 547–548, 843 P.2d 1050 (1993) (quoting *Proctor v. Forsythe*, 4 Wn.App. 238, 242, 480 P.2d 511 (1971)). For the purpose of determining the existence of a constructive trust, an "unjust enrichment" occurs when one retains or attempts to retain benefits that in justice and equity belong to another. *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 810 P.2d 12 (1991). A court can impose a constructive trust

arising in equity when clear, cogent, and convincing evidence proves the existence of the trust. *Baker v. Leonard*, 120 Wn.2d at 547.

The party seeking the declaration of a constructive trust bears the burden of proving each of the necessary elements by clear, cogent, and convincing evidence, meaning that the evidence presented proves that the ultimate facts are highly probable. *In re Estate of Watlack*, 88 Wn.App. 603, 610, 945 P.2d 1154 (1997). While constructive trusts are normally created out of claims of fraud, misrepresentation, or undue influence, a constructive trust may also be found absent a finding of an intentional wrongdoing. *Baker v. Leonard*, 120 Wn.2d at 547. However, when fraud or wrongdoing are not alleged, the complaining party must prove an “equitable base” established by evidence of intent before the courts will impose a constructive trust. *Baker v. Leonard*, 120 Wn.2d at 548.

An oral contract to devise real property such as is at issue in this case is a specific type of equitable contract and is recognized under our jurisprudence. *Resor v. Schaefer*, 193 Wn. 91, 74 P.2d 917 (1937). However, oral contracts to devise real property are not favored at the law, are regarded with suspicion, and may only be enforced only upon the strongest evidence that the promise was founded upon a valuable consideration and deliberately entered into by the decedent. *Arnold v. Beckman*, 74 Wn.2d 836, 447 P.2d 184 (1968). Thus, in order to prove an oral contract to devise real

property, the proponent must prove the following three elements by clear, cogent and convincing evidence:

- (1) that deceased agreed to leave certain property to the claimant;
- (2) that the services contemplated as consideration for the agreement were actually performed; and
- (3) that the services were performed in reliance upon the contract.

Cook v. Cook, 80 Wn.2d 642, 645-646, 497 P.2d (1972) (citing *Jennings v. D'Hooghe*, 25 Wn.2d 702, 172 P.2d 189 (1946)).

For example, in *Cook v. Cook*, *supra*, three siblings claimed that in 1953 their father promised to devise real property to them upon his death. The consideration cited was their action in quit-claiming their interest in their mother's estate to him upon her death that same year. She had died intestate. In fact, not long after their mother's death their father remarried and executed a will giving his entire estate to his second wife. Following their father's death the three siblings brought suit against their step-mother claiming a right to the estate through the creation of an oral contract to devise real property.

The case later came on for trial before the bench, after which the court ruled for defendant, finding that plaintiffs had not met their burden of proving the alleged oral contract to devise by direct evidence beyond all legitimate controversy. Plaintiffs then appealed, arguing that the trial court had erred when it applied the wrong burden of proof and when it required the

presentation of direct evidence tending to prove the existence of the promise to devise. The Washington Supreme Court agreed with this argument, reversed and remanded to the trial court for reconsideration of the evidence upon the correct burden of proof that did not necessarily require the presentation of direct evidence. The court noted:

It appears from the trial judge's memorandum opinion that he attached minimum weight to plaintiffs' evidence and felt that there was convincing evidence militating against existence of an oral contract to devise. However, we cannot not say with certainty whether he would reach the same result under the new standard of proof. This type of case is appropriate for close adherence to the rule that a trial judge, observing and hearing the witnesses, is in a better position to evaluate the testimony than are we. The trial judge should be given an opportunity to reconsider the evidence in light of the changed burden of proof herein adopted. A new trial is not necessary, reargument by counsel being sufficient.

Cook v. Cook, 80 Wn. 2d at 648-49.

By contrast, in *Southwick v. Southwick*, 34 Wn.2d 464, 208 P.2d 1187 (1949), plaintiff husband and wife brought suit against the executor and sole heir of their uncle's will claiming that during his lifetime their uncle had entered into an oral contract to devise his real property to them if they moved their family from Minnesota and took care of him and his wife until their deaths, which actions they claimed they had fully performed. Ultimately plaintiffs prevailed and the defendant appealed, arguing that plaintiffs had failed to prove the three elements for an oral contract to devise property. Following careful consideration of the evidence presented at trial the

Washington Supreme Court affirmed, holding as follows:

We agree with the trial court that respondents met the burden of proof which rested upon them to prove the contract with Mr. Sugnet “by evidence that is conclusive, definite, certain, and beyond all legitimate controversy.” *Resor v. Schaefer*, 193 Wn. 91, 74 P.2d 917, 918.

In the case of *Jennings v. D'Hooghe*, [25 Wn.2d 702, 172 P.2d 189 (1946)], this court said, referring to cases similar to the case at bar:

This court has held that the above statutes (Rem.Rev.Stat. §§ 1395, 10550, 10551) do not apply in instances in which oral contracts are made to convey property by will and the consideration has been fully paid. However, in such cases, in order to take the contract out of the statutes, the proof must show: (1) That deceased agreed to will or leave to the claimant property; (2) that the services contemplated as consideration for the agreement were actually performed; and (3) that the services were performed in reliance upon the contract.’

The evidence in the case at bar fully meets these three prerequisites.

Southwick v. Southwick, 34 Wn. 2d at 474.

In the case at bar the defendant does not dispute the existence of an oral contract to devise in favor of his children, including plaintiff. Specifically, defendant agrees (1) that his father and mother agreed to devise one-third of their 35 acres to each of his two sisters and to him, (2) that moving to the property and building a home upon the property was the contemplated consideration to be given, which agreement each sister performed, and (3) that each of his sisters relied upon their parents’ promise to devise one-third of the 35 acres to each of them. Indeed, as the evidence

and documents entered during the trial conclusively showed, the defendant's father and mother later specifically executed wills in compliance with the oral contract to devise. The relevant portion of those wills stated as follows:

In the event there is no surviving spouse or at the time of the death of the surviving spouse or at the conclusion of the Trust specified in Article 5, then I give, devise and bequest at the rest, residue and remainder of my estate, whether real or person, or mixed, wheresoever located to DUANE LUND, DIANE LUND-SWOGGER, and DEBORAH LUND-DESPAIN, in equal shares.

Trial Exhibit No. 2, pages 2-3.

This bequest fulfilled the requirements of the oral contract to devise. In fact, it gave more than was required under the oral contract. A careful review of the evidence plaintiff alleged and proved reveals that she moved to the property and build a home in reliance upon her father and mother's promise to devise her one-third of the 35 acres they owned. She did not claim and did not prove that she acted in reliance upon her parents' promise to either devise her their home, their promise to devise her the land upon which their home sat, or their promise to devise her a specified portion of the 35 acres other than that land upon which her home sat. Thus, to the extent George Lund's original will devised real or personal property to plaintiff beyond the general one-third of the 35 acres, he was free to change that bequest.

It is important to note in this case that plaintiff did not prevail upon

her claim that her father's subsequent will was invalid. Rather, she prevailed upon a claim that she had proven an oral contract to devise one-third of the 35 acres to her, including the land at 2409 Mt. Pleasant Road where she built her home and where her adult children now live. Thus, George Lund's will is only invalid to the extent that it attempted to prevent plaintiff from taking one-third of the 35 acres including the land at 2409 Mt. Pleasant Road. While plaintiff did present some evidence that her father had later indicated that he intended to give her his home at 2403 Mt. Pleasant Road, she in no wise proved that she relied upon this promise when she originally built her home at 2409 Mt. Pleasant Road and moved into it.

In this case the trial court's failure to distinguish between the original promise upon which plaintiff relied (move and build a home and I will give you one-third of the property in my will) and George Lund's subsequent statement of intent to devise his home made after plaintiff had built her home and moved to the property constitutes error for two reasons. First, as was stated previously, an oral contract to devise property is only enforceable if plaintiff acted and relied upon it to her detriment. In this case, by the time plaintiff claimed her father made a promise to give her his home she was already living on the 35 acres. Thus, this promise did not induce any actions upon her part and she could not have relied upon it to her detriment.

Second, the trial court's ruling giving plaintiff her father's home and

the land upon which it sits acts to invalidate a portion of George Lund's final will and testament that is valid. That is to say, although plaintiff claims that George Lund later promised to give her his home, he was free to change his mind and give it to another person because the promise to devise his home was not a part of the original promise to devise one-third of the 35 acres. As a result, although the trial court did not err when it found that plaintiff was entitled to one-third of the original 35 acres, including the land upon which her home at 2407 Mt. Pleasant Road sits, it did err when it found that she was entitled to her father's home at 2403 Mt. Pleasant Road. Even if he later had such an intent he was free to change his mind and his last will and testament show that he did. As a result, this court should reverse the decision of the trial court to the extent it defeats the devise of 2403 Mr. Pleasant Road to the defendant pursuant to George Lund's ultimate will and testament.

IV. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE DEFENDANTS' MOTION FOR RECONSIDERATION WAS UNTIMELY.

Under CR 59(b) motions for reconsideration must be filed no later than 10 days after entry of the judgment, order or decision from which the motion is taken. This rule states:

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other

decision, unless the court directs otherwise. A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

CR 59.

In the case at bar the trial court ruled that the Motion for Reconsideration was untimely because “[t]he Order was filed on March 18, 2014” and “[t]he Defendant filed the Motion for Reconsideration on April 18, 2014, far in excess of the required time.” CP 226. The trial court erred in this holding. The order from which the defendant sought reconsideration was not filed on March 18, 2014. Rather, that was the date of the trial and the court’s oral ruling. The ruling from which the defendant sought reconsideration was contained in the written Findings of Fact, Conclusions of Law and Order filed with the clerk of the court on April 8, 2014. Indeed, a Motion for Reconsideration from an oral ruling cannot be taken because oral rulings are always tentative and do not become final under they are reduced to writing and signed by the court. *See State v. Martinez*, 76 Wn.App. 1, 3–4 n. 3, 884 P.2d 3 (1994) (oral opinion does not become final unless it is incorporated in written findings of fact and conclusions of law).

In this case Respondent may still argue that the Motion was untimely because the court purportedly signed the order on April 7, 2014, whereas the Motion for Reconsideration was filed 11 days later on April 18, 2014. While this claim would be factually correct, the court rule does not require that the

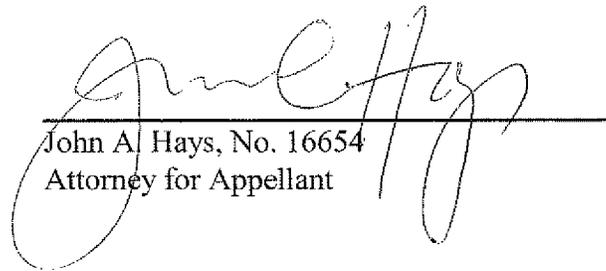
motion be filed within 10 days that the underlying order is “signed.” Rather, it requires that the motion be filed within 10 days after “entry” of the order. Appellant argues that the Supreme Court’s use of the term “entry” is synonymous with the word “filed.” Any other interpretation, particularly one finding the word “entry” synonymous with the word “signed” would allow a party to obtain a judge’s signature on an order and then hold it 10 days prior to filing, thereby cutting off any potential Motions for Reconsideration as untimely. Court rules, as with statutes, should not be interpreted to create absurd results. *Heinemann v. Whitman County*, 105 Wn.2d 796, 718 P.2d 789 (1986). Thus, in the case at bar the Motion for Reconsideration filed 10 days after the underlying order was filed with the clerk was timely under the rule.

CONCLUSION

This court should vacate the judgment in this case and remand for a new trial based upon the trial court's abuse of discretion in denying defendant's motion to continue and motion for reconsideration. In the alternative, this court should reverse the judgment in this case to the extent it invalidated that portion of George Lund's will devising his home at 2403 Mr. Pleasant Rd. to the defendant.

DATED this 3rd day of November, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

CR 59(b)

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based.

CR 40(e)

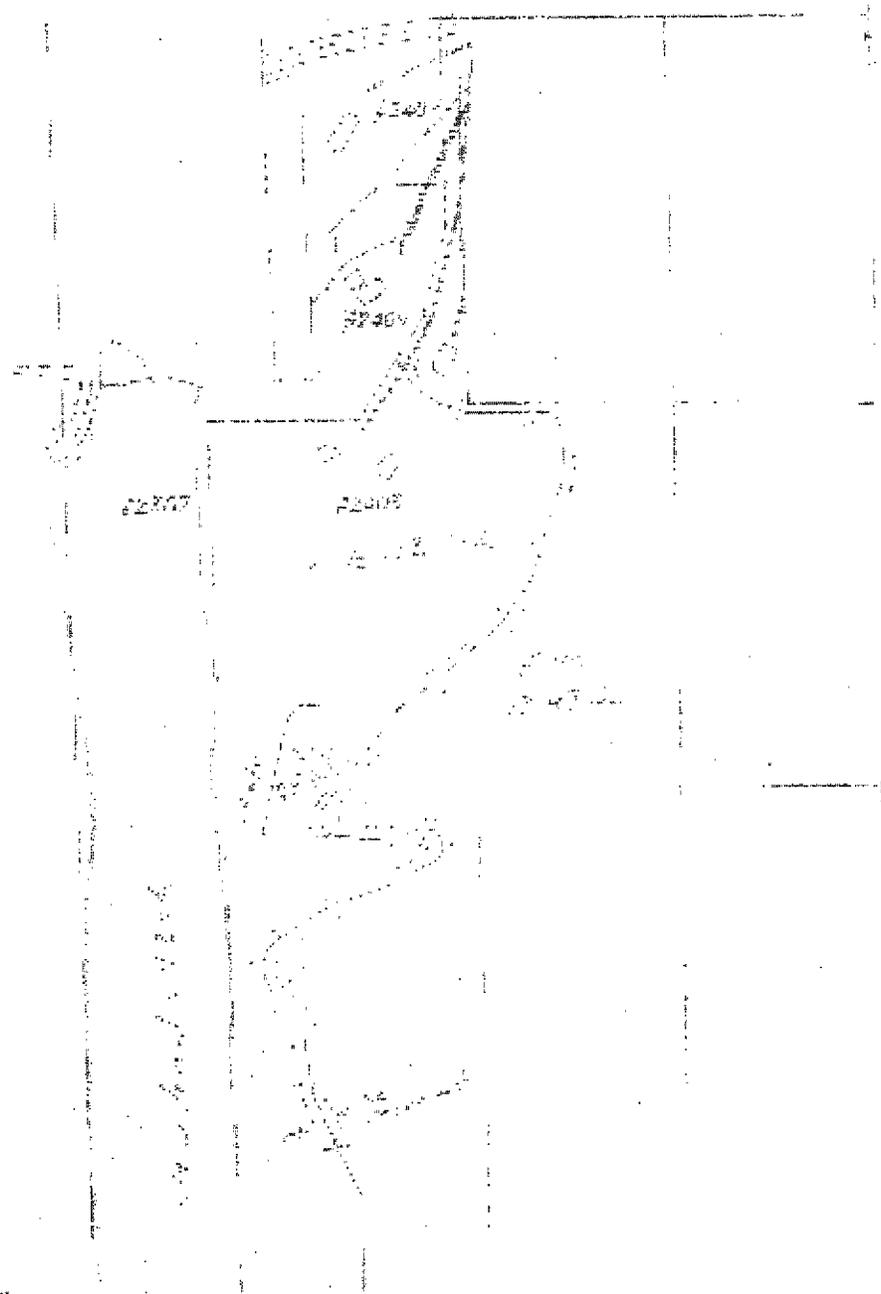
(e) Continuances. A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and address of the witness or witnesses. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain; and if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. The court, upon its allowance of the motion, may impose terms or conditions upon the moving party.

RCW 4.44.040

(repealed by Laws 1984, ch. 76, § 14)

A motion to continue a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain; and if the adverse party admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be continued. . . .

TRIAL EXHIBIT NO. 1
(partial)



COURT OF APPEALS OF WASHINGTON, DIVISION II

DEBORAH DESPAIN,
Respondent,

vs.

ESTATE OF GEORGE LUND,
JR. and DUANE LUND,
Appellants.

NO. 46321-1-II

**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. William R. Kiendl, No. 23169
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2. Mr. Duane Lund
2403 Mr. Pleasant Road
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Dated this 3rd day of November, 2014, at Longview, WA.


Diane C. Hays

HAYS LAW OFFICE

November 03, 2014 - 2:42 PM

Transmittal Letter

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Court of Appeals Case Number: 46321-1

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Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

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