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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

In re the Estate of:

ZORA P. PALERMINI,

Deceased.

BRIEF OF APPELLANT
DOMINIQUE JINHONG

Aaron P. Orheim, WSBA #47670
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellant
Dominique Jinhong

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A. INTRODUCTION

Zora (“Polly”) Palermini passed away on January 12, 2018 from self-administered medication she obtained utilizing Washington’s Death with Dignity Act, chapter 70.245 RCW (“DWD”). Polly’s friends, family, physicians, and nurses testified that Polly was “fiercely independent,” “spirited,” and mentally “sharp” woman who was deeply “devoted to her family.” At the time of her death, she had just two living family members, her son, Matthew (“Matt”) Palermini, and her granddaughter Dominique Jinhong.¹ Despite Polly’s verified mental state, the trial court found that Dominique unduly influenced and financially exploited her grandmother, after Polly’s accountant George Braly filed a petition under the Trust and Estate Dispute Resolution Act, chapter 11.96A RCW (“TEDRA”).

This Court should reverse the trial court because it fundamentally prevented Dominique from presenting the merits of her case. The trial court committed numerous errors, repeatedly exacerbated by its pervasive and flawed evidentiary rulings favoring the Estate. Most notably, it fundamentally misapplied the so-called dead man’s statute, spousal privilege exception, and hearsay rules, creating a one-sided picture of the

¹ This brief uses first names and nicknames for family members for ease of reference. No disrespect is intended. Dominique is alternatively referred to in the record as “Niqué” and “Nicky” by her family and friends, including Polly.

case. Even as is, the record does not support the conclusion that Dominique engaged in wrongdoing, where all the documentary evidence showed that Dominique acted at her grandmother's request, as her attorney-in-fact, while Polly was fully competent, independent, and aware of Dominique's efforts to settle her final affairs. These and the many other errors described below, require that this Court reverse.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying Dominique's motion for partial summary judgment as a matter of law. RP 1528-38.

2. The trial court erred in entering its final findings of fact and conclusions of law and order granting relief dated April 19, 2019, including its findings and conclusions of undue influence, fraud, breach of fiduciary duty, and financial exploitation of a vulnerable adult.

2. The trial court erred in entering findings of fact under roman numeral I., including sub findings 6, 10.

3. The trial court erred in entering findings of fact under roman numeral II, including sub findings 3, 7, 10, 11, 13, 15, 16, 20, 22, 24, 26, 27, 28, 29, 30, 31, 32, 36, 38, 39, 40

4. The trial court erred in entering findings of fact under roman numeral IV, including sub finding 3.

5. The trial court erred in entering findings of fact under roman numeral V, including sub findings 1, 2, 5, 6, 8, 9, 10, 12, 13, 14, 19.

6. The trial court erred in entering findings of fact under roman numeral VI, including sub findings 3, 6, 8, 9, 10, 11, 12, 14, 15, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32, 33, 34, 35, 36.

6. The trial court erred in entering findings of fact under roman numeral VII, including sub findings 1, 4, 5, 8, 9.

3. The trial court erred in entering judgment along with its final findings of fact as to award of fees and costs; recovery amounts; amount of supersedeas bond; and other issues, both dated July 15, 2019.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in its consistently one-sided evidentiary decisions including its wrongful application of the dead man's statute, the spousal privilege, and hearsay rules, thus preventing Dominique from a full and fair hearing and warranting a new trial on all claims?

2. Did the trial court err in finding undue influence and breach of fiduciary duty where Dominique followed Polly's directions while friends and doctors actively monitoring Polly's mental state overwhelmingly testified that she remained fiercely independent, aware of, and in control of her life and finances, which was further supported by the documentary evidence?

3. Did the trial court err in finding that Dominique violated the slayer/abuser statute where the Estate did not prove its case by clear, cogent, and convincing evidence?

4. Did the trial court err in finding that Dominique committed fraud, where the evidence did not support the elements of fraud?

5. Did the trial court err in refusing to offset its judgment with the debts the Estate owed to Dominiqué, where the TEDRA act gives it plenary authority to exercise its equitable powers to prevent unjust enrichment?

6. Did the trial court err in entering a punitive fee award?

C. STATEMENT OF THE CASE

Dominiqué Jinhong is the granddaughter of the decedent, Polly Palermini. Polly was a “fiercely independent” woman who was “very devoted to her family.” RP 940-41, 1588. Dominiqué and Polly had a very close relationship dating back to Dominiqué’s childhood when she lived with her grandmother. RP 1871-72. Polly and Dominiqué spoke frequently on the phone and consistently visited in person throughout Polly’s life. RP 1627-30. They had a loving, trusting relationship, and multiple witnesses testified that Polly was “proud” of Dominiqué who had become a lawyer and administrative law judge. RP 557-58, 954. Polly always supported these endeavors, even cosigning on Dominiqué’s law school loans and donating to Dominiqué’s campaign for superior court judge. CP 6508-17.

Polly’s late husband died decades prior, and, aside from Dominiqué, Polly’s only remaining biological family members were her two adult sons, Matt and Louis Daniel (“Dan”) Palermini.² Both Matt and Dan were

² Polly had disinherited Dominiqué’s mother, who did not factor in her estate plan.

disabled and required assistance in meeting their daily needs. RP 455-86. Matt needed even more assistance managing his affairs than Dan, and Dan and Polly cared for Matt while they were both alive, ensuring he got to medical appointments and that his bills were paid. CP 8331, 8333, 8335.

Polly set up a living trust to manage and distribute her assets as early as 1991. In general, the trust was intended to provide small sums of money (approximately \$200 a month) to pay for Matt and Dan's supplemental needs during their lifetimes upon Polly's death. CP 3267-74, 8330-45. The trust was not meant to "supplant" the benefits they received through various governmental assistance programs, such as social security disability and veteran's affairs benefits. *Id.* When Dan and Matt died, the assets in the trust would pass 50 percent to Dominique and 25 percent each to two neighbor children (Zachary and Ethan Bernstein) who Polly came to see as her own grandchildren. CP 3274. The trust was structured this way as of 2016, however the terms, beneficiaries, and trustees had changed several times over the years. *E.g.*, CP 3243-47. At times, Polly made these changes informally, before codifying them by having an attorney redraft the trust paperwork. *E.g.*, CP 8334.

Despite the changing terms of the trust over the prior years, Polly's estate planning attorney, John Kenney, testified: "Dominique was the one constant in all those documents." RP 444. Dominique was always a

remainder beneficiary of the trust, but Polly increased her share in recent years because Polly felt that Dominique “had always helped [her].” CP 8334. Polly always wanted Dominique to manage her affairs after she passed away. CP 8332, 8336. Although the last trust they drafted in 2016 named her accountant, George Braly, as co-trustee upon Polly’s death, Polly indicated that Dominique would take care of her wishes and Braly would only help out if needed. CP 8343. (Polly’s notes documenting that “*If George Braly helps then he can be paid a reasonable fee.*”) (emphasis added).³

Another constant was Polly’s desire for Dominique to have her house when she passed; witnesses testified that Polly wanted Dominique to have the house. CP 502-03; RP 892, 925. Polly’s neighbors of 37 years testified that she was “adamant about [Dominique] having her house.” RP 925. Although the trust as written in 2016 allowed Dominique to buy the house at 90 percent of its fair market value, largely to fund the special needs trusts for Dan and Matt, witnesses testified that Polly contemplated other options as well, such as gifting the house outright or selling it at a “deep

³ The Estate tried to posit the false notion that Polly appointed co-trustees because she did not trust Dominique. However, Kenney admitted that a declaration he signed saying that Polly did not trust Dominique was inaccurate. RP 432-34. Kenney knew there was some “general mistrust in the family,” most notably as to Dominique’s mother whom Polly disinherited, but he knew “[n]othing specific” regarding any allegation that Polly distrusted Dominique. *Id.*

discount.” RP 881-82, 892.

Polly had congestive heart failure, and by late 2017 she was nearing the end of her life. However, she still lived independently until she entered the hospital on December 6, 2017. CP 3528-40. On November 22, 2017, before entering the hospital for the final time, Polly went to her bank with Dominique and made Dominique the payable-upon-death beneficiary of her checking account, which had approximately \$180,000 in it at the time.⁴ CP 3395, 6643-45; RP 700. Polly always intended this account to remain separate from her trust, in part, to receive payments and pay various bills for Matt. RP 8335. Vincent Masocol, a bank employee, processed the transaction and notarized the payable-on-death designation. He testified that Polly wanted help with her finances and that he saw no signs of any influence from Dominique. RP 721-23. Masocol also testified that Polly intended to add Dominique as her power of attorney, so Dominique could manage her affairs. RP 728.

Polly followed through on that plan when on December 2, 2017, four days before she entered the hospital, she executed a Durable Power of Attorney. CP 3215-23. Two, disinterested witnesses were present, both of whom firmly believed that Polly understood exactly what she was doing

⁴ Payable-on-death accounts are governed by chapter 30A.22 RCW.

and that she wanted to give Dominique authority to manage the entirety of Polly's finances, including the trust. RP 887, 900. Kenney had drafted a placeholder power of attorney that would have appointed Braly and Dominique as co-agents *if* Polly became incapacitated. CP 3336-56. However, consistent with her wishes that Dominique manage her affairs, Polly chose to appoint Dominique as her sole agent during the final weeks of her life, without ever being deemed incapacitated. CP 3215-23; RP 887.

Kenney testified that Polly had the power to designate such an agent pursuant to the provision in her trust that the trustee "may appoint any individual or entity to serve as my trustee's agent under a Power of Attorney to transact business on behalf of my trust or any other trust created under this trust." CP 3291; RP 427-28. He testified that the trustee's agent in that scenario would be governed not by the trust, but by the power of attorney and would have broad authority over Polly's accounts. *Id.* Moreover, Polly's living trust was fully revocable, and she had broad powers to change the terms of the trust or the assets held in trust up until the time she died. CP 3254-56.

Polly entered the hospital for the final time on December 6, 2017, due to worsening leg swelling caused by her congestive heart failure. CP 3528-40. She was discharged to hospice care at Liberty Shores, in Poulsbo, WA on December 12, 2017. *Id.* Dominique began exercising her powers

as Polly's attorney-in-fact at Polly's direction, paying out of her own pocket an initial check to Liberty Shores and trying to access money in Polly's investment accounts to ensure payment for her end of life care. CP 8506. She began keeping contemporaneous notes of Polly's wishes and directions in an instruction log. CP 1521-41.

Polly ultimately chose to die using the Death with Dignity Act, RCW 70.245, *et seq.* CP 3628. Polly "wanted very much to be in control" at the time of her death. RP 926. Pursuant to the statute, Polly was required to undergo examination by two different physicians to determine whether she was mentally competent to receive DWD medication. Dr. Elaine Sugimoto spoke with Polly on December 26, 2017. RP 1552. Dr. Sugimoto testified that Polly was mentally competent, possessed the "decision making capacity" to request DWD, and "was doing it voluntarily." RP 1555. Her notes documented that Dominique was Polly's "main contact and support person." CP 7834.

Dr. Andrea Chun also spoke with Polly several times in the final weeks of her life. Dr. Chun testified that it was "clear that she was competent and clear...not at all timid about her decision." RP 1764. Dr. Chun testified that Polly was an "inspir[ing]...independent, strong woman [who was] not being coerced or influenced in any way." RP 1766. Dominique was present during many of these calls, and Dr. Chun testified

that she observed a “supporting” and “trusting relationship” with no signs of coercion or undue influence. RP 1766-67. Even at the very end, Polly was “engaged and honest...in good spirits, and very clear.” RP 1767.

Polly’s hospice nurse, Gwendoline Thompson, testified that Polly was an “amazingly spirited, clear, vocal woman” who “knew what she wanted.” RP 1570. She observed Dominique visit Polly frequently, and testified that they were “very loving” together. RP 1572. Thompson testified that, as an experienced hospice nurse, she knew the signs of “coercion,” signs she never observed when Polly and Dominique were together. RP 1572-73. Another nurse witnessed Polly signing the quit claim deed to her house, transferring the house as a gift to Dominique. RP 574. She saw no signs of coercion and had no concerns that Polly did not know what she was signing. *Id.*

Doctors reported that Polly took minimal medication near the end of her life. She took occasional, “very low dose[s]” of morphine. RP 1580; *see also*, RP 1306-08. Dr. Sugimoto testified that these doses were a mere five milligrams a day, where 40 milligrams would still be considered a “low dose” for a patient like Polly. RP 1556. She also used an opioid patch that was the “lowest dose patch” in production. *Id.* Dr. Sugimoto testified her mental capacity was not diminished in any way near the end of her life. RP 1557. Her hospice nurse testified that the only goal with her medications

was “comfort,” and she did not require any drugs for mental issues like “anxiety...agitation or hallucinations.” RP 1575.

Polly’s friends also testified that Polly was “very sharp” even at the end of her life. RP 915. As one witnesses put it, “her brain and her heart were still as passionate as always.” RP 916. Another friend testified that she remained a mentally “strong...determined...and opinionated” up until the very end. RP 939-40. She continued to check her mail, which was hand-delivered to her directly at Liberty Shores including the statements to her financial accounts, where she would have seen the transfers she directed Dominique to undertake. CP 8484; RP 937-38.

Polly’s close friends and neighbors also testified that Polly’s focus changed near the end of her life: “She started looking a little bigger than her boys and started looking at the caregivers and other people that had been in her life and just expanded her scope of appreciation for people.” RP 923. Polly wanted to “provide a little something...to a list of people” to “acknowledge” them. RP 934-95. For example, she wanted to give her Mercedes to her neighbor and remote trust beneficiary, Ethan Burstein, for one dollar. RP 892. She wanted to give items to her handyman and fur coats to her friends. CP 506. She also bought a BMW motorcycle for Dominique’s wife, Dr. Maureen Smith. RP 1659. This gift was in part to thank Dr. Smith for a harrowing incident where Dr. Smith administered

emergency care to Dan after he came to visit Polly looking catatonic and in need of oxygen. RP 1633-36.

Polly was also always concerned that Dan had a good car. CP 8333. At Polly's direction, Dominique bought a car for Dan in December 2017 with her own money. CP 8519-36; RP 1925, 1929. Dan was "ecstatic" when Dominique gave it to him. RP 1929.

Unfortunately, the new car was for naught, as Dan's health took a turn for the worse. Although his health had been failing, it deteriorated quickly at the end of 2017. RP 2007-09. The family learned that he would die within a matter of weeks. *Id.* Dan's impending death was a major shift in the family's needs going forward. Dan would no longer be available to help care for his brother; someone else would have to manage Matt's finances, help him run errands, and ensure that he got to all his medical appointments. CP 8331, 8333, 8335. Additionally, the special needs trust required considerably less funding, as it no longer needed to provide for Dan's supplemental care. *Id.* Dan passed away on January 9, 2018. RP 2007.

Consistent with this new reality, Polly no longer wanted Dominique to purchase her home at a 10 percent discount, rather, she decided to convey her home to Dominique as a gift. CP 8482. She signed a quitclaim deed, conveying the house for the consideration of one dollar that was witnessed

by two disinterested witnesses who testified that Polly knew what she was signing. RP 574. She ripped in half a promissory note that had been drafted to convey the property as a sale and wrote “gift for Nicky” across the note with her initials signed in cursive. CP 8254. She signed two real estate tax affidavits, filed with the county, conveying the house as a gift. CP 78-94, 1521-41. Polly also paid Dominique’s law school loans, which she had cosigned, and some campaign debt Dominique incurred when she ran for judge. *Id.* Polly told Matt about these intended gifts before she died. CP 697-704. Polly also directed that Dominique transfer \$628,000 from her investment accounts with Morgan Stanley to the checking account that was outside of the trust. CP 78-94, 1521-41. She wanted to make sure there was enough to pay for her own medical and other anticipated expenses, as Dominique took ownership of the account going forward. *Id.*

The family held a celebration of Polly’s life on January 7, 2018 where friends and family stopped by to pay their respects. Witnesses testified that she was “feisty” as ever and “classic Polly” during that celebration, engaging with her guests. RP 958, 1637-38. Witnesses also testified that she continued to oversee the tidying up of her affairs until her final day. RP 1643-44. For example, Dominique’s wife, Dr. Smith, was present on January 12, 2018 and heard Polly ask if the “transfer [from Morgan Stanley] had gone through.” RP 1641. When Dominique told her

the transfer did go through, Polly responded “good.” *Id.*⁵ Polly passed on January 12, 2018 via self-administered medication obtained using DWD.

Soon after Polly passed away, Braly hired a lawyer and filed a TEDRA petition against Dominique. CP 3-15. Because he was named as a co-trustee of Polly’s trust upon Polly’s death or incapacity, he felt that Dominique acted beyond the scope of her authority during Polly’s lifetime, despite the fact that Polly named her as her sole agent in the durable power of attorney. CP 8, 12. He also claimed that she fraudulently created and sent a document to Morgan Stanley when requesting funds that listed her as the sole trustee of the trust. CP 8-9. However, Dominique simply scanned this document on her phone from Polly’s trust binder, which contained multiple versions and drafts of the trust. RP 1903.

After the petition was filed, Dominique immediately agreed to resign as trustee, freeze all disputed funds, and disclose all documents and files related to the case. CP 125-36. She provided an accounting to Braly and freely disclosed all her activities while acting as Polly’s attorney-in-fact. CP 9. With Dan passed on, Dominique also began caring for Matt, making sure he got to all medical appointments and taking him shopping, which she continues to do to this day. RP 456.

⁵ The trial court ultimately excluded this testimony as hearsay, RP 1643, 1650, even though a question and a response indicating her mental feeling are not hearsay.

Dominiqué also immediately sought to mediate the dispute. CP 96-97. Despite the no contest clause in Polly’s trust requiring that disputes arising under the trust be resolved through mediation, CP 3287; RP 429-30, Braly opposed mediation and took the stance that it would be “futile.” CP 106-09.⁶ Rather than avoiding court and preserving the parties’ resources, per Polly’s wishes, Braly said from the outset that he wanted to experience the “joy of dragging Dominiqué’s ass before a judge.” CP 8626.⁷

Braly took a very aggressive stance, knowing that the dead man’s statute, RCW 5.60.030, would significantly hinder Dominiqué’s defense; however, from his very first filing in the case, Braly largely waived the statute’s protections. His petition included multiple statements regarding his transactions with the deceased as well as statements Polly made. CP 6 (“Polly repeatedly told Petitioner, her friends, and Mr. Kenney, that her sole concern was the care of her ‘boys’ – Dan and Matt, and that she intended the entirety of her estate...to be available to care for them for the remainder of their lifetimes”); CP 7 (“Polly never reported the creation of the 2017

⁶ The Estate further undermined mediation attempts later in the case by failing to arrange for transportation for Matt to attend. CP 2155-56.

⁷ Braly displayed his misunderstanding of the trust, as he actively sought to remove Matt from the assistance of “government agencies,” CP 8627, despite the fact that Polly always intended that his government assistance provide the bulk of his support, with the trust providing limited supplemental needs. CP 3267-74, 8330-45.

Durable Power of Attorney to Petitioner”);⁸ CP 13 (“[N]othing controverts that Ms. Jinhong engaged in fraud”). Dominique answered the petition, refuting its litany of misstatements. CP 78-96. Braly moved to strike her answers due to the dead man’s statute, which the trial court granted. CP 116-17, 1345-46. Thus, Dominique was fundamentally prevented from rebutting the allegations against her from the outset of the case.

The trial court denied Dominique’s motion for partial summary judgment, and the case went to a bench trial before the Honorable Daniel Goodell, a visiting judge from Mason County Superior Court. Before and during trial, the court repeatedly issued evidentiary rulings that unfairly favored the Estate. The court refused to find that the Estate waived the dead man’s statute,⁹ refused to consider admissible evidence and admissions regarding Polly’s wishes, and even permitted Dominique’s ex-wife to testify over Dominique’s objection, in clear violation of RCW 5.60.060’s spousal privilege protections. It ultimately found that Dominique was liable for undue influence, breach of fiduciary duties, and fraud. The trial court not only nullified the *inter vivos* gifts and the transfers to the non-trust

⁸ As discussed later in the brief, assertions that an event did not occur waives the dead man’s statute in the same way affirmative testimony involving the decedent does. *Bentzen v. Demmons*, 68 Wn. App. 339, 346, 842 P.2d 1015 (1993).

⁹ Dominique repeatedly asked the court to find that the Estate had waived the statute’s protections. *E.g.*, CP 1053-65; RP 154-80, 522-26, 586-87, 607-14.

checking account, it disinherited Dominique pursuant to RCW 11.84.150 and held her personally liable for taxes, attorney fees, and costs totaling \$663,632.84. CP 8881-8909. This appeal follows.

D. ARGUMENT

(1) The One-Sided Evidentiary Decisions Warrant Reversal

A new trial is warranted where the trial court only permitted a one-sided account of the evidence through multiple flawed evidentiary rulings. The trial court seriously misapplied the dead man’s statute, hearsay rules, and the spousal privilege exception, all in the Estate’s favor. The trial court repeatedly excluded admissible testimony showing that Dominique acted pursuant to her grandmother’s directions. Where, in general, the “paramount duty” of a Court hearing in a TEDRA action is to give effect to the testator’s intent, *e.g.*, *In re Estate of Bernard*, 182 Wn. App. 692, 697, 332 P.3d 480 (2014), the trial court was wrong to shield itself from this important evidence. These many one-sided errors prevented Dominique from having a fair hearing, and this Court should reverse.

(a) The Trial Court Misapplied the Dead Man’s Statute¹⁰

¹⁰ Application of the dead man’s statute is a question of law this Court reviews *de novo*. See *Bentzen*, 68 Wn. App. at 346 (reversing and remaining for a new trial due to trial court’s misapplication of the statute without giving deference to the rulings below).

Reversal is warranted due to the trial court’s frequent and pervasive misapplication of RCW 5.60.030, more commonly known as the “dead man’s” or “deadman’s” statute.¹¹ “The purpose of the statute is to prevent interested parties from giving self-serving testimony regarding conversations and transactions with the deceased because the dead cannot respond to unfavorable testimony.” *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 574, 291 P.3d 906 (2012), *review denied*, 178 Wn.2d 1025 (2013). “That is not to say that an interested party cannot testify at all.” *Id.* An interested party can testify regarding his or her own acts, feelings, and impressions, “so long as they do not concern a specific transaction or reveal a statement made by a decedent.” *Id.* at 575 (citing *Jacobs v. Brock*, 73 Wn.2d 234, 237-38, 437 P.2d 920 (1968)). For example, in *Jacobs*, our Supreme Court held that a plaintiff may testify regarding a deceased defendant, “I was always given the impression we were getting the lake property for looking after him.” 73 Wn.2d at 237-38.

The statute is largely aimed at preventing testimony regarding the “principal event or occurrence” at issue in a dispute. *See, e.g.*, Karl Tegland, 5A *Wash. Prac., Evidence Law and Practice* § 601.20 (6th ed.) (citing *Vogt v. Hovander*, 27 Wn. App. 168, 172, 616 P.2d 660 (1979)). It does not bar

¹¹ RCW 5.60.030 is reprinted in the Appendix to this brief.

a party from testifying “about the surrounding circumstances” regarding their interactions with a decedent. *Id.*

The statute’s protections may be waived when a protected party offers “testimony favorable to the estate about transactions or communications with the decedent.” *Kellar*, 172 Wn. App. at 577. This makes sense, as it would be “palpably unjust to permit the representative of a deceased person to use the adverse party to the extent that it might aid him in defeating a claim...and then claim the benefit of the statute when the adverse party sought to qualify or explain his testimony.” *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001) (citing *Robertson v. O’Neill*, 67 Wash. 121, 124, 120 P. 884 (1912)).

Here, the trial court erred by excluding evidence that is admissible even under the statute and refusing to find that the Estate waived the statute’s protections. Reversal is warranted where these errors prevented Dominique from presenting her side of the case.

(i) The Trial Court Excluded Evidence Not Implicated by the Deadman Statute

Throughout the case, the trial court fundamentally misapplied the dead man statute, excluding a host of responses, statements, and testimony that are simply not subject to the rule. Dominique was not permitted to properly answer the TEDRA petition, and even her answers that did not

violate the statute were stricken. CP 116-17, 1345-46. (striking, *e.g.*, Dominique and Polly had a close and loving relationship for the entirety of Dominique's life, Dominique was aware that Polly met with Kenney, etc.).

The trial court continued this practice at trial, excluding Dominique's testimony regarding her own acts, feelings, and impressions. For example, Dominique was not allowed to testify that she lived with her grandmother as a child. RP 1871-72. She was not allowed to testify that she took leave from work to care for her grandmother during the final months of her life. Supp. RP 40-41. She was not allowed to describe what Polly's relationship was like with her sons (*i.e.* Dominique's uncles). RP 1872-73. She was not allowed to testify where Polly habitually kept notes regarding her final wishes. RP 2025-26. She was not allowed to testify to her own feelings and impressions about whether she would receive a portion of the estate for her new responsibilities to care for Matt after Dan passed away. RP 2029-35.

These statements are simply not evidence of transactions with the deceased. They are either Dominique's own actions and impressions, or descriptions of the surrounding circumstances regarding this family. The latter testimony regarding Dominique's feelings and impressions is clearly admissible pursuant to *Jacobs* where, even an interested party, could testify "I was always given the impression we were getting the lake property for

looking after [the decedent].” 73 Wn.2d at 237-38.

There are numerous other examples of times when the trial court fundamentally misapplied the dead man’s statute, and several specific examples are described below. However, these initial examples show how the court fundamentally and pervasively misapplied the statute from the beginning of the case, seriously hindering Dominique’s defense. Again, as the Supreme Court recognized, the statute is already “fundamentally unfair.” *Erickson v. Robert F. Kerr, M.D., P.S., Inc.*, 125 Wn.2d 183, 883 P.2d 313 (1994).¹² The trial court erred in adding to the inequity of the rule by broadening its application throughout the case.

(ii) The Trial Court Wrongfully Excluded Matt’s Admissions Against Interest

The trial court seriously misapplied the dead man’s statute by refusing to allow Dominique to offer Matt Palermini’s admissions and denials that were against his and the Estate’s interest and therefore admissible under the statute. CP 1350-51; RP 1959. Matt was represented by counsel and participated as a party at trial. Dominique served requests for admission, which he answered. CP 697-704. Among other things, the trial court excluded Matt’s formal admissions that:

¹² Even here, the trial court recognized the inequity caused by the rule, “I believe that in this case the deadman’s statute is serving to place the respondent at a considerable disadvantage in being able to present her case.” RP 1441. Despite this recognition, the trial court applied the rule as broadly as possible and disinherited her.

- Polly “mentioned in a telephone conversation at the end of December 2017 that she was going to pay off Jinhong’s campaign loans”;
- Polly “intended to purchase a motorcycle as a gift for Maureen Smith”;
- Polly “requested that [Dominiqué] purchase a vehicle for [Dan]” and that Polly “intended to reimburse [Dominiqué] for purchasing the vehicle for [Dan]”;
- “During a telephone conversation at the end of December 2017, [Polly] told me she wanted Nicky to “have the house”;
- “Polly had a very close relationship with [Dominiqué] since Dominiqué was a child.”

Id. Again, this latter admission is clearly admissible as part of the “surrounding circumstances” of the family. So too are the other, more consequential, admissions as statements against interest.

Matt’s admissions regarding his mother’s wishes are statements against the Estate’s interest, and courts in Washington have long held that such statements are admissible in an action against an estate, because the statute only bars “self-serving” testimony. *Kellar, supra*. For example, in *Fleishbein v. Thorne*, 193 Wash. 65, 69, 74 P.2d 880 (1937), our Supreme Court allowed a brother to testify that his deceased sister told him she intended to transfer a mortgage on her property to another brother. This statement was opposed to the declarant’s “pecuniary or proprietary interest,” especially to the extent it created a debt on behalf of the estate.

Id. Likewise, in *In re Estate of Miller*, 134 Wn. App. 885, 894, 143 P.3d 315 (2006), the court held that a beneficiary’s testimony that may otherwise be excluded by the dead man statute could be offered against the estate, because the beneficiary was a party in interest whose share would be diminished if the claim against the estate was successful. It was a statement against the estate’s interest, and therefore admissible. *Id.* That is exactly the case, here, with Matt’s formal admissions verifying that Polly intended to make several *inter vivos* gifts before she died.

Additionally, as courts have pointed out:

In ‘close’ or ‘arguable’ situations, it is helpful to remember the general overriding principle that the [statement against interest] exception is intended to apply only to statements that are likely to be trustworthy, considering the surrounding circumstances and the context in which they are made.

Thor v. McDearmid, 63 Wn. App. 193, 203-04, 817 P.2d 1380, 1387 (1991) (citing 5B K. Tegland, *Wash. Prac., Evidence* § 403 at 267 (1989)). Here, the surrounding circumstances of these formal admissions by a represented party show that they are trustworthy. Admissions made pursuant to CR 36 are admissible and favored by courts as they promote efficiently and “eliminate from controversy factual matters that will not be disputed at trial.” *Peralta v. State*, 187 Wn.2d 888, 895, 389 P.3d 596 (2017). When determining whether such admissions are admissible a court should consider whether they “promote...the administration of justice” and

“facilitate a proper decision on the merits.” *Coleman v. Altman*, 7 Wn. App. 80, 86, 497 P.2d 1338 (1972).

Here, Matt made the admissions as a part of a formal discovery response, with advice from his attorney. They are trustworthy responses from Polly’s only surviving family member, aside from Dominiqué. They are candid responses that are not only against Matt’s own interest, but also the Estate’s interest. They are highly relevant as some of the best evidence of what Polly wanted for her family, and support Dominiqué’s contentions that she carried out Polly’s wishes in the final weeks of her life. The trial court was simply wrong to ignore this key, admissible evidence that promoted a proper decision on the merits of the dispute by revealing Polly’s true intent. *Estate of Bernard, supra*.¹³

(iii) The Estate Waived the Statute’s Protections

The trial court also erred in refusing to find, at any point in the case, that the Estate waived the protections of the dead man’s statute. Again, the party seeking the rule’s protections can waive the application of the statute.

¹³ The trial court’s reasoning on whether to admit Matt’s statements was not the picture of clarity, as the issue was addressed several times before and during trial. However, to the extent the trial court ruled that his testimony was barred by the dead man’s statute as a “party in interest,” these admissions were not subject to the rule as they were no way “self-serving” to Matt’s own interest. *See Estate of Miller*, 134 Wn. App. at 895 (beneficiary’s testimony when offered against the estate is not self-serving and not barred by the rule). Matt’s admissions showed that Polly directed Dominiqué’s actions, absent any undue influence or fraud, thus reducing the size of the Estate passing to him in trust.

Courts have long questioned the fairness and efficacy of the dead man's statute. See *Johnson v. Peterson*, 43 Wn.2d 816, 818, 264 P.2d 237, 239 (1953) (doubting the "sound[ness]" of the rule and citing commentators); *Erickson*, 125 Wn.2d at 189 (noting that the rule is "fundamentally unfair"). As such, courts apply waiver rules broadly, as the Supreme Court has clearly stated:

[T]he party asserting the statute [cannot] juggle with it, and extend or contract [the party's] waiver of it to suit [the party's] purposes...Where the incompetency imposed upon a witness by the statute is waived at all, it is waived as to all facts pertinent to the matters developed from the witness by the party for whose benefit the statute was enacted.

Johnson, 43 Wn.2d at 819-20. As discussed *supra*, it would be "unjust" to allow the Estate to question the defendant and then "claim the benefit of the statute when the adverse party sought to qualify or explain his testimony." *Lennon, supra*.

This rule has been applied in Washington for decades. For example, in *Johnson*, our Supreme Court held that an estate waived the rule's protection "[b]y calling defendant as an adverse witness and examining her upon the transaction in issue, including the execution of the receipts and how she made the payments which they purported to show" 43 Wn.2d at 818. The court explained that the estate cannot "use the testimony of defendant in so far as it might be of assistance to establish the claim of the

estate” and then “assert the statute to render defendant’s explanatory testimony incompetent.” *Id.* at 819; *see also, Bentzen*, 68 Wn. App. 345-46 (statements on behalf of the estate that the decedent never told a party about an oral contract waived the statute).

Personal representatives of an estate are subject to the dead man’s statute, even when testifying in a representative capacity in support of the estate. *In re Tate’s Estate*, 32 Wn.2d 252, 254, 201 P.2d 182, 183 (1948) (holding that executors of a will were prohibited from testifying); *In re Shaughnessy’s Estate*, 97 Wn.2d 652, 656, 648 P.2d 427 (1982) (holding that estate representatives, even when testifying in a “representative capacity” are subject to the rule). Thus, it has long been settled that “a decedent’s personal representative can waive protection of the deadman’s statute.” *Thompson v. Henderson*, 22 Wn. App. 373, 380, 591 P.2d 784 (1979); *Hill v. Cox*, 110 Wn. App. 394, 405, 41 P.3d 495 (2002).

Here, the Estate waived the protections of the statute from the very beginning of the case where the personal representative himself asserted, among other things, *as early as the opening petition*, that: (1) “Polly repeatedly told Petitioner...that her sole concern was the care of her “boys” – Dan and Matt, and that she intended the entirety of her estate...to be available to care for them for the remainder of their lifetimes”; and (2) “Polly never reported the creation of the 2017 Durable Power of Attorney

to Petitioner.” CP 6-7. By raising these affirmative contentions and issues at the outset of the case, the Estate waived the statute’s protections and opened the door to rebuttal. *E.g., Lennon, Johnson, Bentzen, supra.*

Dominiqué should have been allowed to testify that Polly executed the power of attorney, and likely did not tell Braly, because she intended that Dominiqué act as her sole agent while she was still alive. *See* CP 120. By contending that Polly never told Braly about the 2017 power of attorney, the Estate creates the negative implications that Polly did not authorize that transaction or otherwise intend to appoint Dominiqué as her sole agent. Courts have explicitly held that such negative implications offered on behalf of an estate, waived the application of the dead man’s statute. For example, in *Bentzen*, the court held that a personal representative’s statement that the decedent “never told him of the existence of an oral agreement constituted a waiver of the Deadman’s statute.” 68 Wn. App. at 345-46. Even though the statement did not concern a “specific transaction, his negative testimony went to the heart of...the matters directly at issue in this case,” thus waiving the dead man’s statute. *Id.* at 346.

Here, too, the Estate waived the statute by affirmatively raising the heart of the matters at issue. Dominiqué’s proffered rebuttal, that Polly intended her to act as her sole agent and direct important transactions near the end of her life, is entirely reasonable given the fact that Dominiqué was

Polly's only immediate family member apart from her two disabled sons. It is also supported by Polly's decision to appoint Dominique as her attorney-in-fact, the fact that Braly was only named co-trustee upon Polly's death, as well as her own notes written years earlier that she expected Dominique to carry out the bulk of her wishes and Braly could receive compensation "if" he helped her with the estate. Braly's contention should have opened the door to Dominique proffered testimony that Polly, the principal in that agent/principal transaction, intended to appoint her as her sole agent to manage her assets including the trust.

Dominique should have also been able to rebut from the very beginning that Polly's "sole concern" was that the entirety of her estate should go to her sons. Polly also made gifts to Dominique (and others) near the end of her life, and altered her estate plan upon learning that Dan would pass away and was no longer able to care for Matt. Dominique should have been allowed to testify how Polly's wishes changed and how she intended to divide her estate once her son passed, especially now that Dominique would care for Matt with Dan no longer around, which she did. RP 456 (Matt testifying that Dominique had been caring for him and ensuring he got to medical appointments after Dan and Polly's death).

This testimony would have been supported by other evidence, such as the testimony that Polly's focus changed near the end of her life and she

“started looking a little bigger than her boys.” RP 923. Polly’s own notes indicate that her assets were not meant to be transferred wholesale to her sons. Rather, the trust provided small, regular sums for their “supplemental needs.” CP 3271. The plan all along was for Matt to primarily support himself with his government disability payments, receiving small sums from the trust, approximately \$200 a month plus small yearly gifts, to pay for some of his shopping. CP 8340. Polly specifically documented that the checking account she transferred to Dominique upon her death was not “part of [her] trust” and would need to be managed after she passed away to ensure that Matt’s bills were paid because he is “not capable to do this on his own.” CP 8335. When Dan passed, Dominique was the only person left to care for Matt.

Dominique would have testified extensively to how she carried out Polly’s wishes as they changed near the end of her life when Polly learned that Dan was passing away. By raising the issue of Polly’s intentions, especially by affirmatively pleading what Polly told Braly at the outset of the case, the Estate opened the door to rebuttal evidence on this issue. The trial court was wrong to hold otherwise.

The Estate continued its pattern of waiving the statute’s protections through trial. As in *Johnson*, the Estate waived the statute when it called Dominique in its case in chief and questioned her extensively regarding the

specific transactions that were the heart of the matters at issue. RP 578-627.

The Estate opened the door to rebuttal testimony numerous times during that examination. For example:

- The Estate asked her whether she “believe[ed the power of attorney document] authorizes the agent to transact business on Zora P. Palermini Trust.” RP 581. This opened the door to rebuttal testimony that she believed she had that authority to move and convey trust assets because Polly specifically authorized it by executing the power of attorney and directing the transactions on her behalf.
- The Estate asked her if she was aware of the “representations and warranties” she was making by executing the durable power of attorney and signing documents authorizing the Morgan Stanley transfers. RP 588-89. Again, this opened the door to the representations and warranties she made as an agent authorized by the principal, Polly. Polly directed her to transfer funds into Polly’s checking account, which Dominique did on Polly’s behalf.
- The Estate asked her to identify payments made from Polly’s checking account while Polly was still alive and asked if such payments were used to pay Dominique’s personal debt. RP 591-94. This clearly opened the door to rebuttal testimony that Polly wanted to pay Dominique’s personal debts as a gift and otherwise knew about these transfers that she made before she chose to take her own life using DWD.
- The Estate asked her not only where she was when she requested certain funds from the checking account, but also what those funds were for. *See, e.g.*, RP 599-600 (discussing a cashier’s check which she requested in Polly’s presence to buy a motorcycle for Dr. Smith as a gift from Polly). This opened the door to rebuttal testimony that Polly authorized such gifts.¹⁴

¹⁴ *See also*, CP 1751-64; RP 1394-1445 (Dominique’s supplemental briefing and argument pointing out many specific waivers of the dead man’s statute).

Despite opening the door to Dominique’s explanation of these transactions, and the fact that she undertook them on Polly’s behalf, the trial court sustained objections and found that no waiver occurred. RP 1441-45. Pursuant to *Johnson, Lennon, supra*, that was error.

Again, modern courts have interpreted waiver rules relatively broadly noting that it would be “palpably unjust” to allow an Estate to “juggle” with the opposing party’s testimony to the extent it benefits the Estate. *Lennon, Johnson, supra; see also, Waddoups v. Nationwide Life Ins. Co.*, 192 Wn. App. 1078, 2016 WL 1019074 at *16 (2016) (“One should not be free to assert a factual claim to the trier of fact and then shut his opponent’s mouth from controverting the assertion.”). In *Lennon*, for example, the estate waived the statute by asking whether the interested party “brought the entire contents of [a] safe deposit box” to the decedent that the interested party ultimately took home with him. 108 Wn. App. at 179-80. By doing so, the estate opened the door to rebuttal on the implied transaction that the decedent authorized the party to take the property in the security box as a gift. *Id.* Here, too, by asking extensive questions regarding payments and transactions initiated during Polly’s lifetime, all being in her presence, from Polly’s account that she chose to make Dominique the payable-on-death beneficiary, the Estate opened the door to rebuttal testimony on the implied transaction that Polly authorized those payments.

Indeed, the Estate realized its clear error below and had to backtrack on its former argument that the test for prohibited testimony should be “is there an inferred transaction with the decedent?” Supp. RP 38. Realizing that the questions it posed Dominiqué inferred a multitude of transactions, the Estate flipped 180 degree and argued that “[t]he statute isn’t about inference at all.” RP 1402. The trial court was wrong to allow the Estate to have it both ways, applying a broad definition to exclude any inference of a transaction that Dominiqué sought to offer, while allowing the Estate to pepper Dominiqué with a host of questions inferring transactions with Polly without allowing her to explain herself. The trial court should have found that the Estate opened the door.

The Estate did not stop at opening the door through its pleading tactics and examination of Dominiqué, it blew the door off the hinges by presenting a host of favorable testimony to the Estate regarding alleged statements and transactions between Polly and Dominiqué. Witnesses, including Zachary and Ethan Bernstein’s mother and Judy Madden were allowed to testify that Polly told them she did not trust Dominiqué and insinuated that Dominiqué exerted some improper influence over the house. RP 486-521, 971-1023. It relied on this evidence of transactions with and statements from the deceased regarding Dominiqué without giving her any chance to respond. This opened the door to Dominiqué’s rebuttal of those

transactions and statements as discussed in the authorities cited above. *Lennon, Johnson, Waddoups* (testimony by Estate’s disinterested expert waived the dead man’s statute), *supra*. The court should reverse and remand for new trial, to allow Dominique the fair chance to defend herself.

(b) The Trial Court Misapplied the Hearsay Rules¹⁵

The trial court wrongfully excluded as hearsay Dr. Smith’s testimony that she was present when Polly asked whether the transfer from Morgan Stanley “went through” and responded “good” when she heard that it had. RP 1650, 1992-96. The trial court erred in several ways. First, asking whether the transfer went through is not hearsay (*i.e.* a statement offered for the truth of the matter asserted), it is not a statement. By definition a question or “inquiry is not assertive, it is not a ‘statement’ as defined by the hearsay rule and cannot be hearsay.” *State v. Collins*, 76 Wn. App. 496, 498, 886 P.2d 243 (1995) (testimony that out of court witness called and asked to speak with someone was not hearsay); *United States v. Oguns*, 921 F.2d 442, 449 (2d Cir. 1990) (“An inquiry is not an ‘assertion,’ and accordingly is not and cannot be a hearsay statement.”) (citation omitted). The trial court erred in concluding otherwise.

Second, the fact that Polly responded “good” is also not an assertive

¹⁵ Appellate courts “review whether a statement was hearsay de novo.” *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 689, 370 P.3d 989 (2016).

statement, and to the extent it is clearly qualified as an exception under ER 803(a)(3) as a then existing state of mind. It showed her then existing emotional state or “mental feeling” upon learning that her investment funds were transferred into her payable-upon-death account, as she intended.

Third, to the extent Polly did make an assertive statement, it was a statement against interest for the purposes of this case. ER 804(b)(3). Again, in a case brought by Polly’s Estate on her behalf to recover money allegedly fraudulently removed from her trust, it is against the Estate’s interest to show that she intended to transfer funds to a payable-on-death account that was not subject to the trust.

These responses were not hearsay and were relevant in a multitude of ways. They showed, not only that Polly approved of those specific transfers, but also that she knew of and actively played a part in monitoring her own finances until the day she died. This was corroborated by other evidence including the testimony from friends, family, and medical professionals, that she remained fiercely independent and mentally competent until the day she died. It was corroborated by evidence that she continued to receive her account statements in the mail, and actively checked her mail while staying at Liberty Shores. And it would also have been corroborated by Dominique’s testimony had the trial court properly determined that the Estate waived the dead man’s statute’s protections. This

error was material where there was no evidence of undue influence, only speculation, and it showed that Polly was fiercely in control of her finances, up to the day she chose to pass away using DWD.

The trial court also erred in excluding notes Dominique contemporaneously kept during the final months of Polly's life as she acted under the power of attorney authorization. CP 1521-41; RP 316-23. Such testimony "by a party in interest, as to the performance of labor or the rendition of services for the decedent, is not prohibited under the statute as a transaction with the decedent." *Boettcher v. Busse*, 45 Wn.2d 579, 582, 277 P.2d 368 (1954) (citing *Ah How v. Furth*, 13 Wash. 550, 551, 43 P. 639 (1896) (discussing an "account book")).¹⁶ These notes were kept contemporaneously with her business as an attorney-in-fact and therefore was admissible as a business record. RCW 5.45.020.

At the very least, the instruction log should have been available as a recorded recollection that Dominique should have had access to during her testimony after the Estate waived the protections of the dead man's statute. ER 803(a)(5). It also shows that she took her attorney-in-fact duties seriously, executed them diligently, and followed Polly's desires as Polly

¹⁶ Additionally, because the Estate waived the application of the dead man statute, the log should have been admitted in its entirety. However, also could have admitted it for limited purposes, such as to show Dominique's state of mind and desire to follow her grandmother's wishes, to the extent a waiver did not occur.

remained mentally “sharp” and “in control” through her final day.

(c) The Trial Court Erred in Allowing Dominique’s Former Wife to Testify Against Her

The trial court also misapplied the spousal privilege exception, allowing Dominique’s former wife, Kelly Montgomery, to testify regarding statements she allegedly made during their marriage about her desire to inherit Polly’s estate, over Dominique’s objection. RP 1348-58. The court relied on this testimony in making its findings. CP 2090. The court erred.

Pursuant to RCW 5.60.060, one spouse may prevent another “from being called as a witness on any topic without [the spouse’s] consent.” *Barbee v. Luong Firm, P.L.L.C.*, 126 Wn. App. 148, 157, 107 P.3d 762 (2005). “The privilege...survives death or divorce.” *Id.* at 156. This privilege is intended to encourage “that free interchange of confidences that is necessary for mutual understanding and trust.” *Id.* at 155-56.

Because of the obvious public policy in favor of marital harmony, courts have generally applied the spousal privilege broadly. For example, in *McDonald v. White*, 46 Wash. 334, 337, 89 P. 891 (1907) our Supreme Court held that the privilege applied to a couple who held a ceremony but did not produce a marriage license to show the ceremony was valid. The Court held that because they “endeavored to comply with the law,” “solemnize[ed]” the ceremony, and held themselves out to be married, the

privilege applied. *Id.* at 337-38; *see also, State v. Denton*, 97 Wn. App. 267, 270, 983 P.2d 693 (1999) (holding privilege applied to couple who had no license but “held themselves out as husband and wife for years” and “formally began their marriage relationship with a religious ceremony in which they promised to take each other to be husband and wife.”).

Here, Dominique and Montgomery were domestic partners as early as 1997 and married in Multnomah County Oregon in 2004. CP 1745-46. They moved to Washington and held themselves out to be a married until they separated in 2006. *Id.* Dominique even changed her last name to Montgomery, for a time, and the two raised a child together. *Id.*

Despite this unrefuted evidence, the trial court held that the spousal privilege did not apply, and that their marriage was not “valid,” because in 2005 the Oregon Supreme Court issued an opinion voiding marriage licenses issued to same sex couples in Multnomah County Oregon. RP 1356 (citing *Li v. State*, 110 P.3d 91 (Or. 2005), *abrogated by Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015)). Thus, despite undergoing the same formalities as the couples in *McDonald* and *Denton* and “endeavoring to comply with the law” as it existed in Multnomah County Oregon, Dominique was denied the spousal privilege due to the couple’s same sex status. That was clear error.

As this Court is well aware, the Supreme Court invalidated discriminatory practices against same sex couples in *Obergefell, supra*. Same sex couples enjoy the same constitutional right to marry that opposite sex couples enjoy. *Id.* This fundamental right is not tethered to state or legislative grants of authority, and same sex couples “need not await legislative action before asserting” the fundamental right. *Id.* at 2605. Thus, numerous courts have determined that *Obergefell’s* protections apply retroactively, validating same sex marriages that predated *Obergefell’s* ruling. *See Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D. Tex. 2016) (holding that *Obergefell* applies retroactively) (citing, *e.g.*, *De Leon v. Perry*, 975 F. Supp. 2d 632, 639-40 (W.D. Tex. 2014), *aff’d*, 791 F.3d 619 (5th Cir. 2015); *Hard v. Attorney Gen.*, 648 Fed. Appx. 853, 853-6 (11th Cir. 2016); *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155, 1165 n.5 (N.D. Cal. 2016)). As the *Ranolls* court noted, “Generally, in both civil and criminal cases, unconstitutional laws and rules are void *ab initio*, or void from inception, as if they never existed.” *Id.*

Here, the trial court erred in determining that *Li* invalidated Dominique’s marriage, where *Li* itself violated Dominique’s fundamental, constitutional rights and was void *ab initio*. Her marriage was just as legitimate as the couples in *McDonald* and *Denton*, where they also endeavored to comply with the law and held themselves out to be married,

which the trial court failed to recognize. There is simply no basis for upholding the court's ruling except the unconstitutional disparate treatment of same sex couples. Dominique does not assert that the court or opposing party was purposefully biased below, however this was yet another in a long line errors creating a one-sided picture of the evidence in this case. Reversal is warranted, so a fair hearing can be held.

(2) The Trial Court Erred in Finding that Dominique Unduly Influenced Polly or Breached a Fiduciary Duty

Dominique should have the chance to properly defend herself, as described *supra*; however, even considering the record *as is* the trial court erred in finding that Dominique breached any duty or exerted any undue influence over Polly. Rather, she acted as Polly's attorney-in-fact and followed her directions as Polly remained competent and fully in control.

“A party claiming undue influence must prove it by clear, cogent, and convincing evidence.” *In re Melter*, 167 Wn. App. 285, 301, 273 P.3d 991 (2012).¹⁷ Any influence is not undue influence, rather it must be so untoward that it “involves unfair persuasion that seriously impairs the free and competent exercise of judgment.” *Kitsap Bank v. Denley*, 177 Wn. App. 559, 570, 312 P.3d 711 (2013).

¹⁷ When such a finding is appealed, the question to be resolved is not merely whether there is substantial evidence to support it but whether there is substantial evidence in light of the “highly probable” test. *Id.* (quotation omitted).

Dominiqué fully admits that she acted as a fiduciary as Polly's attorney-in-act, and, as such, carries the burden of initially producing evidence to rebut a presumption that undue influence occurred. *Id.* This applies to the transactions she executed at Polly's direction benefiting Dominiqué, after she voluntarily became Polly's attorney-in-fact on December 2, 2017. However, the key word is "rebuttable." While the presumption of undue influence is initially contrary to Dominiqué, "[p]resumptions must give way in light of evidence," and the burden must shift back to the Estate where there was absolutely no evidence that Polly was even susceptible to undue influence, much less that actual undue influence occurred. *In re Estate of Jones*, 170 Wn. App. 594, 611, 287 P.3d 610 (2012); *Matter of Estate of Lint*, 135 Wn.2d 518, 536, 957 P.2d 755 (1998) ("The existence of the presumption imposes...the obligation to come forward with evidence that is at least sufficient to balance the scales and...restore the equilibrium of evidence...it does not, however, relieve the contestants from the duty of establishing their contention by clear, cogent, and convincing evidence.") (quotation omitted); *Dean v. Jordan*, 194 Wash. 661, 673, 79 P.2d 331 (1938) (*accord*).

The court in *Estate of Jones* found that the presumption of undue influence was necessarily overcome where a party presented evidence that a decedent was competent and capable of making her own decisions. *Id.* at

610-11. Absent any other evidence that the testator was not mentally competent, the court dismissed the TEDRA claim for undue influence as a matter of law. *Id.* This is not a new concept. For years, courts have upheld gifts to friends, family members, and fiduciaries alike where the evidence shows that the testator had the capacity to freely give such a gift. *Zvolis v. Condos*, 56 Wn.2d 275, 282, 352 P.2d 809 (1960) (evidence of the “capacity of the donor” and that the donor’s gifts to a fiduciary were “free and voluntary” were enough to defeat claim of undue influence).

This case presents a unique situation where there is far more than just evidence from friends and family that the decedent was competent. This case is perhaps the first where an Estate seeks to prove undue influence against party who ended her own life pursuant to DWD. The rigorous standards imposed by that statute show that Polly was verifiably competent and in control up until the very end. RCW 70.245.040.

The statute requires that two physicians interview a patient, review his or her relevant medical records, and confirm, in writing, that the patient is competent, acting voluntarily, and has made an informed decision. *Id.*; RCW 70.245.050. The statute imposes safeguards and will not permit end of life medication if either physician determines that a patient “may be suffering from a psychiatric or psychological disorder or depression causing impaired judgment.” RCW 70.245.060. In such cases, the patient cannot

utilize DWD without undergoing counseling. *Id.* This protection is broad, as it does not require proof or certainty that a patient is suffering from impaired judgment. Rather, an indication that the patient’s judgment “may be impaired” is enough to keep a patient from receiving DWD. *Id.*

Here, all the physicians and nurses testified that Polly was fiercely independent, fully competent, and showed no signs of influence, undue or otherwise. No physician suspected that Polly may be suffering from any condition that would impair her judgment, and they confirmed that the palliative medication she took had minimal effect on her mental state. Physicians examined Polly three separate times, including on January 10, 2018, after Dan had passed away, and still deemed her competent, in good spirits, and “very clear” minded. RP 1767. This testimony was supported by Polly’s friends who overwhelmingly testified that Polly was mentally “sharp” and showed no signs of influence until the day she died. RP 915. Other professionals, like the bank employee who prepared the payable-on-death designation naming Dominique on her checking account, also noted no signs of influence. RP 721-23.

There was no evidence of undue influence. To the contrary, the only evidence showed that Dominique and Polly had a “loving,” “trusting” relationship that extended back to Dominique’s childhood. Witnesses testified that Polly was “very devoted to her family.” RP 940-41. Polly

specifically designated Dominique as her attorney-in-fact, days before she entered Liberty Shores, and intended that Dominique should carry out her final wishes on her own, without help from Braly or anyone else. Thus, despite Braly's assertions to the contrary, Dominique was fully within her authority to handle Polly's affairs under the power of attorney that was signed before Polly could ever be considered a vulnerable adult.¹⁸

Dominique and Matt were the only remaining family members as of the time of her death; it is eminently reasonable that she would make gifts to show her appreciation for her family near the end of her life, as witnesses testified. This was in line with other evidence, including her historical estate plans – *i.e.*, the fact that she continuously increased Dominique's share of the remainder of her estate – her “adamant” indication that Dominique should have the house, and her indication that Dominique should be compensated for carrying out her wishes, especially given that Dan was no longer around to care for Matt. CP 8330-45. Multiple

¹⁸ Pursuant to RCW 11.84.160 (referencing the definition of RCW 74.34.020) a “vulnerable adult” includes a person who is: “(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or (b) Found incapacitated under chapter 11.88 RCW; or (c) Who has a developmental disability as defined under RCW 71A.10.020; or (d) Admitted to any facility; or (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or (f) Receiving services from an individual provider; or (g) Who self-directs his or her own care and receives services from a personal aide under chapter 74.39 RCW.” The only basis for determining that Polly was a vulnerable adult was her admission to the hospital and later hospice care, which did not occur until December 6, after she made Dominique the recipient of her payable-on-death account and appointed her as her attorney-in-fact. Until that time, she lived and cared for herself independently.

witnesses saw Polly sign documents related to the house, and none saw any sign of undue influence. RP 574, 925. And Polly expressly tore up a promissory note and wrote “gift for [Dominiqué]” across it, a writing the Estate never challenged. CP 8254. As in *Estate of Jones and Zvolis*, this overwhelming testimony of Polly’s capacity up until the day she died was more than enough to shift the presumption back in Dominiqué’s favor.

The court should have considered all the evidence, including the indisputable facts that Polly named Dominiqué as the payable-upon-death beneficiary of an account, weeks before entering the hospital, that she always intended to keep her checking account outside the trust, and specifically intended that the balance go to Dominiqué upon her death. Polly executed a power of attorney to allow Dominiqué to handle her affairs late in life, and Dominiqué did so in Polly’s presence while Polly actively monitored her own finances and made critical decisions about her own health care, as friends and doctors testified. To say these transactions were the result of undue influence does a disservice to Polly who was a fiercely independent and mentally competent woman until the moment she chose to end her own life using DWD. This testimony was sufficient to negate any finding of undue influence.

However, the trial court wrongfully failed to shift the burden back to the Estate. Had it done so, the Estate failed to meet its burden to prove

undue influence by clear, cogent, and convincing evidence. The Estate's evidence was wholly lacking. It primarily relied on the testimony of just two friends, Ruth Bernstein and Judy Maddon, as well as Dominique's ex-wife, Kelly Montgomery, who claimed that Dominique was not trustworthy or that Polly had other plans for the house, despite ample evidence to the contrary. CP 2089-2114. And it relied on the pure speculation from non-family members like Braly and Kenney, that Polly would not change the terms of her trust executed over a year prior or appoint a single attorney-in-fact, despite the fact she had done so several times in her final years and that she had full authority to do so up until the day she died. *Id.* The Estate's own "expert" neuropsychologist, called to comment on Polly's mental state, admitted that his conclusions were entirely "speculative" and that in reviewing the case he never saw any direct evidence of undue influence. RP 1316, 1323-24. Such speculative expert testimony is inadmissible to prove the Estate's case. *See, e.g., State v. Guilliot*, 106 Wn. App. 355, 364, 22 P.3d 1266 (2001) (disqualifying speculative expert testimony that a defendant's hyperglycemia led to diminished capacity under ER 702).

The Estate simply did not produce enough to overcome the clear fact that Polly remained mentally competent and "fiercely independent" throughout her life, trusted Dominique to handle her affairs, and asked her to do so before she ever entered the hospital. Dominique carried out her

fiduciary duties faithfully and executed Polly's wishes *per her instructions*. This Court should reverse with instructions to enter judgment for Dominique where the Estate failed to prove undue influence as a matter of law, relying entirely on a rebutted presumption. *Estate of Jones, Dean, supra*.¹⁹

(3) The Trial Court Wrongfully Found that Dominique Violated the Slayer Abuser Statute

The trial court wrongfully found that Dominique's actions qualified her for disinheritance under the slayer/abuser statute, RCW 11.84.150. Unlike in the undue influence claims where Dominique had the initial burden of proof based on a rebuttable presumption, the Estate had the affirmative burden to prove financial exploitation of a vulnerable adult serious enough to disinherit Dominique by "clear, cogent, and convincing evidence." RCW 11.84.160(1). For all the reasons stated above, the evidence did not support such a finding in this case, and certainly not by clear, cogent, and convincing evidence.

Polly chose Dominique to carry out her affairs long before she ever entered hospice care, as documented by multiple witnesses including friends and bank employees. She was clear of mind and free of influence until the day she utilized DWD. The trial court excluded ample admissible

¹⁹ Dominique moved for judgment as a matter of law. RP 1528-38.

evidence that Dominique acted at Polly's clear direction, at all times. Dominique should be given the opportunity to mount a full and fair defense in light of the Estate's unfair use of the dead man's statute, among the other errors described *supra*.

The trial court's findings largely rely on the wrongful conclusion that Dominique failed to meet her burden to show a valid *inter vivos* gift. CP 2107-10 (finding that Dominique failed to meet her burdens to rebut the presumption of undue influence). However, a perceived lack of proof on Dominique's part does not render the *inter vivos* transfers *per se* the result of elder abuse. The remedy for a failure to prove an *inter vivos* gift is to negate the gift. *See McCutcheon v. Brownfield*, 2 Wn. App. 348, 356, 467 P.2d 868 (1970) ("If the judicial mind is left in doubt or uncertainty as to exactly what the status of the transaction was, the donee must be deemed to have failed in the discharge of his burden and the claim of gift must be rejected.") (quotation omitted). The trial court was not obligated to disinherit Dominique and issue a punitive over half-million-dollar fee award, especially where Dominique did rebut the presumption of undue influence with the ample testimony that Polly was fully in control of her life until the end, and intended to make gifts to Dominique – *one of just two of Polly's only surviving family members*. This Court should reverse with instructions to enter judgment in Dominique's favor on this claim.

(4) The Court Wrongfully Found Dominique Committed Fraud

The trial court also erred in finding fraud, based on the one-sided presentation of the evidence described *supra*. The court's entire findings boiled down to a single certification of trust document Dominique presented to Morgan Stanley to allegedly effectuate the transfer to the checking account. CP 2106-07, 3577-79. Dominique scanned this document from Polly's estate binder using her phone, and it listed Braly as a successor trustee in the event Polly died or was incapacitated. *Id.* The Estate claimed it was forged.

At the outset, Dominique adamantly denied creating any fraudulent document. RP 1903. Moreover, she accessed the Morgan Stanley account at Polly's direction and pursuant to her powers as Polly's chosen *attorney-in-fact*, not as the trustee of the trust. The power of attorney gave her this power to act on Polly's behalf and transfer trust property while Polly was still alive, *regardless of who was named as trustee upon Polly's death*.

Moreover, although Kenney testified that he believed he never created this document, the evidence showed that it was consistent with other documents Kenney had drafted, including a summary of the trust which *also* named Braly as a *successor*, not co-trustee. Ex. 237; RP 1901. It was also consistent with Polly's wishes that Dominique act as her sole agent pursuant to the power of attorney she signed and her documented desire that

Dominiqué handle her affairs and Braly could be compensated “if” he helped too. CP 8343. Kenney created several versions of Polly’s estate plan, and he admitted that he did not keep original copies of the documents he drafted, but rather put them in a binder for his clients to take home. RP 389-90. Dominiqué’s expert witness also testified that the signature on the copy Dominiqué found and produced was more likely genuine than any copy of the same document Kenney produced. RP 1784-98. Again, where the Estate waived the protections of the dead man statute, Dominiqué should have been allowed to fully testify regarding the transfer, including the fact that Polly directly ordered and monitored it. The Court should remand for a new trial so Dominiqué can fairly defend herself.

Even as is, however, the record does not support the court’s finding of fraud. The elements of fraud are: “(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker’s knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff’s ignorance of its falsity; (7) plaintiff’s reliance on the truth of the representation; (8) plaintiff’s right to rely upon it; and (9) damages suffered by the plaintiff.” *Union Bank, N.A. v. Blanchard*, 194 Wn. App. 340, 359, 378 P.3d 191 (2016). The Estate failed to produce evidence to show that Dominiqué *knew* the document was false or intended for anyone to rely on it where she sought access to the account on Polly’s behalf. Rather,

Dominiqué acted, at all times, pursuant to her powers as Polly's attorney-in-fact while Polly was still alive, not as at trustee. Moreover, the Estate produced *no evidence* whether Morgan Stanley even relied on the document when making the transfer or whether it relied on the power of attorney Polly signed, which gave Dominiqué authority to access her accounts while she was still alive. RP 757-58, 766 (Morgan Stanley employees testifying they did not know what documents authorized the transfer, as that decision was made by the "legal department"). Absent evidence of these material elements, this Court should reverse with instructions to enter judgment in Dominiqué's favor on this claim.

(5) The Trial Court Erred by Refusing to Offset the Judgment for Amounts the Estate Owed to Dominiqué

The trial court also erred in refusing to offset its award with amounts owed to Dominiqué from Polly's estate. Dominiqué paid for several items out of her own pocket at Polly's request, including a new car for Dan, as well as funds for Polly's care. CP 142-44 (creditor claim submitted by Dominiqué to preserve the issue), 8519-36; RP 1925. She reasonably expected to be reimbursed from the Estate for these expenses, as Matt, the primary beneficiary of the trust, admitted. CP 697-704. However, the trial court refused to consider these offsets, or even hear evidence regarding them, during the trial, finding that they were outside the scope of the

TEDRA action. That was clear error.

TEDRA is a “grant of plenary powers to the trial court.” *Estate of Jones*, 170 Wn. App. at 604 (quoting *In re Irrevocable Trust of McKean*, 144 Wn. App. 333, 343, 183 P.3d 317 (2008)). It gives the trial court “full and ample power and authority...to administer and settle...[a]ll matters concerning the estates and assets of incapacitated, missing, and deceased persons.” RCW 11.96A.020(1)(a). Included in that plenary power is the basic, equitable authority to offset recovery so a party is not unjustly enriched. *See, e.g., In re Estate of House*, 185 Wn. App. 1006, 2014 WL 7339595 (2014), *review denied*, 183 Wn.2d 1021 (2015) (noting that the TEDRA “statutes support the broad view of the superior court’s authority, under TEDRA, to apply equit[able]” principles to a dispute); *Eagle Point Condo. Owners Ass’n v. Coy*, 102 Wn. App. 697, 702, 9 P.3d 898, 902 (2000) (“It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.”).²⁰

The court erred in refusing to exercise its plenary authority to settle all of the Estate’s affairs and reach an equitable result. Even if this Court upholds the judgment, it should remand with instruction to offset the sums

²⁰ At the very least, the trial court erred in refusing to consider this evidence as to Dominique’s good intentions in managing her family’s affairs. It showed a lack of undue influence, fraud, or any other wrongdoing where she voluntarily took on substantial debts to assist her family in the final weeks of Polly’s life.

Estate owes to Dominiqué.

(6) Upon Reversal the Court Should Reverse the Fee Award

For all the reasons stated above, the trial court should reverse the judgment, including the punitive fee award issued against Dominiqué under the TEDRA statute, RCW 11.96A.150. Such an award is inappropriate given the legal deficiencies described above, or, at the very least, premature until Dominiqué can have a fair hearing.

(7) Dominiqué Should Be Awarded Fees on Appeal

The TEDRA statute, RCW 11.96A.150, also permits attorney fees on appeal. Should this Court reverse, it should award Dominiqué her fees from the Estate or the personal representative individually, especially where she has at all times tried to carry out her grandmother's wishes and sought to limit damages to all parties by seeking to mediate the case very early on, to which Braly objected. She has been unfairly treated by Braly, who indicated early on he cared more about the "joy" of "dragging" Dominiqué to court than preserving the parties' resources. CP 8626.

E. CONCLUSION

For the foregoing reasons the Court should reverse with instructions to enter judgment in favor of Dominiqué. At the very least, a new trial is warranted so Dominiqué can have a fair hearing. The Court should vacate the fee award and award Dominiqué her fees on appeal.

DATED this 5th day of November, 2019.

Respectfully submitted,



Aaron P. Orheim, WSBA #47670
Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorney for Appellant
Dominiqué Jinhong

APPENDIX

RCW 5.60.030

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the *Brief of Appellant* in Court of Appeals, Division II Cause No. 53538-6-II to the following:

Teresa Byers
Bruce A. McDermott
Foster Garvey PC
1111 Third Avenue, Suite 3000
Seattle, WA 98101
teresa.byers@foster.com
bruce.mcdermott@foster.com
jill.beagle@foster.com
chris.elliott@foster.com

William H. Broughton
Kitsap Law Group, Inc., P.S.
9057 Washington Avenue NW
Silverdale, WA 98383-8341
bill@kitsaplawgroup.com

Ethan Bernstein
450 10th Avenue, # 201
San Diego, CA 92101
ethan_bernstein@me.com

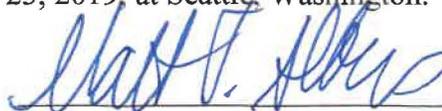
Zachary Bernstein
34 Goodman Street S., #305
Rochester, NY 14607
zachbernst@aol.com

Karen L. Cobb
Frey Buck, P.S.
1200 Fifth Ave., Suite 1900
Seattle, WA 98101
kcobb@freybuck.com
mkniffen@freybuck.com

Original electronically delivered via appellate portal to:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: November 25, 2019, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

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Third Floor Ste C
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