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No. 53538-6-II

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

In re the Estate of:

ZORA P. PALERMINI,

Deceased.

REPLY BRIEF OF APPELLANT DOMINIQUÉ JINHONG

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A. INTRODUCTION

A trial court's "paramount duty" in hearing a TEDRA case is to effectuate the intent of the deceased. *In re Estate of Bernard*, 182 Wn. App. 692, 697, 332 P.3d 480, *review denied,* 181 Wn.2d 1027 (2014). The Estate ignores this paramount duty and defends the trial court's decision to exclude a host of admissible evidence from Polly's closest, and only living relatives, including her son, granddaughter-in-law, and granddaughter, Dominiqué Jinhong. The many one-sided, evidentiary errors show that the trial court had its "thumb on the scale" of justice in the Estate's favor. At the very least, a new trial is warranted.

But even with the record as is, the Estate failed to meet its heavy burdens to prove undue influence, exploitation of a vulnerable adult, and fraud by clear, cogent, and convincing evidence. Polly was verifiably competent, independent, and in control until the day she ended her own life using Washington's Death with Dignity Act, chapter 70.245 RCW ("DWD"). The Estate cannot overcome this key fact, supported by physicians and those closest to Polly who all maintained that Polly remained in independent and in control to her final day. This Court should reverse.

B. REPLY ON STATEMENT OF THE CASE

The Estate's statement of the case is misleading and contains debunked assertions, including the false notion that Polly "did not trust

Dominiqué." Resp't br. at 11. Polly's attorney, John Kenney, admitted at trial that he knew "[n]othing specific" about Polly distrusting Dominiqué and falsely attributed mistrust in the family to Dominiqué in his declaration. RP 432-34. To the contrary, Polly and Dominiqué had a loving relationship dating back to Dominiqué's childhood. *E.g.*, RP 1871-72. Polly always wanted Dominiqué to manage her affairs after she passed away, and this was entirely consistent with her decision to add Dominiqué to her payable-on-death account and name Dominiqué as her attorney-in-fact before she ever entered the hospital for the final time. CP 3215-23, 8332, 8336. And independent witnesses, including doctors, nurses, and bank employees, testified that they observed no coercion or influence on Dominiqué's part, undue or otherwise, during Polly's final months.[1]

Incredibly, the Estate's statement of the case omits *any discussion* of the fact that Dan, Polly's son and one of the two primary beneficiaries of the trust, became terminally ill and passed away days before Polly ended her life using DWD. RP 2007-09. This omission is telling, as the Estate cannot account for the significant effect this had on the family's needs going

[1] *E.g.*, RP 721-23 (bank employee observed Polly's desire to have Dominiqué assist in her affairs when she was added to payable-on-death account and say no signs of coercion); RP 1572 (hospice nurse describing a "very loving" relationship with no signs of coercion); RP 1766-67 (physician describing Polly and Dominiqué's relationship as "supporting" and "trusting" and that Dominiqué "deferred" to Polly); CP 7834 (doctor's notes indicating Dominiqué's was Polly's support).

forward. Dan was Matt's main support, and Dominiqué would need to step up and support him going forward, something she continues to do this day. RP 1886-87; CP 8331, 8333, 8335. Polly was adamant that Dominiqué should be compensated for managing the estate and caring for her uncles, and she increased Dominiqué's share in recent years for all that she did to help the family. CP 8330-45. This history, along with the fact that the special needs trust needed much less funding after Dan passed, is consistent with the gifts Polly made in her final days, when 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," as Polly's, friend and neighbor of 37 years, testified. RP 923.

The Estate omits discussion of these facts because it was not privy to them. Polly's estate, like she always meant it to be, was a family affair, with her trusted granddaughter, Dominiqué, managing her final wishes as her sole agent. CP 8343 (Polly's notes indicating that her accountant could collect a fee for managing the estate only "*if*" he helped Dominiqué). The Estate's personal representative, Polly's accountant George Braly, and its other non-family witnesses merely speculated that Polly would not deviate from an outdated estate plan leaving everything in a special needs trust for her "boys," one of whom was now deceased. Resp't br. at 12. Yet Polly remained "fiercely independent" and "in control" of her life and finances

until the day she died. RP 940-41, 1588. She had every right to rearrange her assets and estate plan, something she naturally did given Dan's terminal illness. CP 3291; RP 427-28. And no one who was with her during her final days witnessed any signs that she was unduly influenced into making those decisions. *E.g.*, *supra* n.1.[2]

C REPLY ON ASSIGNMENTS OF ERROR

The Estate makes an initial attempt to dodge the merits of the appeal, generally taking issue with Dominiqué's assignments of error and citing RAP 10.3(g). Resp't br. at 4-6. This is baseless. Dominiqué complied with RAP 10.3(g), listing 67 individual findings of fact she challenges on appeal. Appellant br. at 2-3.[3] She articulates the major issues related to those assignments of error and argues them in separate sections with citations to

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[2] The Estate also includes an "Appendix," adding three additional pages of argument to an already overlength brief. In addition to violating RAP 10.4's length requirements, the "Appendix" violates RAP 10.3, which mandates that "[r]eference to the record must be included for each factual statement." Many of the Estate's assertions omit any reference the record and merely contend that Dominiqué's assertions are "unsupported by any evidence." Resp't br. Appendix. Not true. Dominiqué extensively cites the record in her opening brief, including the vast evidence showing that she followed Polly's directions as she remained independent and in control until the day she died. The Estate does not, and cannot, refute these facts with its own citations to the record. The Court should strike the improper "Appendix."

[3] Dominiqué assigned error to these 67 individually identified sub-findings "by number" within the meaning of RAP 10.3(g); she merely organized them using the same roman numerals the trial court used to organize its findings to save space in her brief. This does not affect review of her clearly defined arguments. *See In re Disciplinary Proceeding Against Jackson*, 180 Wn.2d 201, 226, 322 P.3d 795, 808 (2014) ("[a]cknowledging [the] difficulty" in separately listing assignments of error to lengthy findings of fact when appellate briefs are subject to page limits, and considering errors clearly raised throughout the brief even where appellant merely assigned error generally to all 391 findings of fact).

legal authority and the record. To the extent there was any technical issue, appellate courts "liberally construe" the RAPs to "facilitate the decision of cases on the merits." RAP 1.2. Dominiqué's brief raises specific challenges to the trial court's findings and fully briefs the issues. This Court should reject this attempt to cast doubt over Dominiqué's clear arguments.

D. ARGUMENT

(1) The Trial Court's Numerous Evidentiary Errors and One-Sided Rulings Favoring the Estate Warrant a New Trial

(a) The Estate Misapplies the Dead Man Statute

The Estate seriously misunderstands the dead man statute. It continues to defend the trial court's decision to exclude testimony that falls outside the statute's purview and fails to understand the rules regarding waiver. For example, it continues to defend the trial court's decision to exclude Dominiqué's testimony that she lived with her grandmother as a child, that she took leave from work to care for Polly at the end of her life,[4] and her observations regarding her uncles' relationship with her grandmother. Resp't br. at 19-22.

The Estate argues that this, and other testimony that the court excluded below is subject to the rule as a "transaction" with the decedent

[4] "[T]estimony related to acts of the witness alone…involve[ing] the rendition of services for the decedent" is not barred and is "not a transaction with the decedent." *Richards v. Pac. Nat. Bank of Wash.*, 10 Wn. App. 542, 548, 519 P.2d 272, *review denied,* 83 Wn.2d 1014 (1974) (testimony that a party worked for decedent and expected payment).

because Polly could theoretically contradict it if she were alive. Resp't br. at 19-20. While it is true that courts have articulated the test as whether the deceased if alive "could contradict the witness of [his or her] own knowledge," this does not apply to *all testimony* about a decedent, only testimony that evidences a "specific transaction or reveal[s] a statement made by the a decedent." *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 574, 291 P.3d 906 (2012), *review denied*, 178 Wn.2d 1025 (2013).

General testimony regarding the "surrounding circumstances" of a family does not reveal any specific transaction or statement. Karl B. Tegland, *Evidence Law and Practice* § 601.20, 5A Wash. Prac. (6th ed.). Rather, "A transaction is the doing or performing of some business ... or the management of any affair." *In re Shaughnessy's Estate*, 97 Wn.2d 652, 656, 648 P.2d 427 (1982) (quotation omitted). "To be a transaction in such a case, the matter concerning which the testimony is given must involve some act by and between the parties for the benefit or detriment of one or both of the parties." *Bentzen v. Demmons*, 68 Wn. App. 339, 344, 842 P.2d 1015 (1993). Thus, the rule only excludes testimony regarding specific business dealings or events, such as the execution of a contract or torts. *See also*, 98 C.J.S. *Witnesses* § 256 (2020) ("The prohibition of a dead man's statute on testimony by an interested party or witness to a 'transaction' with

a decedent implies mutuality or concert of action, such as a business deal, *where the legal relationship of the parties is altered*.") (emphasis added).

Dominiqué's childhood is not some "business done" with her grandmother. It does not concern some *specific* transaction or event where their *legal* relationship was altered. Nor are the surrounding circumstances of the family such as her uncles' relationships with Polly, as Dominiqué observed throughout her life. The error here is plain, where Dominiqué was precluded from defending herself and introducing evidence of the family dynamic from the very outset of the case. CP 1345-46 (striking Dominiqué's answers to the TEDRA petition).

The context of the family is key, where the Estate tries to paint Dominiqué as a greedy, coattail-riding relative, who swooped in near the end of her grandmother's life for her own "personal enrichment." Resp't br. at 1. The opposite is true. Polly and Dominiqué had a "loving" relationship stretching back to Dominiqué's childhood. CP 701; RP 1126, 1572. Polly's estate lawyer admitted that Dominiqué remained the "one constant" in Polly's ever-changing estate plan. RP 444. Polly entrusted Dominiqué to handle her affairs, she herself insisting on signing a power of attorney days before she entered the hospital at the end of her life. CP 3395, 6643-45; RP 700. This was consistent with her historic estate plans and her desire to have Dominiqué, one of her two remaining family members,

manage her affairs at the end of her life. CP 8343 (Polly's own handwritten notes indicating that Braly could receive compensation "*if*" he helped Dominiqué manage the estate).

This family history also helps explain why Polly decided that Dominiqué should have the family home as a gift – *i.e.* the home in which Dominiqué spent her childhood – especially once Dan's health took a turn and the Estate needed less funding. A discounted sale to fund the trust was simply no longer necessary, as the trust had money to supplement Matt's government assistance benefits, and Dominiqué would personally be responsible for taking care of Matt using monies from the payable-on-death account after Dan passed away. CP 8331, 8333, 8335. But again, the Estate fails to even mention the fact that Dan passed away, significantly alternating the family's needs in Polly's final days.

The Estate argues that this testimony, and other testimony regarding Dominiqué's feelings and impressions, are also excluded under the rule because they infer transactions. Resp't br. at 17. Not only is this inconsistent with the case law cited *supra*, as such testimony about the surrounding circumstances and family relationships do not infer some specific event, business dealing, or change in legal relationship. The Estate's argument is also inconsistent with its own argument to the trial court that the dead man statute "is [not] about inference at all." RP 1402

(arguing that it *did not waive* the statute despite extensively questioning Dominiqué about every payment she made on Polly's behalf at the end of her life, *inferring* that Polly had not directed her to make those payments).

The Estate's inconsistencies reveal the true prejudice that occurred below. The Estate continues to argue that the dead man statute allows statements that help its case and bars those that do not. Its ever-shifting, legally inconsistent arguments affected the proceedings, where the trial court acquiesced to this tactic, ruling in the Estate's favor nearly every time, putting its "thumb on the scale" in favor of the Estate. A new trial is warranted so that Dominiqué can properly defend herself.

(i) The Estate Waived the Statute's Protections

As discussed in Dominiqué's opening brief, because the dead man statute is fundamentally unfair, modern courts apply waiver rules liberally and have found waiver in several instances:

> The deadman's statute may be waived by an adverse party by (a) failure to object, (b) cross-examination which is not within the scope of direct examination, or (c) testimony favorable to the estate about transactions or communications with the decedent.

Botka v. Estate of Hoerr, 105 Wn. App. 974, 980, 21 P.3d 723 (2001). Here the Estate waived the statute's protections through favorable testimony from numerous parties about Dominiqué's alleged transactions or communications with the decedent, and, most egregiously, by calling

Dominiqué in its case in chief and examining her extensively regarding transactions with Polly. Appellant br. at 24-33.

The Estate ignores the rule that when an estate calls an interested party as an adverse witness, the statute's protections are presumptively waived. *See Johnson v. Peterson*, 43 Wn.2d 816, 818, 264 P.2d 237 (1953); *Zvolis v. Condos*, 56 Wn.2d 275, 352 P.2d 809 (1960); *Estate of Lennon v. Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001). As the *Johnson* court explained, "By 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, plaintiff waived the provisions of the statute." 43 Wn.2d at 818. The Court reasoned that an estate cannot "use the testimony of defendant in so far as it might be of assistance to establish the claim of the estate, and yet she would assert the statute to render defendant's explanatory testimony incompetent." *Id.*

Here, that is *exactly* what the trial court allowed the Estate to do. The Estate was permitted to examine Dominiqué extensively regarding the power of attorney that Polly signed, giving Dominiqué the legal authority to handle Polly's affairs at her direction, RP 581, 588-89, and specifically grilled her regarding every payment and check drawn on Polly's account in

the final weeks of her life. RP 591-94, 599-600.[5] This opened the door to Dominiqué's rebuttal that Polly herself insisted on the power of attorney and directed these transactions and payments during the final weeks of her life.

Contrary to the Estate's arguments, waiver also applies to the testimony of third parties. Washington courts have routinely held that a party waives the statute's protections by calling other witnesses to testify in favor of the estate especially where the witness describes a transaction or communication (or lack thereof) between the interested party and the decedent. *See* Karl B. Tegland, *Rule 601. General Rule of Competency*, 5D Wash. Prac., Handbook Wash. Evid. ER 601 (2019 ed.); *Botka*, 105 Wn. App. at 974 (estate waived the statute by offering testimony by the decedent's non-party daughter, favorable to the estate); *Waddoups v. Nationwide Life Ins. Co.*, 192 Wn. App. 1078, 2016 WL 1019074 at *16 (2016) (testimony by Estate's disinterested, expert constituted waiver).

Here, the Estate elicited a host of testimony from witnesses describing alleged transactions and communications (or lack thereof) between Polly and Dominiqué. RP 547 (Estate's witness alleging that Polly told her "[Dominiqué] made me" buy the car for Dan); RP 989, 999

[5] *See also*, CP 1751-64; RP 1394-1445 (Dominiqué's supplemental briefing and argument pointing out the Estate's many specific waivers of the dead man's statute).

(Estate's witness testifying about Polly and Dominiqué's alleged arrangement to buy the house and also testifying about the car purchase); CP 6-7 (Estate's representative asserting that Polly never reported the power of attorney assigning Dominiqué as her sole agent or her desires to change her estate near the end of her life).[6] This opened the door to Dominiqué's rebuttal that Polly directed her actions and the payments from her account, directed the car purchase, and determined that Dominiqué should have the house as a gift, especially given Dan's terminal health. The trial court failed to grasp these waiver rules. Reversal is warranted.

(ii) Matt's Statements Against Interest Were Admissible

The trial court erred in refusing to admit Matt's formal admissions regarding Polly's intentions during the final days of her life under the dead man statute. Appellant br. at 21-24. The Estate contends that Matt's testimony is categorically excluded under the dead man statute because

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[6] The Estate is flatly wrong to argue that only representatives who are also "potential heirs" can waive the statute. Resp't br. at 28. As professor Tegland observes:

> The adverse party (normally the estate) waives the protection of the statute by introducing evidence of the transaction or communication in question. The statute may be waived either by the Personal Representative's own testimony at trial, or by offering into evidence a deposition in which the adverse party describes the transaction or communication in question.

Tegland, *Rule 601. General Rule of Competency*, *supra*. Courts have not so limited the waiver rules to the extent the Estate argues. *See, e.g.*, *Hill v. Cox*, 110 Wn. App. 394, 405, 41 P.3d 495, *review denied,* 147 Wn.2d 1024 (2002); *Lennon*, *supra*.

there is "no dispute that Matt is an interested party." Resp't br. at 22. In doing so, the Estate only highlights the misapplication of the dead man statute that permeated the trial below.

The Estate omits a key aspect of the dead man statute – only an interested party's "*self-serving*" testimony is subject to the rule. *Kellar*, 172 Wn. App. at 574 (emphasis added). Courts have carefully explained that the statute does not mean that "an interested party cannot testify at all." *Id.* Only self-interested testimony, concerning a specific transaction, is subject to the rule. *Id.*; *In re Estate of Miller*, 134 Wn. App. 885, 894, 143 P.3d 315 (2006), *review denied,* 161 Wn.2d 1003 (2007) (beneficiary's testimony against interest was admissible against the estate).

Here, Matt made key admissions, contrary to his own self -interest. As the primary beneficiary of the trust, his admissions that Polly planned to pay off Dominiqué's campaign loans, reimburse Dominiqué for purchasing a vehicle for Dan, and that she wanted Dominiqué to "have the house,"[7] reduced the amount of the estate. CP 697-704. The trial court erred in refusing to consider these admissible statements.

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[7] The Estate wrongfully contends that Matt's admission that Polly wanted Dominiqué to "have the house" is immaterial. Resp't br. at 26. The record shows that Polly contemplated many different options for transferring the house to Dominiqué over the years, whether as a gift, allowing her to buy the house at a modest discount, or selling it to her at a "deep discount." RP 881-82, 892. The fact that she told Matt she wanted Dominiqué to "have" the house and not "buy" the house is relevant, and any argument over this statement's meaning goes to weight not admissibility.

Next, the Estate claims that Matt's formal admissions "merely reflect qualified statements." Resp't br. at 25. But whether the admissions or denials are "qualified" or "unqualified" is irrelevant to the question of their admissibility. CR 36(b) mandates that "any matter" or "part of a matter" admitted is "conclusively established." The entire purpose of this rule is to ascertain the uncontested issues and narrow the focus at trial. *Peralta v. State*, 187 Wn.2d 888, 895, 389 P.3d 596 (2017).

Matt's admissions, even those he limited or qualified, conclusively establish Polly's intent in several key areas. He admits key truths about Polly's intentions during the final days of her life, including her intention to reimburse Dominiqué for the car she bought for Dan, her intention to pay off Dominiqué's loans, and her desire that Dominiqué "have the house."[8] His "qualifications" go to weight not admissibility. CR 36.

Importantly, Matt admitted that his mother told him about her intentions in December 2017. This timing is critical, as multiple physicians actively monitored Polly at that time, specifically to evaluate her mental

[8] The Estate is correct that Matt denied that Polly "intended to purchase a motorcycle as a gift for Maureen Smith." Resp't br. at 25. This was an inadvertent oversight in Dominiqué's opening brief. However, this confusion is explained by testimony elsewhere in the record that Matt knew about the motorcycle purchase and asked Dr. Smith if she "liked the motorcycle [Polly] bought [her]." RP 1659. Dominiqué was not permitted to examine Matt regarding this inconsistency in his knowledge that Polly purchased the motorcycle as a gift for Dr. Smith, as the trial court refused to consider testimony regarding the requests for admission.

state and decision-making capacity in accordance with the requirements of DWD. Matt's "qualifications" largely boiled down to his contention that Polly was a "vulnerable adult" therefore subject to influence from Dominiqué during this time. CP 700. However, numerous physicians and nurses testified that in December and January 2017, Polly remained "in control," "competent and clear," and that her mental capacity was not "diminished in any way." *E.g.*, RP 1766. *At that same time* she told Matt she intended to pay off Dominiqué's debts and that she wanted her to "have" the house. This was consistent with other testimony from disinterested witnesses that Polly began "looking a little bigger than her boys" and started making more gifts to people near the end of her life. RP 923.

To the extent the Estate wished to argue the validity of these transactions, it could, but that argument has no bearing on whether the statements themselves are admissible. Matt's formal discovery responses are admissible statements against interest at trial and were some of the best evidence of Polly's wishes and directions as she expressed them to her family in the final days of her life. The trial court erred in excluding them wholesale, depriving itself of this valuable evidence.

This was yet another in a long line of the trial court's one-sided evidentiary errors that favored the Estate and hampered Dominiqué's defense. Reversal is warranted so Dominiqué can have a fair trial. *E.g.,*

Bentzen, 68 Wn. App. at 346 (misapplication of the dead man's statute that prevented a party from presenting its case warranted reversal).

(b) The Trial Court Erred in Denying the Spousal Privilege to a Same-Sex Couple

As discussed in Dominiqué's opening brief, the trial court erred by allowing Dominiqué's ex-wife, Kelly Montgomery, to testify against her over Dominiqué's objection. Appellant br. at 36-39. The Estate continues to defend the trial court's discriminatory application of RCW 5.60.060's spousal privilege protection. The Estate claims that the privilege does not apply to Dominiqué solely because she and her ex-wife, were "never legally married." Resp't br. at 42. First, this argument is not true as a matter of fact. Dominiqué and her ex-wife *were* legally married under the law as it existed in Multnomah County, Oregon in 2004. CP 1745-46. They participated in a marriage ceremony, received a license from Multnomah County, held themselves out to the world as a married couple. *Id.*

Second, and perhaps more importantly, this argument fails as a matter of law. As discussed in Dominiqué's opening brief, the couples in *McDonald v. White*, 46 Wash. 334, 337, 89 P. 891 (1907) and *State v. Denton*, 97 Wn. App. 267, 270, 983 P.2d 693 (1999), were never "legally married," yet the courts applied the spousal privilege because the couples held themselves out as married after a formal ceremony and, at least,

"endeavored to comply with the law." 46 Wash. at 337-38. The only difference between Dominiqué and her ex-wife and the couples in *McDonald* and *Denton* is the relationship's same-sex status.

The United States Supreme Court put an end to such discriminatory application of the law with its seminal opinion, *Obergefell v. Hodges*, __ U.S. __, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). The Court specifically identified the "spousal privilege in the law of evidence" as one of the "constellation of benefits" to which gays and lesbians are entitled, the same as heterosexual couples. *Id.* at 2601. The Court wrote that excluding same-sex couples from this, and other, state-sanctioned privileges "has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians…to lock them out of a central institution of the Nation's society." *Id.* at 2601-02. This Court cannot condone such a demeaning application of the law in this case.

This was no harmless error, as the Estate infers with its blanket harmless error argument in its brief at 55-56. The Estate defends the trial court's unequal, demeaning, and unconstitutional application of the spousal privilege so vigorously because Montgomery's testimony is crucial to its case. The Estate relies extensively on her prejudicial testimony, calling it

"clearly damning." Resp't br. at 43.[9] The trial court relied on this testimony, specifically the accusation that Dominiqué planned to usurp her grandmother's assets for years. CP 2090.

This prejudicial testimony affected the trial court, which ignored the fact that Dominiqué remained the "one constant" in Polly's life and estate plan. RP 444. She was not some greedy, distant relative swooping in at the last minute, but a loving, trusting figure in Polly's life and the only family member left to take care of her disabled uncle after Dan's passing, a key fact the Estate fails to even mention. This serious error warrants reversal.

(c) The Trial Court Misapplied the Hearsay Rules

As discussed in Dominiqué's opening brief, the trial court erred in misapplying the hearsay rules and excluding Dr. Maureen Smith's statement that she was present when Polly asked about the transfers from Morgan Stanley, and when she heard that they "went through" she answered "good." CP 695; RP 1641. The trial court misapplied the hearsay rules in excluding this testimony in several ways. As discussed in Dominiqué's

[9] Dominiqué's ex-wife's testimony is the *only place* in the record where Dominiqué is accused of planning for years to usurp the Estate and referring to Matt and Dan as "the tards." The Estate hammers on this latter, prejudicial accusation several times in its brief. Resp't br. at 9, 42. Not only is this accusation belied by the other evidence of Dominiqué's support for the family and devotion in caring for Matt after Dan passed away, which continues to this day. But it never should have been considered by the court due to the spousal privilege. Testimony from an acrimonious ex-spouse is necessarily suspect and has little probative value anyway. The trial court erred on admitting and relying on it.

opening brief, a question is not hearsay, and Polly's expression of her then existing mental feeling is an exception. Alternatively, they are statements of a party against interest; they show Polly's knowledge and intent to transfer funds into her separate payable-on-death account, thus depleting the funds left in her trust. *See* Appellant br. at 33-36.

Recognizing the error, the Estate does not disagree with the merits of Dominiqué's argument. Rather, the Estate mischaracterizes the record, attempting to avoid review of the issue on a technicality. The Estate falsely claims that Dominiqué did not preserve the error and cannot argue on appeal that "the Court improperly excluded testimony ***that she never attempted to offer at all*** - including testimony that Appellant ***conceded*** was inadmissible hearsay at trial!" Resp't br. at 39 (emphasis in original). This is pure hyperbole, unconnected to what occurred in the trial court.

Dominiqué attempted to offer this testimony multiple times, both before and during trial, and the parties argued the issue extensively. *See* CP 695 (Dr. Smith's declaration offered on summary judgment);[10] CP 908 (the

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[10] The Estate also accuses Dominiqué of "confabulat[ing]" different parts of Dr. Smith's testimony to concoct this testimony. Resp't br. at 42 n.8. Not true. Dr. Smith plainly testified in her declaration:

> Prior to [self-administering DWD medication] Polly asked [Dominiqué] if "the transfer went through." Because of Polly's specific use of the term, "transfer," I knew of no other pending "transfer" other than the funds transfer from Morgan Stanley. When [Dominiqué] confirmed that the funds had been transferred according to her instructions, she said "good." I have no doubt that by having this discussion with [Dominiqué]

Estate's hearsay objection on summary judgment); CP 1063-64 (reply discussing the Estate's hearsay objections); RP 1639-48 (objection and argument at trial); CP 1807-11 (supplemental briefing submitted during trial making another offer of proof and asking to revisit the court's hearsay ruling). Indeed, Dominiqué revisited the trial court's ruling later in the trial to ensure "a good appellate record," and the trial court reassured Dominiqué's counsel "your arguments are on the record now." RP 1992-95. This was a major issue at trial, not some "additional material" Dominiqué "surreptitiously seeks to slip into the record," as the Estate misrepresents. Resp't br. at 41. The Estate resorts to these tactics because it cannot defend the trial court's application of the hearsay rules.

Finally, the Estate argues harmless error, but the error was not harmless, and was key to Dominiqué's defense in a number of ways. First, the Estate relies on this ruling elsewhere in its brief, arguing that "no witness at trial was able to corroborate [Dominiqué's] contention" that Polly directed the transfers from her finance accounts. Resp't br. at 51. Had Dr. Smith been allowed to testify as described above, it would have

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> Polly was making sure all of her affairs were in order. She told me that for the last two months [Dominiqué] had taken such good care of her."

CP 695. Dr. Smith was not permitted offer this testimony at trial due to the Estate's hearsay objection. RP 1639-48. Dominiqué made another offer of proof in a supplemental brief during trial, CP 1807-11, and the issue was argued multiple times as described above.

corroborated the truth that Polly actively monitored transfers from her financial accounts while remaining fully "competent," "in control," and "fiercely independent" until her final day. This testimony would have been further corroborated by Dominiqué's instruction log that she contemporaneously kept, but the trial court also wrongfully excluded from evidence. *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" as admissible evidence).[11]

Second, this another example of the trial court excluding key testimony from those closest to Polly who interacted with her near the end of her life. Not only was Dominiqué forbidden to testify regarding her interactions with Polly, even though the Estate blew the door open to that testimony by waiving the dead man statute, but the court also excluded Matt's admissions and Dr. Smith's testimony regarding Polly's wishes and instructions as she settled her final affairs with Dominiqué's help. CP 2089-

[11] The Estate spends many pages discussing the instruction log, arguing that it appears untrustworthy because it is written with the same pen or missing some days around Christmas. Resp't br. at 32-37. Again, these arguments go to weight not admissibility. *Smith v. Scott*, 51 Wash. 330, 331, 98 P. 763 (1909) (bookkeeping entries made by interested party regarding transactions with decedent were properly admitted and any argument about the self-interest of the author goes to weight). The log is not only a contemporaneous account of the work Dominiqué undertook for her grandmother and therefore admissible per *Boettcher* and *Ah How*, but, at the very least, it shows Dominiqué's state of mind and desire to follow her grandmother's wishes, and should have been admitted at least for that limited purpose. But the trial court excluded it wholesale, true to its pattern of ruling against Dominiqué on *every major evidentiary issue*.

2114. Thus, rather than consider testimony from Polly's son, granddaughter, and granddaughter-in-law who were with Polly in her final days, the Court relied on pure speculation from non-family members like Braly and Kenney, who hypothesized that Polly would not appoint Dominiqué as her single attorney-in-fact or make changes to her estate plan before her death. Again, this speculation is dubious in light of Dan's rapidly failing health, which greatly altered the Estate's needs and Dominiqué's responsibilities going forward. These outsiders also ignored the fact that Polly had changed her estate and trust plans several times in her final years, something she had full authority to do so up until the day she died.[12]

Lastly, this error was not harmless when compounded with all the other evidentiary errors described *supra* and in Dominiqué's opening brief. It was yet another in a long line of evidentiary rulings showing that the trial court had its "thumb on the scale" in the Estate's favor. Dominiqué was

[12] The court placed too much importance on the testimony of these non-family members, especially Braly who actively ignored the family dynamic and purpose of the trust. The trust was always meant to provide small sums to supplement, not "supplant," Matt's income he received from government disability benefit programs. CP 3267-74, 8330-45. Yet as soon as he gained control as sole trustee, Braly immediately sought to remove Matt from the assistance of "government agencies." CP 8627. Kenney also misunderstood the family, admitting that he submitted an incorrect declaration attributing family distrust to Dominiqué, when in fact Polly only had issues with Dominiqué's disinherited mother. RP 432-34. Given these misunderstandings from outsiders, it is no wonder Polly wanted her granddaughter to handle her final affairs. Perhaps had Braly and Kenney honored the mediation requirement in the will, instead of rejecting Dominiqué's offer to resolve the issues at the outset of the case, they could have better understood the family dynamic. Instead, Braly achieved his primary goal of "dragging Dominiqué's ass before a judge" for the benefit of no one but the lawyers in the case. CP 8626.

repeatedly prevented from defending herself through these unfair, one-sided rulings. Moreover, despite the fact that a trial court's "paramount duty" in a TEDRA action is to give effect to the testator's intent, *e.g.*, *In re Estate of Bernard*, 182 Wn. App. at 697, the trial court shielded itself from the testimony of Polly's closest, living family members. A new trial is necessary, given the litany of one-sided evidentiary errors.

(2) The Trial Court Erred in Finding that Dominiqué Unduly Influenced and Exploited Her Grandmother

The evidence in this case does not support the trial court's finding of undue influence or exploitation of a vulnerable adult by clear, cogent, and convincing evidence. Instead the Estate relies on speculation from non-family members that Polly would not alter the assets in her living trust, despite her power to do so until the day she died. It also relies on a presumption of undue influence, due to the fiduciary relationship created by the power of attorney, that Dominiqué rebutted at trial. Appellant br. at 33-47. This presumption alone cannot support the trial court's ruling. *See, e.g.*, *Mueller v. Wells*, 185 Wn.2d 1, 16, 367 P.3d 580 (2016) ("[A] will contestant cannot rely solely on the weight of the presumption [of undue influence] to invalidate a will).

Dominiqué admits that fiduciary status is an important consideration when assessing undue influence claims, but so are a host of other factors,

including the "age or condition of health and mental vigor of the testator, the nature or degree of relationship between the testator and the beneficiary, the opportunity for exerting an undue influence, and the naturalness or unnaturalness of the will." *In re Tate's Estate*, 32 Wn.2d 252, 254–55, 201 P.2d 182 (1948). The Estate simply cannot overcome the fact that Polly was verifiably competent, "fiercely independent," and at full mental capacity during the final weeks of her life. She showed foresight in adding Dominiqué to her payable-on-death account and naming her as her attorney-in-fact before ever entering the hospital, which was consistent with her long-standing plan that Dominiqué would primarily manage her final affairs.

The Estate is flatly wrong that witnesses could not corroborate the truth that Polly actively directed Dominiqué's actions during her final days. Resp't br. at 51. Vincent Masocol, testified that Polly voluntarily named Dominiqué as the payable-on-death beneficiary of her checking account so that Dominiqué could help her with her finances near the end of her life, and he saw no signs of *any influence* from Dominiqué. RP 721-23. Neighbors and nurses witnessed Polly voluntarily and knowingly sign numerous legal documents, including the power of attorney and documents regarding the house. RP 574, 887, 900. Polly's hospice nurse testified that she knew the signs of "coercion," having experienced it regularly in her line

of work, but she never observed any such signs when Polly and Dominiqué were together. RP 1572-73. And Polly's physicians, who evaluated her mental state pursuant to DWD, testified that she was fully competent and in control until the very end. RP 1555, 1764. This would have been bolstered by testimony from Polly's family, including Matt, Dr. Smith, and Dominiqué, that the trial court refused to consider, as described above.

Such evidence necessarily overcomes any presumption of undue influence and negates speculation from outsiders like Braly that Polly lacked the capacity to manage her affairs near the end of her life. *See In re Mitchell's Estate*, 41 Wn.2d 326, 352, 249 P.2d 385, 400 (1952) (overturning undue influence finding where testator maintained mental capacity and witnesses testified that he was "determined, stubborn, and not easily influenced"); *Zvolis*, 56 Wn.2d at 282 (evidence of the "capacity of the donor" and that the donor's gifts to a fiduciary were "free and voluntary" defeats a claim of undue influence).

There was simply nothing to show undue influence other than the fact that Dominiqué was Polly's fiduciary by virtue of the power of attorney. But she was also her granddaughter, and one of just *two* living (non-disinherited) relatives when she died. She was the "one constant" in all of Polly's estate plans and agreed to shoulder the responsibility of caring for her disabled uncle after Polly and Dan had passed away, which she

continues to do to this day. RP 1885-86. There is nothing "unnatural" about Polly's decisions to appoint her as her attorney-in-fact, gift her the house, and ensure that she had enough assets to provide for Matt going forward.

The Estate wrongfully handwaves these facts aside, casting them as "[Dominiqué's] unsupported story of the case." Resp't br. at 50. But this ignores the factors and considerations that a trial court must weigh as described in *Tate's Estate*, *supra*, regarding the family dynamic and the "naturalness" of the estate plan. The trial court made the same error, relying on the fiduciary presumption and speculation alone. *Mueller*, *In re Mitchell's Estate*, *Zvolis*, *supra*. Reversal is warranted.

(3) <u>The Court Wrongfully Found Dominiqué Committed Fraud</u>

The trial court erred in finding that Dominiqué committed fraud, where the Estate failed to meet its burden on several key elements. The Estate omits a discussion of its burden of proof because it is so daunting; it had the burden to prove *every element* of fraud by clear, cogent, and convincing evidence. *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996). The Estate could not meet its heavy burden on several of the key elements. There was conflicting testimony from handwriting experts and the Certification from Polly's trust that listed Dominiqué as the sole trustee, even though it was consistent with the trust Summary and Polly's historic plan that Dominiqué primarily handle her affairs. RP 1784-98, 1901; CP

8343.[13] Also, the Estate admits that it presented no evidence regarding whether Morgan Stanley's legal department relied on the allegedly falsified document, or whether Dominiqué knew the document to be false. The trial court was forced to "draw the…inference" that Morgan Stanley relied on the allegedly altered trust documents, resp't br. at 54, when, in fact, Dominiqué accessed the funds at Polly's direction via the authority granted by her power of attorney. The Estate's omission of its burden of proof is consistent with its tactic of raising and lowering standards of proof and evidence to fit its needs. The trial court erred in following suit.

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

If there was any doubt that the Estate ignores Polly's clear intentions, its argument regarding offsetting the judgment confirms it. Resp't br. at 55. There is no debate among Polly's only surviving family members that Polly intended to reimburse Dominiqué for expenses she incurred out of her own pocket near the end of Polly's life, notably the car she bought for Dan. CP 699-700 (Matt's admissions). Nor can there be any debate that a court hearing a TEDRA petition has plenary powers to "settle...[a]ll matters concerning the estates and assets of incapacitated,

[13] The Estate misrepresents the record; the summary of the trust materials lists Dominiqué as a "successor *trustee*" (singular, emphasis added) with Braly as *Dominiqué's* successor should she not be able to perform. RP 1901; Ex. 237. This corroborates the document Dominiqué scanned from Polly's trust binder listing her as the sole trustee.

missing, and deceased persons," including the power to provide equitable relief. RCW 11.96A.020(1)(a). Again, the court must be guided by its "paramount duty," to effectuate the testator's intent. *In re Estate of Bernard*, *supra*.

The Estate tries to paint Dominiqué's request for reimbursement as a surprise at trial, but she filed a creditor claim early in the case. CP 142-44. Indeed, the Estate's main objection below was that her creditor claim was only filed in the TEDRA action instead of the probate case, not that it was a surprise tactic. RP 2042-43. Such form over substance, ignores the court's plenary powers to settle all debts and broadly effectuate the testator's intent. Polly's intent was clear and uncontested in this case. This issue is just another in a long line of instances where the Estate and trial court ignored it. This Court should reverse.

E. CONCLUSION

The Court should reverse with instructions to enter judgment in favor of Dominiqué. The Estate never met its heavy burdens to prove undue influence, abuse of a vulnerable adult, or fraud. The trial court should have granted Dominiqué's dispositive motions. RP 1528-38. At the very least, a new trial is warranted in light of the numerous, one-sided evidentiary errors, so Dominiqué can have a fair hearing. The Court should vacate the punitive fee award and grant Dominiqué her fees and costs on appeal.

DATED this 1st day of April, 2020.

Respectfully submitted,

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DECLARATION OF SERVICE

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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: April 1, 2020, at Seattle, Washington.

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