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**COURT OF APPEALS**  
**FOR THE STATE OF WASHINGTON**  
**DIVISION II**

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**In Re Estate of**  
**ZORA P. PALERMINI**

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**APPELLEE'S RESPONSE BRIEF**

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**I.**  
**INTRODUCTION**

This appeal concerns a very real injustice, though not the one Appellant would have the Court believe. Decedent Zora P. “Polly” Palermini spent her life living frugally, saving everything she could in order to provide for her two disabled sons after she was gone. In the last weeks of her life, Appellant – her granddaughter and co-trustee of her living trust – systematically transferred almost the entirety of Polly’s assets to Appellant herself, robbing Polly’s trust of virtually all of its assets and rendering it utterly incapable of providing for the care of Polly’s surviving disabled son, as she had always intended. In a matter of weeks, Appellant had undone what Polly had spent a lifetime trying to achieve, all for her own personal enrichment.

After a month-long bench trial, the trial court found that in the final weeks of Polly’s life, and while serving as Polly’s co-fiduciary, Appellant had, among other things:

- Used undue influence, financial exploitation, and fraud to obtain a quitclaim deed transferring title of Polly’s house from Polly’s Trust to Appellant;
- Forged Trust-related documents to obtain unfettered access to Polly’s investment accounts;
- Liquidated over \$600,000 of the investments Polly held in

her Trust, and transferred the proceeds to a payable-on-death bank account with Appellant as the beneficiary;

- Used Polly's checking account to pay for Appellant's personal expenses, including personal credit card debt, student loan payments, and campaign debt from Appellant's failed campaign for superior court judge; and
- Purchased a new motorcycle for Appellant's spouse using \$22,000 of Polly's money.

The trial court arrived at these findings after hearing extensive testimony from numerous disinterested witnesses, including Polly's longtime estate planning attorney, friends, and neighbors.

By way of this appeal, Appellant now asserts that if she had not been prohibited from offering her own transparently self-serving testimony that, essentially, "Polly wanted me to do it," Appellant would have been completely exonerated. Leaving that dubious assertion aside for a moment – contradicted as it is by, among other things, the trial court's conclusion that the actions Appellant claimed to have undertaken at Polly's direction in the last weeks of her life were so wildly inconsistent with Polly's longtime estate planning and financial conservatism as to defy any credibility – the arguments Appellant raises in support of her position are without merit. Indeed, for the most part Appellant simply asserts the same arguments which the trial court on exhaustive, point-by-

point briefing had already properly rejected, clearly hoping for a different result from this Court but without offering any explanation that would justify such a departure.

A review of the record and the applicable law reveals that the trial court thoroughly considered each application of the Dead Man's Statute, applied its rules with careful and correct precision, and properly barred Appellant's proffered evidence. Appellant's contentions to the contrary are based not on the law, but rather on (i) her attempts to mischaracterize the proposed evidence as "feelings" or "impressions" in order to remove it from the purview of the Dead Man's Statute; (ii) her misreading of the Statute to assert waiver by Appellee; or (iii) her repeated references to a fictionalized narrative which was never adduced at trial – and which was in fact entirely contradicted at trial – but which she hopes this Court will accept as gospel.

Appellant also contends that the trial court should not have found that she committed fraud or that she engaged in undue influence, citing a lack of evidence. But Appellant mischaracterizes her own evidentiary burden – as Polly's fiduciary, it was *Appellant* who was required to prove by clear, cogent, and convincing evidence that she had *not* used undue influence to procure the bounty of gifts to which she helped herself in the final weeks of Polly's life. This she utterly failed to do, and, as the record reveals, the evidence to the contrary proved conclusively that she had

engaged in the wrongdoing for which the trial court found her liable.

This appeal is thus fatally flawed. The evidence at trial was overwhelming that Appellant engaged in systematic undue influence, fraud, and financial abuse to enrich herself at Polly's expense while Polly lay in hospice, deliberately depriving Polly's son Matt of the care which Polly had sought to provide for him throughout her life and after her death. Appellant's contention that the trial court's rulings should be overturned is premised entirely on the notion that her own self-serving testimony, essentially by itself, would have turned the tide in her favor. This Court should summarily reject that contention, and affirm the trial court.

## **II.** **ASSIGNMENTS OF ERROR**

### **A. Assignments of Error.**

Appellant purports to assign error to eight categories of decisions by the trial court. Appellee disputes that any of the referenced decisions were in error. At the outset, Appellant's broad-brush assignments, in which she purports to assign error wholesale to *all* of the trial court's findings of fact – either by attempting to assign error to the trial court's entry of its final findings of fact as a whole in Assignment of Error No. 2, or by purporting to assign error to particular findings “including,” but impliedly not limited to, specifically enumerated findings in the remaining Assignments of Error – do not comply with RAP 10.3(g), which requires

“a separate assignment of error for each finding of fact a party contends was improperly made.” Appellant thus has failed to assign error to any findings of fact not specifically enumerated in her Assignments of Error or otherwise articulated in her statement of issues, and such findings of fact are not reviewable. RAP 10.3(g); *State v. Ross*, 141 Wn.2d 304, 310-11, 4 P.3d 130 (2000); accord *State v. Olson*, 126 Wn.2d 315, 324, 893 P.2d 629 (1995) (Talmadge, *concurring*) (though failure to assign error under RAP 10.3(a) and 10.3(g) “should not result in the waiver of the error on appeal where the issue associated with the error is plainly articulated and argued,” such issues are waived “if counsel do not plainly articulate and argue [them] in the appellate pleadings.”). Further, although Appellant purports to assign error to the trial court’s denial of her motion for partial summary judgment, she does not argue that issue anywhere within her brief, and thus has waived Assignment of Error No. 1. *Olson, supra*; *State v. McLaughlin*, 74 Wn.2d 301, 302 n.1, 444 P.2d 699 (1968); *City of Seattle v. Schaffer*, 71 Wn.2d 588, 602, 430 P.2d 183 (1967).

Appellee specifically disputes that the trial court committed error with respect to findings §I ¶¶ 6, 10; §II ¶¶ 3, 7, 10, 11, 13, 15, 16, 20, 22, 24, 26—32, 36, 38—40; §IV ¶ 3; §V ¶¶ 1, 2, 5, 6, 8—10, 12—14, 19; §VI ¶¶ 3, 6, 8-12, 14-16, 19-27, 29-36; §VII ¶¶ 1, 4, 5, 8, 9; or that the trial court erred in entering judgment against Appellant as to its award of fees

and costs, recovery amounts, or the amount of supersedeas bond.<sup>1</sup>

**B. Issues.**

Appellee answers the issues Appellant purports to raise as follows:

1. **No.** The trial court properly applied the Dead Man’s Statute and the hearsay rules to exclude incompetent or inadmissible evidence, respectively. The trial court also correctly declined to apply the spousal privilege where Appellant and the witness whose testimony she sought to preclude were never legally married and had ended their relationship more than a decade earlier. That the trial court’s rulings went against Appellant does not make them “consistently one-sided;” Appellant is an interested party expressly prohibited by statute from testifying about certain matters.

2. **No.** There was no evidence in the record to support Appellant’s contention that Appellant “followed Polly’s directions.” The evidence unequivocally established that Appellant had taken advantage of Polly in the waning weeks of her life to enrich herself, in complete derogation of Polly’s estate plan. The notion that she was directed to do so by Appellant was unsupported by any competent, credible evidence, and the trial court correctly held that Appellee had proven by clear, cogent, and convincing evidence that Appellant had breached her fiduciary duties to Polly, and

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<sup>1</sup> Notably, several of identified contested finding of fact are merely statements reflective of undisputed documents. None of the arguments in Appellant’s brief elucidate why these findings of fact, were are merely recitations of documents, are purportedly disputed.

had committed fraud and financial elder abuse.

3. **No.** The trial court found that the Estate *did* prove its case by clear, cogent, and convincing evidence, even though the Estate did not even bear the legal burden to do so, and correctly applied the Slayer Statute in light of Appellant's financial elder abuse.

4. **No.** The evidence plainly proved all elements of fraud against Appellant, and her contention here that the Estate did not prove knowledge, intent, or reliance is unavailing in light of the facts proven at trial that (1) Appellant is a licensed attorney who drafted a fraudulent Certification of Trust which falsely listed herself as the sole trustee of Polly's trust; (2) Appellant knowingly and intentionally transmitted the fraudulent document to a financial institution to gain access to Polly's account after being repeatedly rejected previously; and (3) that the financial institution would not have granted her access to the account without the fraudulent document.

5. **No.** Appellant attempted to claim an offset the last day of trial on the basis of a purported reimbursement claim against the Estate, for which Appellant had never timely filed a creditor claim as required by RCW 11.40.020, and did not raise the issue as a counterclaim. The trial court correctly rejected her eleventh-hour attempt to assert this claim to reduce her damages, as it was never properly pled and had long since been time-barred.

**III.**  
**STATEMENT OF THE CASE**

Although much of Appellant’s brief is devoted to the purported facts of the underlying case, it deviates substantially from the factual record as established by competent evidence at trial and instead presents Appellant’s fictionalized and unsupported narrative of events. In addition to citing purported testimony which the trial court properly excluded, Appellant repeats numerous claims which are unsupported by any evidence in the factual record, if not directly contradicted by the actual evidence – perhaps most frequently, her oft-repeated refrain that Polly “directed” her to engage in the conduct she did, for which there was not a shred of evidentiary support.<sup>2</sup>

Replete as it is with such inaccuracies, Appellant’s Statement of Facts is misleading in the extreme. Accordingly, we herein provide an accurate summary of the pertinent facts as found at trial.

**A. Background.**

At the time of her death, Polly had been widowed for many years, but had three living children: her daughter Jonnie Kay Schoenholtz (“Jonnie Kay”) and her sons Louis Daniel Palermini (“Dan”) and Matthew Scott Palermini (“Matt”). CP 2090. Jonnie Kay, who is Appellant’s

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<sup>2</sup> Some of the assertions are identified in the accompanying Appendix to this brief in order to assist the Court in analyzing the proper record on review.

mother, had been estranged from Polly for many years, and Polly had disinherited her. CP 2091-92. Both Dan and Matt, to whom Appellant was known to refer as “the ‘tards,’” suffered physical and mental disabilities, and Polly supported them emotionally, financially, and physically until her death. CP 1363, 2090-92, 3573; RP 359, 495, 735, 923, 983, 1363.

**B. Polly’s Assets And Estate Plan.**

Uniformly, the third party witnesses at trial confirmed that Polly lived an austere life and socked away funds for a single purpose – to provide for her sons’ long term care. RP 527, 986. In the four years leading up to her death, Polly never withdrew funds from her investment accounts. CP 3837-3841; RP 745; 764-765. Instead, the records show that while living only on social security income and limited military benefits, Polly supported herself, and both her sons, while she continued to save. CP 4570-6647. Polly knew that Dan and Matt were unable to support themselves, and that their disabilities would require increasing levels of care with age. RP 303, 306-307, 359, 445, 735, 986; CP 3573, 3249-3315. Polly’s concern for her sons’ long term care became an obsession, a theme which pervaded all of her conversations with friends, a source of constant distress to the point of tears – and this constant pre-occupation drove her decisions throughout her life. *Id.*

To address her sons’ long term care, Polly actively engaged in

estate planning. In 1991, Polly placed all or substantially all of her assets, including her home, into the Trust. CP 2092, 3186-87. In October 2010, Polly retained a lawyer, John Kenney, to update her estate plan. RP 300-301. Polly updated her plan three times with Mr. Kenney between 2011 and 2016. RP 304-305; 355-356; 420-421. Mr. Kenney testified, and the documents confirmed, that in each version of her plan, the primary beneficiaries of her estate were special needs trusts for Dan and Matt. RP 445. Throughout Polly's planning four themes remained constant: (1) Polly's assets, including her home, were to be held and managed in the Trust; (2) her sons were to be the primary beneficiaries of her estate, with the survivor as successor beneficiary; (3) Appellant would be co-fiduciary for the Trust; and (4) Appellant would be one of several remote contingent beneficiaries after the deaths of both sons. CP 2091.

The final amendment and restatement of Polly's Trust, and her associated pour over Will and Durable Power of Attorney, were dated October 12, 2016. CP 3249-3315; 3318-3356; Ex. 237. Polly named Appellant and Appellee, who was her accountant, as co-trustees and co-executors of her estate, as well as co-agents under her power of attorney. *Id.*; CP 2092. On October 12, 2016, the same day that she executed her last amendment and restatement of her Trust, Polly executed a Certification of Trust, notarized by Mr. Kenney, confirming that Appellant and Appellee were to act jointly as co-trustees. CP 3330-3334; RP 386.

Polly told her attorney and her friends that she wanted the co-fiduciary arrangement because of mistrust of her family, and specifically because she did not trust Appellant. RP 339; 432-433; 502. Appellant was never anything more than a contingent remainder beneficiary of Polly's Trust. CP 2090-95.

Mr. Kenney testified that in accordance with his normal practice, his office made a black and white copy of Polly's executed Will, stamped that copy with a red stamp, placed the copy with the originals of all other documents in a binder, and gave that binder to Polly when she signed the October 12, 2016 documents. RP 389-391. Prior to delivering the binder to Polly, Mr. Kenney's office made black-and-white scans of the signature pages of the original documents and maintained those with electronic versions of the source documents. RP 389-391; RP 296; 299-300; CP 389-474; CP 475-484.

In 2016, Mr. Kenney's office could not make color copies of documents because the office had no machine capable of doing so. *Id.* This is significant because following Polly's death, a complete set of her original signed estate planning documents could not be found. CP 237. Instead, Appellant produced the binder from Mr. Kenney's office, but it now contained a confabulated set of original and color copies of the purported documents. Appellant claimed to have used her phone to make images of certain documents, including of Polly's Certification of Trust.

CP 2101. Appellant submitted those images to various financial institutions to gain access to Polly's accounts. CP 2100-111; CP 3575-3579. However, the Certification of Trust now in the binder was *not* the original document drafted by Mr. Kenney, but rather a doctored document with substantially different terms – in particular, identifying Appellant as the *sole* trustee as opposed to her actual status as a co-trustee with Appellee. RP 396-399; RP 400-402; RP 811-825.

Upon Polly's death, her Trust became irrevocable. The Trust granted her son, Dan (now deceased), a life estate in a mobile home, authorized the sale of Polly's residence to Respondent for 90% of its fair market value, and provided for the entire remainder of Polly's estate to be held in two equal special needs trusts for the benefit of Matt and Dan. CP 3262-3274. Polly repeatedly told Appellee, 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, valued in excess of \$1.5 million, to be available to care for them for the remainder of their lifetimes. RP 303, 306-307, 359, 445, 495, 506, 508, 735, 983, 986; CP 3573, 3249-3315.

C. **Appellant Takes Advantage Of Polly During The Last Two Months Of Her Life.**

The evidence established that in the last two months of Polly's life, as she was receiving palliative care in hospice, Appellant went about systematically converting virtually all of Polly's assets to her own benefit.

By the time Polly died in January of 2018, Appellant had used her fiduciary position to bypass the terms of the Trust through use of non-probate transfers and lifetime “gifts” – each redounding to the extraordinary benefit of Appellant and detriment of Polly’s boys, each transaction initiated by Respondent as Polly’s fiduciary, and each executed within the last two months of Polly’s life. By those transfers, Appellant transferred \$1.2 million of Polly’s \$1.5 million estate to herself.

Appellant began by drafting a new power of attorney naming herself as Polly’s sole agent. RP 580; CP 3414-3423. When Morgan Stanley rejected Appellant’s authority as power of attorney as insufficient authorization to access Polly’s investment accounts, Appellant used a forged Certification of Trust and other false representations that she was the sole *trustee*, to gain access. CP 2099-2104, 3575-3579, 3590-3599; RP 752, 756, 767, 773-777. Within the first 24 hours of gaining access to the account, Appellant liquidated \$120,000 in investments, transferred them to Polly’s checking account, and proceeded within the next five days to i) withdraw \$22,000 from Polly’s checking account to buy a motorcycle for Appellant’s wife; ii) pay her personal credit cards, iii) pay her student loans, and iv) pay a loan from her failed run for superior court judge. CP 2097-99, 3635-3643, 3829-3835. Appellant took over \$91,000 from Polly’s checking account while Polly was dying in hospice. *Id.* There was no evidence that Polly knew of any of the transfers or payments.

Then Appellant, using a quitclaim deed she drafted, transferred title of Polly's house from the Trust into her own name. CP 2105. Despite the fanciful statement of facts in Appellant's Brief, there was no admissible evidence that Polly tore up the promissory note for the house or intended to gift the home to Appellant. In fact, the testimony of each and every witness was the contrary, with one witness testifying that on January 10, two days prior to Polly's death and after the deed had been recorded, that Polly stated she had *sold* her house to Respondent. CP 2094; RP 989, 999. Nor was there any admissible evidence regarding the execution of the excise tax affidavit reporting the transfer as gift.

Still unsated, a mere two days before Polly's death, Appellant directed Morgan Stanley to sell the bulk of Polly's investments and transfer an additional \$508,000 into a pay-on-death bank account on which Appellant was the beneficiary. CP 2103-04, 3690-3692. That transfer was actually effectuated the night that Polly died, and shortly after Polly's actual death, Appellant sent an email to the financial representative stating "thanks so much, all done" in response to an email request that Appellant call the branch to confirm the wire transfer. CP 6017, 7406.

When all was said and done, Appellant had transferred to herself roughly \$1.2 million in total value from Polly and her Trust. Appellant's looting left the Trust unable to provide resources for Matt's care for the remainder of his lifetime, as Polly always had intended. CP 2099-2112.

Appellant offered no competent evidence to rebut any of these findings, which were memorialized in the trial court's Final Findings of Fact and Conclusions of Law. CP 2089-114. This appeal followed.

**IV.**  
**ARGUMENT & AUTHORITY**

Appellant contends that the trial court incorrectly “shield[ed] itself” from evidence favorable to her case by misapplying Washington’s Dead Man’s Statute, the hearsay rules, and the spousal privilege exception, thus preventing her from having a fair bench trial. Appellant is wrong, and fails to explain the basis for her contentions, instead offering only the same warmed-over arguments the trial court properly rejected in hopes that this Court will, for reasons she never articulates, take a different view. For the reasons detailed herein, the Court should decline to do so.

**A. The Trial Court Properly Applied The Dead Man’s Statute.**

RCW § 5.60.030, the “Dead Man’s Statute,” (“DMS”) excludes “testimony from a party in interest as to (1) any transaction had by him or her with the deceased and (2) any statement made to him or her, or in his or her presence, by the deceased, when the testimony is adverse to the deceased and the opposing party claims through the deceased’s estate.”

*Thor v. McDearmid*, 63 Wn. App. 193, 199, 817 P.2d 1380 (1991).<sup>3</sup> It

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<sup>3</sup> The DMS is not a rule of evidence, subject to modification on the part of a court by way of admission of the testimony at issue combined with limitations on its weight; rather, it is a rule of *competence*, to which no such modification can apply. *Diel v. Beekman*, 7 Wash. App. 139, 152, 499 P.2d 37, 46 (1972) (overruled on other grounds) (“The

provides:

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.

RCW § 5.60.030 (emphasis added).

A “party in interest” is a person who, at the time of testifying, has a “direct and certain” interest in the outcome of the litigation. *Adams Marine Service, Inc. v. Fishel*, 42 Wn.2d 555, 562, 257 P.2d 203 (1953). “In general, a witness is considered an interested party (1) if the witness stands to either gain or lose as a direct result of the judgment, or (2) if the record may be used as evidence against the witness in some other action.” *Himes v. MacIntyre-Himes (In re Himes)*, 136 Wn.2d 707, 729, 965 P.2d 1087 (1998). The DMS “renders the interested litigant or witness ***incompetent to testify***” about transactions with the deceased person.

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prohibition of the statute is absolute and unconditional. It admits of no qualification or exception, and it is not the province of this court to add to it or take from it.”).

*Wildman v. Taylor*, 46 Wn. App. 546, 549, 731 P.2d 541 (1987), citing Comment, *The Dead Man's Statute in Washington*, 15 GONZ. L. REV. 501, 506 (1980) (emphasis added)

For purposes of the DMS, “transaction with the deceased,” in contrast to its possible lay meanings, is not limited to a business transaction or other exchange between the witness and the deceased, but is broadly defined as any matter regarding which the decedent could, if still living, contradict the witness of his or her own personal knowledge. *Thor*, 63 Wn.App. at 199; *see also Estate of Lennon v. Lennon*, 108 Wn.App. 167, 178, 29 P.3d 1258 (2001) (“The test of a ‘transaction’ is whether the deceased, if living, could contradict the witness of his own knowledge.”); *O’Steen v. Wineberg’s Estate*, 30 Wn.App. 923, 935, 640 P.2d 28 (1982) (“The test of ‘transactions with the decedent’ is whether the dead man, if living, could contradict the witness.” (citing *Diel v. Beekman*, 7 Wn.App. 139, 152, 499 P.2d 37 (1972))).

In addition to *direct* testimony regarding a transaction with the deceased, the Dead Man’s Statute also prohibits *indirect* testimony which implies the existence of, or alludes indirectly to, matters otherwise barred by the DMS. *Diel v. Beekman*, 7 Wn. App. 139, 152, 499 P.2d 37 (1972). Thus, testimony which implies conversations or other transactions with the decedent “must be excluded by force of the statute so long as it concerns the transaction or justifies an inference as to what it really was.” *Id.*

(quoting *Martin v. Shaen*, 26 Wn.2d 346, 352, 173 P.2d 968 (1946)); *see also Martin*, 26 Wn.2d at 353 (“[t]he rule is well settled that, under [the DMS], an adversely interested party cannot testify indirectly to that to which he is prohibited from testifying directly, and thereby create an inference as to what did or did not transpire between himself and the deceased person.”).

All of this is so because the core purpose of the DMS “is to prevent **interested parties** from giving **self-serving** testimony about conversations or transactions with a dead or incompetent person.” *Lasher v. University of Wash.*, 91 Wn. App. 165, 169, 957 P.2d 229 (1998) (emphasis added). “The statutory rule was formulated in recognition of the fact that, when the lips of the one who is said to have made the statement, or with whom the transaction is alleged to have been had, are sealed in death, it becomes difficult, and often impossible, to rebut such adverse testimony.” *Thor*, 63 Wn. App. at 193. The DMS thus prevents the potential unfairness of allowing an interested witness to offer testimony on his or her own behalf in a matter involving the interests of a deceased person who is unable to confirm or contradict the proffered evidence. For this reason, Washington courts strictly enforce the DMS.

Here, the trial court correctly ruled that the DMS rendered incompetent certain testimony which Appellant sought to offer. Appellant’s arguments in this appeal echo the arguments she made on the

same topics below, and are no more availing now than they were then.

1. *Appellant's proffered testimony was barred by the Dead Man's Statute.*

Appellant argues broadly that the trial court “fundamentally misapplied” the DMS to exclude “a host of responses, statements, and testimony that are simply not subject to the rule.” Br. at 19. The statements she actually challenges are relatively few, however,<sup>4</sup> and it is clear that they were correctly excluded.

Specifically, Appellant argues that she should have been allowed to testify (1) that she lived with Polly as a child; (2) that she took leave from work to care for Polly in the final months of her life; (3) regarding Polly’s relationship with her sons; and (4) where Polly habitually kept notes regarding her final wishes. Br. at 20. Appellant contends that such statements constitute Appellant’s own “actions or impressions, or descriptions of the surrounding circumstances regarding [Polly’s] family,” and that they are not “evidence of transactions” with Polly. *Id.* Appellant is wrong for at least two reasons.

First, Appellant ignores the broad definition of “transaction” under Washington law. The test is this: if living, could Polly have contradicted (or confirmed) the interested person’s testimony of her own personal

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<sup>4</sup> The Court should decline Appellant’s tacit invitation to review the entire record on its own to find the purported “numerous other examples of times when the trial court fundamentally misapplied” the Statute. Br. at 21.

knowledge? *Thor*, 63 Wn.App. at 199; *Lennon* 108 Wn.App. at 178, *O'Steen*, 30 Wn.App. at 935; *Diel*, 7 Wn.App. at 152. Applied to the statements at issue, it is clear that Polly could have contradicted any of Appellant's proffered testimony – for Polly would know whether Appellant lived with her, whether Appellant took time off work to care for her, what her relationship with her sons was like, or where she kept notes (if anywhere). Such statements, from an interested witness like Appellant, fall squarely within the Statute's prohibition.

Second, even if certain of the statements did not directly reflect transactions with Polly, they certainly imply such transactions and would be barred on that basis as well. *Martin*, 26 Wn.2d at 353; *Diel*, 7 Wn. App. at 152. How would Appellant know where Polly habitually kept her notes, but for her interactions with Polly?<sup>5</sup> How would she know how Polly felt about her sons, other than because Polly told her or she directly witnessed interactions between Polly and her sons?

Appellant's insistence that such testimony reflects only her own impressions or feelings, and thus falls outside the Statute, is unavailing. Appellant relies on *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 574, 291 P.3d 906 (2012), for the relatively straightforward proposition that an

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<sup>5</sup> Moreover, of the trial court *admitted* the notes, which significantly predated the transactions at issue, as the DMS does not bar documentary evidence. CP 8329-8345. Appellant also was able to authenticate the handwriting on the notes as Polly's without implicating the DMS. *O'Steen*, 30 Wn. App. at 934-35. Thus, Appellant can cite to no harm arising from her inability to testify about **where** Polly **kept** the notes.

interested party “may testify as to her own feelings or impressions, **so long as they do not concern a specific transaction or reveal a statement made by the decedent.**” (emphasis added). But Appellant ignores the express caveat in that statement – an interested party *cannot* testify about her feelings or impressions if doing so reveals a “transaction with the decedent.” *Id.* And, as noted above, the statements at issue do just that.

Moreover, *Kellar* certainly does not support the notion that an interested witness can shoehorn factual testimony into the record merely by dressing it up in the language of “feelings” or “impressions.” To the contrary, courts – including those on which Appellant herself relies – routinely bar such testimony. *See Kellar*, 172 Wn. App. at 577 (affirming exclusion of declaration testimony appellant sought to offer as her “feelings,” but which included specific statements by decedent which gave rise to those feelings); *Lappin v. Lucurell*, 13 Wn. App. 277, 291, 534 P.2d 1038 (1975) (testimony regarding feelings and impressions which indirectly “made clear what the decedent’s statements were and what the transaction with him was” should have been excluded).

Where Polly purportedly stored her notes is not a “feeling;” it is would-be factual evidence. The nature of Polly’s relationship with her sons was not Appellant’s “feeling” – and the testimony she actually sought to introduce was not in the nature of her own impression. Rather, she was simply asked by her counsel to “describe [her] uncle Dan’s relationship

with Polly?” RP 1872. Appellant was not asked for her *impression* of that relationship, or her *feelings* about it, but rather simply to *describe* the relationship between two persons who were both deceased – and either one of whom could have contradicted Appellant’s *description* of their relationship as a purported fact witness.

Similarly, Appellant’s would-be testimony regarding her supposed “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” was merely a transparent attempt to testify, indirectly, as to Polly’s intent. Br. at 20. The trial court allowed Appellant multiple opportunities to lay a foundation to show that her “impression” was based on something other than transactions with Polly; she was unable to do so. RP 2029-35. The testimony was properly excluded.

2. *The trial court correctly excluded Matt's responses to Appellant's requests for admission.*

There is no dispute that Matt is an interested party for purposes of the DMS. The DMS thus indisputably barred Matt’s testimony, in the form of discovery responses or otherwise, regarding his alleged conversations, meetings and interactions with Polly. This includes statements regarding alleged interactions with, conversations with, and observations of Polly; and alleged statements by Polly to Matt regarding Polly’s intentions. Moreover, as set forth above, testimony from Matt

about what allegedly did *not* happen, or negative testimony, also was barred. Accordingly, the trial court correctly excluded Matt's responses to Appellant's requests for admission to the extent those responses reflected transactions with Polly.

As an initial matter, contrary to Appellant's position, it is well-settled that the DMS is not waived simply by responding to discovery. *See In re Estate of Reynolds*, 17 Wn. App. 472, 475-76, 563 P.2d 1311 (1977); *McGugart v. Brumback*, 77 Wn.2d 441, 463 P.2d 140 (1969) (mere taking of deposition or propounding of interrogatories does not waive protection of Dead Man's Statute, *unless such discovery is introduced into evidence by representative of estate.*). In *McGugart* the Washington Supreme Court detailed its rationale for insulating the parties from waiver of the DMS through the use of discovery:

All parties have the right to use these discovery techniques and their availability is essential to a fair trial of all the issues. 'Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.' This mutual access to knowledge, secured by discovery, is a basic premise upon which civil litigation is now conducted and its availability should not be contingent upon the rules of evidence or competency as are applied at trial.

*McGugart*, 77 Wn.2d at 445 (internal citations omitted). Thus, the mere fact that Matt responded to Appellant's discovery did not and could not waive the protections of the DMS.

Relying primarily on the holding in *In re Estate of Miller*, 134 Wn. App. 885, 143 P.3d 315 (2006), Appellant further avers that exclusion of

certain of Matt's responses was error because these admissions were statements against the Estate's interest, and thus did not fall within the ambit of the DMS. Appellant is wrong, as a careful analysis establishes that the responses at issue – whether admissions or denials – were neither unqualified nor were they contrary to Matt's or the Estate's interests. They therefore fell squarely within the protections of the DMS.

As Appellant's own authority makes clear, a witness is a "party in interest" if he or she stands to gain or lose from the judgment. *Miller*, 134 Wn.App. at 893. "The interest must be a **direct and certain** interest in the outcome of the proceeding." *Id.* (emphasis added). Courts therefore must ask "whether the witness will gain or lose by the direct legal operation of the judgment rendered in the litigation at hand." *Id.*

In analyzing declaration testimony of an heir submitted to the trial court, the *Miller* court determined that the declarant's testimony, if accepted, would directly reduce her share of the potential estate. *Miller*, 134 Wn. App. at 894. In *Miller*, the issue was whether certain pre-death payments to the decedent by his mother were loans which the decedent intended to repay or whether they were gifts. *Id.* at 888-89. If the payments were loans, the estate would be required to repay them before any distribution was made to the decedent's heirs, thus directly reducing the amount of funds available for such distribution. *Id.* The decedent's daughter and heir submitted a declaration in which she stated that her

father had discussed repaying the loans from his mother. *Id.* Because that testimony supported the position that the payments were loans, and thus would reduce the amount of any distribution which the daughter ultimately would receive, the court held that the statements by the daughter were not made on her own behalf, and thus fell outside the DMS. *Id.* at 895.

Here, Matt's admissions in discovery had no such direct impact on his ultimate recovery. As an initial matter, Appellant misrepresents the record with respect to his purported "admissions," as she claims that Matt admitted that "Polly 'intended to purchase a motorcycle as a gift for'" Appellant's spouse. Br. at 22. Even a cursory glance at the record, however, reveals that Matt **denied** this request for admission. CP 699. Accordingly there is no basis for Appellant even to contend that Matt's response was against either his own interests or the interests of the Estate.

Contrary to Appellant's claims, Matt's "admissions" merely reflect qualified statements which would not have impacted the outcome of the proceeding. In response to Request No. 1, although Matt admitted that Polly mentioned paying off Appellant's campaign debt, he specifically *denied* that she intended to do so voluntarily or as a gift. CP 699. Thus, the response is essentially the opposite of the declarant's in *Miller* – for even if Polly stated that she would pay Appellant's campaign debt, if she did so involuntarily, as a result of undue influence, fraud, and/or financial exploitation, and/or as a loan, Appellant would have been forced repay

those sums to the Estate and Matt's share would not have been reduced.

In response to Request No. 3, Matt's admission that he was "aware" that Polly asked Appellant to purchase a vehicle for his brother was irrelevant, as the purchase of said vehicle was not at issue in the case. CP 699. Appellee's petition did not mention the purchase of a vehicle for Dan at all, and the Estate made no claim to the same; nor did Appellant assert any counterclaims relating to such vehicle. Thus, neither Matt nor the Estate would have gained or lost as a result of that issue, and it therefore was not a statement against Matt's interests.

In response to Request No. 5, Matt admitted that Polly wanted Appellant to have her residence, but there was no dispute as to that issue, as Polly's estate plan already provided Appellant the option to purchase the home at 90% of fair market value. CP 700. Instead, the dispute was whether Polly intended the house to be *sold* to Appellant, as reflected in her estate plan and the promissory note *drafted by Appellant* and as Polly told a friend two days before her death, or to be *given* to her as a gift, as Appellant claimed. Matt **denied** it was a gift; that denial was not contrary to his interests because if the house was not a gift Appellant would be forced to return the house or to pay for it, thus increasing the value of the Estate available to fund the trust for his benefit.

Finally, Matt's admission, in response to Request No. 10, that Appellant and Polly had a close relationship was not a statement against

his interest, as it would not have impacted his pecuniary interest. CP 701.

Thus, what Appellant seeks to characterize in broad strokes as admissions contrary to Matt's or the Estate's interest are, in fact, anything but – and in fact, one of them is a total denial. The analysis in *Miller* therefore does not apply, and the statements were properly excluded.

3. *Appellee did not waive the Dead Man's Statute.*

Appellant next contends that Appellee waived the protections of the DMS, but her arguments misstate both the law and the record and must be rejected. As an initial matter, Appellant's blunderbuss assertion of some form of broad, case-wide waiver of the DMS by the Estate which would allow her to testify about whichever "transactions" with Polly she desires is directly contrary to law, for it is well-settled that a "waiver by introduction of testimony about one transaction does not extend to unrelated transactions and conversations." *Lennon*, 108 Wn. App. at 175. Thus, even if Appellee had waived the DMS with respect to one particular transaction – which he did not – such waiver would apply only to *that* transaction, and would not open the door to Appellant disregarding the DMS for all purposes as she suggests.<sup>6</sup> *Id.*

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<sup>6</sup> Nor are Appellant's repeated protestations regarding the purported "unfairness" of the DMS a basis for waiver, as "the principle that legislative expression will not be derogated by judicial interpretation applies with respect to the deadman's statute." *Lappin*, 13 Wn. App. 277, 291-92, 534 P.2d 1038 (1975) (noting that court was mindful of "numerous criticisms" of DMS, but also was "cognizant of the fact that the statute has not been repealed or superseded by any duly promulgated court rule.").

Further, Appellant blatantly misrepresents the governing law when she contends that “[p]ersonal representatives of an estate are subject to the dead man’s statute, even when testifying in a representative capacity in support of the estate.” Br. at 26. What Appellant declines to tell the Court is that her statement is true only if the personal representative is also a potential heir, for the DMS on its face does not apply to a disinterested representative appearing solely in a representative capacity. RCW 5.60.030 (“...provided further, that [the statute] *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.*”) (emphasis added).

Here, Appellee was neither a beneficiary nor heir of Polly’s estate or her Trust, and had no pecuniary interest in Polly’s estate plan at any time; instead, he brought the underlying petition solely in his role as Polly’s fiduciary. Appellant’s contention that Appellee waived the DMS by offering his own testimony – about anything – is thus foreclosed in its entirety by the plain language of the DMS. Not surprisingly, the cases on which Appellant purports to rely do not contradict this statutory truism. *See In re Shaughnessy’s Estate*, 97 Wn.2d 652, 653, 648 P.2d 427 (1982) (the DMS “prohibits a ‘party in interest’ from testifying ... [the estate representative] is clearly such a person because he would ‘gain or lose by a decree sustaining or revoking a will.’”); *In re Tate’s Estate*, 32 Wn.2d 252, 254, 201 P.2d 182 (1948) (executors of will were also legatees and

devises); *Hill v. Cox*, 110 Wn. App. 394, 405, 41 P.3d 495 (2002) (personal representative waived by offering deposition testimony of interested opponent); *Thompson v. Henderson*, 22 Wn. App. 373, 380, 591 P.2d 784 (1979) (personal representative can waive, not by own testimony, but by failing to object or by cross-examining interested witness beyond scope of direct examination).

Nor did Appellee waive the DMS by its questioning of Appellant at trial. Once again, Appellant fails to grasp – or deliberately obscures – what is meant by a “transaction with the decedent.” Appellant insists that Appellee waived the DMS by questioning her regarding (1) her beliefs about the legal meaning of a power of attorney she drafted; (2) her beliefs about the representations she made by signing certain documents; (3) identification of entries on a bank statement; and (4) where Appellant was located when she obtained the \$22,000 cashier’s check from Polly’s account that Appellant used to buy her spouse a new motorcycle. Br. at 30. None of these are “transactions” with Polly; even if Polly were alive, she could not of her own personal knowledge contradict Appellant’s testimony regarding Appellant’s understanding of legal documents or her identification of bank accounts. *Thor*, 63 Wn. App. at 199.

Appellant’s argument regarding the cashier’s check, however, is perhaps the most audacious of all, for it rests on Appellant’s attempt to force waiver by giving nonresponsive testimony which was, in fact,

demonstrably untrue. The testimony was as follows:

Q. Did you request this cashier's check for \$22,000?

A. Yes.

Q. And where were you when you made this request?

A. I was initially with my grandmother.

RP 597. Appellee was seeking a location – *i.e.*, the bank – but Appellant chose to answer by referencing her grandmother in an obvious, deliberate attempt to force waiver of the DMS – one of many such attempts throughout her testimony. Those attempts failed, for it cannot be said that a party unfairly attempts to use the DMS as both a sword and a shield when that party carefully tailors its questions to seek only non-barred testimony, but the witness nevertheless deliberately interjects barred testimony. Indeed, were it otherwise, an interested party could answer *any* question by offering barred testimony in order to render the DMS a nullity. The trial court properly recognized that to find waiver in such a circumstance would be contrary to the plain intent of the law.

Finally, Appellant's contention that Appellee "blew the door off its hinges" and waived the DMS by offering "a host of testimony favorable to the Estate regarding alleged statements and transactions between Polly and [Appellant]" through third party witnesses such as Ruth Bernstein and Judy Madden is a patently absurd position that is contrary to law, and must be rejected. Appellant would have this Court believe that if an estate

offers evidence from *disinterested third parties* – such as Ruth Bernstein and Judy Madden<sup>7</sup> – regarding transactions with the decedent, the estate waives the protections of the DMS. Such a position would render the DMS a nullity – for if the estate cannot submit evidence from **interested** parties without waiving the DMS, and it cannot submit evidence from **disinterested** parties without *also* waiving the Statute, the estate is precluded from offering any evidence at all unless it also allows the opposing party to offer her own self-serving testimony regarding transactions with the deceased. Under Appellant’s view of the world, the DMS would either bar *all* evidence, or it would bar *no* evidence at all. That is not the law.

By its express terms, the DMS bars only testimony from interested parties regarding transactions with the decedent, not testimony from disinterested parties. RCW § 5.60.030; *Thor*, 63 Wn. App. at 199. Thus, while a party may waive the protections of the statute by offering testimony from an interested party regarding such transactions, testimony from a disinterested party does not implicate the DMS and cannot effect a waiver. *See, e.g., In re Estate of Reynolds*, 17 Wn. App. 472, 475-76, 563

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<sup>7</sup> There is no dispute that Judy Madden and Ruth Bernstein are disinterested third parties, though it does not escape notice that Appellant refers to Ms. Bernstein here not by name but as “Zachary and Ethan Bernstein’s mother” – no doubt in attempt to subtly suggest that Ms. Bernstein has some interest by virtue of her adult sons’ status as beneficiaries. Br. at 32. By that logic, of course, Dr. Smith would be an interested party by virtue of her marriage to Appellant – a position Appellant certainly opposed at trial. RP 1642.

P.2d 1311 (1977) (statute can be waived only by offering statements of interested parties into evidence or by failing to object to opponent's offer of such statements). Indeed, the very purpose of the Statute is to prevent an interested party from giving self-serving statements which the deceased can no longer rebut, which forces the parties (and the finder of fact) to rely instead on evidence from disinterested parties and/or contemporaneous records – which presumably are more reliable – to make their case.

*Lasher v. Univ. of Wash.*, 91 Wn. App. 165, 169, 857 P.2d 229 (1998);  
*Thor*, 63 Wn. App. at 199.

**B. The Trial Court Correctly Applied The Hearsay Rules.**

Appellant objects that the trial court improperly applied ER 801(c) to exclude as hearsay what she sought to characterize as a handwritten “instruction log” and to prevent Appellant’s spouse from testifying regarding a conversation she claimed to have overheard between Polly and Appellant. Appellant is wrong as to both issues.

1. *The so-called “instruction log” is inadmissible hearsay.*

Several months after Appellant claimed to have produced all relevant documents in discovery in this matter, during her deposition, Appellant suddenly claimed to have inadvertently omitted certain documents from her prior production. CP 1514-15. One such document was a so-called “instruction log,” an approximately 20-page handwritten document, in Appellant’s handwriting, containing various notes regarding

supposed conversations and transactions Appellant had with Polly. *Id.* Later still, during a deposition of another witness, Appellant's counsel advised that Appellant had just discovered an additional page of the "instruction log" in the trunk of her car during the lunch break. *Id.* Curiously, this "missing page" was written with a pencil, while the rest of the log had been written in ink. *Id.*

Appellee moved in limine to exclude the so-called "instruction log" as inadmissible hearsay. CP 1501-13. The trial court granted the motion. Appellant now contends that this was error because the "instruction log" was a contemporaneously-maintained record which fell within the "business records" exception to the hearsay rule. Br. at 35. Plainly, however, it was not.

As an initial matter, Appellant was unable to lay any foundation for her claim here that the "instruction log" was contemporaneously maintained or anything else about it, as such testimony was obviously barred by the DMS. There is thus no evidence in the record to support Appellant's characterization of the document here. Without a proper foundation or offer of proof in the record, Appellant cannot assign error to the log's exclusion. *See Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 617, 762 P.2d 1156 (1988) (if party fails to make adequate offer of proof at trial, "then the appellate court will not make assumptions in favor of the rejected offer.").

Even if Appellant had been allowed to so testify, such transparently self-serving “evidence” would have been subject to considerable scrutiny – in no small part because every page of the supposedly late-discovered “log” – save for the missing page produced even later – was written in what appeared to be the same ink, despite purporting to have been prepared over the course of several weeks and, miraculously, spoke favorably to nearly every legal issue facing Appellant. Curious indeed that Appellant would have forgotten all about such a critical document in the course of discovery, which she claimed to have studiously prepared on a daily basis during the last weeks of Polly’s life, only to suddenly remember it months later as the case against her continued to mount. More curious still that Appellant discovered an additional page months into the litigation and during depositions of various individuals affiliated with Polly’s financial institutions. How convenient!

In any event, even if Appellant had been able to adduce evidence as to the authenticity of the “log,” which she was not, the business record exception nevertheless was unavailing, for the exception does not apply to the type of statements included in the document. Such statements are viewed with a jaundiced eye, being “self-serving hearsay.” *Baxter v. Safeway Stores, Inc.*, 13 Wn.App.229, 237-38, 534 P.2d 585 (1975) (excluding diary kept by plaintiff); *see also W. G. Platts, Inc. v. Guess*, 56

Wn. 2d 143, 147, 351 P.2d 512, 515 (1960) (upholding exclusion of letters as “plaintiff’s letters, [which] were merely self-serving declarations”). “Diaries and small memorandum books do not generally belong to the class of books which are admissible in evidence. It should be borne in mind that it is essential to the admission of books of account in evidence that the charges should be in such a state that they may be presumed to be the minutes of the daily business of the party; that is, the book must on its face be a regular and usual book of accounts.” *State v. Coffey*, 8 Wash. 2d 504, 506–08, 112 P.2d 989, 991 (1941) (admission of notes in diary was reversible error). Moreover, it is clear from the surrounding circumstances that the log was not kept in the “ordinary course of business,” as there *was* no business, no business decisions depended on the maintenance of the log, and the log was not maintained in a business-like fashion, seeing as how it was apparently stored in Appellant’s trunk. There was thus no basis for Appellant to assert the business records exception. RCW 5.44.040.

Nor was the “log” admissible as a recorded recollection under ER 803(a)(5). To avail herself of that exception, Appellant bore the burden of establishing four foundational elements: (1) that the record pertains to a matter about which Appellant once had personal knowledge; (2) that Appellant, at trial, had an insufficient recollection about the matter to testify fully and accurately; (3) that the record was made or adopted by

Appellant when the matter was fresh in her memory; and (4) that the record accurately reflected her prior knowledge. *State v. Nava*, 177 Wn. App. 272, 290-91, 311 P.3d 83 (2013). Appellant was unable to establish any one of those elements.

As noted above, the DMS prevented Appellant from testifying as to any of the underlying facts concerning the “log.” No other witness had any personal knowledge regarding the document. Appellant thus could not satisfy the foundational elements of ER 803(a)(5). Her only response here is to insist that Appellee waived the DMS, but as discussed above, that is not correct – moreover, even when waiver of the DMS *does* occur, it is applied on a transaction-by-transaction basis; waiver as to a certain transaction does not simply waive the DMS for all purposes as Appellant suggests. *Lennon*, 108 Wn. App. at 175.

Notwithstanding the DMS, Appellant still could not make the requisite foundational showing, for an examination of the “log” raises serious questions as to authenticity. As an initial matter, its internal chronology is incorrect, as can clearly be seen when comparing the “log” to other documents in the record. For example, the log states that on December 22nd, 2017, there was a question as to why Morgan Stanley was “taking so long” to give Appellant access to Polly’s investment account. CP 1524. Yet, Respondent was advised via email on **December 21st** that she already *had* access to the account, and Respondent replied to Morgan Stanley **that**

**same day** thanking them. CP 1573-74. Indeed, on December 22, Appellant had already signed and submitted a wire transfer authorization for the first \$120,000 transfer from the Morgan Stanley account to Polly's Key Bank account on which Appellant was the pay-on-death beneficiary. CP 1577. It defies credulity to think that Respondent would have contemporaneously complained in her "log" about not having access to the Morgan Stanley account on the **day after** she knew access had been granted, and the **same day** she accessed that account!

The "log" also purports to contain a reminder to Respondent as the last entry dated January 5th to obtain forms from the Kitsap County Recorder's office to facilitate recording of the quitclaim deed which purported to transfer Polly's home to Appellant. CP 1535. Yet, the deed, with all required forms, had already been recorded at 9:45 am on January 5th, a Friday, by Appellant. CP 1594. The Kitsap County forms were purportedly signed the day before on January 4th. CP 1596. The log itself was thus nonsensical in supposedly reminding Appellant to obtain forms that were purportedly signed the day before, and filed first thing that morning, before any other actions reported in the log. Needless to say, the log does not reference the actual recording of the documents.

Similarly, the log references nonsensical conversations between Appellant and Morgan Stanley's Adrian Croft. The log states that Appellant instructed Mr. Croft to sell the "high risk" stock from Polly's account first.

CP 1537. Yet, Mr. Croft's notes in Morgan Stanley's system and his testimony at trial do not reflect any such "high risk" instruction. CP 1581 and RP 754-755. In fact, Morgan Stanley's records show no such conversation between Mr. Croft and Appellant, and Mr. Croft testified he had no recollection of such a conversation. RP 754-755; CP 1579-83. Moreover, Polly's investments were held in mutual funds, not individual stocks – "high risk" or otherwise. CP 1581, RP 754-55.

The log also has a noteworthy and unexplained gap between December 22, 2017 and December 27, 2017. This gap completely omits any mention of the creation of the quitclaim deed for Polly's house and the supposed promissory note, or execution of either document, both of which are dated within that span. CP 1585-86, 1588. Given the detail of the log, the complete omission of these significant transactions and acts, including any notes regarding how the value for the house and the terms of the promissory note was set, is telling.

As the trial court recognized, these and other inconsistencies in the log were incompatible with the notion of a contemporaneous record, and instead suggest a document created after the fact, reconstructed from then-available partial records, in an effort to bolster Appellant's case. In fact, it is apparent from the language used, the changing tenses and the flipping of various pronouns that the log *was* created after the fact, from memory and by reviewing some of the key documents. Because of that, the log included

errors such as those described above.

Indeed, perhaps most telling of all, the “log” is written all in the same pen and all on the same paper, with no variance between entries – with one damning exception. CP 1609-11. During the deposition of one of the financial advisors in October, Appellant returned from lunch and claimed she had suddenly found, ten months after Polly’s death, a previously-missing page of the log in the trunk of her car! CP 1514-15. The supposedly missing page, however, was written in **pencil** on an entirely different type of paper from the rest of the log. *Id.* It frankly is astonishing that Appellant evidently believes that this Court or any other will accept her obviously manufactured and contrived “log” as contemporaneous evidence.

2. *The trial court properly excluded Maureen Smith’s hearsay testimony.*

Appellant also assigns error to the trial court’s exclusion of certain testimony by Appellant’s wife, Maureen Smith, regarding a conversation she claimed to have overheard between Polly and Appellant. Yet, Appellant contends that the Court improperly excluded testimony **that she never attempted to offer at all** – including testimony that Appellant **conceded** was inadmissible hearsay at trial!

Appellant claims in this appeal that the trial court wrongfully excluded testimony by Dr. Smith “that she was present when Polly asked

whether the transfer from Morgan Stanley ‘went through’ and responded ‘good’ when she heard that it had.” Br. at 33. That is false, and perhaps it is telling that Appellant’s brief does not direct the Court to the portion of the record where the challenged testimony actually appears, citing instead to trial counsel’s legal argument. The actual proffered testimony was as follows:

**Q. (By Ms. Cobb):** And so what did you observe related to Polly’s estate plan and the terms?

**Mr. Broughton (counsel for Matt Palermini):** I guess I need more foundation, Your Honor. I mean, who – who is the conversation supposedly between?

**Ms. Cobb:** I’m asking what she observed. We’re getting there.

**The Court:** We’ll look for foundation. Continue.

**A. (By Dr. Smith):** Polly asked if the transfer had gone through.

RP 1640:20-1641:5 (emphasis added).

Thus, while it is true that Dr. Smith attempted to testify that she overheard Polly ask Appellant “if the transfer had gone through,” she *never* attempted to testify that Polly said anything about which transfer she meant, or what the response to the question was, or that Polly ever said “good” during that conversation, as Appellant now claims. To the contrary, Appellant’s counsel *admitted* that Dr. Smith was not attempting to identify what transfer Polly allegedly meant, and that the response to Polly’s alleged question *would have been hearsay*:

**Ms. Cobb:** The fact that she answered that – the fact that she just asked a question is simply not hearsay. It’s not a statement and it’s not – it’s simply offered for the – to prove that Polly had understood that **something** was going on. We’re not – **this witness is not testifying that she knew what that something was. She’s testifying only that Polly made – asked a question, “did the transfer go through.”** It doesn’t go any further than that. **There was actually a response after that. We’re not going to ask her about that because that would be a statement.**

**... This witness is not going to testify as to what that transfer was or even her understanding of it.**

RP 1649-50 (emphasis added).

Appellant’s claim that the trial court excluded evidence that (i) Polly asked about the Morgan Stanley transfer and that (ii) she responded “good” when told therefore is demonstrably false, and she conceded as much at trial. She cannot now be heard to state that she should be allowed a new trial to permit such testimony, given that no offer of proof was ever made and that she herself admitted that the additional material she now surreptitiously seeks to slip into the record was inadmissible hearsay. *See Sturgeon*, 52 Wn. App. at 617, *supra*.

All that is at issue here is whether the question, “did the transfer go through” was hearsay or not. Even if it was not, its exclusion was plainly immaterial in the bench trial, and thus would constitute, at most, harmless error. The statement has no larger context, is not attached in any way to the issues raised at trial, and no further testimony was offered by

Dr. Smith to connect the vague statement she claims to have overheard to any relevant evidence.<sup>8</sup>

**C. Appellant Was Not Legally Married To Her “Former Wife.”**

Appellant insists that she should have been allowed to invoke spousal privilege to bar testimony by her former domestic partner Kelly Montgomery – from whom she separated in 2006 – who testified *inter alia* that Polly’s will was a “constant” subject of discussion with Appellant; that Appellant had often talked about “getting [Polly’s] house, the money, the car, and stuff like that;” and that Appellant “constantly told her mother, her brother, her sister that they were not going to be in [Polly’s] will. She was -- it would be her. She would be getting it. She was the only one who visited, you know. There was tension between them. She was concerned about the boys. She called them ‘the tards.’” CP 1360-63.

The law is clear that the spousal privilege applies only to legally married couples, something Appellant does not dispute. RCW 5.60.060(1). Due to the admittedly unfortunate state of the law during the period of Appellant’s relationship with Ms. Montgomery, however, the two were never legally married. Appellant avers that she Ms. Montgomery *were*

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<sup>8</sup> Appellant seems to confabulate testimony regarding two separate alleged conversations. The trial transcript reflects that after the initial statement regarding Polly’s alleged “transfer” question, Dr. Smith switched gears entirely and attempted to testify regarding a different conversation on speakerphone at her home earlier in the day between Appellant and a financial advisor. Polly was not present for any such phone conversation; she was in hospice. The court properly excluded the testimony as hearsay.

married, in Oregon in 2004 – but their marriage was later voided by the Supreme Court of Oregon when it held that same-sex marriages in performed in 2004 were void ab initio as a matter of law. *Li v. State*, 338 Or. 376, 397, 110 P.3d 91 (2005) (abrogated on other grounds by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)) (“marriage licenses issued to same-sex couples in Multnomah County before that date were issued without authority and were void at the time that they were issued”).

Appellant argues now that *Obergefell* voided the holding in *Li*, and that the voiding of *Li* voids *Li*'s voiding of her marriage to Ms. Montgomery – thus entitling her to assert the marital privilege to exclude Ms. Montgomery's clearly damning testimony. Br. at 38. But not only is that contention unsupported as a matter of *law*, it makes no sense as a matter of *fact* – for if Appellant's marriage to Ms. Montgomery was never voided, then Appellant and Ms. Montgomery are in fact *still married*, as they never filed for divorce. Appellant thus would be married to two different people, which is a result barred everywhere, and one we presume no one involved would countenance.

Nor do the out-of-state authorities cited by Appellant compel a different result. The courts in *Hard v. Attorney Gen.*, 648 Fed. Appx. 853 (11th Cir. 2016), *Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D. Tex. 2016), and *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155 (N.D. Cal. 2016) all reached only the narrow conclusion that *Obergefell* could be applied to

allow same-sex partners to claim benefits or standing as “surviving spouses” of their deceased partners who had died prior to *Obergefell*.<sup>9</sup> That is an entirely different question from whether a former same-sex partner can prevent her living ex-partner from testifying against her more than 12 years after they broke up; Appellant’s authorities have nothing to say on such matters, and we are aware of no court which has so held.

Indeed, while Appellant encourages this Court to overturn the trial court’s ruling on this issue to promote the “obvious public policy in favor of marital harmony,” Br. at 36, there in fact are no such considerations in this case. Appellant and Ms. Montgomery ended their relationship in 2006; there is no harmony to preserve. The holdings in *Li* and other cases invalidating same-sex marriages are woeful reminders of an unfortunate past, and it may be that this Court will one day be asked to decide whether a now-married same-sex couple can invoke the privilege to prevent testimony from a time before they could legally marry. This, however, is not that case.

**D. The Court Should Affirm The Trial Court’s Findings As to Undue Influence, Fraud, And The Slayer Statute.**

This Court should deny Appellant’s attempt to re-litigate the trial court’s findings that Appellant committed undue influence and fraud, that

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<sup>9</sup> Similarly, *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) presented only situation in which the plaintiff sought to enjoin the state of Texas from continuing to enforce its same-sex marriage prohibition law after *Obergefell*.

she breached her fiduciary duties to Polly, and that she was thus disinherited under RCW 11.84.150 in this forum. Appellant mischaracterizes her legal burden below, conflates the legal standard for undue influence with the standard for lack of capacity, and identifies no evidence which would have compelled a different result.

1. *Appellant did not meet her burden to prove by clear, cogent, and convincing evidence that each transaction for her benefit was not the result of undue influence.*

Because Appellant was admittedly Polly's fiduciary, it was *her* burden at trial to prove by *clear, cogent and convincing evidence* that each action she took in a fiduciary capacity was **not** the result of undue influence or fraud. *Wilkins v. Lasater*, 46 Wn. App. 766, 777, 733 P.2d 221, 228 (1987) (“[t]he burden of proof is on the fiduciary to demonstrate no breach of loyalty has been committed”); *McCutcheon v. Brownfield*, 2 Wn. App. 348, 357, 467 P.2d 868, 874 (1970) (“Because undue influence is treated in law as a species of fraud, *evidence of a gift between persons in a confidential relationship must be clear, cogent and convincing.* The existence of undue influence between persons in a confidential relationship is more readily inferred”) (emphasis added, internal citations omitted). Moreover, “gift transfers or transfers without substantial consideration inuring to the benefit of the principal violate the scope of authority conferred by a general power of attorney to sell, exchange, transfer, or convey property for the benefit of the principal.” *Bryant v.*

*Bryant*, 125 Wash. 2d 113, 119, 882 P.2d 169, 172 (1994).

The presumption against gifts in the context of a fiduciary relationship acts to invalidate the transaction if the fiduciary is unable to meet her burden. *Meyer v. Champion*, 120 Wn. 457, 468, 207 P. 670 (1922) (“a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action”); *White v. White*, 33 Wn. App. 364, 371, 655 P.2d 1173 (1982) (“[U]pon a sufficient showing that the donor has reposed such trust and confidence in the donee as to create a fiduciary relationship, a presumption arises which thrusts upon the donee the burden of persuasion to establish the absence of undue influence”).

Moreover, Washington law provides that documents such as powers of attorney drafted by the fiduciary are presumptively ***fraudulent***, and that when such documents are then used for the benefit of the agent, ***every presumption arises against the transaction***. *In re Beakley*, 6 Wash. 2d 410, 423–24, 107 P.2d 1097 (1940) (“strict is the rule on this subject that dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, and to sustain a transaction of advantage to himself with his client the attorney has the burden of showing not only that he used no undue influence but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as

beneficial to the client as it would have been had the client dealt with a stranger”); *Meyer*, 120 Wn. at 470 (“Another feature of the case which tells against the position of the respondent is that the documents under which he claims were entirely prepared by himself... Where that relation of confidence exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction”); *see also Butler v. Thomsen*, 195 Wn. App. 1054 (2016) (drafting attorney could not invoke arbitration clause he drafted into contract) (unpublished; cited as persuasive pursuant to GR 14.1).

Washington law makes identical presumptions for actions taken as *trustee*. Under RCW 11.98.072(2), any “transaction involving the investment or management of trust property entered into by the trustee for the trustee’s own personal account or which otherwise affected by a conflict between the trustee’s fiduciary and personal interests is voidable.” Similar statutory provisions prohibit self-dealing transactions taken by an agent pursuant to a power of attorney. RCW 11.125.140 (“notwithstanding the provisions in the power of attorney, an agent that has accepted appointment shall...(b) act in good faith; (c) act only within the scope of authority granted in the power of attorney...(f) attempt to preserve the principal’s estate plan”).

Thus, it was Appellant’s burden at trial to prove by clear, cogent, and convincing evidence that the many actions she took to benefit herself

while acting as Polly's fiduciary and trustee were *not* the product of undue influence. Appellant utterly failed to do so, as there was little to no competent evidence introduced in her favor as to *any* of the subject transactions. None of the third party witnesses who testified had any personal knowledge of the reason for any of the alleged transfers from Polly to Appellant. Coupled with the ample evidence that Appellant fraudulently held herself out as sole trustee of Polly's Trust in order to gain access to Polly's accounts, the complete lack of evidence to corroborate Appellant's tale of Polly abandoning her estate plan in the last weeks of her life in order to benefit Appellant was fatal to her case.

Appellant now contends, however, that the presumption of undue influence is "rebuttable," and that she successfully rebutted the presumption by presenting evidence of Polly's decision to end her life pursuant to the Death With Dignity Act. Br. at 40-41. Thus, Appellant argues, the burden of proof shifted to the Estate. Appellant's position is risible, for while it is true that application of the Death With Dignity Act requires physicians to determine that the patient is competent to make the decision, it says absolutely nothing about undue influence.<sup>10</sup> Needless to

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<sup>10</sup> In fact, the physicians, each of whom met with Polly only by phone, testified that they ascertained only whether Polly properly understood the effects of ending her life through Death with Dignity. Neither made any effort to determine if Polly was vulnerable to undue influence or whether Polly was competent to take any other action. RP 1771-1772, 1559-1561. Neither testified as to any knowledge of Polly's estate plan or any desire on Polly's part to change her estate plan. RP 1779, 1564.

say, those are separate concepts, and a person who is competent may nevertheless be unduly influenced.<sup>11</sup> *Matter of Estate of Lint*, 135 Wn.2d 518, 535, 957 P.2d 755 (1998) (“A will of a person who otherwise possesses testamentary capacity may be set aside upon a showing that a beneficiary exercised undue influence over the testator.”) (citing *Dean v. Jordan*, 194 Wn. 661, 79 P.2d 331 (1938)).

Appellant’s purported reliance on *In re Estate of Jones*, 170 Wn. App. 594, 287 P.3d 610 (2012) is misplaced and unavailing. In addition to evidence of the decedent’s general competence, the *Jones* court also found that the fiduciaries at issue had introduced evidence to establish that the transaction at issue was favorable to the decedent; that decedent had engaged in the transaction after consulting with an independent financial advisor; and that the relevant third party witnesses had seen no signs of undue influence. 170 Wn. App. at 617-18. This evidence, coupled with the opposing party’s failure to adduce any evidence of undue influence at all, led the *Jones* court to conclude that summary judgment had properly been granted. *Id.* at 618. Those facts are markedly different from those at issue here, and *Jones* simply does not support Appellant’s position.

Similarly, the court in *Zvolis v. Condos*, 56 Wn.2d 275, 352 P.2d

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<sup>11</sup> Indeed, even if Polly’s competence were an issue in the case, the legal standard for testamentary capacity is not the same as the standard under the Death With Dignity Act, and would require different evidence.

809 (1960) merely declined to hold that the fact that the decedent had not sought independent advice before engaging in the transaction was dispositive of undue influence. There, the court noted that the recipient of the challenged gift had not initiated the transfer and that the evidence showed that he had not used undue influence to obtain it. 56 Wn.2d 279. The evidence in this case was directly to the contrary.

Nor does *Lint* support Appellant's position. To the contrary, *Lint* affirms the proposition that a beneficiary occupying a fiduciary position bears the burden to overcome the presumption of undue influence by clear, cogent, and convincing evidence. *Lint*, 135 Wn.2d at 535-36 (citing *Dean*, 194 Wn. at 671-72).

Here, Appellant's sole evidence pertains to Polly's competence to decide to end her life pursuant to the Death With Dignity Act. The purported evidence regarding whether it was "eminently reasonable" for Polly to essentially give all of her assets to Appellant in the last weeks of her life, Br. at 42-44, is not evidence at all; it is merely Appellant's unsupported story of the case. No evidence was adduced at trial to support it, much less prove it. Appellant's proffered evidence is irrelevant and wholly inadequate to rebut the presumption.

It is worth nothing that the trial court, in fact, found that not only had Appellant *failed* to meet *her* burden, but that even if the burden of proof had rested with Appellee – which it did not – Appellee would have

met that burden, as he had actually proven by clear, cogent, and convincing evidence that the transfer of the house, the transfers from the Morgan Stanley Investment Account and the lifetime transfers from Polly's KeyBank account all were financial exploitation. CP 2112. In sum, the Court left no doubt that any evidence produced by Appellant was entirely unconvincing and, instead, the clear, cogent, and convincing evidence at trial showed in stark detail Appellant's abuse of her fiduciary duties and financial exploitation of her terminally ill grandmother.

2. *The evidence proved that Appellant committed fraud.*

The trial court found that Appellant committed fraud by misrepresenting to Morgan Stanley that she was the sole trustee of Polly's trust in order to gain access to Polly's investment account and transfer funds to another account for her benefit. Appellant assigns error to this conclusion for four reasons, none of which are availing.

First, Appellant repeats her oft-cited claim that she made the transfers at Polly's direction. Br. 48. But that claim is unsupported by any evidence whatsoever; it is only Appellant's argument. No witness at trial was able to corroborate that contention, and Appellant herself was properly barred from so testifying by the DMS.

Second, Appellant appears to contend that it is conceivable that the document she sent to Morgan Stanley, which falsely stated that she was the sole trustee, was "consistent" with earlier documents Mr. Kenney had

drafted. Br. at 48. But the sole evidence she cites for that claim is simply a provision providing that Appellant and Appellee were to be joint successor trustees in the event of Polly's death. RP 1901. That is entirely inconsistent with Appellant's false representation that she was *ever* the sole trustee; she was not. Again, Appellant attempts to advance this argument relying entirely on her own self-serving story about "what Polly wanted," but again, any testimony to that effect was barred by the DMS and contradicted by ample evidence at trial, including the testimony by Polly's estate planning attorney.

Third, Appellant insists that there was insufficient evidence to support the trial court's finding that she *knew* the forged Certification of Trust that she sent to Morgan Stanley was false. But Appellant *created* and intentionally transmitted the document after Morgan Stanley twice refused to allow her access to Polly's accounts based on other documents she sent them, and Appellant, a licensed attorney, *knew* she was not the sole trustee (Polly was).<sup>12</sup> The suggestion that this evidence is inadequate to establish her knowledge of the document's falsity is absurd.

Moreover, it was not only the Certification of Trust in which

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<sup>12</sup> Appellant avers that she "simply scanned" the fraudulent Certification of Trust at issue in this case from the "trust binder" prepared by Polly's attorneys, "which contained multiple versions and drafts of the trust." Br. at 14. That assertion, however, is false – the evidence established that the binder contained only the final, executed versions of Polly's estate planning documents, not drafts or alternate versions. CP Ex. 237 (original binder mailed to the Court).

Appellant fraudulently represented herself as the sole trustee. She separately signed and submitted a series of documents to Morgan Stanley entitled “Fiduciary Certification and Trust Account Agreement” in which she attested two more times that she was familiar with the Polly’s Trust Agreement and *affirmed her authority to act as sole trustee under that Agreement*. CP 2099-104. Thus, Appellant repeatedly, and in multiple formats, fraudulently held herself out as the sole trustee of Polly’s Trust during Polly’s lifetime.

Nor does Appellant’s cherry-picking of her expert’s testimony support her claim of error. Appellant’s expert testified that when evaluating which photocopy of the Trust Certification was more likely made from the genuine original, she had not taken her own images of the questioned document but instead relied on secondhand images pulled from the trial court files and emailed to her by counsel. RP 1853; 1855-1859. Those copies necessarily were lesser quality than the actual documents. Upon examination of the *actual* documents in question, Appellant’s expert acknowledged that reproductions can never be better quality than the original and that, in fact, her conclusion as to the better quality document, and by extension the genuineness of the document, had changed. RP 1855-1859. In sum, Appellant’s own expert in fact *agreed* with Appellee’s expert that the Trust Certification submitted by Appellant to Morgan Stanley was a lesser quality, doctored copy. *Id.*

Fourth, Appellant claims that there was insufficient evidence to show reliance by Morgan Stanley on the fraudulent Certification of Trust, contending that the Morgan Stanley witness at trial did not personally know which documents the company had relied upon to authorize Appellant's access to the account, as that was handled by Morgan Stanley's legal department. Br. at 49-50. This claim, of course, fails to recognize that both Morgan Stanley employees testified repeatedly that powers of attorney could not administer trust accounts, that only the trustee would have that authority. RP 752, 756, 767-768, 773-779. That testimony was borne out by the undisputed evidence that Appellant submitted two other documents to Morgan Stanley in her attempts to gain access, but was rejected. After she sent the third, fraudulent document, she was granted access. CP 5843-5999. It does not take a forensic analysis to draw the proper inference from this evidence, and the trial court did just that.

3. *Appellant was properly disinherited under the Slayer Statute.*

RCW 11.84.150, the so-called "Slayer Statute," disinherits by operation of law a beneficiary who is found to have slain or abused the testator. The trial court properly applied the Slayer Statute based on its findings as to the other claims in the case. In fact, the Court found by clear, cogent and convincing evidence that Appellant engaged in financial

abuse and that the Slayer's Statute thus applied. Appellant's assignment of error is based on the same unsupported rhetorical challenges to the trial court's other findings, and should be rejected for the same reasons.

**E. Appellant's Remaining Assignments Of Error Also Are Unavailing.**

1. *The trial court properly rejected Appellant's claim to an "offset."*

Appellant contends that the trial court erred by refusing to "offset" the damages against her by amounts she contends were owed to her by the Estate. Br. at 50. But Appellant never timely filed a creditor claim as required by RCW 11.40.020 for the claimed offset and she never asserted the offset as a counterclaim or defense in her Answer or amended Answer. The trial court properly rejected her attempt to raise a time-barred claim in the final day of trial. *See* RCW 11.40.051 (setting limitations period for creditor claims against probate estates).

2. *The trial court's fee award was proper.*

Appellant's contentions that the fee award in the case should be reversed, or that she should be entitled to her fees for this appeal, are wholly premised on her presumed success as to the other issues in this appeal. As detailed above, Appellant should not prevail on those issues and her claims as to the fees in this case should accordingly be rejected.

**F. Any Error Was Harmless.**

Even to the extent any of the trial court's challenged decisions

were in error, such error was harmless and should not be the grounds for reversal. As discussed above and by the trial court, the evidence of Appellant's wrongdoing was abundant and overwhelming. Appellant's appeal depends entirely on the proposition that, had she been allowed to present her self-serving testimony that Polly wanted her to take all of Polly's assets to enrich herself, rather than to provide for Matt, the trial court would have reached the opposite conclusion.

Quite simply, however, that is ridiculous – no reasonable court, as the trier of fact, would have credited such transparently self-interested testimony, from the interested defendant who was also found to have falsified documents, over the voluminous testimony of multiple independent witnesses, including Polly's estate planning attorney and longtime friends. Thus, even if this Court should find error in any of the trial court's decisions the Court should find that such error was harmless and decline to reverse.

**G. The Court Should Award Appellee's Fees On Appeal.**

TEDRA, RCW 11.96A.150, permits the award of attorney's fees to a prevailing party on appeal. The Trust has already expended significant sums to redress Appellant's wanton misconduct in this matter and to recover Trust assets for the benefit of its beneficiaries, as Polly intended. Should Appellee prevail in this appeal, the Court should award Appellee's attorney's fees and costs against Appellant.

**V.**  
**CONCLUSION**

For the reasons stated herein, this Court should affirm the trial court's judgment against Appellant. The pertinent, competent, and credible evidence in this case – all of which was ably considered by the trial court – established beyond a doubt that Appellant enriched herself by thoroughly and systematically thwarting Polly's estate plan. This appeal is but the latest action in her years-long effort to convince a trier of fact that at the very end of her life, Polly suddenly and dramatically reversed course on her life's goal to care for her disabled son, abandoned entirely the estate plan she had spent years preparing (without actually amending it in any way or discussing it with anyone other than Appellant) and decided to give everything she owned to Appellant instead – and yet, that it is Appellant who is somehow the victim. The trial court correctly rejected that narrative, which is as heartbreaking as it is ludicrous. Appellant has given this Court no reason to reverse that result.

DATED this 31st day of January, 2020.

FOSTER GARVEY P.C.

By   
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Teresa Byers, WSBA #34388  
Daniel J. Vecchio, WSBA #44632  
Bruce A. McDermott, WSBA #18988  
Attorneys for Personal Representative  
and Trustee George Braly

Appendix

Assertions in Appellant's Statement of Facts Unsupported by the Record

Brief page	Assertion	Notes
4	"[A]side from [Appellant], Polly's only remaining biological family members were her two adult sons, Matt and Louis Daniel ("Dan") Palermini."	This assertion is false, as Polly has several siblings, including at least one who was named in a prior version of Polly's estate plan. RP 364-365; CP 3247.
4	"Polly always supported these endeavors..."	This assertion is unsupported by any evidence in the record.
5	"At times, Polly made these changes [to her estate plan] informally, before codifying them by having an attorney redraft the trust paperwork."	This assertion is unsupported by any evidence in the record. Mere notes or statements of intent cannot change an estate plan. <i>In re Button Estate</i> , 79 Wn.2d 849, 490 P.2d 731 (1971)
8	John Kenney, Polly's estate planning attorney, "testified that ... [the power of attorney] would have broad authority over Polly's accounts."	The record reflects no such testimony.
9	[Appellant] "began exercising her powers as Polly's attorney-in-fact at Polly's direction ..."	Appellant's self-serving testimony regarding Polly's purported "directions" to her was properly barred by the Dead Man's Statute, and no other evidence to support the claim was introduced.
9	[Appellant] "began keeping contemporaneous notes of Polly's wishes and directions in an instruction log."	There was no evidence at trial of the purported "instruction log," which was properly excluded as hearsay.
10	The hospice nurse "saw no signs of coercion and had no concerns that Polly did not know what she was signing."	The nurse also testified that she did not know what the document was, did not see Polly read it, and did not recall any conversations about Polly signing the document voluntarily. RP 572-573; 577
11	Polly "continued to check her mail ... including the statements to her financial accounts, where she would have seen the transfers she directed [Appellant] to undertake."	No witness was able to testify as to whether Polly ever saw statements reflecting the transfers at issue, particularly as one occurred on the day of her death. In the instance cited in Appellant's Brief, the witness testified she didn't know what document Polly was looking at in the picture. RP 968-969

11	Polly “also bought a BMW motorcycle for [Appellant’s] wife, Dr. Maureen Smith ... in part to thank Dr. Smith...”	The uncontroverted evidence was that Appellant purchased the motorcycle using a cashier’s check she drew on Polly’s account. RP 3675-3676; 597. There was no evidence Polly even was aware of the transaction.
12	“At Polly’s direction, [Appellant] bought a car for Dan in December 2017 with her own money.”	Appellant’s self-serving testimony regarding Polly’s purported “directions” to her was properly barred by the Dead Man’s Statute.
12	“Additionally, the special needs trust required considerably less funding, as it no longer needed to provide for Dan’s supplemental care.”	This assertion is unsupported by any evidence in the record.
12	Polly “decided to convey her home to [Appellant] as a gift.”	This assertion is unsupported by any evidence in the record.
13	Polly “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. She signed two real estate tax affidavits...”	There was no evidence introduced at trial that Polly ever tore the purported note in half, and the only evidence to authenticate Polly’s purported signatures or handwriting was offered by Appellant herself. RP 1917-1918
13	“Polly told Matt about these intended gifts before she died.”	Matt’s responses to Requests for Admission, on which this assertion is solely based, were properly barred by the Dead Man’s Statute. Moreover, Matt’s responses do not reflect that Polly intended any of these transfers as “gifts.”
13	“Polly also directed that [Appellant] transfer \$628,000 from her investment accounts with Morgan Stanley to the checking account that was outside of the trust ... [s]he wanted to make sure there was enough to pay for her own medical and other anticipated expenses, as [Appellant] took ownership of the account going forward.”	This assertion is based solely on the purported “instruction log” written by Appellant, which was properly excluded as hearsay.
13	Dr. Smith “heard Polly ask if the transfer [from Morgan Stanley] had gone through ... when [Appellant] told her the transfer did go through, Polly responded, ‘good.’”	Appellant did not even proffer such testimony, and conceded that testimony regarding the alleged responses to Polly’s question would have been hearsay.
14	Appellant “simply scanned this document on her phone from Polly’s trust binder, which	This assertion is false, as the evidence established that there were no drafts of the trust contained in the binder, only the

	contained multiple versions and drafts of the trust.”	final, executed estate planning documents. Ex. 237 (original binder mailed to the Court of Appeals)
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COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

In re the Estate of

Zora P. Palermini,

Deceased.

NO. 18-04-00395-18

NO. 53528-6-II

**DECLARATION OF  
SERVICE**

The undersigned hereby declares as follows:

1. I am an employee of the law firm of Foster Garvey P.C., attorneys for Appellee, George Braly, in the above-entitled matter.
2. I am a citizen of the United States and a resident of the State of Washington. I am over the age of eighteen years and not a party to this action.
3. On the 31st day of January, 2020, I caused to be served as indicated, a true and correct copy of Appellee's Response Brief, and this Declaration of Service, as follows:

Aaron P. Orheim  
Talmadge/Fitzpatrick  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126  
*Via Agreed Electronic Mail*

Philip A. Talmadge  
Talmadge/Fitzpatrick  
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Karen L. Cobb  
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1200 Fifth Avenue, Suite 1900  
Seattle, WA 98101  
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William H. Broughton  
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9057 Washington Avenue NW  
Silverdale, WA 98383-8341  
*Via Agreed Electronic Mail*

Ethan Bernstein  
*Via Agreed Electronic Mail*

Zach Bernstein  
*Via Agreed Electronic Mail*

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

Executed at Seattle, Washington, this 31st day of January, 2020.

  
\_\_\_\_\_  
Chris Elliott  
Legal Assistant to Teresa Byers

# FOSTER GARVEY PC

January 31, 2020 - 4:11 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 53538-6  
**Appellate Court Case Title:** In re the Estate of Zora P. Palermini  
**Superior Court Case Number:** 18-4-00395-3

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