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COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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IN THE MATTER OF THE ESTATE OF  
LAWRENCE D. GOLDBERG,  
Deceased.

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Consolidated With:  
RACHAEL LAUREEN GOLDBERG,  
Respondent,  
v.  
JENNIFER ALLEN,  
Appellant.

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REPLY BRIEF OF APPELLANT

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**REPLY BRIEF OF APPELLANT**

**TABLE OF CONTENTS**

**I. Introduction . . . . . 3**

**II. Argument. . . . . 3**

**a. The Claim of Error Presented in This Appeal Was Preserved in the Trial Court. . . . . 3**

**b. The Trial Court Burden Was Finding by Clear, Cogent, and Convincing Evidence That the Will Was Witnessed in an Invalid Fashion . . . . 10**

**c. Standard of Appellate Review That a Finding Has Been Made by Clear, Cogent, and Convincing Evidence . . . . . 12**

**d. Key Trial Court Findings by Clear, Cogent, and Convincing Evidence Were Not Possible Except With Erroneous Consideration of Impeachment Evidence as Substantive Evidence . . . . . 14**

**e. Reply to *Ad Hominem* and Other Attacks. . . . . 16**

**III. Conclusion. . . . . 20**

**TABLE OF AUTHORITIES**

**Table of Cases**

*Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989) . . . . . 10

<i>In re Estate of Chambers</i> , 187 Wash. 417, 60 P.2d 41 (1936) .....	11
<i>In re Estate of Kessler</i> , 95 Wn.App. 358, 977 P.2d 591 (1999) .....	11
<i>Newcomer v. Masini</i> , 45 Wn.App. 284, 724 P.2d 1122 (1986) .....	4, 5, 6, 10
<i>Reitz v. Knight</i> , 62 Wn.App. 575, 814 P.2d 1212 (1991) .....	4
<i>Rolph v. McGowan</i> , 20 Wn.App. 251, 979 P.2d 1011 (1978) .....	13
<i>Shaw v. City of Des Moines</i> , 109 Wn.App. 896, 37 P.3d 1255 (2002) .....	6
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999) .....	10
<i>State v. Clinkenbeard</i> , 130 Wn.App. 552, 123 P.3d 872 (2005) .....	8
<i>Williams v. Leone &amp; Keeble, Inc.</i> , 171 Wn.2d 726, 254 Wn.3d 818 (2011) .....	6

**Constitutional Provisions**

None

**Statutes**

None

**Regulations and Rules**

CR 52(b) .....	5
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**Other Authorities**

K. Tegland, 5D Wash. Practice *Evidence Law and Practice* (2007) . . . . . 8

**I. Introduction.**

To the contrary of the claim of the respondents, appellant preserved in the trial court her contention that the court properly considered the evidence of key witness Tracy Potter for impeachment but erred in treating it as substantive evidence. In adopting the impeachment evidence as substantive evidence as well, the court committed reversible error.

**II. Argument.**

**a. The Claim of Error Presented in This Appeal Was Preserved in the Trial Court.**

Respondents assert in much of their brief that the claim of error appellant raises in this appeal was not adequately preserved in the trial court. Replying to this claim inevitably requires reference to portions of the trial court record and also mandates revisiting certain principles of law applicable in this situation.

It will be remembered that the contention in this appeal is that, whereas the respondents were required to overcome the presumption of valid execution of the will under consideration in this

case by clear, cogent, and convincing evidence, the court relied upon evidence admissible only for impeachment of a non-party witness as substantive evidence in making its findings that the will had been witnessed in an invalid manner. The trial court's findings of fact in several places identify the non-party witness' out-of-court statements, not on oath, as his "testimony" which it found persuasive, and adopted those as factual findings. (See, e.g., Finding 3.27: "The . . . Potter *testimony* the [c]ourt finds persuasive and compelling is limited to [Mr.] Potter's responses to [Mr.] Visser's interview questions." (Italics added.) CP 316.

Appellant preserved in the trial court the claim that it was error for the court to elevate impeachment evidence applicable to a non-party witness to substantive evidence and base dispositive findings thereon.

First, however, some law:

In a nonjury trial, an issue or theory not dependent upon new facts may be raised for the first time through a motion for reconsideration and thereby be preserved for appellate review. *Newcomer v. Masini*, 45 Wn.App. 284, 287, 724 P.2d 1122 (1986).

*Reitz v. Knight*, 62 Wn.App. 575, 581 n. 4, 814 P.2d 1212 (1991).

Indeed, in *Newcomer v. Masini*, *supra*, 45 Wn.App. 284, 287

(1986), the court said the standard was whether the claim of error

had been “sufficiently raised” and that the claim of error could come as part of the proceedings respecting reconsideration. The *Newcomer* case appears to be saying two things: (1) Whether the claim against the outcome in the trial court is to be considered on appeal is a matter of whether it was “sufficiently raised.” (2) A claim raised prior to entry of the order denying a motion for reconsideration is raised in time to be considered on appeal.

Further, a rule-based source of law, CR 52(b), provides that claims of sufficiency of evidence to support findings in non-jury trials may be raised at any time before the case becomes final, irrespective of whether raised at any earlier time in the litigation:

When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the court an objection to such findings or has made a motion to amend them . . . .

CR 52(b).

The foregoing appears to reflect a particular abhorrence in the law for insufficiency of evidence to support findings in cases trial to a court without a jury. As is shown above, especial latitude is afforded in raising such claims. CR 52(b). Further, claims not raised during a non-jury trial are nevertheless always claims a court

is *required* to consider if raised before it enters its order denying a motion for reconsideration. *Newcomer v. Masini, supra*, 45 Wn.App. 284, 287 (1986). (Similarly, the law dislikes orders entered by courts lacking subject matter jurisdiction to the extent that those actions are to be dismissed whenever lack of subject matter jurisdiction is shown, at any time and by anyone. CR 12(h)(3). See, e.g., *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 254 Wn.3d 818 (2011). Orders, judgment, and decrees not expressing a court's intent are repugnant enough to the law that they may be corrected at any time, regardless who may have been the source of the error. *Shaw v. City of Des Moines*, 109 Wn.App. 896, 901, 37 P.3d 1255 (2002)).

In this case, however, what the appellant claims on appeal was in fact rather comprehensively brought to the attention of the trial court:

In her written memorandum in support of her motion for reconsideration, Ms. Allen contended:

While the [c]ourt properly indicated that the rules required Petitioners to overcome the validity of the [w]ill by clear, cogent and convincing evidence, Respondent believes that the [c]ourt abused its discretion in misapplying the . . . interview of Tracy Potter.

CP 175.

At the hearing on the motion, one of the attorneys for Ms.

Allen contended:

Tracy Potter's statements -- . . . *it's . . . not testimony, but statements . . . .*

(Italics added.) 6/5/19 RP 55. (The court reporter unfortunately numbered the pages of each day's proceedings in this case beginning with number 1 for the seven different days on which proceedings were conducted in this case. A hearing date is thus provided with each reference to the report of proceedings for this case.)

The attorney for Ms. Allen argued to the court 11 days prior to entry of the substantive orders appealed from and one month prior to the entry of the order denying motion for reconsideration as follows:

[Mr.] Potter's statements to [Mr.] Visser and the recording are hearsay under Evidence Rule 801. It's hearsay because it's an out of court statement[,] both to [Mr.] Visser and the recording itself.

. . . [T]he out of court statements are offered to prove . . . the matter asserted, . . . [b]ut that statement and that recording was not under oath. So, the hearsay exception in 801 says if the statement is under oath under penalty of perjury[,] then it's not hearsay. Otherwise, it is hearsay.

. . . Tegland in his . . . handbook on Washington evidence, volume 5-D of . . . Washington Practice . . . , lays this all out. He says that . . . the prior statements of in court witnesses. . . . are only for impeaching of the witnesses or inconsistent statement, not for substantive use. So, at trial the witness's statement is admissible for impeachment, but not for substantive evidence . . . .

Then you go to Evidence Rule 613, prior inconsistent statement used – can be used only for impeachment. It's not substantive evidence. It attacks the credibility of the witness, but it does not allow for substantive evidence. . . . Tegland says in section 613(2) [that] a prior inconsistent statement that is admissible under 613 but not under 801 is not substantive evidence and will not support a verdict o[r] a finding. He uses the case of State v. Clinkenbeard to support his statement[,] and that case is at . . . 130 Wn.App. 522. [I]t says a witness may be impeached with a prior out of court statement of material fact that is inconsistent with his testimony in court even if such a statement would otherwise be inadmissible as hearsay. Impeachment evidence [a]ffects the witness's credibility but is not probative on the substantive facts encompassed by the evidence. . . .

So, if [Mr.] Potter's statement to [Mr.] Visser in the tape recording can only be impeached, it is not substantive[,] and petitioners have presented no other evidence that Mr. Goldberg didn't sign that [w]ill. . . . [The heirs at law] had to come forward with evidence that's clear, cogent and convincing or highly probable. And, they didn't do that. They just relied on Tracy Potter. But, Tracy Potter's credibility may be zero, but that doesn't mean that . . . it's used substantively to overturn the [w]ill. . . . [T]he Potter evidence shouldn't be in there as substantive.

8/9/19 RP 9.

My point is that [Mr.] Potter's testimony should not be used as substantive findings. Only to impeach him for an inconsistent statement. He was under oath when he testified to you that he and his mother were present when Larry Goldberg brought the [w]ill over to them at their house. He testified to that.

8/9/19 RP 10.

Immediately after, the attorney for the institutional personal representative advised the court as follows:

THE COURT: Ms. Bieniewicz?

. . .

MS. BIENIEWICZ: . . . [O]bviously we were kind of [a] neutral party. Legally, I believe that Mr. Wolfe is absolutely correct. I was a prosecutor for years and do a lot of trial work. The statements, the interview with Mr. Visser as well as statements, they are hearsay. They come in under 613, but that's just for impeachment purposes, not for something like this. . . . [B]ecause there is a burden of proof on the other side. . . , I'm not sure if you can meet your burden of proof . . . .

8/9/19 RP 12.

Although the forgoing portions of the record amply show that the claim on appeal was presented in the trial court, an "inherent authority" line of cases make clear that advancement of a claim in a trial court may not be held in all cases to be required in order for it to be considered on appeal:

An appellate court has inherent authority to consider issues which the parties have not raised if doing so is necessary to a proper decision.

*Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989).

[T]his court has the authority to determine whether a matter is properly before the court, . . . and to waive the rules of appellate procedure when necessary to “serve the ends of justice.”

*State v. Aho*, 137 Wn.2d 736, 740-41, 975 P.2d 512 (1999).

Ms. Allen’s claim of error was very thoroughly preserved in the trial court and, by all means, “sufficiently.” *Newcomer v. Masini*, *supra*, 45 Wn.App. 284, 287, 724 P.2d 1122 (1986).

**b. The Trial Court Burden Was Finding by Clear, Cogent, and Convincing Evidence That the Will Was Witnessed in an Invalid Fashion.**

The respondents’ submission to this court includes an unfocused and misleading description of what the burden of proof was in this case. The description almost arrives at a claim that the burden was appellant’s and she failed to sustain it, mandating affirmance.

Respondents’ burden was to show by clear, cogent, and convincing evidence that the decedent’s will was attested in a fashion other than that provided by statute. In short, this means

that the party challenging the will had to show by that degree of proof that the witnesses did not sign the will in the testator's presence and at this request. *In re Estate of Kessler*, 95 Wn.App. 358, 380, 977 P.2d 591 (1999); see also, *In re Estate of Chambers*, 187 Wash. 417, 425, 60 P.2d 41 (1936).

In fact, this description of the law was conceded by all parties below and is even included in the court's findings and conclusions to have been its task in adjudicating this case. The court set forth in its conclusions of law that

The contestant in a will challenge must prove the invalidity of the [w]ill's execution by clear, cogent, and convincing evidence.

Conclusion of Law 4.1. CP 316.

Indeed, the following colloquy occurred between the court and both counsel for the respondents during counsels' opening statements at trial:

THE COURT: Okay. One question I think I know the answer, but let's get it on the table so we're all there. Under this you gentlemen [attorneys for respondents] would agree you have the burden of proof?

MR. ISELY. Correct, Your Honor.

MR. TURNER: Yes.

THE COURT: Preponderance.

MR. TURNER: I think it may actually be clear, cogent and convincing, Your Honor.

THE COURT: Is it clear, cogent and convincing? Okay. That's why I wanted to bring –

MR. TURNER: Yeah, Yeah, Yeah. I have to admit that because I don't want to invite any error.

RP 4/26/19 RP 18.

This case was tried by the court and counsel upon the undisputed proposition that clear, cogent, and convincing evidence needed to be shown that the will was witnessed in invalid fashion in order for it to be held to be an invalid will. CP 316. 4/26/19 RP 18. All the attempted confusion by respondents as to this proposition should be rejected and held for naught.

**c. Standard of Appellate Review That a Finding Has Been Made by Clear, Cogent, and Convincing Evidence.**

Appellant cites the following in a further attempt to straighten out confusion as to the standard of proof in this case introduced by respondents:

It is not surprising to find that the law includes heightened requirements on appeal to support a trial court finding that a proposition has been demonstrated in the trial court by clear,

cogent, and convincing evidence. A case illustrating this proposition, not addressed in the respondents' brief, is *Rolph v. McGowan*, 20 Wn.App. 251, 979 P.2d 1011 (1978). There the contest was between opposing parties who gave conflicting testimony regarding the determinative issue in the trial court which needed to be proven by clear, cogent, and convincing evidence. Commenting upon the requirement of proof of a proposition by clear, cogent, and convincing evidence, the court said there, *Rolph v. McGowan, supra*, 20 Wn.App. 251, 256 (1978), that

The clear, cogent, and convincing standard does not require that the . . . proof be uncontradicted. *Noord v. Downs*, 51 Wn.2d 611, 615, 320 P.2d 632 (1958). However, *the standard is not met where the only evidence consists of uncorroborated conflicting testimony by the parties.*

(Italics added.) The standard of appellate review is a search for whether substantial evidence supports the finding of clear, cogent, and convincing evidence in the trial court, but uncorroborated conflicting testimony by parties in the trial court is not sufficient to support a finding that one party's testimony has established a proposition by that degree of proof notwithstanding the other party's testimony to the contrary. *Rolph v. McGowan, supra*, 20 Wn.App. 251 (1978). **In the case now before this court, no witness**

**testified to the state of facts found to be such in the trial court's findings adjudicating this case.**

**d. Key Trial Court Findings by Clear, Cogent, and Convincing Evidence Were Not Possible Except With Erroneous Consideration of Impeachment Evidence as Substantive Evidence.**

Here, only one witness remained alive and testified at the trial respecting the circumstances of execution of the testator's will on December 18, 2014, almost four years before Dr. Goldberg's death: Tracy Potter. Nobody testified to contradict his version of events. His sworn testimony at both his deposition and at trial were to the effect that he and his mother signed as witnesses to Dr. Goldberg's will that date in Dr. Goldberg's presence and at his request. Ex.3. 4/26/19 RP 22 - 86. Operating in the background of this scenario was a presumption which could only be overcome by clear, cogent, and convincing evidence that no defect in the execution of the will existed. However, no one was called as a witness and testified at trial in opposition to the version of events twice testified to by Mr. Potter.

The "rub" is that when Mr. Potter was asked about this matter at his residence, he provided a different version of events,

which he corrected within minutes of his initial account, explaining that he had mistakenly confused a self-authentication declaration he and his mother signed on October 22, 2018, with the will he and his mother witnessed almost four years earlier on December 18, 2014. The two “documents” Mr. Potter was shown on January 19, 2019, were merely lap top computer images shown to him outside at sunset on a windy winter day, and as to one of the documents, only the signature page was exhibited and not the entire document. The laptop was positioned on the trunk of the interviewer’s car, and the interviewer described the trunk as “not a real great place for me, . . .,” after he originally proposed that the interview be conducted inside, in the light and out of the winter weather, at a conventional table or desk of some sort. 4/26/19 RP 59.

If this court agrees with appellant that what Mr. Potter said when interviewed, not under oath, was properly admitted for impeachment but then erroneously considered as substantive evidence and made the substance of several key findings of fact, what we have is relatively clear reversible error. Mr. Potter was impeached, but no witness testified opposite the testimony he gave at both his deposition and at trial, and the strong presumption of regular execution and witnessing of the will never left the case.

The trial court clearly considered the impeachment evidence as substantive evidence, and it unmistakably was the biggest part of several dispositive findings the court made, to its satisfaction, by clear, cogent, and convincing evidence. Clear error is revealed in the court's reference, in its findings, to the out-of-court statements as "testimony." CP 316. Erase that evidence as inappropriate for use as substantive evidence, and very little, if anything, remains to rebut the presumption of regularity of execution by clear, cogent, and convincing evidence.

**e. Reply to *Ad Hominem* and Other Attacks.**

Contested probate cases often involve not only one form or another of disparagement of one side by the other but also advancement of express or implied claims that the other side is a "wrong" or "unworthy" person to receive something of value from an estate. These claims are included in respondents' brief and justify a reply.

The first reply is that courts do not administer probate cases by a standard of who deserves estate assets or who is a more appealing personality than someone else to take under a decedent's estate. The standard under a will is, of course, the

decedent's intent and, in the case of intestacy, is the structure for distribution decided upon by the Legislature.

The first factual consideration deserving mention in this situation is that the decedent's signature is on a will which provides for no bequest to the decedent's lineal descendants and instead makes appellant the sole legatee of his estate. The will is dated approximately 3-3/4 years prior to decedent's death. Ex. 1. 4/26/19 RP 45. The evidence was that the decedent lived with appellant and her husband, socialized with him, and shared their mutual interest in horseback riding and often went to Mr. Potter's equestrian operation in LaCenter to ride together. 4/26/19 RP 22, 28, 89. The evidence is further that in at least the last four years of decedent's life he had no relationship or contact with any of his children, even though two of them lived as nearby as Vancouver, Washington. 11/16/18 RP 29. Decedent never even so much as spoke to appellant or her husband of a daughter, who, it turns out, lived in San Jose, California. 4/26/19 RP 104. None of these three persons provided any evidence of contact with their father in the last four years of his life, as he battled and ultimately succumbed to lung cancer and was cared for by appellant and her husband at

their home until the day he went to the hospital and died. 4/26/19  
RP 1-123.

On this state of the undisputed evidence, it is not surprising that a will bearing the signature of the decedent leaves nothing to his children and everything to a person who befriended, housed, and cared for him in the last years of his life. His signature on his will surely expresses his intent, and the evidence of the relationship between the decedent and the appellant and her husband, on the one hand, and the non-relationship between the decedent and his children, on the other hand, surely makes his intent, as manifested by his signature, more than a little understandable.

To this, respondents answer only, in substance, "Yes, but his will was not properly witnessed."

The answer to the implication in the brief of respondents that the children are the ones who were "supposed" to receive their late father's estate is that both the decedent's signature and also the evidence of the parties' very different relationships with the him strongly indicate otherwise.

Respondents' brief cites incidents of claimed "misconduct" by appellant, strongly implying, in part, that these should be considered as demonstration that she is someone the court should

not favor to receive through this estate, irrespective of the decedent's intent as expressed by his signature and the highly obvious factual basis for the decedent's estate planning choice. Ms. Allen was clearly perturbed to see an investigator sent out on behalf of the children interviewing Mr. Potter at sunset in midwinter, flashing him one document and a signature page of another on the trunk of the investigator's car and, she felt, allowing him to become confused as to which of the two documents he was being asked about. 4/26/19 RP 56. Three months later she exploded with profanity during the course of a deposition two days before trial. 4/26/19 RP 14. As of that date, it is clear she had long since heard enough from the decedent during his lifetime about the extent to which he had been ignored by his children during the years of his last illness and death and had encountered one of the respondents filing a intestacy probate proceeding claiming there was no will when the Ms. Allen and the filer had discussed the will only 2-1/2 weeks prior to the date the latter filed a petition falsely stating, on oath:

NO WILL. Petitioner has discussed [d]ecedent's financial situation and estate planning with friends and family of the [d]ecedent. Petitioner does not believe that [d]ecedent executed a last will and testament.

CP 1, 20.

Appellant's sense of nothing less than outrage at respondents' case is completely understandable, although her profane tirades during the deposition clearly went too far. Respondents' first representation to the court was the claim, known to be false when uttered, that decedent had died intestate. When the will was brought forth, the claim next became that the will had not been properly witnessed. Respondents now assert it is obvious that they are the "proper" ones to inherit, but good reason, including the decedent's signature and the undisputed facts as to the decedent's relationship with his children and with the appellant, make it highly understandable that the decedent chose otherwise.

### **III. Conclusion.**

There was no error in the court's admission of evidence of what a key witness told an investigator out of court and not under oath. The court was only entitled to consider the evidence in impeachment, though. The court's findings, however, are express that what the non-party witness told the investigator was allowed to become substantive evidence and was a material part of the basis

for the court's finding by clear, cogent, and convincing evidence that the will in question had not been witnessed properly.

The trial court's use of impeachment evidence as substantive evidence was error. The decision of the trial court should be reversed, and appellant should be awarded her costs and reasonable attorney's fees.

Dated: October 2, 2020.

Respectfully submitted,



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**Transmittal Information**

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