

IN THE WASHINGTON STATE COURT OF APPEALS

**FILED**

DIVISION III

AUG 01 2011

Court of Appeals Case No. 298469

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

On Appeal from Spokane County Superior Court

Case No. 10200401-1

Hon. Gregory D. Sypolt

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ESTATE OF VANCE BROWNFIELD,  
through its personal representative, LESLIE SCHNEITER,

Appellant,

v.

BANK OF AMERICA, N.A., a national banking association;  
KAREN RHODES, an individual, and the marital community  
of KAREN RHODES and JOHN DOE RHODES,

Respondents.

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APPELLANT'S OPENING BRIEF

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Estate of Vance Brownfield

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## **I. INTRODUCTION.**

May a bank in Washington release funds from an account to a putative payable-on-death beneficiary when the bank has no signed contract of deposit indicating that the account is held in that form? This is the question presented by this appeal.

Vance Brownfield died testate on December 31, 2008. The Estate of Vance Brownfield, the Appellant in this matter, was opened in Stevens County Superior Court, and Leslie Schneiter was appointed as the personal representative of the Estate.

In its investigation of Brownfield's assets, the Estate became aware of two accounts ("Accounts") that Brownfield had opened at Respondent Bank of America ("Bank of America") before his death. When the Estate inquired concerning the status of the accounts, Bank of America responded that its computer records indicated that the two accounts were in the form of "Payable on Death" ("POD") accounts and that Respondent Karen Rhodes ("Rhodes") had withdrawn all of the funds, totaling \$200,973.27, on January 19, 2009, a few weeks after Brownfield's death. When the Estate requested Bank of America to provide "signature cards" for the two accounts, described as "contracts of deposit" in the language of the

applicable statute (RCW 30.22.060), showing that the accounts were in POD form, Bank of America stated that it had no such signature cards. Bank of America could not find any physical piece of paper or any facsimile thereof that indicated Brownfield had opened the accounts as POD at the time of Rhodes' withdrawal and has no direct evidence that signed contracts were in existence at any point before then. The *only* signed contracts of deposit in Bank of America's possession, custody or control at the time Rhodes withdrew the funds or at the time the Appellant requested proof of POD status — or to the present — indicate that Brownfield was the *sole owner* of the accounts without any POD beneficiary. There is nothing on those contracts of deposit indicating that they were superseded by any POD designation. Bank of America's procedure is for the teller or other bank official completing a change of account form to write "superseded" on the old form. No such word or any indication that the forms were superseded appears on the forms.

It is undisputed by any party that the only day that Brownfield ever attempted to change the accounts to POD with Rhodes as a beneficiary was September 25, 2008. In her deposition, Rhodes testified that she went into the Bank of America with Brownfield that day. She is the only

eyewitness as to whether Brownfield signed any contracts of deposit to change the status of the accounts. She testified that *she did not see Brownfield sign anything that day at the bank*. The only “record” of POD status is Bank of America’s computer. Bank of America’s computer data base indicates the accounts were in POD form. Why the change was made on the bank’s computer is unknown (and irrelevant). But it is known that Bank of America has no signed contract to that effect.

RCW 30.22.060 states in pertinent part:

The contract of deposit shall be in writing and signed by all individuals who have a current right to payment of funds from an account. . . .

For purposes of this appeal, it is not disputed that Brownfield intended to make Rhodes a POD beneficiary of the two Accounts. Rather, the central focus of the appeal is the proper application of RCW 30.22.060. Appellant knows of no Washington case directly on the issue presented here — namely, that for every bank account in this state, a signed contract of deposit under RCW 30.22.060 must be obtained when the account is opened and maintained throughout the life of the account. This appears to be an issue of first impression.

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

### **A. Errors.**

#### **1. Errors as to the court's denial of Appellant's motion for summary judgment.**

i. The court erred in ruling that RCW 30.22.060 does not require, at the time of a putative POD beneficiary's withdrawal, a signed contract of deposit showing that the bank account is in POD form. The court erred by not enforcing the plain terms of the statute and by disregarding strong policy reasons supporting the statutory requirement.

#### **2. Errors as to the court's granting of Bank of America's and Rhodes' motions for summary judgment.**

i. The court erred in ruling that there had been signed contracts of deposit in existence on September 25, 2008. There are genuine issues of material fact as to whether contracts of deposit changing the two accounts from single ownership to POD ever existed or were ever signed. Appellant offered direct evidence that no contracts of deposit were ever

signed; yet, the court ruled that they had been signed. This violates the express standards of CR 56, inasmuch as it is a disputed fact.

ii. The court erred in admitting extrinsic evidence under Evidence Rule 1004(a), such as the standard procedures of Bank of America (i.e., what should have been done at the time the status of the Accounts was supposedly changed), to prove the existence of signed contracts of deposit when there was disputed evidence as to whether they were lost or destroyed.

**B. Issues Pertaining to the Errors.**

**1. Issues as to the errors in the court's denial of Appellant's motion for summary judgment.**

i. The statute applicable to bank accounts in Washington, RCW 30.22.060, mandates that a written contract of deposit be signed by the depositor. All parties to this appeal agree that at the time of withdrawal there was no signed contract of deposit in Bank of America's possession, custody or control. Bank of America searched for the actual documents but found none. The court erred in not following the express requirement of the statute by ruling that, despite the lack of any such signed contract of

deposit, Bank of America properly released the funds to Rhodes, and that Rhodes lawfully took possession of them. The court erred in not enforcing the terms of the statute.

ii. Although a contract of deposit for a POD account need not be signed with the same formalities as a will, a POD account nevertheless functions as a testamentary instrument. Its creation and maintenance should at least follow the applicable statutory mandate for a signature card in RCW 30.22.060. Strong policy considerations, such as the prevention of fraud, undergird this statutory rule. The court erred in not enforcing the policy concerns behind the statute.

**2. Issues as to the errors in the court's  
granting of Bank of America's and  
Rhodes' motions for summary judgment.**

i. In response to Respondents' motions for summary judgment, Appellant proffered evidence from Rhodes' deposition that Brownfield *never* signed any new contracts of deposit changing the disputed accounts from single ownership to POD. Thus the court erred in granting Respondents' motions for summary judgment inasmuch there are genuine issues of material fact as to whether there ever were signed contracts of

deposit in conformity with RCW 30.22.060. This warrants reversal of the court's ruling on Respondents' motions for summary judgment.

ii. The court erred in admitting under Evidence Rule 1004(a) evidence of Bank of America's policies and procedures for processing new contracts of deposit when there was no preliminary showing that any such writing ever existed or was lost or destroyed. In admitting this evidence, the court ruled that there had been signed contracts at least initially and that this was enough under RCW 30.22.060, even though indisputably no such contracts existed at the time of withdrawal.

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

#### **A. Factual background.**

Before his death on December 31, 2008, Brownfield owned two accounts at Bank of America: Account No. 82158429 and Account No. 89071914. CP 18-29. At the time of Brownfield's death the sum of \$100,730.02 was on deposit in Account No. 82158429, and \$100,243.25 was on deposit in Account No. 89071914. CP 392. The total of Brownfield's deposits in the two Accounts at Bank of America on the date of his death was \$200,973.27. CP 39-40.

Brownfield owned these Accounts for a number of years before his death, together with his wife, Virginia, who was at different times named as a beneficiary or joint owner of the Accounts. CP 40-41. On February 19, 2008, just ten months before his own death, Brownfield changed the ownership of the Accounts to remove Virginia's name because she had died a few years earlier. CP 30-33, 41, 192-201. Brownfield signed the new contracts of deposit for both accounts as a single owner; the Accounts had no payable on death or right of survivorship feature. These are the *only* signed contracts of deposit that Bank of America has for the Accounts. *Id.*

In its motion for summary judgment, Appellant proffered evidence that no signed contracts for POD accounts ever existed. This evidence was of two types:

- First, handwritten words on the existing contracts of deposit for the Accounts (CP 19, 20, 30-37); and
- Second, testimony from the only eyewitness to what occurred when Brownfield allegedly changed the Accounts to POD status. That witness is Rhodes. She testified that Brownfield never signed anything. CP 373-379, 386-402.

On the first point, the parties do not dispute what is and is not on the extant contracts of deposit for the Accounts. In the upper right corner of the contract of deposit for Account No. 89071914 that Brownfield signed on February 19, 2008, the word “superseeds” [sic] appears in handwriting just under a table with vertical printed writing. CP 19, 30. The prior contract for Account No. 89071914, which included Brownfield’s wife, Virginia Brownfield, shows the word “superseded” written diagonally across the top of the form. CP 19, 31. The last in-force contract of deposit for the other Account (No. 82158429), like the one for Account No. 89071914, also contains the word “superseeds” [sic]. CP 19, 32.

These contracts were exhibits to the deposition Rebecca Peterson, Bank of America’s designee under CR 30(b)(6). Ms. Peterson testified at deposition that it was the policy of the Bank that tellers or other bank employees who handled contract changes were to pull the old card and write “superseded” on it. CP 20-34-37. “If they’re pulling the old one they should be writing ‘superseded’ on it.” CP 35 (dep. p., 18, lines 9-23; p. 21, lines 10-11; p. 20, lines 11-22). Thus a new contract should have the word “supersedes” on it, and the old one should be marked

“superseded.” However, both of the single-ownership contracts signed by Brownfield on February 19, 2008 contain the word “supersedes” — that is, they superseded the accounts with Virginia’s name as owner. But neither is marked with the word “superseded.” If, in fact, there had been a change in form to POD, the contracts of February 19, 2008, would have been marked with the word “superseded.” The fact they were not supports the contention that no contracts changing the accounts to POD form were ever signed by Brownfield.

On the second point, Appellant’s proffered evidence that no signed contracts of deposit for the Accounts ever existed based on the testimony of Rhodes, the only eyewitness to the time that Brownfield allegedly changed their status from single ownership to POD. CP 373-379, 387-392. Rhodes testified at deposition that she went with Brownfield to a Bank of America branch on September 25, 2008, and accompanied him when he spoke with a teller. She testified that she never saw him sign anything while at the bank that day. CP 387-392.

On January 16, 2009, after the death of Brownfield, Rhodes went to a Bank of America branch in order to withdraw all the funds from the Accounts. CP 42, 242, 392. Based on her trip to the bank with

Brownfield on September 25, 2008, Rhodes believed that she was the POD beneficiary of both Accounts. When Rhodes requested the funds, Bank of America first reviewed its electronic records and noted that Rhodes was designated the POD beneficiary in the computer records. CP 242. However, as required in its policies and procedures, Bank of America personnel then searched for signed contracts of deposit — physical pieces of paper — showing that the Accounts were in fact “POD.” The Bank of America employees were unable to locate the original signature cards or any copy in any format. There were no hard copies and no images recorded in any electronic/computer file. But the Bank paid Rhodes anyway.<sup>1</sup> CP 242. The only signature cards in Bank of America’s possession at the time of payment, and through the present, are those of February 19, 2008, indicating that the Accounts were individually owned by Brownfield and that they have no POD or right of survivorship features. CP 30-33, 40-42, 192-401. Rhodes’ name does not appear

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<sup>1</sup>On this point, the court at oral argument inquired of counsel for Appellant what the bank could have done. RP 30-32. The bank had numerous options. First, it should have contacted the Estate. Perhaps an agreement could have been reached. Or the bank could have opened an escrow on the funds until an agreement was reached. Or the bank could have interpleaded the funds so that the parties could litigate their dispute. The one thing it should not have done was to release the funds to Rhodes.

anywhere on any signed contract of deposit. No one at Bank of America has testified that there were, in fact, signed contracts of deposit showing that the Accounts were in POD form.

**B. Allegations of the complaint and procedural history.**

Appellant's complaint alleges that Bank of America wrongfully gave the funds in the Accounts to Rhodes. It alleges causes of action based on breach of contract, breach of the covenant of good faith and fair dealing, constructive trust, conversion, and negligence. Constructive trust and conversion are alleged against Rhodes. All claims but constructive trust are alleged against Bank of America. CP 3-8.

On March 11, 2011, Appellant moved for summary judgment based on the unambiguous terms of RCW 30.22.060. CP 56-63, 503. Appellant's argument, in sum, is that RCW 30.22.060 is clear and its terms must be enforced. In addition to the standard axioms of statutory interpretation, which mandate word-for-word application of language that is plain, Appellant argued that strong policy reasons support the need for a literal reading of RCW 30.22.060, inasmuch as POD accounts function as

testamentary instruments but without the formalities pertaining to a will.  
CP 39-55, 64-92.

Bank of America also filed a motion for summary judgment for hearing on the same day, in which Rhodes joined. CP 312-328, 496-502. That motion was based primarily on an argument that Washington's "Financial Institution Individual Account Deposit Act" ("Act") (RCW 30.22.010 through 30.22.901, of which RCW 30.22.060 is a part) is to be "liberally construed." CP 312-324. By this, Bank of America essentially contended that the words of the statute may be ignored, and that there is no need for any signed contract of deposit at the time a putative POD beneficiary withdraws funds. Bank of America further argued that its practices and procedures for changing an account guide a teller to obtain a signed contract of deposit, after which the changed information is input to the bank's computer. CP 192-197. From this "evidence" about what "should have happened," Bank of America argues facts — namely, that it did happen that way and that Brownfield actually did sign contracts on September 25, 2008. CP 192-197, 239-274, 275-284. No evidence exists for these contentions other than Bank of America's policies and procedures. In this connection, Respondents argue for the admission of

such extrinsic evidence based on Washington Evidence Rule 1004(a), concerning proof of writings lost or destroyed. CP 312-324.

Appellant argued that Evidence Rule 1004(a) was inapplicable because there was no evidence that there ever had been signed contracts of deposit, and, in any event, it did not matter because indisputably there were no such writings at the time of Rhodes' withdrawal. CP 373-385, 403-414.

Judge Sypolt denied Appellant's motion and granted Respondents' motion. RP 34-40; CP 531-535. Judge Sypolt held that RCW 30.22.060 need not be construed to require a signed written contract of deposit. He also admitted extrinsic evidence for the purpose of showing that Brownfield's intent was to name Rhodes as a POD beneficiary, and also for the purpose of "proving" that a signed contract of deposit was once in existence. The court rejected the holding of *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952 (1998), which provides that when a signed document is specifically required by statute and does not exist, the intent of the party does not matter nor is any evidence of the intent admissible. Judge Sypolt instead relied on an improper interpretation of *Humleker v. Gallagher Bassett Services, Inc.*, 159 Wn. App. 667 (2011).

In fact, in *Humleker* the prior existence of the signed document was not disputed and the fact of its existence was integral to the court's holding. By contrast, the issue of whether any contracts of deposit for the Accounts ever existed is disputed in this case. *Id.*

Appellant brought a motion for reconsideration and argued that in allowing extrinsic evidence of the bank's procedures to establish the prior existence of a signed contract of deposit, the court had misread *Humleker*, which in fact is consistent with *Torgerson*. CP 504-516. Appellant additionally argued that Respondents' motion for summary judgment was improperly granted inasmuch as there is a genuine issue of material fact as to whether there ever was a signed contract of deposit based on: (1) Rhodes' eyewitness testimony that she never saw Brownfield sign anything at the bank on September 25, 2008; and (2) the handwritten notations on the only extant contracts for the Accounts. The court denied the motion for reconsideration. CP 528-530.

#### **IV. ARGUMENT.**

##### **A. Standard of review.**

On an appeal from a ruling on a motion for summary judgment, the standard of review is *de novo*. “The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion.” *Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998). “An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment.” *Id.*, citing *Mountain Park Homeowner’s Ass’n v. Tydings*, 125 Wn.2d 337, 341 (1994).

##### **B. Appellant’s motion for summary judgment should have been granted.**

###### **1. Financial institutions in Washington must maintain a signed contract of deposit for each account.**

Bank accounts in Washington are governed by the “Financial Institution Individual Account Deposit Act” (“Act”). RCW 30.22.010 through 30.22.901. A bank account is defined in RCW 30.22.040(1) as “a contract of deposit between a depositor or depositors and a financial

institution.” Thus the terms “account” and “contract of deposit” are interchangeable. Bank accounts in Washington may be created in the following forms:

- (1) A single account;
- (2) A joint account without right of survivorship;
- (3) A joint account with right of survivorship;
- (4) An agency account;
- (5) A trust or P.O.D. account; and
- (6) Any compatible combination of the foregoing.

RCW 30.22.050.

Regardless of form, the contract of deposit must be a writing and it must be signed:

The contract of deposit shall be in writing and signed by all individuals who have a current right to payment of funds from an account. . . .

RCW 30.22.060.

On summary judgment, Appellant made two arguments for the position that without a signed writing financial institutions may not distribute funds to a putative POD beneficiary. First, that is what Section

30.22.060 says. Second, if this were not the rule, then the careful system of laws governing testamentary dispositions in Washington would be compromised. CP 39-55.

**2. RCW 30.22.060 requires that banks maintain signed contracts of deposit for all accounts.**

The language of RCW 30.22.060 is straightforward: “The contract of deposit shall be in writing and signed.” Statutes are to be interpreted according to legislative intent. The primary test for intent is the plain meaning of the language. As the court stated in *Lake v. Woodcreek Homeowners Ass’n v. Kennewick*, 169 Wn.2d 516, 526, “Statutory interpretation begins with the statute’s plain meaning.” The test for plain meaning is what the language ordinarily means and how it functions in the statutory context. *Puget Sound Energy v. Department of Revenue*, 158 Wn. App. 616, 620-21 (2010) (“We discern the plain meaning from the ordinary meaning of the language at issue, the statute’s context, related provisions, and the statutory scheme as a whole. [Citations.] . . . If we determine that the statute is unambiguous after reviewing its plain

meaning, our inquiry ends.”). Section 30.22.060 unambiguously requires a signed writing for each account.

This position is bolstered by how “contract of deposit” functions in other sections of the Act. For example, in situations with multiple POD beneficiaries, a bank may not give more than a proportional share of the account to a single POD beneficiary, “unless the *contract of deposit* otherwise provides.” RCW 30.22.160 (emphasis added). Similarly, RCW 30.22.180 governs circumstances under which account funds are to be given to the personal representative. Subsection (3) gives the funds to the representative “[w]hen the decedent was a beneficiary of a P.O.D. or trust account and the financial institution has received proofs of death of the beneficiary and all depositors to the account who, pursuant to the terms of the contract of deposit, were required to predecease the beneficiary . . . .” (Emphasis added.) It is vital to the operation of all sections of the Act that a signed contract of deposit be maintained.

Washington case law on RCW 30.22.060 is scant. Although not directly on point, the case of *In re Estate of Fox*, 51 Wn. App. 498 (1988), provides some instruction concerning the pivotal role a signature card plays under the Act. In that case there were several certificates of deposit

in existence upon the George Fox's death. With respect to the significance of the signature card, the court noted:

the signature requirement in RCW 30.22.060 was intended to prevent a designated co-owner from taking funds out of the account during the depositor's lifetime unless the designated co-owner's signature is on file. If the signature is not on file, the designated co-owner does not have "a current right to payment" . . . .

*Id.* at 507-508.

Based upon this rationale, the court in *Fox* ruled that a certificate was properly awarded to the estate because there was no signed signature card to the contrary. *Id.* at 507. Signature cards were key to resolution of the issues in *Fox*.

There were no signatures on file with Bank of America showing that the Accounts at issue in this case were in POD form. Therefore, the proper distribution should have been to the Estate, inasmuch as single ownership funds are the property of the estate. RCW 11.12.100(1).

The importance of following the language of statutes concerning written instruments that in themselves serve a policy function is illustrated

by *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952 (1998). *Torgerson* is instructive on the issues in this case. The question in *Torgerson* was whether a rejection of UIM coverage in an automobile policy needed to be in written form, as required by statute, or could be inferred from evidence that State Farm, as a matter of routine, would require a written rejection. In ruling against State Farm, the court held that “absent some specific recollection that the Torgersons signed a rejection form, there is no substantial proof of a written rejection.” *Id.* This comports with the legislative intent, as expressed by statute, that UIM rejections must be in writing. Evidence of what “might” or “should” have been done is insufficient to support an inference of conformity in a specific instance. Appellant contends that there is a strong public policy behind the signed writing statute at RCW 30.22.060, just as there was for the *Torgerson* court when analyzing the requirement that UIM insurance be rejected in writing.

*Torgerson* holds that, in the absence of a statutorily required writing, no extrinsic evidence of intent or business practice is admissible. If a statutorily required writing is absent, that ends the inquiry. At the hearing on the motions, the Court cited to *Humleker* for what it

characterized as a contrary or distinguishing rule. RP 34-40. However, *Humleker* is not contrary to *Torgerson*; indeed, it underscores the necessity of applying the *Torgerson* rule in this case.

Like *Torgerson*, *Humleker* concerned the statutory requirement of a writing in order to properly reject or limit UIM coverage in Washington under RCW 48.22.030. Because the court below relied heavily on *Humleker* in admitting evidence of Bank of America's procedures to establish that there had been signed contracts at one point, Appellant analyzes the case closely below.

In *Humleker*, Zurich Insurance Company issued automobile insurance for the fleet of delivery trucks owned by Franz Bakery. Zurich's account executive, Bill Ennis, sent a packet of documents to the Bakery's CFO that included state specific rejection forms together with a summary form listing all the coverages and the limits. On the summary form, there was indication that a UIM limit of \$60,000 had been selected, despite the fact that there was \$1 million in liability coverage. Franz Bakery's CFO testified that he had in fact selected the lower limit of \$60,000 for UIM. The Bakery's CFO had signed the summary form, but he did not sign a standard Washington form of rejection.

When plaintiff, one of Franz Bakery’s drivers, was injured in a vehicle accident involving an underinsured driver, he made a claim for \$1 million under UIM coverage on the grounds that the summary form was not a “writing” under RCW 48.22.030. Notably, ***there was no question as to the existence of the signed summary form. The only issue in the case was whether that form was a “writing” under the statute.*** “The parties’ summary judgment arguments focused on whether the summary form constituted a rejection as contemplated by Washington’s UIM statute.” *Humleker*, 159 Wn. App. at 673.

The *Humleker* court cited *Clements, supra*, in carefully distinguishing between two situations — one with a writing and one without. With respect to the latter, the *Humleker* court reiterates the rule in *Clements* which was later followed in *Torgerson*. “Our Supreme Court [in *Clements*] explained that, in light of the statute’s ‘bright line’ requirement that the rejection of UIM coverage be in writing, absent the written rejection, ***the intent of the various parties is irrelevant to a determination of coverage.***” *Id.* 159 Wn. App. at 676 (emphasis added). By contrast, “[w]here, as here [in *Humleker*], there is a specific writing

limiting UIM coverage and the issue is the sufficiency of that writing, the parties' intent is relevant.” *Id.* at 677 (emphasis in original).

The only thing that matters in the situation of a statutorily mandated writing is the writing. If there is no writing in existence at the time of the inquiry, intent and extrinsic evidence are irrelevant and inadmissible. If there is a putative writing and the question is only whether it is sufficient under the statute, then and only then is intent relevant.

It is of utmost importance in the present case to note that *Humleker* ***in no manner conflicts with*** *Torgerson*. *Humleker* itself distinguishes *Torgerson* on the facts. Quoting *Torgerson*, *Humleker* states, ““When there is *nothing* in writing rejecting full UIM limits, the intent of the parties is irrelevant.”” *Id.* at 684.

Properly applied to the facts of the present case, *Humleker* actually dictates the result that Appellant argued in its motion. In complete contrast to *Humleker*, in this case no signed contract of deposit under RCW 30.22.060 exists and there is at least a dispute as to whether such contracts ever existed. No extrinsic evidence may be used to establish the existence of such a document. Therefore, all of the evidence proffered by

Bank of America concerning the decedent's intent and the Bank's standard business practices regarding signature cards is irrelevant and inadmissible

**3. "Liberal construction" does not mean ignoring statutory terms.**

Bank of America argued below that the Act is to be "liberally construed" and that this permits a court to ignore the writing requirement of RCW 30.22.060. CP 312-324. The bank cites the language at RCW 30.22.030, focusing in particular on one subsection:

When construing sections and provisions of this chapter, the sections and provisions shall:

(1) Be liberally construed and applied to promote the purposes of the chapter . . . .

RCW 30.22.030.

From this proposition Respondents reason that the court may ignore the fact that RCW 30.22.060 requires a writing and that Bank of America failed to maintain such a writing. This is the position that Respondents urged on the trial court, and which it adopted. RP 34-40.

However, liberal construction in the Act does not permit disregard for its provisions and requirements. Liberal construction is set in the

context of “promot[ing] the purposes of the chapter.” Section 30.22.020, in turn, specifies the purposes of the Act, none of which endorses the linguistic laxity urged by Respondents:

The purposes of this chapter are:

- (1) To provide a consistent law applicable to all financial institutions authorized to accept deposits from individuals with respect to payments by the institutions to individuals claiming rights to the deposited funds; and
- (2) To qualify and simplify the law concerning the respective ownership interests of individuals to funds held on deposit by financial institutions, both as to the relationship between the individual depositors and beneficiaries of an account, and to the financial institution-depositor-beneficiary relationships; and
- (3) To simplify and make consistent the law pertaining to payments by financial institutions of deposited funds both before and after the death of a depositor or depositors, including provisions for the validity and effect of certain

nontestamentary transfers of deposits upon the death of one or more depositors.

Bank of America's argument assumes that liberal construction allows financial institutions to disperse funds without following the Act's dictates. This position *assumes* that the purpose of the Act is to bless the acts of banks and does not include protection of depositor's and beneficiaries' interests. There is no support for this in the language of the Act. Liberal construction in the Act is designed to achieve its purposes. Those purposes are served, not diminished, by abiding by the writing requirement of RCW 30.22.060.

**4. Allowing putative POD beneficiaries to take without a signed contract of deposit on file would undermine an important part of Washington's system of testamentary distribution.**

Section 30.22.060 must be strictly followed because it is in derogation of the otherwise inviolable Statute of Wills, codified at RCW 11.12.020, forms of which have been a feature of Anglo-American law since the time of King Henry VIII. POD accounts, along with accounts

having a “right of survivorship” feature, are permitted as post-death means to transfer money outside a will *only* if the procedures for creating such accounts are followed. If this were not the rule, the strong public policy embodied in RCW 11.12.020, such that formalities must be followed in order to create a valid testamentary instrument, would be undermined. The signature card requirement of RCW 30.22.060 is the Deposit Act’s equivalent of subscription by two witnesses under RCW 11.12.020(1). Each protects the vital interest of the state to ensure that property is distributed at death according to the intent of the decedent.

RCW 11.12.020(1) provides:

Every will shall be in writing signed by the testator or by some other person under the testator’s direction in the testator’s presence, and shall be attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator’s direction or request.

To create a valid will, these formalities must be followed.

Numerous cases hold that whether or not the formalities were followed

makes or breaks a will, even when noncompliance is relatively minimal. For example, in *In re Estate of Ricketts*, 54 Wn. App. 221 (1989), the court invalidated a codicil because the signatures and affidavits of the two witnesses were not on the codicil but were on a piece of paper stapled to the will, which did not comply with the pre-2002 version of 11.12.020. *See also In re Brown's Estate*, 101 Wash. 314, 317 (1918) (“because the Legislature of this state has enacted laws providing for the kind of wills which may be executed and the manner of their execution, those forms of wills not provided for are not recognized.”); *In re Chafey's Estate*, 167 Wash. 185, 188 (1932) (“A writing is not valid as a will unless it complies with the provisions of the statute.”); *Browne v. Mundem*, 193 Wash. 166, 168 (1938) (same).

The essential purpose of the formalities of will-making is to prevent fraud and to accurately represent the testator's intent. *See, e.g., In re Estate of Bauer*, 5 Wn.2d 165, 171-72 (1940); *see also Estate of Black*, 30 Cal. 3d 880, 884 (1982). The same public policies arise with respect to post-death distributions of bank accounts. The possibility of fraud and the ability to determine whether, in fact, the signature is that of the depositor are chief among the policies that necessitate strict compliance with RCW

30.22.060. By enacting RCW 30.22.060, the Legislature allowed limited exceptions to the Statute of Wills with respect to bank accounts. But there is no basis for concluding that the prescribed procedures to create a contract of deposit are any less stringent for bank accounts than the subscription formalities are for wills. Nowhere is an anonymous computer entry accepted as a substitute for a signature under the Statute of Wills. Neither is a computer entry sufficient to meet the demands of RCW 30.22.060. A POD account, which effectively disposes of property upon death in the same manner as a will, must have a signed contract of deposit in order to be valid.

Indeed, the argument is stronger for bank accounts than for wills. Under the Deposit Act, a bank is empowered to simply hand over funds to a putative beneficiary or co-owner upon presentation of a death certificate and identification. CP 392. The bank is then discharged from liability for its actions if there was a valid contract of deposit. RCW 30.22.120.<sup>2</sup> This

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<sup>2</sup>The statute discharges a bank from liability when it relies on the “form” of the contract. In this case, the only form of contract complying with RCW 30.22.060 that was in existence at the time of withdrawal showed single ownership in Brownfield. A similar provision in the probate code shields financial institutions from liability when they disperse “non-probate” funds, such as money in a POD account. RCW 11.11.040. Whether the funds at issue in this case are properly classified as non-probate funds is the

level of informality in the dispersal of funds requires as a reasonable and equitable counterpoise — namely, strict compliance with RCW 30.22.060. It is a trade-off. The price that banks must pay for the privilege of avoiding liability for turning money over to the wrong person is that their records must comply with the statutory requirement of a signed writing.

Moreover, there are practical reasons for requiring an actual signature. A signature can show the level of mental capacity in the signer. For example, a degeneration in the quality of signatures from earlier to later instruments can show lack of capacity at the time of the last disposition. A signature also provides direct evidence of forgery when there is a dispute as to authenticity of the bank records.

Bank of America acknowledges these rationales. Through its CR 30(b)(6) designee, Rebecca Peterson, Bank of America confirmed the purpose of maintaining signature cards. CP 395. In response to a question concerning why Bank of America normally maintains signature cards, Ms. Peterson responded, “to be able to stop fraud on an account you’d need to view a signature. A signature is very important to stop fraud.” CP 395 (dep. p. 29, lines 6-8). Ms. Peterson goes on to note that the Bank had a

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very matter in dispute.

policy that any check above \$10,000 for an unknown person required comparison with the signature card on file, or the Bank would call the customer. CP 395 (dep. p. 29, line 21 through p. 31, line 6). In this case, Rhodes was totally unknown to the Bank, and she was requesting over \$200,000.

The failure of a bank to maintain a signature card prevents potential litigants from vindicating the true intent of the depositor, which may or may not be reflected in a purported signature. This issue is what the Statute of Wills was designed to address. Equally, this principle is enshrined in the Deposit Act's signature requirement.

**5. Other states analogize POD accounts to wills and view the policy for the former as significant for the latter.**

What follows is a sampling of non-Washington case law on this topic. These cases were presented to the court below in a supplemental memorandum. CP 64-92. The cases are attached at CP 71-91. Each case is summarized below the citation.

- *In re Estate of Joseph J. Waitkevich*, 25 Ill. App. 3d 513, 323 N.E.2d 545 (1975).

The decedent opened a single-owner account with West Pullman Savings & Loan Association in 1954. A ledger card contained his signature, the fact and authenticity of which neither party disputed. A typewritten notation of “POD” status in favor of Felix Palilunas appeared on the ledger card. Both parties conceded that this typewriting must have been added after 1954 because, in addition to mentioning Palilunas’s name, the card listed as his residence address a place to which he did not move until 1959. Thus the signature on the ledger card was placed there before any notation concerning POD status. It was a conceded fact of the case that the signature card was lost or destroyed. On the basis of the typewritten notations on the ledger card, the bank had paid the funds to Palilunas.

The applicable Illinois statute provided that a depositor could create a POD account by “execut[ing] a written agreement with the association.” *Id.*, 25 Ill. App. 3d at 516, 323 N.E.2d at 547, quoting Ill. Rev. Stat. 1969, ch. 32, par. 770(c). The Illinois Court of Appeal held that there was no POD account and that the bank had paid the funds to the wrong person.

We do not believe that trial courts, however sympathetic they may be toward promoting the validity of such a “poor man’s will,” should be burdened with the task of *indulging in presumption or conjectures in the face of the statutory mandate that the evidence show the existence of the execution of a written agreement.*

*Id.*, 25 Ill. App. 3d at 516-517, 323 N.E.2d at 548 (emphasis added).

The court further based its ruling on an analogy with the subscription requirements of a will:

A payable on death account is a will substitute, a specific statutory exception to the prescribed manner of making a testamentary disposition found in the Statute of Wills.

[Citation.] Accordingly, we believe the statute creating such accounts should be strictly construed.

. . . We do not mean to discourage payable on death accounts as will substitutes. We simply hold that the evidence must reflect the account holder’s intent. Claims cannot be dubious or ambiguous. Consequently, we hold

that the evidence adduced at the hearing failed to meet the statutory prerequisites of a valid payable on death account.

*Id.*, 25 Ill. App. 3d at 518, 323 N.E.2d at 549.

Better language in support of Appellant's position can hardly be found. Indeed, in *Waitkevich*, there was *more* evidence of written intent than in this case. There was a signed ledger card with an indication of POD status, and there was evidence that there had been a signed signature card to the same effect. In this case Bank of America has nothing — nothing, that is, except a signed signature card showing single-owner status in Vance Brownfield.

• *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

Based on facts remarkably similar to those presented in the instant case, the Nebraska Supreme Court invalidated a purported POD account. In 1997, John Henry M. Chamberlin opened a single-party certificate of deposit with American National Bank. During the latter part of Chamberlin's life, Alfred Thomas helped him with errands and household chores. After Chamberlin's death, Thomas came to American National claiming he was the POD beneficiary of the CD. Thomas brought with him the form that Chamberlin had used to open the CD. On the portion of

the form used to designate the type, an “x” had been marked in the area for a POD account. But the “x” did not appear on the bank’s copy of the form.

Thomas stated in deposition that he had accompanied Chamberlin to the bank when the switch was allegedly made to POD status. Thomas was even able to identify the specific teller who allegedly oversaw the transaction (but in deposition she did not recall the event). Thomas claimed that the teller had typed something on the form, implying that it was the “x” on the POD line. (It is noteworthy that the bank, instead of paying the funds to either the estate or Thomas, deposited the funds with the court and was dismissed from the action. In the instant case, Bank of America simply paid Rhodes all of the money.)

In ruling against Thomas and in favor of the estate, the Nebraska Supreme Court relied on the Probate Code, a version of the Uniform Probate Code. The Code provided that the “type of account may be altered by written notice given by a party to the financial institution to change the type of account . . . . The notice must be signed by a party and received by the financial institution during the party’s lifetime.” *Id.*, 264 Neb. at 806, 652 N.W.2d at 570 (emphasis omitted). The Court stated that this part of

the probate code “is designed to provide simple nonprobate alternatives for the disposition of assets upon death of a party to a multiparty or POD account. [Citation.] Requiring signed written notice to alter the type of account furthers this purpose by ensuring clear evidence of the account owner’s intent, thus preventing fraud and adding certainty to nonprobate transfers.” *Id.*, 264 Neb. at 808, 652 N.W.2d at 572.

The applicability of the Nebraska Supreme Court’s reasoning to the instant case is clear. Without a signed writing, a POD account cannot be created or maintained.

• *In re Estate of Stepnowski*, 200 Del. Ch. LEXIS 76 (Del. Ct. of Chancery, Register of Wills, 2000).

This was a dispute between two brothers, Charles and Joseph, both whom were sons of the decedent. Joseph challenged the estate as to whether an account of their father’s was in the form of joint tenancy with the right of survivorship in Charles. There was testimony that during the decedent’s lifetime, Charles accompanied him to the bank to make a payable on death account with Charles. Apparently, rather than execute a signature card at the bank, the decedent took it home with him. He never signed it.

In attempting to show the establishment of a POD account, Charles Stepnowski referred to the bank's records, which showed "Charles P. Stepnowski-POD eff date 1-26-98" in different typeface below his father's name. A handwritten note in the same record indicated, however, that a new signature card to this effect was never received by the bank.

In ruling that there was no POD account, the court held that the absence of a signature card indicated that there was "simply no competent evidence in the record to indicate that the decedent ever created such a joint tenancy. Charles has testified that his father had that intent at the time they went to Artisans Bank, and I believe that to be the fact. The fact that he intended to create this account at some point does not mean that he ever carried through on this intention or that the account was created." *Id.*, at 8.

The situation is similar to the instant case. There is no signature card, as required by RCW 30.22.060; therefore, there was no POD account.

• *O'Brien, Jr. v. Reece*, 45 N.C. App. 610, 263 S.E.2d 817 (1980).

The issue in this estate dispute was compliance with North Carolina statutes to create a joint bank account with right of survivorship.

Under the applicable statute (G.S. 41-2.1(a)), such an account can be established in North Carolina by executing a signature card to that effect or by a separate instrument expressly providing for the right of survivorship. (Washington does not provide for a “separate instrument” exception. RCW 30.22.060.) In this case, there was no separate instrument. In addition, the signature card at issue had no express indication that it was a joint account with right of survivorship. This failure to follow statutory procedure, the court held, eliminated the right of survivorship aspect. The court held that the statute “requir[es] a signed writing that expressly provides for the right of survivorship.” *Id.*, 45 N.C. App. at 618, 263 S.E.2d at 821.

The parallels between the North Carolina statute and Washington’s are obvious. Strict compliance with a state’s specified procedure for creating a POD or right of survivorship account is necessary.

Each state has a slightly different statutory system for establishing POD accounts. Yet, even from these diverse sources, the basic principle can be established: a depositor must follow the prescribed procedures to establish a POD account, otherwise it is invalid. The policy predicate for this position is that POD accounts are “will substitutes.” As such, the risk

of fraud or the difficulty of establishing the depositor's intent requires strict compliance with statute.

**C. Respondents' motions for summary judgment should have been denied.**

**1. There is no evidence that the contracts of deposit were "lost" or "destroyed"; hence, analysis under ER 1004(a) using extrinsic evidence is improper.**

Bank of America's primary argument is that signed contracts may be proven by extrinsic evidence under ER 1004(a) because they were "lost." But this presupposes that there ever were such documents in existence. The argument begs the very question at issue in this case. As noted in a prominent commentary, "Implicit in the notion of the original being *lost or destroyed* is an assumption that the original once existed." 5C K. Teglund, *Washington Practice, Evidence* § 1004.2 (2007). In its moving papers, Bank of America spends no time addressing the *applicability* of ER 1004(a); rather, it is assumed. Bank of America cannot utilize the proof principles of ER 1004(a) unless it establishes that

there were signed contracts of deposit in existence at one time. This Bank of America cannot do.

Bank of America submitted evidence that its “practices and procedures” were such that an entry in the computer data base would not have occurred without a signed signature card. The trial court accepted this evidence. Specifically, Bank of America proffered declarations from Beth Theodorson, Rebecca Peterson, and Patricia Hulett, all current or former Bank of America employees, to show how signature cards were *supposed to be handled*. CP 192-284. Bank of America then invited the court to *infer*<sup>3</sup> that those procedures were followed on September 25, 2008, even though Bank of America has no independent corroborating evidence that that was the case. Indeed, the only direct evidence, from Rhodes, is that the procedures were not followed.

Bank of America argued that events *must have* transpired a certain way based on self-serving citation to its “procedure.” That is, the procedures were such that there must have originally been signed contracts

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<sup>3</sup>The trial court explicitly made a factual inference concerning the notion that there originally was a signature card. RP 39, lines 13-15. On a motion for summary judgment, factual inference from disputed facts is improper.

because the computer says so. By contrast, Rhodes testified directly that she recalled no document being signed by Brownfield. Bank of America cannot rebut Appellant's evidence by sheer speculation. *Higgins v. Stafford*, 123 Wn.2d 160, 169, 866 P.2d 31 (1994); *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988). Evidence of what individuals who did not witness the event and have no personal knowledge regarding what actually happened is mere speculation.

**2. Rhodes' testimony precludes**

**Respondents' summary judgment.**

Even if extrinsic evidence were admissible, there are genuine issues of material fact with respect to whether there was ever a signed contract of deposit.

In deposition, Rhodes carefully narrated what transpired on September 25, 2008, the day Vance Brownfield and she went to the North Spokane branch of Bank of America, allegedly to make Rhodes a POD beneficiary. CP 389-302. In her testimony, Rhodes describes a single teller working with them. The teller worked on a computer only. Rhodes' narrative seamlessly covers the time that she and Brownfield interacted

with the bank teller who supposedly changed the account. Rhodes is clear that even within the transaction that allegedly took place, the teller made a mistake that had to be corrected by Rhodes and Brownfield.<sup>4</sup>

A. [RHODES] Uncle Vance told her [the teller] that he wanted to add me as payable on death beneficiary to his accounts. . . .

Q. Okay. Then what happened?

A. She took — she gave me a piece of paper to sign. She took it, my Social Security card, my driver's license, and took copies of them. And then she started entering it on the computer. And as she did that she looked at us and said there, your names are now on the accounts.

And it kind of hit me that that wasn't quite what he wanted. I said, I don't think he wants my name on all his accounts. And Uncle Vance kind of jumped, and he says, no, no, no. And he reached in his pocket and he grabs out

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<sup>4</sup>Rebecca Peterson also acknowledged in deposition that the Bank of America branches she audited would sometimes fail to follow procedures and would make mistakes, including allowing signature cards to pile up for months without being filed.

two different checkbooks. He handed those to her. He said, I just wanted her on these accounts.

Q. So he was telling her she made a mistake?

A. Yes.

Q. Okay.

A. He said, I want her listed on these accounts. And so then she fixed her mistake.

Q. Okay. Did your Uncle Vance sign the same document you did?

A. I don't remember that he did.

Q. Do you recall if he signed any documents?

A. ***I don't recall that he signed anything.***

CP 390-391 (emphasis added).

This passage establishes two things. First, Bank of America initially made a mistake regarding the subject accounts in allegedly changing their status. Second, Rhodes, sitting near Brownfield during the interaction at the branch, only saw the teller make changes on the computer, after which the teller said, "There, your names are now on the accounts." No documents were signed by Brownfield. Rhodes does not

testify that she does not recall *whether* Brownfield signed any documents. Rather, she states that she does not recall *that* he signed anything. *The teller's activity took place solely on the computer.* RCW 30.22.060 does not permit a computer record to substitute for a signed contract.

V. CONCLUSION.

Appellant requests that this court reverse the rulings of the court below with respect to its motion for summary judgment and Respondents' motions for summary judgment. This court should then direct the court below to enter judgment in favor of Appellants and to award interest, costs and fees, as appropriate under the law.

Dated: August 1, 2011      PHILLABAUM, LEDLIN, MATTHEWS &  
SHELDON, PLLC

By:   
Karl W. Kime, WSBA #41668  
ATTORNEYS FOR APPELLANT  
Estate of Vance Brownfield

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury of the laws of the state of Washington that on this date true and correct copies of the document to which this declaration is attached were served by the method indicated below, and addressed to the following:

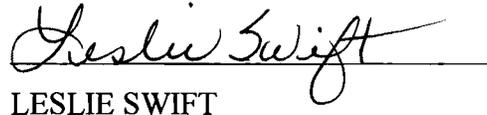
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