

FILED

JAN 07 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 309959-III

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re: the Estate of:

THEODORE ROOSEVELT ALSUP

NICOLA J. WARREN,

Appellant,

v.

MICHAEL J. BRESSON, Respondent.

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY
THE HONORABLE JEROME J. LEVEQUE, PRESIDING

BRIEF OF APPELLANT

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III. ASSIGNMENTS OF ERROR

1. The trial court erred in granting respondent's motion to invalidate appellant's marriage to Theodore R. Alsup.
2. The trial court erred in granting respondent's motion to invalidate the Will of Theodore R. Alsup.
3. The trial court erred in Finding 2.
4. The trial court erred in Finding 4.
5. The trial court erred in Finding 5.
6. The trial court erred in Finding 9.
7. The trial court erred in Finding 10.
8. The trial court erred in Finding 11.
9. The trial court erred in Finding 12.
10. The trial court erred in denying appellant's motion for summary judgment.
11. The trial court erred in denying appellant's motion for reconsideration.

IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does respondent lack standing to challenge the validity of appellant's marriage to Theodore R. Alsup after his death?
(Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
2. May appellant challenge for the first time on appeal respondent's lack of standing to challenge appellant's marriage to Theodore R. Alsup after his death? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
3. Did respondent's lack of standing to challenge appellant's marriage to Theodore R. Alsup after his death deprive the trial court of jurisdiction to hear respondent's motion to invalidate the marriage? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
4. Do Washington courts do permit a post-death collateral attack on a deceased spouse's marriage, absent proof of lack of solemnities or fraud of the grossest kind? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
5. Does RCW 26.04.130 confer standing to challenge the validity of a marriage of a person incapable of consenting thereto only upon the party suffering from the disability? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).

6. Do RCW 26.09.040 (1), (2), (4) permit a petition to invalidate a marriage to be brought only while both parties to the marriage are living? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
7. Do RCW 26.09.040 (1) (a), (b) narrowly circumscribe the classes of persons who may bring a petition to invalidate a marriage? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
8. Under RCW 26.09.040 (1) (a), (b), is a personal representative such as respondent within the class of persons authorized to bring a petition to invalidate a marriage? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
9. Does respondent lack standing under RCW 26.09.040 to bring a petition to invalidate Theodore Alsup's marriage to appellant, either before or after his death? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
10. Does the trial court's order invalidating appellant's marriage to Theodore R. Alsup after his death conflict with *In re Hollingworth's Estate*, 145 Wash. 509, 261 P. 403 (1927)? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
11. Does the trial court's order invalidating appellant's marriage to Theodore R. Alsup after his death conflict with *In Re: Romano's*

Estate, 40 Wn. 2d 796, 246 P. 2d 501 (1952)? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).

12. Are the facts of this case distinguishable from the facts in *Estate of Lint*, 135 Wn. 2d 518, 957 P. 2d 75 (1998)? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
13. Does RCW 11.96A.020 confer standing upon respondent to bring a petition to invalidate Theodore Alsup's marriage to appellant? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
14. May appellant argue for the first time on appeal that respondent's motion to invalidate appellant's marriage to Theodore R. Alsup after his death fails to establish facts upon which relief can be granted? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
15. Did any claim to avoid the marriage of appellant to Theodore Alsup abate upon his death? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
16. Is Finding 9 a conclusion of law? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
17. Did the trial court err in Finding 9 by finding that since Theodore Alsup lacked the capacity to enter into a contract, and because marriage is a contract, his marriage to appellant was therefore void? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).

18. Under RCW 26.04.130, when either party to a marriage is incapable of consenting thereto, for want of sufficient understanding, is such marriage voidable, but only at the suit of the party laboring under the disability? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
19. If Theodore R. Alsup was incapable of consenting to his marriage to appellant, was that marriage voidable only by him during his lifetime? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
20. If respondent lacked standing to challenge post-death Theodore Alsup's marriage to appellant, did the trial court lack jurisdiction to hear respondent's motion, let alone enter Finding 9? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
21. Is Finding 10 a conclusion of law? Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
22. Is Finding 10 in conflict with RCW 26.04.130 or RCW 26.09.040? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
23. If respondent lacked standing to challenge post-death Theodore Alsup's marriage to appellant, did the trial court lack jurisdiction to hear respondent's motion, let alone enter Finding 10? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).

24. Is Finding 11 a conclusion of law? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
25. Is Finding 11 in conflict with RCW 26.04.130? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
26. If respondent lacked standing to challenge post-death Theodore Alsup's marriage to appellant, did the trial court lack jurisdiction to hear respondent's motion, let alone enter Finding 11? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
27. Is Finding 12 a conclusion of law? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
28. Is RCW 26.09.040 relevant to respondent's motion to invalidate the marriage of appellant to Theodore R. Alsup? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
29. Is the trial court's order declaring the marriage of appellant to Theodore R. Alsup in conflict with RCW 26.04.130? Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
30. Is the trial court's order declaring the marriage of appellant to Theodore R. Alsup in conflict with RCW 26.09.040? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).
31. Did the trial court lack jurisdiction to enter the order invalidating appellant's marriage to Theodore R. Alsup, as respondent lacked

standing to assert the invalidity of that marriage? (Pertains to Assignments of Error Nos. 1, 6, 7, 8, 9, 11).

32. Is Finding 4 a conclusion of law? (Pertains to Assignments of Error Nos. 2, 3, 4, 5, 11).
33. Did respondent's failure to serve his motion to invalidate the Will of Theodore R. Alsup together with a summons as required by RCW 11.96A.100 within the 4-month period in RCW 11.24.010 deprive the trial court of jurisdiction to enter Finding 4 or to invalidate the Will? (Pertains to Assignments of Error Nos. 2, 3, 4, 5, 11).
34. Is Finding 5 a conclusion of law? (Pertains to Assignments of Error Nos. 2, 3, 4, 5, 11).
35. Did respondent's failure to serve his motion to invalidate the Will of Theodore R. Alsup together with a summons as required by RCW 11.96A.100 within the 4-month period in RCW 11.24.010 deprive the trial court of jurisdiction to enter Finding 5 or to invalidate the Will? (Pertains to Assignments of Error Nos. 2, 3, 4, 5, 11).
36. Is Finding 2 a conclusion of law? (Pertains to Assignments of Error Nos. 2, 3, 11).

37. Is Finding 2 contrary to the legislative intent expressed in RCW 11.88.005? (Pertains to Assignments of Error Nos. 2, 3, 11).
38. Is appellant an omitted spouse under the Will of Theodore R. Alsup pursuant to RCW 11.12.095? (Pertains to Assignments of Error Nos. 1-11).
39. Under RCW 11.12.095 (3), is appellant entitled to a distribution from the Estate of Theodore R. Alsup equal to the amount that she would have received under RCW 11.04.015 had Mr. Alsup died intestate? (Pertains to Assignments of Error Nos. 1-11).
40. Did the trial court abuse its discretion in denying appellants' motion for reconsideration? (Pertains to Assignments of Error Nos. 1-11).

V. STATEMENT OF THE CASE

A. FACTS

The deceased, Theodore Roosevelt Alsup, a resident of Spokane County, died testate on May 12, 2011, leaving property subject to probate. CP 2. Mr. Alsup left an estate consisting of money and other personal property valued at approximately \$76,400. CP 52. Mr. Alsup left a surviving spouse, appellant Nicola J. Warren. CP 2. Mr. Alsup and Mrs. Warren were married in Couer d'Alene on September 13, 2002. CP 1, 22, 113.

Mr. Alsup executed his Last Will and Testament on January 1, 2001. CP 1, 23-28. Mr. Alsup's Will neither named nor provided for a present or future spouse. *Ibid.*

Appellant, Nicola J. Warren, is a long-time resident of Grant County. CP 20. Mrs. Warren met Theodore Alsup in January, 1980. CP 21. Mrs. Warren and Mr. Alsup began a relationship that endured as a 16-year dating relationship. CP 21. In the early 1980s, Mr. Alsup lived with Ms. Warren at her residence in Moses Lake for approximately one year. CP 21. Mr. Alsup moved from Mrs. Warren's residence when he gained custody of his son. CP 21. Mr. Alsup and Mrs. Warren thereafter maintained a social and sexual relationship that lasted for 16 years. CP 21.

During their relationship, Mr. Alsup taught math and social studies at the Columbia Basin Job Corps. CP 21. Mr. Alsup taught there until he suffered a flashback from his experience in Vietnam. CP 21. Mr. Alsup suffered from Post Traumatic Stress Syndrome (PTSD). CP 21. Mr. Alsup also suffered effects of exposure to Agent Orange. CP 21. Mr. Alsup became disabled in 1995. CP 21.

Despite his disability, Mr. Alsup maintained his own residence, raised his son, and even cared for a young male relative. CP 21. Mr. Alsup and Mrs. Warren continued the relationship. CP 21. During that time, Mr. Alsup was fully aware of his financial affairs and his relationships, and he would not allow anyone to take advantage of him. CP 21

From 1996 to 1997, Mr. Alsup suffered a series of illnesses, including a stroke, diabetes, and hypertension. CP 21. After his stroke, Mr. Alsup was hospitalized at the Veterans Administration (VA) Hospital in Walla Walla. CP 21. Mrs. Warren visited Mr. Alsup at that hospital. CP 21. After a short stay at the VA Hospital in Walla Walla, Mr. Alsup was transferred to the VA Hospital in Seattle. CP 21. After his release from that facility, Mr. Alsup was placed in a nursing home in the Puget Sound area. CP 21. Mr. Alsup left the nursing home without permission and returned to his residence at 129 Schilling in Moses Lake. CP 21.

Mr. Alsup resided at his Moses Lake residence for two years. CP 21. A nephew also resided there with Mr. Alsup. CP 21. Mr. Alsup's nephew managed Mr. Alsup's finances, and there were allegations of misappropriation of funds. CP 21. Mr. Alsup and Mrs. Warren continued to maintain their relationship during that time. CP 21. Mr. Alsup became unable to live independently, so he moved into an adult family home. CP 21.

In 1997, guardianship proceedings were commenced on behalf of Mr. Alsup in Grant County Superior Court Cause No. 97-4-00099-1. CP 102-03. The notice of hearing in that case advised Mr. Alsup, *inter alia*, that he could lose his right to marry at the hearing. CP 102. The order appointing guardian in that case made no mention of any limitation on Mr. Alsup's right to marry, nor did it state any other limitation on Mr. Alsup. CP 97-100.

On February 16, 2001, in Grant County Superior Court Cause No. 97-4-00099-1, the court entered an Order Terminating Guardian, Modifying Guardianship and Appointing Successor Limited Guardian. CP 167-176. In paragraph 3 thereof, the trial court ruled that the guardianship over Mr. Alsup was changed to a limited guardianship. CP 169. In paragraph 4 thereof, the court placed specific limitations upon Mr. Alsup, including the lack of authority to enter into any contract. CP 170.

On March 30, 2001, the trial court issued letters of guardianship to Catherine McKinzy as the limited guardian of the person and estate of Mr. Alsup. CP 132.

On March 14, 2003, an order was entered in the Grant County cause appointing Eagle Guardianship & Professional Services as limited guardian for Mr. Alsup. CP 133. Letters testamentary were issued to Eagle Guardianship on March 18, 2003. *Ibid.*

Mr. Alsup proposed marriage to Mrs. Warren, and she accepted. CP 21. They were married in Couer d'Alene, Idaho on September 13, 2002. CP 1, 22, 113. For the next year, due to her work schedule, Mr. Alsup stayed at the adult family home during the week, and he spent the weekends with Mrs. Warren. CP 22. Mr. Alsup was then transferred to Eagle Guardianship in Spokane. CP 22. Thereafter, Mrs. Warren's relationship with Mr. Alsup began to deteriorate, as she did not have the money to drive to Spokane and rent a motel room for visits to Mr. Alsup. CP 22. Mr. Alsup continued to tell Mrs. Warren that he loved her and wanted to continue a physical relationship. CP 22. Mrs. Warren continued to maintain contact with Mr. Alsup through telephone conversations. CP 22. In 2009, Mr. Alsup sent Mrs. Warren \$1,500 though Eagle Guardianship to help her repair her automobile. CP 22.

B. PROCEDURE

On June 27, 2011, appellant filed a petitioner for orders directing letter of administration, waiving bond, adjudicating the Estate to be solvent and directing administration without court intervention. CP 1-5.

On July 11, 2011 the court entered an order appointing respondent as personal representative and directing that letter of administration be issued by the clerk. CP 33-34. On August 8, 2011, letters of administration were issued to respondent. CP 35.

On October 14, 2011, respondent filed a notice of appointment of representative and pendency of probate. CP 44-45. On November 10, 2011, respondent filed an inventory and appraisement. CP 51-52

On January 11, 2012, respondent filed a Motion for Hearing on Declaratory Judgment Regarding the Validity of Marriage and Will of an Incapacitated Person. CP 177-79.

On February 21, 2012, appellant filed a Petition to Establish Surviving Spouse as Pretermitted Heir. CP 75-77. Also on that date, appellant also filed a Petition to Determine Specific Gifts or Devisees Provided in Will; Determination of Proceeds of Estate after Award to Surviving Spouse. 72-74. On March 12, 2012, appellant filed a motion for summary judgment. CP 114-16.

The matter was heard by the trial court on March 30, 2012. CP 143. On April 30, 2012, appellant filed a motion for reconsideration. CP 129. On June 22, 2012 the trial court entered its order wherein it declared the marriage of Mr. Alsup and appellant void and declared the Will of Mr. Alsup void. CP 155-158. On July 6, 2012, appellant filed a notice of appeal from the trial court's order. CP 159-64.

VI. ARGUMENT

A. Standards of review.

Respondent brought a motion for declaratory judgment regarding the validity of appellant's marriage to Theodore Alsup and the validity of Mr. Alsup's Will. CP 177-79. The trial court heard respondent's motion on the affidavits presented and entered findings of fact and conclusions of law. CP 155-58; App. 1. Therefore, the appropriate standard of review of the trial court's order is *de novo*, and the record is not viewed in a light favorable to either party. *Brouillet v. Cowles Publishing Co.*, 114 Wn. 2d 788, 793-94, 791 P. 2d 526 (1990); *Estate of Gardener*, 103 Wn. App. 557, 560-61, 13 P. 3d 655 (2000).

The appropriate standard of review of the trial court's order denying appellant's motion for summary judgment is *de novo*. *Macias v. Saberhagen Holdings, Inc.*, -- Wn.2d--, 282 P.3d 1069, 1073 (2012). Summary judgment is appropriate if there is no genuine issue as to any

material fact and the moving party is entitled to judgment as a matter of law. CR 56 (c); *Macias*, 282 P.3d 1073.

The trial court's denial of appellant's motion for reconsideration is reviewed for abuse of discretion. *Conrad ex rel. Conrad v. Alderwood Manor*, 119 Wn. App. 275, 290, 78 P. 3d 177 (2003). A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. *Gildon v. Simon Property Group, Inc.*, 158 Wn. 2d 483, 494, 145 P. 3d 1196 (2006). An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Ibid*

B. Respondent lacks standing to challenge the marriage of Theodore Alsup to appellant.

Appellant may raise respondent's lack of standing for the first time on appeal. *Roberson v. Perez*, 119 Wn. App. 928, 933, 83 P. 3d 1026 (2004) (“*Facts establishing standing are as essential to a successful claim for relief as is the jurisdiction of a court to grant it. Thus, we hold that the insufficiency of a factual basis to support standing may also be raised for the first time on appeal in accordance with Mitchell v. Doe*, 41 Wn. App. 846, 848, 706 P. 2d 1100 (1985)”); *Gross v. City of Lynnwood*, 90 Wn. 2d 395, 400, 583 P. 2d 1197 (1978).

Respondent's lack of standing also deprived the trial court of jurisdiction to hear his claim to invalidate appellants' marriage to Theodore Alsup. *High Tide Seafoods v. State*, 103 Wn. 2d 695, 702, 725 P. 2d 411 (1986) ("If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it."); *Postema v. Snohomish County*, 83 Wn. App. 574, 579, 922 P. 2d 176 (1996). Therefore, respondent's lack of standing may also be raised for the first time on appeal pursuant to RAP 2.5 (a) (1).

Respondent lacks standing to assert the invalidity of appellants' marriage to Theodore Alsup because Washington courts do not permit a post-death collateral attack on a deceased spouse's marriage. RCW

26.04.130 provides as follows:

When either party to a marriage shall be incapable of consenting thereto, for want of legal age or a sufficient understanding, or when the consent of either party shall be obtained by force or fraud, such marriage is voidable, but only at the suit of the party laboring under the disability, or upon whom the force or fraud is imposed.

RCW 26.04.130 confers standing to challenge the validity of a marriage of a person incapable of consenting thereto only upon the party suffering from the disability. Respondent is not that party. Under RCW 26.04.130, respondent therefore has no standing to challenge the validity of appellant's marriage to Theodore Alsup after his death.

RCW 26.09.040 (1), (2), (4) provide, in pertinent part, as follows:

(1) While both parties to an alleged marriage or domestic partnership are living, and at least one party is resident in this state or a member of the armed service and stationed in the state, a petition to have the marriage or domestic partnership declared invalid may be sought by:

(a) Either or both parties, or the guardian of an incompetent spouse or incompetent domestic partner, for any cause specified in subsection (4) of this section; or

(b) Either or both parties, the legal spouse or domestic partner, or a child of either party when it is alleged that either or both parties is married to or in a domestic partnership with another person.

(2) If the validity of a marriage or domestic partnership is denied or questioned at any time, either or both parties to the marriage or either or both parties to the domestic partnership may petition the court for a judicial determination of the validity of such marriage or domestic partnership

(4) After hearing the evidence concerning the validity of a marriage or domestic partnership, if both parties to the alleged marriage or domestic partnership are still living, the court:

(a) If it finds the marriage or domestic partnership to be valid, shall enter a decree of validity;

(b) If it finds that:

(i) The marriage or domestic partnership should not have been contracted because of age of one or both of the parties, lack of required parental or court approval, a prior undissolved marriage of one or both of the parties, a prior domestic partnership of one or both parties that has not been terminated

or dissolved, reasons of consanguinity, or because a party lacked capacity to consent to the marriage or domestic partnership, either because of mental incapacity or because of the influence of alcohol or other incapacitating substances, or because a party was induced to enter into the marriage or domestic partnership by force or duress, or by fraud involving the essentials of marriage or domestic partnership, and that the parties have not ratified their marriage or domestic partnership by voluntarily cohabiting after attaining the age of consent, or after attaining capacity to consent, or after cessation of the force or duress or discovery of the fraud, shall declare the marriage or domestic partnership invalid as of the date it was purportedly contracted;

RCW 26.09.040 (1) limits the right to have a marriage declared invalid to the time when both parties to the marriage are living. Under RCW 26.09.040 (4), the court may make the finding authorized by subsection (b) only if both parties to the marriage are still living. RCW 26.09.040 (1) (a), (b) also narrowly circumscribe the classes of persons who may bring such a petition. Again, the statute does not authorize the personal representative of a deceased party to a marriage as one of the persons who can bring such a petition. Respondent thus did not have standing under RCW 26.09.040 to bring a petition to invalidate Theodore Alsup's marriage to appellant, either before or after his death.

Washington decisions support the view that a personal representative may not bring a post-death challenge to a decedent's marriage. *In re Hollingworth's Estate*, 145 Wash. 509, 261 P. 403 (1927) involved a post-death challenge to the decedent's marriage to an allegedly feeble-minded woman. The trial court's dismissal of the petition was affirmed on appeal. The court held that in the absence of a statute declaring such a marriage void, the marriage was voidable only during the lifetime of both spouses. 145 Wash. 513-14. Washington has no such statute. Instead, RCW 26.04.130 expressly makes such a marriage voidable only during the life of the party suffering the disability.

In Re: Romano's Estate, 40 Wn. 2d 796, 246 P. 2d 501 (1952) followed *Hollingworth's Estate*. The executrix and legatees under a will, which was purportedly revoked by the subsequent marriage of the testator, sought to have the marriage declared void as of the date of the ceremony. The deceased, at age 64, had obtained a marriage in Nevada to his housekeeper twenty years younger than him shortly after suffering a stroke and a rapid deterioration in his physical and mental health. Following his return to Seattle, the deceased did not cohabit with his new wife and was soon institutionalized and a guardian appointed for him. The deceased died two years after having been adjudicated incompetent.

The trial court's dismissal of the executrix's petition was affirmed on appeal. The court noted that under Rem. Rev. Stat. § 8449 (RCW 26.04.130), marriage of a person incapable of consenting thereto is voidable. The court reaffirmed *Hollingworth's Estate's* prohibition of a collateral attack upon voidable marriages after the death of one of the spouses. 40 Wn. 2d 806. The court therefore concluded that the appellants were without standing to attack the validity of the marriage in that case, and the trial did not err in dismissing the petition to invalidate the deceased's marriage. 40 Wn. 2d 806-07.

In *Romano's Estate*, the court noted the failure of the guardian to challenge the marriage in the two years between appointment of the guardian and the deceased's death. *'There was ample time during Romano's lifetime for his general guardian or some next friend to make a direct attack, in Romano's behalf, upon the validity of this marriage.'* 40 Wn. 2d 806. Similarly, in this case there was ample time for the guardian to have challenged Theodore Alsup's marriage to appellant in the nine years between the marriage and his death. Such a remedy was then available to the guardian under RCW 26.09.040 (1) (a), (4) (i). The remedy available to the guardian to invalidate Theodore Alsup's marriage during his lifetime would have been limited to circumstances involving his best interests. *Marriage of Gannon*, 104 Wn. 2d 212, 124-25, 702 P. 2d

465 (1985). Given the failure of the guardian to challenge the marriage in those nine years, the trial court was not justified in recognizing a right in respondent to make such a challenge after Theodore Alsup's death.

In *Marriage of Gannon*, the court recognized the widely held view that the decision to dissolve a marriage is highly personal.¹⁰⁴ Wn. 2d 124. Because that decision is so highly personal, a personal representative has no business making such a decision after the death of a person.

RCW 26.09.040, *Romano's Estate* and *Hollingworth's Estate* provide controlling authority here. Here, as in *Romano's Estate* and *Hollingworth's Estate*, respondent brought a post-death petition to invalidate a marriage voidable for incapacity. Under both the common law as announced in *Hollingworth's Estate* and RCW 26.04.130, appellant's marriage to Theodore Alsup was at most voidable for incapacity, but only prior to his death. Under RCW 26.04.130, RCW 26.09.040 and *Romano's Estate*, respondent lacks standing to bring a post-death challenge to that marriage.

Estate of Lint, 135 Wn. 2d 518, 957 P. 2d 75 (1998) does not compel a contrary conclusion here. In *Lint*, the court recognized a very narrow exception to the rule announced in *Romano's Estate*. That exception allowed a post-death challenge to the deceased's marriage where there was no solemnization to that marriage and there were

exceptional circumstances indicating fraud of the grossest kind 135 Wn. 2d 540-41. Here, the trial court made no such finding of a lack of solemnization, nor did the trial court find exceptional circumstances indicating fraud of the grossest kind. CP 156-57; App. 1. Thus, the facts of this case do not fit within *Lint*'s narrow exception for post-death invalidation of a decedent's marriage. Simply put, *Lint* has absolutely nothing to do with the facts of this case.

RCW 11.96A.020 does not compel a contrary conclusion here, as that statute does not confer standing on anyone. RCW 11.96A.020 lacks any language similar to language conferring standing in RCW 26.04.130 or RCW 26.09.040 (1) (a) or (b). Nor can RCW 11.96A.020 be construed as having repealed or amended RCW 26.04.130 or RCW 26.09.040 (1) (a) or (b). *Our Lady of Lourdes Hospital v. Franklin County*, 120 Wn. 2d 439, 450, 842 P. 2d 956 (1993) ("*Repeals by implication are disfavored.*").

Because respondent lacks standing to challenge appellant's marriage to Theodore Alsup after his death, the only course available to the Court here is to reverse the trial court's Order for Declaratory Judgment and dismiss respondent's petition.

C. The trial court lacked jurisdiction to hear respondent's motion to declare invalid appellant's marriage to Theodore Alsup.

Lack of jurisdiction in the trial court may be raised for the first time on appeal. RAP 2.5 (a) (1). Because respondent lacked standing to challenge post-death Theodore Alsup's marriage to appellant, it follows that the trial court did not have jurisdiction to hear respondent's motion. *High Tide Seafoods v. State*, 103 Wn. 2d 702; *Postema v. Snohomish County*, 83 Wn. App. 579.

D. Respondent's motion to invalidate appellant's marriage to Theodore Alsup fails to state a claim upon which relief can be granted.

Appellant may argue for the first time on appeal respondent's failure to establish facts upon which relief can be granted. RAP 2.5 (a) (2). RCW 26.09.040 (1) limits a claim to invalidate a marriage to the time when both parties to the marriage are living. Therefore any claim to avoid the marriage of appellant to Theodore Alsup abated upon his death. 21 Washington Practice, Family and Community Property Law, § 48.33 *RCWA 26.09.040 and its drafting history clearly indicate that the death of a spouse abates any pending proceeding to declare the marriage to be invalid.*"). Therefore, respondent's motion to invalidate appellant's marriage to Theodore Alsup, having been brought after his death, fails to establish facts upon which relief can be granted.

Estate of Lint does not compel a contrary conclusion here, as the extraordinary relief granted in *Lint* was conditioned upon a lack of solemnities or fraud of the grossest kind. No such facts were found in this case. Therefore, the exception to RCW 26.09.040 recognized in *Lint* has no application here.

E. The trial court erred in finding appellant's marriage to Theodore Alsup void.

In Finding of Fact 9, the trial court found that since Theodore Alsup lacked the capacity to enter into a contract, and because marriage is a contract, his marriage to appellant was therefore void. CP 157; App. 1. Finding 9 is in reality a conclusion of law. *Moulden & Sons, Inc. v. Osaka Landscaping and Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P. 2d 968 (1978) (“*The fact that a court designates its determination as a ‘finding’ does not make it so if it is in reality a conclusion of law.*”). In *Moulden & Sons*, the court distinguished a finding of fact from a conclusion of law:

If a determination concerns whether the evidence showed that something occurred or existed, it is properly labeled a finding of fact, but if a determination is made by a process of legal reasoning from, or of interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law. (Citation omitted).

21 Wn. App. 197 n.5.

Tested by this definition, Finding 9 determined that appellant's marriage was void from a series of evidentiary facts. Finding 9 is therefore properly considered to be a conclusion of law, and is therefore reviewed *de novo*. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 556, 132 P. 3d 789 (2006); *Sloan v. Horizon Credit Union*, 167 Wn. App. 514, 519, 274 P. 3d 386 (2012).

Finding 9 cannot be reconciled with RCW 26.04.130 or RCW 26.09.040, *supra*. Under RCW 26.04.130, when either party to a marriage shall be incapable of consenting thereto, for want of sufficient understanding, such marriage is voidable, but only at the suit of the party laboring under the disability. Therefore, even if Theodore Alsup was incapable of consenting to his marriage to appellant, that marriage was voidable only by him during his lifetime. *See also Hollingworth's Estate and Romano's Estate, supra*. Finding of Fact 9 must therefore be reversed.

Further, because respondent lacked standing to challenge post-death Theodore Alsup's marriage to appellant, it follows that the trial court did not have jurisdiction to hear respondent's motion, let alone enter a finding such as Finding 9. *High Tide Seafoods v. State*, 103 Wn. 2d 702; *Postema v. Snohomish County*, 83 Wn. App. 579. Finding of Fact 9 must therefore be reversed.

In Finding 10, the trial court found that the court had the ability to void a marriage there no marriage existed. CP 157; App. 1. Finding 10 is a conclusion of law and must be treated as such. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 556; *Sloan v. Horizon Credit Union*, 167 Wn. App. 519. As with Finding 9, Finding 10 cannot be reconciled with either RCW 26.09.040, or *Hollingworth's Estate* or *Romano's Estate*, *supra*. Finding 10 must therefore be reversed.

Further, because respondent lacked standing to challenge post-death Theodore Alsup's marriage to appellant, it follows that the trial court did not have jurisdiction to hear respondent's motion, let alone enter a finding such as Finding 10. *High Tide Seafoods v. State*, 103 Wn. 2d 702; *Postema v. Snohomish County*, 83 Wn. App. 579. Finding 10 must therefore be reversed.

In Finding 11, the trial court found that since Theodore Alsup did not have a right to marry, and where there is no right to marry then no marriage can exist. CP 157; App. 1. Finding 11 is a conclusion of law and must be treated as such. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 556; *Sloan v. Horizon Credit Union*, 167 Wn. App. 519. Finding 11 cannot be reconciled with RCW 26.04.130. In that statute, the Legislature provided that the marriage of one incapable of consenting

thereto is voidable at most, and then only upon suit of the party laboring under such a disability. Finding 11 must therefore be reversed.

Further, because respondent lacked standing to challenge post-death Theodore Alsup's marriage to appellant, it follows that the trial court did not have jurisdiction to hear respondent's motion, let alone enter a finding such as Finding 11. *High Tide Seafoods v. State*, 103 Wn. 2d 702; *Postema v. Snohomish County*, 83 Wn. App. 579. Finding 11 must therefore be reversed.

In Finding 12, the trial court found that RCW 26.040 [sic]¹ is not relevant. CP 157; App. 1. Finding 12 is a conclusion of law and must be treated as such. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 556; *Sloan v. Horizon Credit Union*, 167 Wn. App. 519. RCW 26.09.040 is clearly relevant, as it defines the classes of persons who may seek a declaration of invalidity of their marriage. Respondent is not within the classes of persons authorized by the statute to bring an action to have their marriage declared invalid. Further RCW 26.09.040 limits such an action to the period of time when both parties to the marriage are living. Nothing in RCW 26.09.040 supports respondent's post-death challenge to appellant's marriage to Theodore Alsup. Finding 12 must therefore be reversed.

¹ See RCW 26.09.040.

The trial court erred in entering the order declaring appellant's marriage to Theodore Alsup void. CP 157; App. 1. The order cannot be reconciled with RCW 26.04.130, as under that statute, the marriage of party lacking capacity to consent is voidable, not void. The order cannot be reconciled with RCW 26.09.040, which permits an action to invalidate a will only when both parties to the marriage are still living, and no exception to that statute applies here. The trial court lacked jurisdiction to enter the order, as respondent lacked standing to assert the invalidity of appellant's marriage to Theodore Alsup. *High Tide Seafoods v. State*, 103 Wn. 2d 702; *Postema v. Snohomish County*, 83 Wn. App. 579. The order should therefore be reversed.

F. Respondent's failure to issue notice required by RCW 4.24.020 deprived the trial court of jurisdiction to hear respondent's motion to challenge the will.

Appellant's challenge to the jurisdiction of the trial court to void the Will may be raised for the first time on appeal. RAP 2.5 (a) (1). Appellant assigns error to the trial court's Findings 4 and 5. CP 156; App. 1. In Finding 4, the trial court found that because the Guardianship Order was still in effect at the date of the Will's execution, the Guardianship Order effectively blocked Theodore Alsup from executing a Will without prior court approval. CP 156. In Finding 5, the trial court found that the Will was void because Theodore Alsup did not have the capacity to create

a Will and did not have Court authority to create a Will. CP 156.

Findings 4 and 5 are conclusions of law and must be treated as such.

Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 556; *Sloan v. Horizon Credit Union*, 167 Wn. App. 519.

Respondent brought his challenge to the Will by a motion. CP 177-79. Respondent made no attempt to comply with either RCW 11.24.020 or RCW 11.96A.100. . Because respondent made no attempt to comply with RCW 11.24.020 or RCW 11.96A.100 within the 4-month limitations period in RCW 11.24.010, the trial court therefore lacked jurisdiction to invalidate the Will. *In re Estate of Kordon*, 157 Wn. 2d 206, 214, 137 P. 3d 16 (2006) (“A court ‘has no jurisdiction to hear and determine a contest begun after the expiration of the time fixed in the statute; neither does a court of equity have power to entertain such jurisdiction.’” (Quoting *State ex rel. Wood v. Superior Court*, 76 Wash. 27, 30-31, 135 P. 494 (1913))). Findings 4 and 5 and the trial court’s order must therefore be reversed.

G. The trial court erred in finding that Theodore Alsup was not granted or given any rights or privileged under the 1997 Guardianship Order entered by the Grant County Superior Court, including the right to marry or make a Will.

Appellant assigns error to Finding 2. CP 155; App. 1. In Finding 2, the trial court construed the legal effect of the 1997 Guardianship Order. CP 155; App. 1. Finding 2 is a conclusion of law and must be treated as such. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 556; *Sloan v. Horizon Credit Union*, 167 Wn. App. 519. Finding 2 cannot be reconciled with RCW 11.88.005:

It is the intent of the legislature to protect the liberty and autonomy of all people of this state, and to enable them to exercise their rights under the law to the maximum extent, consistent with the capacity of each person. The legislature recognizes that people with incapacities have unique abilities and needs, and that some people with incapacities cannot exercise their rights or provide for their basic needs without the help of a guardian. However, their liberty and autonomy should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to adequately manage their financial affairs.

The 1997 Guardianship Order is silent as the Theodore Alsup's right to marry, to make a contract, or to execute a Will. CP 97-100. Thus, the only permissible conclusion regarding that order is that Theodore

Alsup's right to marry, to make a contact and to execute Will were not terminated by that order. Finding 2 should therefore be reversed.

H. The trial court erred in denying appellant's motions for summary judgment.

Appellant moved for summary judgment to establish herself as an omitted spouse under the Will pursuant to RCW 11.12.095. CP 114. Appellant also moved for summary judgment to determine specific gifts or devises provided for in the Will and to determine the proceeds of the Estate after award to appellant as the omitted spouse. CP 114. The trial court's Order recites that it considered both of appellant's motions for summary judgment. CP 155-56; App. 1. While the Order does not specifically deny appellants' motions, it can only reasonably be construed as having denied both motions.

As indicted in Paragraphs IV B-F, *supra*, because respondent has no standing to challenge appellant's marriage to Theodore Alsup, because the trial court lacked jurisdiction to declare that marriage invalid, because respondent's motion to invalidate that marriage failed to state a claim upon which relief can be granted, because the lacked authority to invalidate appellant's marriage to Theodore Alsup after his death, and because the trial court lacked jurisdiction to invalidate the Will, respondent therefore presents no viable defense to appellant's motions for

summary judgment. Appellant was married to Theodore Alsup after he executed his Will. CP 1, 22, 23-28, 113. The Will fails to mention either appellant of any future spouse. CP 23-28. Appellant is therefore an omitted spouse under RCW 11.12.095, and the Will is revoked as to her. *Estate of Deoneseus*, 128 Wn. 2d 317, 906 P. 2d 922 (1995). Under CR 56, appellant therefore is entitled to summary judgment.

I. The trial court erred in denying appellant's motion for reconsideration.

The trial court's order recites that it considered appellant's motion for reconsideration. CP 156; App. 1. While the trial court's order does not specifically mention how it ruled on appellant's motion, the order can only reasonably be read as having denied the motion. In her motion, appellant demonstrated that the 1997 order of guardianship for Theodore Alsup was changed by the February 16, 2001 Order Terminating Guardian, Modifying Guardianship, and Appointing Successor Limited Guardian. CP 130-34. Appellant argued that order did not mention any limitation on Theodore Alsup's right to marry. Appellant further established that she was married to Theodore Alsup on September 13, 2002. CP 134. By denying appellant's motion for reconsideration, the trial court failed to recognize that there was no legal impediment to appellant's marriage to Theodore Alsup, and thereby abused its discretion.

J. Appellant requests an award of costs and reasonable attorney fees on appeal.

Appellant invokes RCW 11.96A.150:

(1) Either the superior court or any court on an appeal may, in its discretion, order costs, including reasonable attorneys' fees, to be awarded to any party: (a) From any party to the proceedings; (b) from the assets of the estate or trust involved in the proceedings; or (c) from any nonprobate asset that is the subject of the proceedings. The court may order the costs, including reasonable attorneys' fees, to be paid in such amount and in such manner as the court determines to be equitable. In exercising its discretion under this section, the court may consider any and all factors that it deems to be relevant and appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

The touchstone for an award of attorney fees under this statute is whether the actions of the party requesting such an award produced a benefit to the Estate. *Estate of Black*, 153 Wn. 2d 152, 174, 102 P. 3d 796 (2004); *Estate of Watlack*, 88 Wn. App. 603, 945 P. 2d 1154 (1997). Here, as in *Estate of Black*, appellant's actions in this case have produced a benefit to the Estate by establishing the final wishes of Theodore Alsup and by establishing which beneficiaries have a right to participate in his Estate. As in *Estate of Watlack*, the will dispute in this case involves all the beneficiaries, affects the rights of all beneficiaries, and an award against the estate would not harm any uninvolved beneficiaries. An award

of attorney fees to appellant under RCW 11.96A.150 is therefore appropriate.

Respondent, in contrast, has needlessly burdened the Estate with the expense of this litigation by making a post-death challenge to the marriage despite lacking standing to do so, and by ignoring statutory authority and case law prohibiting such a challenge. Respondent also burdened the Estate by failing to serve the summons required by RCW 11.24.020 and RCW 11.96A.100, thereby depriving the trial court of jurisdiction to hear respondent's challenge to the Will. Respondent's actions have thus produced no benefit to the Estate. Respondent is therefore not entitled to an award of attorney fees under RCW 11.96A.150.

Appellant also invokes RCW 11.24.050:

If the probate be revoked or the will annulled, assessment of costs shall be in the discretion of the court. If the will be sustained, the court may assess the costs against the contestant, including, unless it appears that the contestant acted with probable cause and in good faith, such reasonable attorney's fees as the court may deem proper.

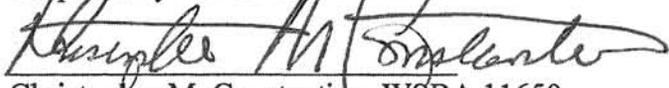
Respondent brought a challenge to the Will and is therefore the contestant. The court has discretion under the statute to assess the costs against respondent where, as here, he acted without probable cause or

good faith in bringing a challenge to the Will. Costs of the will contest should therefore be assessed against respondent. *In re Vaughn's Estate*, 137 Wash. 512, 518, 242 P. 1094 (1926).

VII. CONCLUSION

Findings 2, 4, 5, 9, 10, 11, 12 and the trial court's order of June 22, 2012 should be reversed. The order denying appellant's motions for summary judgment and reconsideration should also be reversed, appellant should be declared a pretermitted spouse of the deceased, and the Will should be revoked against her. Appellant is therefore entitled to inherit her intestate share of the Estate, and the specific bequests in the Will should be adeemed accordingly. Appellant should be awarded costs and reasonable attorney fees on appeal. The costs of the will contest should be assessed against respondent.

Respectfully submitted,



Christopher M. Constantine, WSBA 11650
Of Attorneys for Appellant

VIII APPENDICES

1. Order
2. Last Will and Testament of Theodore R. Alsup



LAST WILL AND TESTAMENT
OF
THEODORE R. ALSUP

I, THEODORE R. ALSUP, of Moses Lake, Washington, of legal age, of sound and disposing mind and memory, and realizing the uncertainties of life, and not acting under duress, menace, restraint, or undue influence of any person whomsoever, and hereby revoking any and all other Wills and codicils heretofore made by me, do hereby make, publish and declare this to be my Last Will and Testament in the manner and form following:

ARTICLE I

Debts and Burial Expenses

I hereby order and direct that all my just debts, for which proper claims are filed against my estate, and the expenses of my funeral and last illness, be paid by my Personal Representative hereinafter named, as soon after my death as is practical, provided that this direction shall not authorize any creditor to require payment of any debt or obligation prior to its normal maturity in due course.

ARTICLE II

Personal Representative, Powers, Non-Intervention

I hereby nominate and appoint CATHERINE MCKINZY as Personal Representative of this, my Last Will and Testament, and I direct that all the estate of which I may be possessed at the time of my death shall be settled by my Personal

Testator's Initials T R A

Page 1

Date 1/2/01

Representative hereinbefore named, without the Intervention of any Court and in such manner as she may deem advisable, with full power to sell and convey any or all of the real estate or personal property belonging to my estate without an order of any Court for that purpose, and without notice or confirmation, at such price and upon such terms and conditions as she may deem just and reasonable; that no letters testamentary or of administration or bond of any kind shall be required of my said Personal Representative hereinbefore named, or upon the sale of real estate or otherwise, except as expressly required by law, and that after probate of such Will and the filing of an inventory required by existing laws, all my estate shall be held, managed and settled without the intervention of any Court, and all rents, issues and profits derived therefrom, as well as the proceeds arising from the sale thereof and all increments of the same, shall be held and managed by said Personal Representative, as Trustee, for the persons, uses and purposes hereinafter specified. If the aforesaid named Personal Representative shall fail, refuse or be unable to serve as my Personal Representative, then in that event I appoint DORSEY GENE MCKINZY, to serve as my Personal Representative in her place and stead and to serve without bond or Court action as hereinbefore specified.

ARTICLE III

Contest of Will

Should any of the beneficiaries of this Will contest or aid in the contest of any provisions of this Will without probable cause, such interest as such contesting beneficiaries would have taken under the Will shall be forfeited and shall pass into the residue of my estate. My reason for so providing is to avoid controversy within my family, and the distasteful publicity which may arise from such controversy.

ARTICLE IV

Personal Representative May Continue Business

I authorize and empower my Personal Representative, in her discretion, pending the administration of my estate and pending such time as a sale of the property thereof

Testator's Initials T.R.A

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Date 1/2/01

may be made, to continue to carry on any and all business ventures in which I may be engaged or interested at the time of my death either as a sole proprietor or in a co-partnership or association with others, in order that and until such time as the same may be sold to the best business advantage as the judgment of my Personal Representative shall direct.

ARTICLE V

Limitation of Assignment

I direct that the interests of the beneficiaries of any and all gifts and trusts hereunder shall not be subject or liable in any manner to or for their, or any of their anticipations, assignments, sales, pledges, debts, contracts, engagements or liabilities, or subject or liable to attachment or execution under any equitable, legal or other process.

ARTICLE VI

Family

My family consists of myself. My only son TRAVIS ALSUP is deceased.

ARTICLE VII

Bequest of Property

All of my property, both real, personal and mixed of every kind and nature, and wheresoever situated or located, as I may own or to which I may be entitled to at the time of my death, I give, devise and bequeath as follows: to CATHERINE MCKINZY I leave my residence located at 129 Schilling, Moses Lake, Washington, a one-third undivided interest in the Mexico time share, a one-half undivided interest in the 1971 DODGE CAR and the 1971 CHEVROLET PICKUP, one of the small boats, one-fourth of my personal household furnishings and 37% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts. To DORSEY GENE MCKINZY I leave my rental property located at 1101 Arnold, Moses Lake, Washington,

Testator's Initials T.R.A.

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Date 1/2/01

a one-third undivided interest in the Mexico time share, on one-half undivided interest in the 1971 Dodge CAR and the 1991 CHEVROLET PICKUP, one of the small boats, one-fourth of my personal household furnishings, my two safety deposit boxes and 28% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts. To TIM ALSUP I leave my two properties located in Alrway Helghts, Washington, a one-third undivided interest in the Mexico time share, my bass boat and one of the small boats, one-fourth of my personal household furnishings and 14% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts. To VICK BURNET I leave one-fourth of my personal household furnishings and 7% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts. To DENNIS VALUE I leave 14% of any remaining assets not herein spccifically mentioned, stocks, bonds, and bank accounts.

IN WITNESS WHEREOF, I have hereunto set my hand and published and declared this my Last Will and Testament on this 2nd day of January, 2001, at Moses Lake, Washington.

Theodore R. ALSUP
 THEODORE R. ALSUP, Testator

THE FOREGOING INSTRUMENT, consisting of four (4) pages, of which this is the last, was on this 2nd day of January, 2001, signed by THEODORE R. ALSUP, and declared by him to be his Last Will and Testament in the presence of us, the undersigned, who at his request and in his presence and in the presence of each other, and believing him to be of sound mind and memory and not acting under duress, menace, fraud, or undue influence, have submitted our names as witnesses to such Last Will and Testament, together with our residences, respectively.

Rose J. Rice
 Residing at Moses Lake, Washington

Laura R. Lasso
 Residing at Moses Lake, Washington

Testator's Initials T.R.A.

Date 1/2/01

a one-third undivided interest in the Mexico time share, on one-half undivided interest in the 1971 DODGE CAR and the 1991 CHEVROLET PICKUP, one of the small boats, one-fourth of my personal household furnishings, my two safety deposit boxes and 28% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts. To TIM ALSUP I leave my two properties located in Airway Helghts, Washington, a one-third undivided interest in the Mexico time share, my bass boat and one of the small boats, one-fourth of my personal household furnishings and 14% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts. To VICK BURNET I leave one-fourth of my personal household furnishings and 7% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts. To DENNIS VALUE I leave 14% of any remaining assets not herein specifically mentioned, stocks, bonds, and bank accounts.

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Theodore R. ALSUP
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Carol J. Reis
 Residing at Moses Lake, Washington

Laura R. Larson
 Residing at Moses Lake, Washington

Testator's Initials T.R.A.

Date 1/2/01

AFFIDAVIT OF WITNESS TO A WILL

STATE OF WASHINGTON)
) ss.
COUNTY OF GRANT)

THE UNDERSIGNED, being first duly sworn on oath, depose and say: That your affiant is a resident of the State of Washington, at the address shown below and is over the age of eighteen (18) years; that on the date shown below your affiant was requested to witness the signing of the attached Will by THEODORE R. ALSUP, the Testator, and that at the time your affiant observed the Testator sign the said Will in your affiant's presence and in the presence of the persons whose signatures appear on the Will as witnesses, the other said witnesses and your affiant signed and witnessed the Will in the presence of each other and in the presence of the Testator, and that the signature appearing on the attached Will is the signature of said Testator; that at the time of the signing of the Will, said Testator appeared to be of sound mind and understood the nature of the acts being performed; that we sign this Affidavit at the request of the Testator.

Lorise J. Riew

Laura R. Hanson

SUBSCRIBED AND SWORN to before me this 2nd day of January 2001.

[Handwritten Signature]

Notary Public in and for the State of
Washington, residing at Moses Lake.
My Commission Expires: 6/15/04



RECEIVED
JUN 25 2012
BY: _____

COPY
ORIGINAL FILED
JUN 22 2012
THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

In re the Estate of:)
THEODORE ROOSEVELT ALSUP) CASE NO. 2011-04-00778-4
) ORDER
)
)
)
)
_____)

I. BASIS

THIS MATTER comes upon the Estate's Motion for Hearing on Declaratory Judgment Regarding the Validity of Marriage and Will an Incapacitated Person and upon Plaintiff's Motion for Summary judgment to Establish Spouse as Pretermitted Heir; Determine Specific Gifts or Devisees Provided for in Will; Determination of Proceeds of Estate After Award to Surviving Spouse, as follows:

The court considered the pleadings filed in this action. The court also considered the case file and following documents and evidence which were brought to the court's attention:

1. Memorandum of Points and Authority in Support of Declaratory Judgment Regarding the Validity of Marriage and Will an Incapacitated Person
2. Petition to Establish Surviving Spouse as Pretermitted Heir
3. Petition to Determine Specific Gifts or Devisees Provided for in Will; Determination of Proceeds of Estate After Award to Surviving Spouse
4. Declaration of Michael Bresson
5. Plaintiff's Brief in Support of Motion for Summary Judgment
6. Affidavit of Nicola J. Warren in Support of Motion for Summary Judgment

7. Plaintiff's Brief in Support of Motion for Summary Judgment
 8. Affidavit of Nicola J. Warren in Support of Motion for Summary Judgment
 9. Plaintiff's Motion for Summary Judgment to Establish Spouse as Pretermitted Heir; Determine Specific Gifts or Devisees Provided for in Will; Determination of Proceeds of Estate After Award to Surviving Spouse
 10. Motion to Strike Affidavit of Nicola Warren in Support of Motion for Summary Judgment in Addition to Plaintiff's Brief in Support of Summary Judgment
 11. Estate's Response to Plaintiff's Brief and Estate's Objection to Plaintiff's Motion for Summary Judgment
 12. Plaintiff's Motion for Reconsideration
 13. Affidavit of Patrick R. Acres in Support of Motion for Reconsideration
 14. Estate's Response to Plaintiff's Motion for Reconsideration
 15. Plaintiff's Reply Brief in Support of Motion for Reconsideration
- Based on the argument of counsel and the evidence presented, the Court finds that the undisputed factual record establishes that:

II. FINDINGS

1. That the Guardianship Order entered by the Grant County Court in 1997 was a full guardianship of the Decedent's estate and person.
2. That the Decedent was not granted or given any rights or privileges under the 1997 Guardianship Order, including the right to marry or create and/or execute a Will.
3. That on January 2, 2001, while under the protection of a full guardianship, the Decedent executed a Will.
4. That the 1997 Guardianship Order was still in effect at the date of the Will's execution, and the Guardianship Order effectively blocked the Decedent from executing a Will without prior Court approval.
5. That the Will is invalid and void because the Decedent did not have the capacity to create a Will and did not have Court authority to create a Will.
6. That the 1997 Order entered by the Grant County Court was modified to a limited guardianship on February 16, 2001.

7. That the modified guardianship held the decedent did not have the authority or capacity to enter into ANY contract.
 8. That Washington law defines marriage as a contract.
 9. That since the Decedent lacked the authority or capacity to enter into a contract and because a marriage is a contract, the marriage is invalid and void.
 10. That as to Court's ability to invalidate a marriage when one of the parties to the marriage is deceased, the Court has the ability to void a marriage where no marriage existed.
 11. That the Court determined in this matter the Decedent did not have a right to marry and where there is no right to enter into a marriage then no marriage can exist.
 12. That RCW 26.040 is not relevant.
- NOW, therefore, it is

III. ORDER

ORDERED that the Decedent was found to be incapacitated under the 1997 guardianship order entered by the Grant County Superior Court; that the guardianship was a full guardianship of the person and of the estate; that the guardianship was not limited in any manner nor did it reserve any rights for the benefit of the Decedent to execute a Will; that because a full guardianship of the person and estate was ordered, the Decedent did not have the capacity or the right to create and/or execute a Will; that the Will in question herein was created and/or executed by the Decedent on January 2, 2001 while still under the protection of a full guardianship; and that because a full guardianship of the person and estate was ordered, the Decedent did not have the capacity or the right to create and/or execute a Will; that because the Decedent did not have the right or the capacity to create and/or execute a Will that the Will executed by the Decedent on January 2, 2001 is invalid and void and therefore ineffective.

IT IS FURTHER ORDERED that the 1997 Guardianship was modified on February 16, 2001; that the modified guardianship Order held the Decedent did not have the authority to enter into ANY contract; that Washington law defines a marriage as a contract; that since the Decedent lacked the authority or capacity to enter into a contract and because a marriage in the State of Washington is a contract, the marriage is invalid and void; and that RCW 26.040 is not relevant because where there is no right to marry then a marriage cannot exist.

IT IS FURTHER ORDERED that the Personal Representative in this matter is authorized to hire counsel to represent the Estate in any and all legal matters pertaining the estate (past, present and future) and to pay the reasonable fees of said counsel, without the prior approval of the Court, in representing the estate, *pro nunc tunc*, as well as for any future action that may evolve from the Court's ruling in this matter or any other matter where the estate may require legal counsel.

DATED this 22nd day of June, 2012

JEROME J. LEVEQUE

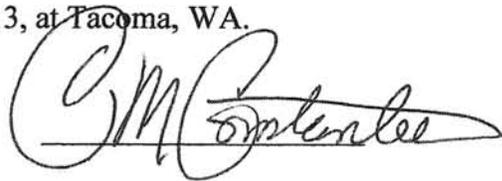
JEROME J. LEVEQUE
SUPERIOR COURT JUDGE

IX. CERTIFICATE OF MAILING

The undersigned does hereby certify that on January 3, 2013, she served a copy of the Brief of Appellant upon Respondent, by depositing the same in the United States mail, first class postage prepaid, addressed to the following:

Mr. Michael Bresson (by US Mail)
Attorney at Law
P. O. Box 30501
Spokane, WA 99223-3008

Dated this 3rd day of January, 2013, at Tacoma, WA.

A handwritten signature in black ink, appearing to read "G.M. Bresson", written over a horizontal line.